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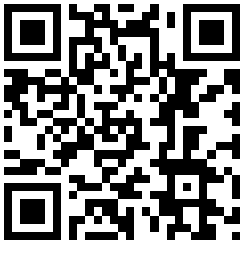

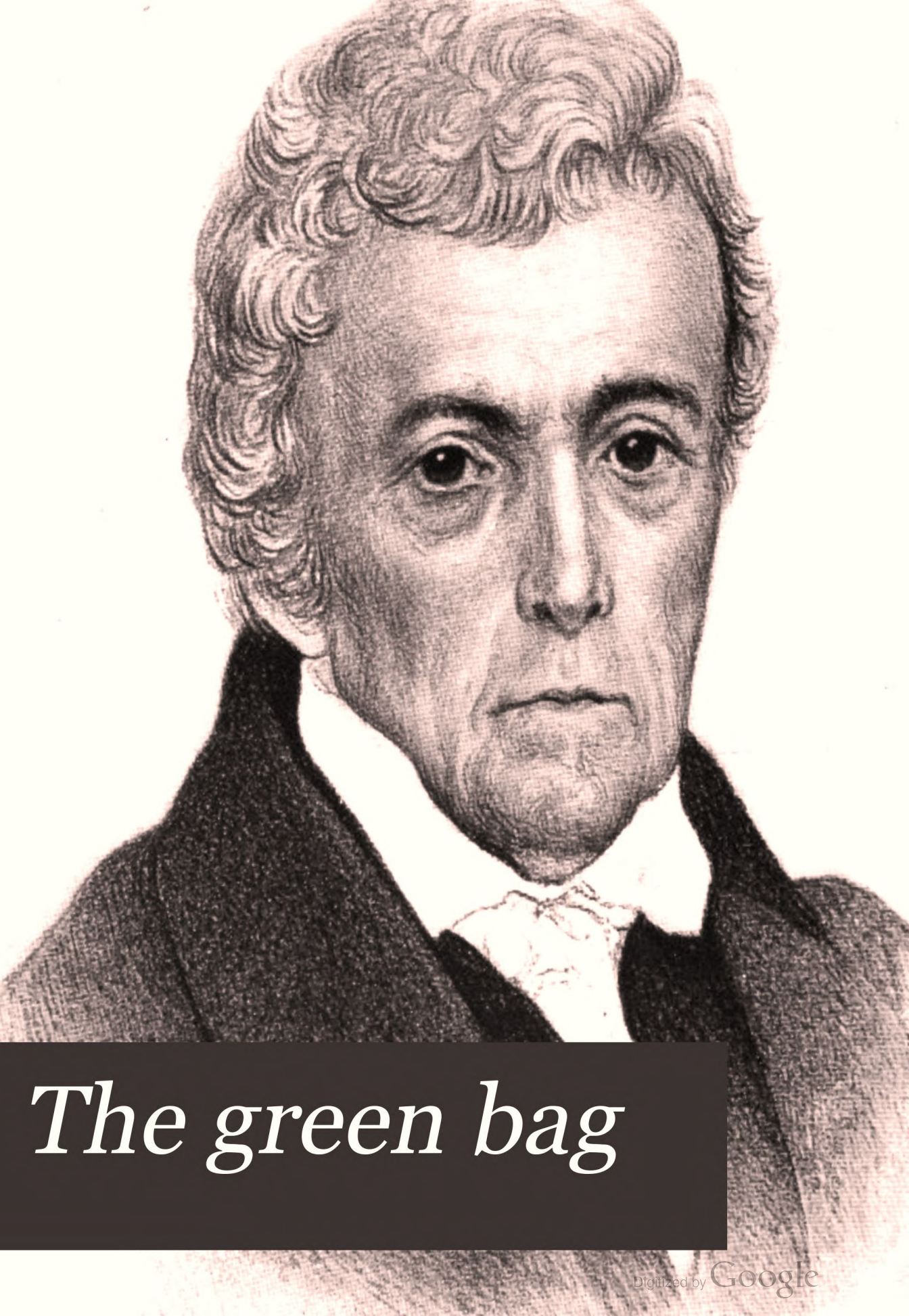

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INDEX VOL. XVIII GREEN BAG

LIST OF PORTRAITS

	PAGE
Benton, T. H.	585
Brown, H. B.	321
Calvo, Carlos	377
Langdell, C. C.	437
Martin, F. X.	261
Parker, A. B.	537
Peckham, W. H.	57
Loreburn, Lord	121
Robinson, Christopher, K. C.	1
Stevens, Thaddeus	641
Woolworth, J. M.	485

LIST OF ILLUSTRATIONS

	PAGE
A Jury Trial. Thomas Leaming.	499
Corridor London Courts. Thomas Leaming.	446
Crossing the Strand to Court. Thomas Leaming	547
Hermes	185
Northwestern University Law School Library	146

AUTHORS' INDEX

	PAGE
Adams, H J.	459, 561
Ashurst, R. L.	503
Batchelder, S. F.	437
Beale, J. H., Jr	269
Bigelow, H. A.	348
Bigelow, M. M.	64, 132
Bonner, Shearon	451
Boone, H B.	223
Bordwell, Percy	377
Bowdle, S E.	614
Bowen, W. A.	667
Bruce, A. A	273
Bruncken, Ernest	516
Bryant, Howard	208
Butler, C. H	321
Butler, Pierce	261
Carling, Geo.	286
Case, F. T.	392
Chamberlayne, C. F.	396, 677
Chandler, Wm. E	9
Conner, B. H.	225
Costigan, G P., Jr.	550
Crane, R. N.	216
Crossley, F. B.	146
Daish, J. B.	150
Darling, C. R.	339
Didier, E. L.	585
Duane, Russell	214
Fake, F. L., Jr.	453
Gilmore, E. A.	142
Gregory, C. N.	331
Hayes, J. N.	57
Hensel, W. U.	451
Howard, L. C.	29
Judson, T. N.	662
Kernan, T. J.	589
Leach, E. D.	598
Leaming, Thomas	444, 496, 544
Leval, G De	220
Lightner C. A.	193
Lindsay B. B.	126
Littlefield, C. E.	72
Manson, Edward	121
Maxey, Edwin	155
Newcomb, R. B.	196
Norris, W. F.	557
Parker, A. B.	537
Pound, Roscoe	17
Quackenbush, J. L.	212
Reed, R. R.	383
Richberg, D. R.	253, 465
Rogers, E. E.	153
Rogers, R. V.	1,402
Schouler, James	657
Shepard, E. M.	601
Shepard, H. N.	88
Speranza, G. C.	26
Taylor, Hannis	489
Taylor, O. B.	205
Warner, R. S	185
Webster, J. L.	485
Werner, Percy	201
West, R O.	200
Wheeler, E. P.	14
Wyman, Bruce	290
Young, A. D.	91, 616

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SUBJECT DIGEST

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

PAGE

ADMINISTRATIVE LAW.
Act of State. 355
Post-office Fraud Order. *245*
State and Official Liability. 230

ADMIRALTY.
See also Shipping.
Liens of Shipping. 231
Partition of Vessel. 412
Seamen — Personal Injuries 300
State Statutes. 32
Torts — Master and Servant. 299
Wrongful Death — Measure of Damages. *246*

AGENCY.
Blacklisting. 355
Contracts. 355
Estoppel. 95
Nature of Agent's Authority. 300
Ratification. 157
Special Police. *42*
Torts of Agents. 95

ARBITRATION.
See International Law.

ASSOCIATIONS.
Religious Societies — Membership. *481*

ATTORNEY AND CLIENT.
Authority of Solicitor 623
Champerty *474*
Compensation of Attorney — Contingent Fee. *627*

AUTOMOBILES.
Law in England and United States. 568
Law of 32

BANKRUPTCY.
Decisions under Act of 1898. 623
Duty of Receivers. 355
Insolvency — Right of State to Preferment. *172*
Life Insurance Policies. *169*
National Act. 157
Receivers — Power to Act Outside of District. *169*
Trustees Election. 32

BIBLIOGRAPHY.
Digest — U. S. Reports. 237
Law Books — Case Law Reporting 360
Law Books — Method of Writing. 232
Library of Foreign Law — The Gary Collection. **146**
Library of Gray's Inn. 684

BILLS AND NOTES.
Negligence. *309*
Uniform Negotiable Instruments Law. 518

PAGE

BIOGRAPHY.
Asher. 95
Bacon. **503**
Benjamin. 412
Bentham. 470, 518
Benton. **585**
Brewer. 470
Brown. **321**
Calvo. **377**
Cockburn. 684
Iowa Judges and Lawyers. 412
Jay. 355
Langdell. **437**, 684
Lincoln. 95, 232, 301, 684
Lindsay. 684
Loreburn, Lord. **121**
Mansfield, Lord. 518
Martin. **261**
Massachusetts Bench and Bar. 518
Moran. 412
Peckham. **57**
Porter. 301
Robinson. **1**
Stanley. 301
Stevens. **451**
Stevenson. 623
Woolworth. **485**

CAPITAL PUNISHMENT.
See Criminal Law.

CARRIERS.
Baggage. *170*
Freight — Conversion. *366*
Independent Business, Limitations on Public Service Company in. **290**
Liability. 233
Loss of Shipment — Evidence as to Damage. *621*
Monopolies — Express Companies — Exclusive Contracts. *428*
Passenger Elevators. *309*
Passengers. 157, *246*, *628*
Passengers — Injuries — Proximate Cause. *627*
Passengers — Misconduct of Servant. *309*
Refusal to Ship Goods in Regular Course. *695*
Rules — Reasonableness. *474*
Street Cars — Wrong Transfer — Ejection of Passenger. *569*

CELEBRATED CASES.
Gilhooley Case — Trades — Unions. 453
Olivio, The Case of. **26**
Orange Routing Case. **667**
Phillipine Courts. **557**
Romance of the Courts, A. **91**
Seymour Will Case. **616**
Trials, The World's Most Celebrated. **153**

CHATTEL MORTGAGES.
Oral Mortgage of Stock in Trade. *695*

Digitized by Google

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

PAGE

CONFLICT OF LAWS.
See also Divorce.
Comity. *474*
Crimes. 301
Domicile — Divorce. *310*
Liability of Shareholders. *105*

CONTEMPT.
Assault on Judge. *248*
Criminal Liability — Truth as Defense. *476*

CONSTITUTIONAL LAW.
See also Equity, History, Insurance, Jurisprudence.
Aliens — Exclusion — Finality of Determination. *569*
American States. 518
Australia — Secession. 519
Carriers — Ticket Brokers. *474*
Christian Science — Religious Liberty. 158
Civil Rights — "Jim-Crow Cars." *423*
Combination to fix Rates. *311*
Commerce. 234, *367*, *369*
Constitutional Convention. 412
Contracts. 302
Contracts — Due Process. 33
Convention, The Next Constitutional. 355
Corporations — Amendment of Charter — Insurance. *106*
Crime — Commutation of Sentence. *42*
Dartmouth College Case. 623
Departments of Government. **72**
Divorce — Interstate Judgments. 413
Due Process. *246*, 413, *526*
Due Process — Costs. *42*
Due Process — Equal Protection. *526*, *569*
Due Process — Game Laws. *424*
Due Process — Imprisonment of Insane. *106*
Due Process — Railroads. *475*
Due Process — Taxation — Situs. *107*
Election Laws. *424*
Election of President. 158, 234
Elections — Ohio. 33
Eleventh Amendment. 96
Eminent Domain — Condemning Right of Way Through Cemetery. *631*
Eminent Domain — Police Power. 685
Eminent Domain — Public Purpose. *43*
Employer's Liability. 686
England. 355
England — Imperial Conference. *472*
Equal Protection. 96, *170*
Equal Protection — Discrimination. *43*
Equity Jurisdiction. *696*
Federal Capital. 301
Flag Law. *247*
Foreign Corporations. *475*
Freedom of Contract. *525*
Game Laws. *696*
History — New York. 623
Impairment of Contract — Franchises. *311*
Increasing Compensation of Judges. *475*
India. 519
India — Jurisdiction Cases. 519
Indians — Legal Status. 412
Inheritance Tax. 686, *698*
Initiative of the President. 684
Interstate Commerce. 355

PAGE

CONSTITUTIONAL LAW — Continued
Interstate Commerce. Regulation by State — Power of Commission. *528*
Intoxicating Liquor — Medicinal Preparations. *478*
Intoxicating Liquors — Patent Medicines. *176*
Judicial Power. 519, 684
Juries. 414
Jurisprudence. *414*
Jury — Right to Jury Trial — Wrongful Attachment — Porto Rico. *529*
Liberty — Dipsomaniacs. *698*
Licenses — Transient Merchants. *249*
Life Insurance — Federal Control. 98, 355
Monopolies — Anti-Trust Statute — Constitutionality. *574*
National Quarantine. 98
Negro Suffrage. 684
Notes on Constitution. 301
Patents — Constitutional Law. *372*
Physicians and Surgeons — License. *315*
Police Power. 158, 568
Police Power — Child Labor. *699*
Police Power — Hours of Labor. *700*
Police Power — Liberty of Contract. *312*
Police Power — Race Schools. *570*
Power of Congress in Interstate Insurance. 623
Privilege — Searches and Seizures. 415
Racial Destructions in Southern Law. 684
Railroad Rates. 235
Railway Rate Law. 687
Rate Regulation. 34, 98, 356, 416
Regulation of Bill Board. 623
Regulation of Corporations. 96, 98, 687
Regulation of Plumbing. *476*
Regulation Physicians. *476*
Right of Judges — Usurpation. 412
Right to Contract — Wages. *571*
Sales in Bulk — Statute. *107*
Schools — Religious Instruction. *315*
Sec. 117 Constitution. 301
Special Legislation — "Illinois Cases." 412
State License Laws. 158
Studies in — Due Process under Constitution 684
Supreme Law. 519
Taxation. **247**, 470, 687
Taxation of Great Fortunes. 520
Trade Marks — Use of State Seal. *109*
Treaties — Agreements. 34
Treaties. 302
Unconstitutional Acts of Congress. 472
Unreasonable Searches — Witnesses — Privilege. *44*
Unwritten Constitutions. 158, 234
Usurped Powers of the Senate. 684
Validity of State Statute — Discrimination against Patented Articles. *630*
Veteran's Preferment. *248*
Waters — Commerce — Contracts. *109*

CONTRACT.
See also Agency, Equity.
Acceptance by Post. 159
Assumpsit — Duress. *423*
Bills of Lading. 520
Competition Bidding — Lowest Responsible Bidder. *696*
Consideration. *45*

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

PAGE

CONTRACTS — Continued.
Consideration — Parties. *44*
Employment by the year — Corporations. *45*
Illegality — Combination. *46*
Illegality — Employers' Association. *45*
Illegality — Restraint of Trade. *571*
Impossibility of Performance. 302
Infants — Contracts — False Representations as to Age — Estoppel. *572*
Guaranty. 302
Legality — Lobbying. *312*
Part Payment of Claim. 471
Public Policy. 235
Public Policy — Physicians. *170*
Restraint of Trade. 302
Rewards. 159
Risk in Transit. 687
Sales. 235, 688
Theaters — Tickets of Admission — Resale. *530*

COPYRIGHT.
See also Trade Marks.
Assignee — Notice of Copyright. *527*
Copyright Bill. 568
Infringement — City Directory. *367*
Literary and Artistic. 302
Musical Composition. *110*
Patents — Copyrights — Contract of Employment. 625
Price Restrictions. *110*
United States. 520

CORPORATIONS.
Contracts. 471
Contracts — Ultra Vires. *312*
Control of. **662**
Exclusion from State. 159
Foreign. 303, 356
Foreign Practice. *425*
Forged Transfer of Stock. *46*
Harvey's Handbook. 520
History, Theory. 235
Liability of Associates. 688
Limitation of Actions — Liability of Stockholders — Corporate Debts. **550**
Limitation of Actions — Liability of Stockholders — National Bank. *314*
Modern Business. 624
Names. 303
National Banks — Stockholders' Right to Inspect Books. *113*
Organization. 356
Partnership. 98
Promoters. 303
Promoters' Contracts. 34
Public Policy. 35, 520
Railroads — Pa. 688
Report of Commissioner of. 34
Stockholders. 99
Stock — Exclusive Voting Power — Trust. **383**
Stock Transfers. 520
Stocks. 357
Winding-Up Proceedings. 624

CRIMINAL LAW.
Accomplices in Thefts. 688
Anthropology. 357
Attempts. *477*
Blackmail and Extortion. 304

PAGE

CRIMINAL LAW — Continued.
Bribery. *48*
Capital Punishment. 99, 304
Case of Patrick. 568
Changes in Practice. 304
Cheating in Indian Law. 304
Confronting Witnesses — Deaf and Dumb Defendant. *367*
Conspiracy. 305
Conspiracy — Causation. *48*
Conspiracy — Combines. 36
Corporal Punishment. 624
Corporal Punishment in India. 568
Corporations, Imprisonment of. **253**
Criminal Responsibility. 36
Curious Cases. 160
Custom. 357
Disorderly House. *171*
Disturbance of Public Assembly. *700*
England and India. 304
Evidence. *248*
Extradition. 36
Forgery — Telegrams. *110*
Grand Jury. 521
Homicide — Binding Instructions — Degree of Crime. *171*
Immunity — Beef Trust Case. *528*
Incitor or Abettor of Suicide. 36, 304
Indictment. *171*
Insanity. 357
Intent. 100
Jurisprudence of Lawlessness. **588**
Justice and Crime — Abyssinia. 688
Larceny — Property Subject to Lien. *49*
Larceny — Public Officers. *477*
Lotteries — Elements of Chance. *51*
Manslaughter — Negligence. *368*
Murder in Jail. *701*
Passport System. 472
Perjury. 357
Practice. 36, 160
Previous Jeopardy. 357
Procedure. 160
Rape — Consent. *172*
Receiving Stolen Goods — Attempts — Impossibility of Committing Crime. *595*
Security for Good Behavior. 568
Self-Defense. 36
Statistics 1904. 521
Stealing Gas. *700*
Usury, Money Lenders' Act, 1900. 365

CUSTOMS DUTIES.
Forfeitures — False Statements. *111*
Illegal Importation — Forfeiture. *111*

DAMAGE.
See also Torts.
Dead Bodies — Mutilation — Damages — Mental Anguish. *631*
Evidence — Future Suffering. *50*
Mental Injuries. 624

DIPLOMACY.
Monroe Doctrine. 37
Panama. 36
Russia — United States. 416
Spanish American, Preceding War of 1898. 237

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

PAGE

DIVORCE.
Antenuptial Agreement. 416
Condonation — Recrimination. *701*
Conference. 416
Conflict of Laws. 416
Desertion — Domicile. *426*
Legislation — Needed Reforms. **598**
Marital Relations — Recent Cases on. **348**
Public Order. 472
Uniform Legislation. 160
Vagrancy. *426*

DOMESTIC RELATIONS.
Defects in Quebec Code. 305
Marital Rights. 103
Marriage — Common Law. *249*
Marriage in United States. 161, 305

EDUCATION.
American Lawyers. 358
Bar. 37
"Centralization and the Law." **88**
Evidence, Method of Teaching. **677**
Function of State University Law School. 688
Law as Culture Study. 100
Legal Training. 472

EMPLOYERS' LIABILITY.
See also Constitutional Law — Personal Injury Litigation.
Constitutional Law. 625
Employers' Liability. **185**
Employers' Liability in France. **225**
Statutory Regulation. 521

EQUITY.
Can a Court of Equity Circumvent Law? 305
Complainant must have Clean Hands. *477*
Contracts of Release — Fraud. 521
Injunctions. 161
Injunctions — Boycotts. 305
Injunctions — Municipal Corporations. 306
Injunctions — Remedy at Law. *701*
Injunctions — Stockholders — Abuse of Process. *113*
Jurisprudence. 237
Marshalling of Mortgages. 522
Partnership — Surviving Partner. 361
Specific Performance. 161
Trade Marks. 416

ESTOPPEL.
Banking. 37

EVIDENCE.
See also Damages, Practice, Witnesses.
Criminal Law. 688
Declarations. 688
Deed — Parol Explanation. *312*
Experiments — Insurance. *427*
Hearsay. 472
Law on. 358
Legislation. 358
Method of Teaching. **677**
Photographs. 38
Presumptions. 306
Witnesses. 100, 688
Witnesses — Self-Incrimination. *368*

PAGE

EXECUTORS.
Administrators — Judgments. 101
Descent and Distribution — Legislative Power. *425*
Right of Retainers. *112*
United States. 237

FEDERAL COURTS.
Jurisdiction. *50*
Jurisprudence of. 38
Removal of Causes — Diverse Citizenship. *112*

HISTORY.
Addresses on Judge Brown's Retirement. 522
Anglo-Saxon Institutions and Laws. 688
Bar of Paris. 238
Civil War Controversies. 358
Constitutional Law. 162
Crime — Sir Edmund Godfrey. 688
Declaration of Independence. 688
Glasgow Sheriff Court. 688
Illinois Courts. 358, 417
Influence of Christianity on Roman Law. 522
Innkeeper, The Medieval. **269**
Johnson Impeachment. 688
Judge and Jury. 238
Jurisprudence. 162
Maine's Ancient Law. 162
Marriage in Old Rome. **402**
Massachusetts Bench and Bar. 417
Newfoundland. 38
Nineteenth Century Chancellors as Law Reformers. 237
North Carolina — State Rights — Political Parties. 625
Old Testament Law. 358
Philadelphia Law Association. 417
Property. 162
Public Policy. 101
Rise and Fall of the Green Bag. **465**
Russell Sage as a Litigant. 625
United States Supreme Court. 418, **657**
Year Books. 522, 689

HUMOR.
See also The Lighter Side.
Propriety. **614**
Squire Attom's Decisions. **459, 561**
The Lawyer. **451**

INJUNCTION.
See also Equity.
Boycott — Injury to Business. *313*
Criminal Prosecution. *313*
Restraining Prosecution for Crime. *572*
Violation — Labor Unions. *477*
Violation — Persons Liable. *478*

INTEREST.
See also Constitutional Law.
India Law. 306, 568

INTERNATIONAL LAW.
Arbitration. 38 163
Boundaries. 690
Brig *General Armstrong*. **331**
Calvo and the Calvo Doctrine **377**
Cases. 417
Consular Courts — China. 238

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

PAGE

INTERNATIONAL LAW—Continued.
Decisions of Courts. 538
Development of. 307
Enforcement. 163
Extradition — Liability to Civil Process. *572*
History. 38
Interference on Ground of Humanity. 625
Need of International Conference. 306
Need of Provision for Amending. 306
Neutrality. 238, 307
Neutral Rights and Duties. 238
Neutral Waters — Naval Base. 418
Oppenheim's Treatise. 238
Property, Private, at Sea, Exemption from Capture. **155**
Treaties as a Source of. 306
War in Orient. 38

INSURANCE.
See also Bankruptcy, Constitutional Law.
Briefs on. 102
Commodity, As a. **142**
Constitutional Law — Anti-trust Law. *113*
Construction — Forfeiture. *427*
Equity — Contracts. 417
Foreign Corporations. 417
Warranties and Representations — Policies. 472
FIRE — Construction of Policy. *50*
Eighty Per Cent Clause. *369*
Joinder of Action. **392**
Spontaneous Combustion. *112*
Liability. *478*
LIFE— 38
Armstrong Amendments. 625
Accident Policy — Construction — Death by Inhaling Gas. *172*
Beneficiary Associations — Increase of Rates. *173*
Benefit Certificate. *427*
Forfeiture. *478*
Mutual — Policy — Construction. *574*
Mutual Benefit Societies, Increase of Assessment. *573*
Mutual Companies. *369*
Mutual Companies — Reorganization. *369*
Policy — Incontestability. *313*
Sunstroke. *573*

JUDGMENTS.
Merger. *248*
Res Judicata. 522, 690

JURISPRUDENCE.
See also Constitutional Law, Equity, Federal Courts, History.
American Judiciary, The. **14**
Analysis of. 164
Case Law. 522, 690
Chinese Law and Equity. 358
Common Law — Legal Liability. 624
Constitutional Law. 164
Custom. 38
Economic Evils — Remedy. 419
England, Noteworthy Decisions of 1905. 568
England — Ontario. 472
Hindu Law — Negative Precepts. 625
Law and Government. 523
Law *v.* Functionaries. **489**
Lawlessness. **588**

PAGE

JURISPRUDENCE—Continued.
Legal Conceptions. 472
Legal Fictions. 359
Liberty of Contract. 39
Medical — Obscenity. 568
Medical — Statutes. 39
Mohammedan. 239, 358, 418
Quebec and the French Civil Code. 239
Quest for Error — Justice. 625
Responsibility 358, 523
Roman — Dutch. 472
Separation of Executive and Judicial Functions in India. 472
Sovereignty. 359
Spirit of the Common-Law, The. **17**
Stare Decisis. 419
Turkish. 473

LANDLORD AND TENANT.
Bengal Tenancy Act. 164
Covenant for Quiet Enjoyment — Wrongful and Negligent Acts. *313*
Negligence. *701*

LEGAL ETHICS.
Business Methods in Law. 419
Career of Lord Chancellor Bacon. **503**
Conscience. 419
Ideal Lawyer. 690
Lawyers and Corporate Capitalization. **601**
Practice. 360, 522
Soul of Profession. **396**
Suggestions for Young Counsel. 419
United States. 103, 307

LEGISLATION.
Bar Associations — International. 157
Codification — Japan — Civil Code. 568
Codification — Oklahoma. 355
Complexities of. 307
England and America, 1904. 473
Gas and Oil. 307
Index of Comparative. 691
Multiplicity of Statutes. **516**
New York Governors' Messages. 164
Overproduction of Law. 164
Poor Laws — England. 241
Practice. 165
Review of 1905. 39, 691
Year Book of. 39

LIENS.
Woodmen's in New Brunswick. 307

LIGHTER SIDE.
54, 117, 178, 255, 320, 375, 432, 483, 532, 578, 634, 703

LITERATURE.
Country Lawyer in National Affairs. 165
Doctrine of Libels. 165
First Breach of Promise Case in United States. 523
Foibles of the Bench. 473
Law Office, An Old Fashioned. **286**
Lawyers of Dickens. 473
Recollections of a Country Lawyer. 239
"Squire Phin" **29**
Stray Notes of Parsons and Religion. 688
Vagabonds — Law of. 419

Digitized by Google

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

PAGE

MANDAMUS.
Supervision of Official Action. *314*

MARITIME LAW.
See also Shipping.
American Law of Prize and Capture. 691
Marine Insurance. 691
Salvage. 360
Salvage — Nature of Service — Salvage or Tonage. *576*
Treaty. 691

MASTER AND SERVANT.
See also Negligence.
Defective Appliances — Promise to Repair. *529*
Fellow Servants. *314*
Messenger. *314*
Personal Injuries — Safe Place to Work. *370*
Wrongful Dismissal — Question for Jury. *174*

MILITARY LAW.
Amendability. 691

MORTGAGES.
See also Sales.
Chattel. 239
Equity of Redemption. 239
Pledge — Stock Brokers. *372*
Sub Mortgages. 239

MUNICIPAL CORPORATIONS.
Bonds. 360, *428*
Change of Grade — Compensation. *702*
Constitutional Law. 419
Contracts. 166
Franchises. *428*
Highway — Automobile Racing. *371*
Home Rule Charters. 691
Injuries by Mob, Notice to Mayor. *530*
License Tax — Telephones. *175*
Medieval Switzerland. 240
Municipal Codes in Middle Western States. 625
Ordinances — Billboards. *428*
Pension Funds. 165
Rights of Creditors. 473
Scotch Law. 360
Ultra Vires — Municipal Trading. *249*

NEGLIGENCE.
See also Landlord and Tenant.
Elevators. 103
Evidence — *Res ipsa loquitur.* *430*
Landlord and Tenant. 103, 240
Manufacturer and Vendor — Mental Suffering. *371*
Master and Servant. *702*
Mental Suffering — Telegrams. *315*
Telegraphs. *479*
Telegraphs — Mental Anguish. *175*
Trespasser — Turntable. *371*

PARTNERSHIP.
Liability of Partner's Executor. 693

PERSONS.
Adoption. 166
Citizenship. 361
Infancy — Contracts. 240
Minors — Civil Law. 361
Names. 240
Slaves — Legitimacy. *175*

PAGE

POLICE POWER.
See Constitutional Law.

PERSONAL INJURY, LEGISLATION AND LITIGATION.
Personal Injury Litigation, The Abuse of. *et. seq.* 193
Workmen's Compensation, Personal Injury Actions and, in England. 216
in Belgium. 220
in Italy. 223
in France. 225

PRACTICE.
Appeals. *372*
Brief Making. 103
Cause of Dissatisfaction with the Administration of Justice. 692
Chicago — Municipal Court. 420, 625
Collection of Judgment. 625
Congestion of Law. 537
Contracts. 693
Costs — Suing in *Forma pauperis.* *51*
Courts, The London, A Philadelphia Lawyer in. 444, 496, 544
Decrees against Holders of Impartible Estates. 241
Elements of Business Law. 239
England — Courts. 358
England — Officialism. 166
Evidence — Demurrers. 308
Examination of Jurors — Personal Injury Litigation. *480*
Executions — Exemptions. 100
Expert Testimony. 39
Finality of Award. 420, 523
Grand Jury. 166
Immunity from Civil Process. 308
Imprisonment for Debt. 241
India — Relief. 166
Instructions to Juries. 473
Joinder of Action in Fire Insurance Actions. 392
Jurisdiction — Conflict between Civil and Revenue Courts. 625
Law's Delays. 473
Limitations — Real Actions — Accruing Interests. *479*
New Trial — Jurisdiction. *114*
New Virginia Act, Demurrers to Evidence. 568
Obiter Dicta. 308
Personal Injury Litigation. 361
Peer's Privilege. *114*
Pleadings. 166
Probate Courts. 103
Quest for Error — Justice. 692
Res Judicata. 473
Reversible Error. 361
Service of Answer by Mail. 523
Setting Aside Award. 361
Suit on Official Bond. 308
Supreme Court — Method of Work. 625
Waiver by Counsel in Argument. *52*

PROCEDURE.
See also Criminal Law.
Arbitration. 103
Canadian Changes. 362
Criminal Law. 103
Criminal Law — Torts. 166

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

PAGE

PROCEDURE — Continued
Demurrers to Evidence. 473
Jury System. 308
Law of Bail. 166
Lunacy. 166
New Jersey. 308
Order Absolute for Sale. 362
Plea of Set-Off. 241
Searches and Seizures, Arbitrary. **273**

PROPERTY.
Adverse Possession. 166, *315*, *702*
Alien and Corporate Ownership of Land in Texas. 241
Consent in Law of Alienation. 420
Conveyancing. 39, 473
Domestic Relations. 104
Easements — Party Walls. *373*
Equitable Conversion. 242
Franchise — Exemption from Taxation. *52*
Fraudulent Conveyances. *250*
Future Interests. 523, 693
Hunting Right. 308
India — Law of Alienation — Third Parties' Consent. 626
Intermediate Land — Holders — India. 241
Licenses — Revocation. *176*
Literary Production. *430*
Manx Land Tenure. 362
Mines and Minerals, Surface Support. *370*
Mining — Acts of Ontario. 239
Oil and Gas Leases — Implied Covenants. *372*
Oil Lease — Construction. *372*
Prescription — Easements. *480*
Protected Life Estates. 693
Public Lands — *Bona Fide* Purchaser — Notice. *373*
Public Policy — Mortmain. 626
Restraint on Alienation. 420
Revocation of Deeds. 626
Rule Against Perpetuities. 241
Sale for Taxes — Failure to Execute Deed. 523
Torrens Law. 40
Torrens Law — Hawaii. 420
Torrens System. 166, 626
Water Courses. *25*

PUBLIC POLICY.
See also Contracts, Corporations, Property.
Aliens Act, 1905 — Suggested Amendments. 524
Blackmail and Extortion. 243
Corrupt Practice. 362
Disregard of Law. 362
Election Reforms. 307
Eight Hour Movement in New York. 626
Government. 307
Independence of the Judiciary. 626
Juvenile Laws — Colorado. **126**
Legal Aid for Poor. 694
Life Insurance. 40
Monopolies. 473
Pennsylvania — Judge-Made Ignorance. 420
Prevention of Trusts and Monopolies. 626
Quality of Jurors. 626
Railroad Rates. 40
Records — Local — Policy. 362
Reign of Law. 167

PAGE

PUBLIC SERVICE COMPANIES.
See also Constitutional Law — Rate Regulation.
American. **290**
Combinations — Railroad Monopolies — New York. 518
Combinations — Sherman Anti-Trust Law. 518
Commerce — Federal Regulation — Discrimination. *310*
Commerce — Interstate Regulation — Freight Rates. *629*
Limitation in Engaging in Independent Business. **290**
Warehousemen — Stock Yards — Regulation of Rates. *579*

RAILROADS.
See also Constitutional Law Negligence.
American Railroad Rates. 362
American Street Railroad Reports. 420
Duty of Railroad Company — Licensees of Tracks. 626
Power of Commission. *176*

RATE REGULATION.
See also Constitutional Law.
Interstate Commerce Act — Proposed Amendments. **150**
Orange Routing Cases. **667**
Railroad Rate Regulation. **9**

SALES.
Chattel Mortgages. 421
Conditional Sales — Record. *176*
Intoxicating Liquors. 104
Liability of Assignee of Bill of Lading. *52*
Right to Restrict Future Sales. *632*

SHIPPING.
See also Maritime Law.
Abandonment — Contract of Affreightment. *114*
Bill of Lading — Harter Act. *115*

TAXATION.
See also Constitutional Law
Excise Taxes — Trading Stamps. *316*
Jurisdiction — Equitable Conversion. *177*
Property Used for Public Purpose — Bonds Owned by City. *576*
Succession Tax. 362

TELEGRAPHS.
Discrimination. *250*
Refusal to Send Message — Damages — Mental Anguish. *530*

STATUTES.
Interpretation. 421
Interpretation — Anti-Cigarette Law. *481*

SURETYSHIP.
Release of Surety. *481*

TORTS.
See also Agency, Procedure.
Accidents. 308
Automobiles. 40
Boycott — Conspiracy — Labor Unions. *525*

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

PAGE

TORTS — Continued.
Boycott — Injunction. *115*
Charities — Charitable Hospitals — Liability for Injuries to Servants. *628*
Combinations. 167
Conspiracy — Injuring Person in Business. *629*
Damages — Telegraph — Mental Anguish. 694
Domestic Relations. 104
False Imprisonment. *177*
Fraud — Negligence. *250*
Imputed Negligence. *115*
Injunction. 243, 694
Injunctions — Boycotts. *702*
Injunctions — Ticket Speculators. *251*
Insanity as Answer. 167
Law of. 362
Libel. 308
Libel — Injunction. *482*
Libel — Publication. *431*
Libel — Publication by Corporation — Liability of Managing Editor. *631*
Negligence. 40, 473
Nuisance — Injunction. *430*
Nuisance — Noise. *113*
Physicians and Surgeons Operation on Minor — Consent of Parents. *575*
Presumptive Negligence. 308
Privacy. 422
Slander — Privileged Communications. *316*
Statutory in Massachusetts. 421
Strike — Injunction. *116*
Theory and Doctrine of. **64**, 134
Voluntary Assumption of Risk. 694

TRADE MARKS.
See also Constitutional Law, Equity.
Digest of Law of, and Unfair Trade. 626
Trade Names — Deception of Public. *633*
Unfair Competition. *530*
Union Label. 167

PAGE

TRADES UNIONS.
See also Torts.
Closed Shop. **339**
Contracts — Validity. *482*
Incorporation of Labor Unions. 363
Trade Dispute. 363

TRUSTS.
Capital and Income. 363
Charitable. 363
Following Trust Property. 364
Free Church Case. 243
Precatory Trusts. 422

WILLS.
Definite and Indefinite Failure of Issue. 243
Equitable Conversion. 40, 167
Power of Appointments. 104
Probate — Appeals. *316*
Restrictions 244
Testamentaire Execution. 694
Validity of Conditions — against Contesting Wills. 626

WITNESSES.
See also Evidence.
Competency — Criminal Law Confessions. *531*
Evidence. 626
Expert Testimony. 308
Medical Privilege. 422
Privileged Communications. 626
Privileged Communications — Husband and Wife. *252*
Privileges. 104
Privileges — Immunity. *577*
Self-Crimination. 104

WORKMEN'S COMPENSATION.
See Personal Injury.

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Yours very truly
C. Robinson

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The Green Bag

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CHRISTOPHER ROBINSON, K.C.

By R. Vashon Rogers, K.C.

WHEN Sir William Berkeley — an aristocrat to the end of his fingers, a man of velvet and gold lace, a brave soldier, a devoted husband, a chivalrous friend, and withal as narrow and bigoted and stubborn a creature as one could find anywhere — as Fiske describes him — was oppressively administering the affairs of the colony in the days of that "merrie monarch" King Charles II, and about the year 1666 came Christopher Robinson from Cleasby, in Yorkshire, to Virginia, where the English were then told there was "plenty, health and wealth," and nothing wanting to make people happy. This gracious and courtly cavalier arrived not with empty pockets. He speedily acquired — partly by purchase and partly by grants from the Crown — large estates in the counties of Middlesex and Essex. He bore his share in the affairs of church and state — he became a vestryman and churchwarden, an officer in the militia, a coroner, clerk of the court, a member of the House of Burgesses — and died Secretary of State for the Colony.

Christopher Robinson left in England a brother named John, Bishop of London, a famous diplomat and Lord Privy Seal; and Christophers and Johns have been in the family ever since. The Virginia property passed down through four successive generations of Christophers — the last, dying a bachelor in 1775 — devised it to a sister whose daughter parted with it only some thirty years ago.

Christopher — the grandfather of the subject of our sketch, was a youth of eighteen at William and Mary College, Williamsburgh, when the unhappy disputes between Great Britain and her colonies reached a climax — when the differences arose between mother and daughter about housekeeping (as the eloquent Bishop of Missouri puts it) the shrill call of the trumpet sounded through the quiet dormitories and corridors of the college. Christopher heard, and parting with his friends made his way to the British Army. He obtained a commission from Sir Henry Clinton in Colonel Simcoe's Legion, sometimes called "the Queen's Rangers." He served with his corps until the peace, and then emigrated with other U. E. Loyalists to New Brunswick; the only one of his family that clung to the cause of King and Crown.

In New Brunswick the half-pay officer married. Soon he moved Westwards — first to Lower Canada, then to what was then known as the Upper Province. He was called to the Bar there and practised at Kingston until 1798. His son John Beverley — born in 1791 — the father of the learned K.C. to whom we pay this tribute of respect — was one of the greatest men that young Canada has yet produced. While still a student he too heard the trumpet's blast calling "to arms! to arms!" and as lieutenant in the York (Toronto) Volunteers he hurried with General Brock to meet General Hull who had crossed from Detroit into Canada. Hull retired as Brock approached and shut himself up in his fort at Detroit; in a day or two he surrendered, and young Robinson was sent on August 16, 1812 to take possession of the fort and hoist the British flag. A couple of months after this he fought at Queenston Heights when Brock was killed and was chosen to convey the prisoners across Lake Ontario. When embarking with these (among whom

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was Colonel Scott, afterwards Commander-in-Chief of the United States Army), he was surprised to hear that he had been appointed acting attorney-general in the place of Colonel Macdonell who had fallen on the bloody heights. However, after peace came, in 1815, Solicitor-General Boulton, was liberated from the French prison, where he had spent some years, and was made attorney-general, Mr. Robinson becoming solicitor-general. In 1813, he was one of the Canadians to arrange terms of the capitulation at York. In 1815, he went to England for a time; returning he was soon made Attorney-General of Upper Canada; rising rapidly in his profession he entered the House of Assembly in 1821 — was appointed Chief Justice of Upper Canada in 1829, held that office with credit, honor, and renown for thirty-three years, becoming the President of the Court of Appeal in 1862, the year before his death. For some years after his appointment as chief, he was also ex-officio President of the Executive and Speaker of the Legislative Council of the Province. In 1838, his sovereign offered him the honor of knighthood, but this was declined. However, in 1854, he accepted the higher rank of a Baronet of the United Kingdom. He more than finished the threescore years and ten of the Psalmist, and whether viewed in his public or private relations he lived equally pure, upright, unselfish, amiable.

Through all his track of years
Wearing the white flower of a blameless life.

We have spoken thus much of Sir John, because like father like son — each were men *sans peur et sans reproche* — each were dominated by the idea of Duty.

Christopher Robinson, the subject of our paper, first saw the light in Beverly House, Toronto, on January 21, 1828, the third son of Sir John. (For one hundred and forty years a Beverley House — occupied by other members of the Robinson family — stood on the Hudson, opposite West Point.) His elder brothers were both members of the Canadian Bar — the one, Sir James L. Robinson, was for years Surrogate Clerk, the other Hon. John Beverly Robinson was prominent in public life, a member of the Dominion Parliament and Lieutenant-Governor of the Province of Ontario. Christopher received his early education at Upper Canada College, and his university course at old King's College, the predecessor of Toronto University. In Trinity term 1850, he was called to the Bar of Upper Canada and admitted to practice as an attorney and solicitor, and in March, 1863, Her Late Majesty appointed him one of Her Counsel learned in the law. From the first he was a worker in his profession, and he ever did honest, faithful work. In 1850, he was appointed Reporter of the Court of Queen's Bench, and twenty-two volumes bear witness to his carefulness and accuracy. In 1872, he was made editor of the Ontario Reports and so continued until elected a Bencher of the Law Society in 1885. In 1880, he completed the preparation (with the aid of a faithful assistant) of a digest of all the cases contained in the Ontario Reports from 1822, some one hundred and twenty-five volumes, a work of immense labor and invaluable to the profession.

Although at first he was chiefly engaged in solicitor's work, and his prospects in that line were excellent, he was soon attracted by the greater freedom of counsel business, and to that he gave himself more and more as time went on. His clear conception of legal business, his knowledge of case law, and his conscientious thoroughness in all that he undertook, soon brought him briefs — and briefs enough and to spare, but he never fell into that objectionable practice (sometimes charged against leaders of the bar) of taking more briefs than he could attend to. In those days in Upper Canada the English practice of counsel devoting themselves to special circuits was still in vogue, and Mr. Robinson attached him-

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self to the western circuit. Before many years had passed hardly an action was entered for trial at the assizes in that district without Robinson being retained either on one side or on the other. When the time came that he could pick and choose he gradually refused briefs at trials in outside places and devoted himself to work before the Court of Appeal and the other courts sitting in Osgoode Hall, Toronto (the Westminster Hall of Ontario), the Supreme Court of the Dominion at Ottawa, and the Privy Council in London — the final Court of Appeal for all the British Colonies. He varied his court work by preparing opinions on the many very important matters on which he was being constantly consulted. He soon became the acknowledged leader of the Bar in Ontario, if not the greatest counsel in Canada, and he was engaged in many of the most important and interesting legal conflicts that have occurred since the birth of the Dominion. Not only has he fought good fights and won victories, or credit and renown, in his own Province, but he has done so in the West, in London, and in Paris; in strenuous fights, interprovincial and international; against criminals fighting for their lives; provinces struggling to expand; huge corporations eager for gain. He has been in the fray when the foremost nations of the world have wrestled with brain and tongue for the untold riches of the sea and of the land. Let us glance at a few of these contents.

The Hon. Thomas D'Arcy McGee was "in the sixties" the most eloquent and one of the most brilliant members of the Canadian Parliament. In early life he had been a friend of the agitators who had for so many years opposed everything British in Ireland, but on this side of the Atlantic he had become a loyal citizen and a faithful minister of the Crown. Returning home from his parliamentary duties on the night of the seventh day of April, 1868, he was feloniously, wilfully, and of malice aforethought, killed by one Patrick James Whalen. The country was shocked at the deed. It was believed that the assasination had been the work of an emissary of a foreign society, because of the change in McGee's views on Irish affairs. Every effort was made to secure the acquittal of the assassin by his brilliant counsel, the Hon. John Hillyard Cameron, but the jury brought in a verdict of guilty, an application thereupon was made for a writ of error. The errors alleged involving many difficult and abstruse questions in criminal practice, such as, whether a special commission to the judge to take the assize at which Whalen was condemned was necessary; whether the award of jury process was correctly framed; whether a distinction existed between justices of oyer and terminer and general gaol delivery; whether the judge had been right in disallowing Whalen's challenge of one Sparks for favor as not being indifferent (he having said that if on the jury he would hang him) the prisoner not having then exhausted all his peremptory challenges; had the prisoner a right to challenge peremptorily his full number of jurors in addition to Sparks. Mr. Robinson was the senior counsel for the Crown and his arguments both before the Court of Queen's Bench and afterwards in the Court of Error and Appeal were masterful efforts, showing most minute and accurate knowledge of criminal jurisprudence and procedure as contained in the books, from the days of black letter law to the then latest decisions of the American courts, effecting the matters in dispute. His arguments were successful; and although the courts held that the learned judge who had tried the case was wrong in not allowing the challenge for cause, yet as the prisoner and the Crown had both (in deference to the opinion of the judge) treated the challenge as a peremptory challenge and proceeded with the trial, Whalen could not now appeal against the decision of the trial judge. The prisoner wished for a further respite to appeal to the Privy Council — but this was not

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granted, and he was executed on February 11, 1869. (The arguments and proceedings and judgments in this *cause celèbre* fill one hundred and eighty-five pages of U. C. Reports, volume 28.)

What was known to the Canadian politicians of "the seventies" as the Big Push case, was one of the most interesting legal matters in which Mr. Robinson was concerned. In 1872, the Hon. George Brown, for more than a generation an active and prominent politician of the Dominion and a leader of the Reform or Clear Grit party, the manager of the printing company that published the Toronto *Globe*, and the dictator of its policy, in August, while a general election was in progress, wrote a letter to the Hon. John Simpson, a member of the Senate of Canada and the then president of the Ontario Bank, in which he said that "a big push" had to be made on election days in Toronto if the Reformers were "not to succumb to the cash" of the Conservative government of which Sir John A. Macdonald was the head. He wrote, "There are but half a dozen people that can come down handsomely, and we have all done what we possibly can do, and we have to ask a few outsiders to aid us; will you be one?" However, the banker did not rise to the occasion. One Wilkinson, in 1875, in the West Durham *News*, published some articles containing scathing remarks anent the political acts of the bank president and the favors his institution had received from the new Reform government — Sir John Macdonald and his friends having been submerged by the tempest raised by the Canadian Pacific Scandal — Mr. Simpson made application for a criminal information for libel against Wilkinson. Mr. Robinson (the late Dalton McCarthy, Q.C. being with him) showed cause against the application. The matter was exhaustively argued before Harrison, C.J. and Wilson & Morrison, J.J. Wilson J. in his judgment discussed certain documents filed by the defendant, including George Brown's letter, saying that "if they shew political intriguing in parliamentary elections for corrupt purposes, or conduct of that nature, or improper and unjustifiable, the extraordinary aid of the court should not be invoked for the service of the complainant." The learned judge considered that the charge of political intriguing was proved. But the court as to two of the articles complained of allowed the application, refusing it as to the other.

The comments on his letter by his old friend, follower, and colleague in the political field, Justice Wilson, greatly annoyed Mr. George Brown, and in about a week appeared in the daily *Globe*, and a few days afterwards in the weekly *Globe*, a most powerful and trenchant article from his pen entitled "Justice Wilson on the war-path." This speaks of the judge "indulging in assumptions, surmises and insinuations" (in a way) "totally unparalleled in the judicial proceedings of any Canadian court:" states that the judge "did not content himself with indulging in legal eccentricities;" that "it was ridiculous enough to hear Tory newspapers for nearly a year past, making night and day hideous with their howlings about the 'Big Push Letter;' but the Bench has descended low indeed when a judge of the Queen's Bench condescends to take up the idiotic howl and rivals the party-whoop of the most blatant pot-house politician." For these and similar sentences in November, 1876, by Wilkinson (who alleged that his trial was prejudiced by the article) a rule was obtained calling upon Brown to show cause why a writ of attachment should not issue against him, or why he should not be committed for contempt of court. Brown filed an affidavit, most voluminous and most interesting to all students of Canadian politics during that stormy period. He himself showed cause but he had (two learned counsel at his elbow) occupying the court for nearly two whole days, speaking with great force and courage, repeating and

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emphasizing and endeavoring to justify his libellous article. His argument fills some ten pages. Mr. Robinson replied in an hour's speech (with him was Mr. Henry O'Brien, the editor of the *Canada Law Journal*). But the judges differed and nothing came of all the bother, although the article was held to be a reckless, unjustifiable attack on the judge and a contempt of court. The chief justice thought Brown should be punished. Judge Morrison was of the opinion that as the courts had abstained from noticing the libellous matter for five months, they should not now do so on the motion of Wilkinson. Judge Wilson, of course, took no part in the motion.

But this was not the end of the Big Push, for Wilkinson was tried and found guilty, but recommended to mercy; but of course he was dissatisfied thereat, and so applied to the full court to have the verdict set aside for misdirection, and for a new trial; but the motion was not successful. On this application Mr. Robinson again appeared for Wilkinson.

Altogether Messrs. Brown and Wilkinson occupy about one hundred and fifty pages of the 41st and 42d volumes of U. C. Reports.

Occasionally members of one family differ as to their respective rights and possessions. States and provinces do the same, though under one flag. The question as to what were the western and northern boundaries of Ontario have been a *question brulante* between the governments of the Dominion and the Province for years. Manitoba, a sturdy and progressive and self-assertive junior in the Canada galaxy of provinces, was given the land up to the western boundary of Ontario: but where was that? Manitoba tried to push it East; Ontario to shove it West. The denizens of the disputed territory voted in the elections for both provinces and for two constituencies in the Dominion elections. In 1883, Ontario sent special constables to Rat Portage, the scene of the conflict, to support the dignity of the premier province. Manitoba did the same to sustain its dignity. On the 27th of July, the Dominion commissioner, with two policemen, the Ontario magistrate with twenty-five policemen, and the Manitoba stipendiary magistrate, with fifteen constables, were arresting each other all day, and the people were siding, some with one side and some with another, to the imminent danger of the peace and the loss of life. One province was Conservative, the other Reform. "Mowat's lambs," burned the Manitoban gaol; and "a tory band of ruffians" were equally violent. For weeks the fight went on. At last the attorneys-general of the two provinces met, and very soon a *modus vivendi* was established, and an agreement arrived at to refer to the Privy Council the difficult question as to whether Ontario was right in saying that the boundary should be the meridian of the Northwest angle of the Lake of the Woods or a line west of it; or if Manitoba should prevail in the contention that the meridian of the confluence of the Ohio and Mississippi Rivers, or the height of land lying west of such meridian and dividing the waters that flow into the Hudson's Bay from those emptying into the Great Lakes was the correct one. The unpretentious upstairs room in the low shabby-looking building in Downing Street, where the appellate tribunal sits which maintains the even balance of justice over a fifth of the human race and exercises sway over a fifth of the lands occupied by man on this globe, was brilliant with the array of legal luminaries when the matter came on. The members of the Judicial Committee were The Lord President, Lord Carlingford, the Lord Chancellor Selbourne, Lord Aberdare, Sir Barnes Peacock, Sir Montague Smith, and Sir Robert Collier. For Ontario appeared Attorney-General Mowat, and the Hon. David Mills, and Messrs. Haldane & Scoble of the English Bar. On behalf of Manitoba, Attorney General Miller and Mr. Dalton McCarthy

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Q.C., while Mr. Christopher Robinson and Mr. Hugh McMahon, Q.C. were for the Dominion. The argument began on the 15th of July and lasted six days, many were the old treaties, plans, reports, travels, records, and other documents cited and discussed, much dust was shaken off the musty records of the past; much recourse was had to the tales of French, English, and American explorers.

On the 11th of August Her Majesty approved of the decision of her counselors which was practically in favor of the contention of Ontario — and against the views of Mr. Robinson.

In 1885, while the snow still lay thick upon the ground, Eastern Canada was astonished to hear that Louis Riel had again incited the half-breeds and the Indians of the Northwest to rebellion. He had played the game in 1870, and had escaped over the border to the south, and in time had been allowed to return, and was even elected member of Parliament. The Canadian Pacific Railway was not yet completed north of Lake Superior, and navigation was not open, yet volunteers from the east were hurried to the west. In the skirmishes that followed thirty-eight of the loyal party were killed and one hundred and fifteen wounded, and very many were the casualties along the line of march, and severe were the diseases contracted through the hardships of the campaign, and enormous was the expense. Riel was captured, and tried for high treason at Regina. The court opened on July 20, before Mr. Stipendiary Magistrate Richardson and an associate justice, with a jury of six men, according to the Northwest Territories Act, 1880. He pleaded not guilty and was defended by F. X. Lemieux, Charles Fitzpatrick, the present Minister of Justice, J. N. Greenshields, and T. C. Johnston: while Mr. Christopher Robinson prosecuted for the Crown, assisted by B. B. Osler, R. W. Burbridge, D. L. Scott, and T. C. Casgrain. The court overruled all objections to its jurisdiction. The trial lasted several days and was followed by a verdict of guilty. The defense rested chiefly on the plea of insanity, but this he himself repudiated in his addresses to the court, although he even then claimed he was "the Prophet of the New World;" but his deeds were clear, however dark his mind may have been; his fate was sealed; he was sentenced to be hung. The case was appealed to the Court of Queen's Bench, Manitoba, and there, the judgment was confirmed. His counsel applied to the Judicial Committee of the Privy Council for leave to appeal to that august body, but their Lordships refused permission, and so after a commission of medical experts had reported that he was sane, this unhappy enthusiast who intended after the overthrow of the English in Canada to give Quebec to the Prussians, Ontario to the Irish, and the Northwest to the other nations of Europe, perished on the scaffold. For long years his spirit haunted the Canadian politician, refusing to rest, or let friend or foe have peace, although his body lay in peace in the graveyard at St. Bonifice.

In 1893, Mr Robinson crossed swords with members of the American Bar, with Messrs. Carter, Phelps, and Coudert, "as good as we have," said Irving Brown anent them. The Behring Sea Arbitration tribunal met in March of that year in Paris, and amid the array of legal talent that discussed the sea and the seals before that august body Mr. Robinson was not the least conspicuous figure. The court consisted of arbitrators named by the President of the French Republic, the King of Italy, and the King of Norway and Sweden respectively, two appointed by the British and two by the American government. The question was "Had the United States acquired any special jurisdiction in Behring Sea or any special right of protection over or property in the fur seals there by the purchase of Alaska in 1867." The judgment was in favor of Great Britain, but certain regulations were

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established as to the fishing for seals in Behring Sea.

Sir Charles Russell, then attorney-general, and afterwards Lord Chief Justice, and Sir Richard Webster, then solicitor-general, now Lord Alverstone, were for Great Britain as well as Mr. Robinson. The *London Times* said "Mr. Christopher Robinson, the Canadian counsel, in a brilliant speech summarized the whole case, reducing it to series of concise propositions, which from the British point of view, at least, demonstrated the absurdity of the American claims."

Again, in 1903, Mr. Robinson appeared before an international tribunal and with leaders of the English Bar struggled with brilliant advocates from the United States in the Alaskan Boundary dispute: struggled and wrestled so as to gain the praise and plaudits of friends and foes; but struggled and wrestled well nigh in vain.

Mr. Robinson's mind was wonderfully clear and capacious; his reasoning power was marvelously acute; his knowledge of precedents was practically unlimited. But he was always the least demonstrative man in court, and his quiet speeches were pure argument. He never bullied a witness, nor attempted to browbeat a judge; he did not bluster before a jury nor try to deceive them. One who knew him intimately professionally said he was never known to overstate his case, misstate facts, or mislead the court by a hair's breadth.

Mr. Robinson's secret of success was his intense application, his coolness and his physical condition, which, being excellent, aided the mental process. No man worked harder than he did at his profession, and no man who is less assiduous can expect to reach the eminence he attained. Every one trusted him — his clients, the Bar, and the Bench. His opinions prevented many an action being instituted.

Mr. Robinson was of medium height, slight and active in his walk and movements. Until recent years he was extremely fond of horseback riding, and shooting. In fact, a few weeks before his death he was shooting on his marsh on the St. Clair flats.

He married, in 1879, the eldest daughter of the Hon. J. B. Plumb, one time speaker of the Senate of Canada.

He closed his eyes for his last long sleep in Beverly House where he had first seen the light, on the last day of October, 1905, in his seventy-eighth year. "His eye was not dim nor his natural force abated."

His life had been a quiet unostentatious one. He never sought for political honors, or tried to win popular applause or the votes of the people. The only public position which he was ever induced to accept was one his father had held half a century before, that of Chancellor of the University of Trinity College, Toronto, an institution connected with the Anglican Church, of which body Mr. Robinson was a sincere and faithful member. In this position he did good work — showing great breadth of mind and liberality. For his eminent services in connection with the Behring Sea Arbitration Her Majesty offered him the honor of knighthood, but, for reasons of his own he saw fit to decline. Had he so desired he might, without doubt, have had any of the highest judicial positions in Canada. If he had accepted a judgship he would have shed luster on the Bench, for his mind was essentially judicial, he had the faculty of seeing all sides of the question under discussion and seeing it quickly; and his learning, industrious research and keeness of intellect, his quiet manner and the well-balanced mode of expressing his views on any subject would have enabled him to rank high as a judge.

As a man he was gentle, unselfish, helpful, the soul of honor. His friends loved him. As a citizen he was respected by all who knew him; and he brought credit to his country. Although quiet in manner, undemonstrative and temperate in his utterances, he clung firmly to his own opinions:

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what he considered right he held to with an unyielding grasp.

He was the most popular man in his profession, this feeling of friendship and respect was not confined to the seniors who knew him best and longest, but was widely diffused among the younger members of the Bar and the students, to whom he was uniformly kind and encouraging, and who looked up to him as a model worthy of their sincerest imitation, realizing that in his person he worthily sustained the best traditions of the profession.

Many were the expressions of regret and sorrow; many the words of praise and admiration, spoken by the judges and his confrères; and many were the tokens of regard and esteem shown by his fellow-citizens, when the news of his sudden death became known.

Sir John Boyd — the Chancellor of Ontario — on taking his seat on the Bench, the next day, at the Toronto Assizes said: "Since we last met, the profession, of which both judges and Bar form a part, has sustained a lasting loss in the very sudden death of Christopher Robinson — that great counsel, whose face was so familiar. I say it is a lasting loss, as I suppose every one will admit he was at the head of the Bar, an eminent advocate, a great lawyer, a good man; and people of that sort cannot be easily replaced. They are not too common.

He was a man who did not spare himself. Although he had great parts, he never came into court with an unprepared brief. He spent himself zealously in the interests of his clients, but always within such limits as he thought to be right. He would never violate the dictates of conscience. He would never condescend to do a mean thing, or to gain an unfair advantage. His fighting was of the honorable kind, which it is the pride of the English Bar to exemplify in its best methods. He was one of that class. We shall deplore his loss, but we shall think of him with pleasant recollections as one we can be proud of, and as one whom we can exhort our students to follow in the high course he took in his professional career."

Chief Justice Falconbridge when opening his court at Osgoode Hall, said, "It has not been the practise of our courts for the presiding judge to say anything in the case of other distinguished members of the Bar who have passed away without occupying any official or judicial position, but the place occupied by the late Mr. Christopher Robinson was so exceptional and unique that I feel — occupying as I do the seat on this Bench so long occupied by his illustrious father — that it is right and fitting that the departure of so noble and worthy a son should not pass without some tribute to his memory. There is no public or private expression of mine that can adequately voice my appreciation of his high character and of the loss that we have sustained. His career will furnish every answer to those who have doubted whether it is possible to combine the positions of a great advocate with the character of a stainless Christian gentleman. He was the Chevalier Bayard of the Canadian Bar, a man *sans peur et sans reproche*." His Lordship, very visibly affected, ended his tribute to his friend in an almost inaudible voice. "For more than forty years he was personally to me a guide, philosopher, and friend. His death is a cruel blow privately, and an irreparable public calamity."

In each of these courts the senior counsel present most feelingly joined with the judges in paying tribute to the memory of their departed friend, brother, leader.

KINGSTON, ONT., December, 1905.

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RAILROAD RATE REGULATION

Legislation Constitutional and Legal Questions Not Many or Difficult

By Hon. William E. Chandler

THE railroad question now pending in Congress is not complicated nor does it raise serious legal doubts. The simple proposition of the President is that when a complaint is made to the Interstate Commerce Commission that a particular rate charged by a railroad for the transportation of a specified kind of merchandise, or for the carriage of passengers, is unreasonably high, the Commission, after a hearing, may decide that the complaint is just and may fix a new rate which shall take the place of the old rate and go into immediate effect, that is, within a short period of about thirty days; the remedial rate thus fixed not to be increased without either the consent of the Commission or a decision by a court that it will be confiscatory in its effect.

The railroad counter-proposition is that the roads shall not be interfered with as to any freight or passenger charges which they may choose to make and collect, unless a court upon due complaint made by a person aggrieved and proofs submitted, shall decide that the rates are unreasonably high and should be prohibited.

The Constitutional power of Congress to establish in due form the first of the foregoing methods does not seem to be seriously disputed. (The Granger Cases. See 108 U. S. 526, 541, and 118 U. S. 557.) The railroads do indeed urge that it is an unjust interference with the rights of private property belonging to the owners of the railroads; while the shippers say as to the second method that it is either a futile and worthless remedy or else will compel the courts to perform a non-judicial function.

Such legal questions as may arise in connection with rate legislation by Congress have been carefully considered by Attorney-General Moody in an opinion given on May 5, 1905, to the Senate Committee on Interstate Commerce. This committee had no right to require an opinion and it was most unusual for the Attorney-General to give an opinion to a Committee of Congress; but he thought the public interest would be promoted, and after careful consideration he sent an opinion which is so full and well-reasoned that it should command the attention of every person interested in the legal questions considered. Copies may be obtained by writing to him or to any senator or member of Congress.

Corporations being the creatures of legislative power are, of course, absolutely subject, so far as their existence is concerned, to the will of future legislatures. The power that can create can also destroy. A limitation, however, clearly exists as to the power of the legislature over the property of a corporation whose existence it chooses to terminate. That property belongs to the stockholders, cannot be taken from them, and may be taken possession of by a court of equity and held and administered or disposed of for the benefit of its lawful owners. (Greenwood *v.* R.R. Co., 105 U. S. 13.) But even with this limitation existing there is ample power in the legislatures which created the various railroad companies to fully control the rates of charge for fares and freights. No contract rights have been given to them which entitle them perpetually to operate their roads. Any requirement whatever imposed by the legislatures may be enforced by the provision that if the companies do not formally agree and submit to the same they shall cease to exist as corporations. If such an extinction takes place and a court of equity takes possession of the railroad for its owners it can only operate it through a

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receiver, and it cannot create a corporation for that purpose, even if the owners of the property can be considered as entitled to retain forever against the legislative will the franchise to operate their road.

Although Congress does not possess and cannot exercise the power to dissolve and extinguish railroad corporations which are chartered by the states it can, under the power to regulate commerce among the several states, prohibit any railroad which crosses state lines from carrying freight or passengers across such lines except upon such conditions as to the future conduct of the railroad as Congress may prescribe; so that both the states and Congress, as to corporations engaged in interstate commerce, have full and ample power through laws carefully drawn to compel the corporations under penalty of practical destruction to comply with the severest law which may be passed by either state or nation. That these extreme powers are not likely to be exercised does not alter the substantial and useful fact of their existence.

These views are not impaired by the fact that the United States Supreme Court has exercised the power to declare certain railroad rates fixed under state laws to be so low as to be confiscatory and non-enforceable. (Reagan's Case, 154 U. S. 362; Moody's Opinion.) These decisions are based upon the same idea that justifies a court in preserving for the stockholders the property of a corporation whose charter has been repealed. But if the states should provide for fixing rates exactly in the same way and should enact that the companies refusing to submit thereto should have their charters repealed, the railroads would be helpless and the courts without power to give relief. The same result would follow a similar law of Congress coupled with the provision that railroads refusing to obey should not carry freight or passengers from one state to another.

There are many ways of doing things when the people and their state legislatures and the Congress very much wish to do them.

The Union Pacific Railroad Company, created a corporation by Congress on July 1, 1862 (12 Stats. 489) has in its charter a provision in section 1 that the stockholders shall elect "by ballot not less than thirteen directors for said corporation." The section also provides as follows: "At the time of the first and each triennial election of directors by the stockholders two additional directors shall be appointed by the President of the United States, who shall act with the body of directors, and be denominated directors on the part of the government; any vacancy happening in the government directors at any time may be filled by the President of the United States. The directors to be appointed by the President shall not be stockholders in the Union Pacific Railroad Company."

This method of introducing officers of the government directly into the governing body of a corporation has great merit. Such directors can be put into every railroad corporation by the legislatures and into every interstate commerce railroad by Congress; and it may be provided that no rates of transportation shall be fixed except with the concurrence of all the government directors.

The telegraph companies which were given by the Act of Congress of July 24, 1866 (14 Stats. 221) the right to construct and maintain telegraphs over any of the post-roads of the United States, were subjected to this provision: "that telegraphic communications between the several departments of the government of the United States and their officers and agents . . . shall be sent at rates to be annually fixed by the Postmaster-General."

They were also required to accept the provisions of the act by section 4, as follows: "That before any telegraph company shall exercise any of the powers or privileges conferred by this act, such company shall file their written acceptance with the Post-

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master-General of the restrictions and obligations required by this act."

By a similar method all railroad corporations could be required to expressly assent to any methods provided by law for fixing rates, or else driven out of business. No court could interfere. There is no question of power — it is only one of exigency or popular determination.

Such extreme measures of legislation as are above suggested are not likely to be resorted to in the pending and future conflicts between the railroads and the people; although it is well for the former to contemplate the possibility of their adoption. Unquestionable and unobjectionable powers of the states and Congress exist to enact all legislation which is now proposed — such as we are now considering.

Congress may provide that the Interstate Commerce Commission may make remedial rates and put them immediately in force. The courts may restrain and annul those rates if they find they are confiscatory, and Congress cannot take away that power except by extreme legislation. Congress cannot confer upon the courts the discretionary power to make remedial rates but can confer upon the courts the judicial power to declare a given rate extortionate; and possibly without legislation the courts possess this latter power, which cannot be taken away except by extreme legislation.

Under these practical conditions affecting legislation it seems to be reasonably clear that the legislation which should be passed is that recommended by President Roosevelt. It is intolerable that the railroads which are monopolies controlling 200,000 miles of transportation, with competition obsolete, should be allowed to tax the people of this country two thousand millions of dollars annually with power to increase the rate of taxation and the amount of money raised, without restraint or limitation other than that which may be self-imposed by the fear that increased rates will altogether stop the traffic in the articles too heavily burdened.

The power now sought for the Interstate Commerce Commission, it was universally believed, was given in the original act of 1887, and it was exercised by the Commission, but the decision of the court in Interstate Commerce Commission *v.* Texas Pacific R. Co., 167 U. S. 479, destroyed it, because although Congress had the authority to grant the power, it had not in fact done so.

When next unmistakably given no harm will happen because the courts will still possess all the power they ever had to declare any given rate confiscatory and annul it.

On the other hand, it is a fatal objection to the proposition of the railroads allowing only a court to interfere with rates which they may fix and put in operation, that the court will not interfere with a rate merely because it may seem too high to the judge who tries the case; that the court will only act when it clearly appears that the rate is grossly extortionate; that the proceedings in court will be sure to be fatally dilatory; and that when the court reaches a conclusion condemning the rate fixed by the railroads it will not have the power to fix a remedial rate.

What is wanted is a controlling body which can decide the practical question what rate on the whole is fair and just to the patrons of the railroads and to the railroads themselves — what the railroad service is reasonably worth.

A tribunal which can only act by deciding as a judicial question that one rate is grossly extortionate and another rate is confiscatory of the railroad property will utterly fail to meet the just demands of the passengers and shippers for whose benefit primarily our vast railroad system has been constructed through the organization of huge corporations and the exercise of the high governmental power of eminent domain in the taking of private land for public use throughout the whole country.

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In considering whether the public will be sufficiently protected by the exercise of a power by a court to declare a given rate extortionate, the subject should be looked at practically. An existing rate for transportation being 25 cents per hundred pounds the question in controversy will never be whether the railroad has justly made it 100 cents, nor whether a commission representing the people has justly made it 5 cents. In the one such case a court would undoubtedly judicially say that the rate was extortionate, and in the other that it was confiscatory. But a court would never undertake to judicially pass upon the fairness of the raising of a rate from 25 cents upward to 30, 40, or 50 cents, nor upon the fairness of the reduction of a rate from 25 cents to 20 or 15 cents. Yet within these limits of 15 cents on the one side and 50 cents on the other, hangs the whole question — not of an extortionate or confiscatory rate — but of a fair and just rate. What the railroads wish to do is to slowly push the 25 cent rate up to 30, 40, 50 — as far as the traffic will bear — and so pay interest and dividends upon as much as possible of the fourteen billions of dollars of stock and bonds which they have made the capitalization of the six or eight billions of value in the railroads of the country. That there shall be some superior power to determine how far they shall go in this scheme seems to be a reasonable popular demand.

It should always be borne in mind that three quarters of the ablest legal lawyers in the United States are in the employ and riding on the free passes of the railroads, and are constantly on the watch for an opportunity to do their clients a service by putting forth or countenancing legal views hostile to the popular demands. One of these much insisted on is that rate-making is a judicial question and that the Interstate Commerce Commission cannot be invested with the judicial power to make rates. The idea is absurd. To determine what, on the whole, is a reasonable rate between man and man, between railroad and passenger, is in no sense a judicial question; it is a legislative and administrative question — the legislative and executive branches of the government may participate therein, but not the judicial branch. The latter may, indeed, by a stretch of legal reasoning, be allowed to decide, as a matter of law whether a low rate complained of is so low as to be confiscatory, or whether a high rate is so high as to be extortionate; but in the decision of the real common-sense business questions of reasonable rates there is absolutely no judicial element whatever.

The railroads further say that the making of innumerable rates is a complicated business involving deep and prolonged investigation and expert capacity; that the power must exist to make discriminations to meet varying conditions; that the system must be flexible, and that, therefore, the work must be entrusted to the railroad officials uncontrolled by any power. The sufficient answer is that original rate-making power is not to be given to the Commission, but only a remedial power in special cases which the Commission is in every way qualified to exercise effectively. And it is also obvious that if the Commission is unfit to do the work averred to be so troublesome and complicated, much more unfit is the court; which is further disqualified because the question cannot possibly be made a judicial one except when it involves only a decision whether a rate is so extremely outrageous as to be either extortionate or confiscatory. The more important the rate question, the more complicated and troublesome a decision thereof, the more impossible does it become that the people shall leave it wholly in the hands of the railroads, and the more impossible it becomes to place it for any practical or useful purpose in the hands of the courts.

Doubtless, before Congress acts, the railroads will wisely conclude to drop subterfuges and to concede legislative and execu-

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tive control of rates, to be exercised through power to the Interstate Commerce Commission to hear complaints and fix remedial rates — subject to interference by the courts, if at any time confiscatory rates are ordered by the Commission. This latter condition should, in my opinion, be omitted and the courts left with only such power of interference as their general jurisdiction gives them. It is a greater concession than their conduct in recent years entitles them to receive. If they successfully oppose the legislation now urged by the President the country will resort to government ownership. One argument in favor of that is this: The railroads are now seeking to retain the power to raise rates by degrees, as opportunities occur and the traffic will bear it, so as to pay 6 per cent interest on the railroad capitalization of ($14,000,000,000) fourteen billions of dollars — which will require yearly ($840,000,000) eight hundred and forty millions of dollars. The railroads are, however, not fairly worth over ($8,000,000,000) eight billions of dollars. If the United States were to condemn and take the roads at that sum the amount to pay the owners could be borrowed at 3 per cent and the yearly burden would be only ($240,000,000) two hundred and forty millions. This difference of $600,000,000 annually to the people who are now taxed $2,000,000,000 annually by the railroads may sometime be accomplished by government ownership; and to the deliberate adoption of that no possible constitutional or legal objection can be stated. It is a mere question of popular desire.

WASHINGTON, D.C., December, 1905.

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THE AMERICAN JUDICIARY [1]

By Everett P. Wheeler

THIS book of Judge Baldwin's contains the fullest and most accurate account of the organization and functions of the American Judiciary that has ever been published. It is written for popular use, and ought to be in the hands of every student of American Government, for the Judiciary in this country is one of the coördinate departments of that government, and its influence upon the growth of the nation can hardly be over-stated.

There are some points in the present judicial system which seem to us to need improvement, and the appearance of this timely volume affords an opportunity for suggesting them.

The fusion of law and equity was a favorite subject for law reformers in the first half of the nineteenth century. No doubt there were abuses in the administration of the Court of Chancery under Lord Eldon which did indeed require reform; and no doubt in the administration of the Chancery courts in this country there were sometimes failures of justice. So far as procedure was concerned, there was need for improvement. Two methods for making this improvement were attempted: One by rule of court; the other by specific and minute acts of the legislature. David Dudley Field was the father of the latter method, which he embodied in a Code of Civil Procedure, which was adopted by the Legislature of New York in 1848. Many other states followed the example. But the codifiers of practice overlooked the fact that the principles of law and equity are essentially different. They may be administered by one court and in one form of suit, but you can no more fuse them than you can fuse a woman into a man. The attempt to do it, by a curious perversion of terms, led the courts to apply to all appeals the common law practice upon writs of error. The Codes in terms abolished writs of error and gave a review by appeal in every case. But the courts treated the enactment as if it had abolished appeals and substituted writs of error as the only method of review. The result of this has been that the appellate courts in the states which have adopted the Code practice, as a rule confine themselves to discovering whether or not there is reversible error in the record; whereas, according to the practice in equity and admiralty appeals, it was the business of the Appellate Court to render final judgment according to the merits of the record. Indeed, at common law, it was the duty of the court upon writ of error to render judgment according to the merits of the whole record. The practice which has sprung up among appellate courts in this country, of attributing special sacredness to the finding of the court of first instance, and of refusing themselves to make a finding, did not prevail at common law. Any one who has ever glanced over Burrough's Reports, for example, will find that while undoubtedly weight was given to the finding of a jury, yet the full Bench did not consider it essential, where it disagreed with this finding, in all cases to order a new trial, but exercised the right to render final judgment upon the merits of the record before it.

The effect of the practice thus referred to, which has become so general in this country, has been that which was naturally to be expected. A judge whose whole attention on an appeal is devoted to the question as to whether or not there is reversible error in the record, and whose first thought is not devoted to the ascertainment of the actual merits of the controversy, and rendering a just judgment thereon, becomes almost of necessity

[1] "The American Judiciary," by Simeon E. Baldwin, LL.D. The Century Co., New York, 1905

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technical and narrow. Some men of extraordinary ability have risen superior to the tendency, but they have been the exceptions; and the existence of this practice in the Appellate Court has led to the development of a type of judge in the court of first instance, who tries a case not so much with the view of rendering a just judgment, but of rendering one which will not be reversed on appeal. This disposition on the part of the Trial Court is just as belittling as that practice in the Appellate Court to which reference has been made.

In an investigation which was made some two years ago, into the causes of the delay which prevailed in the administration of justice in New York courts, a curious table was prepared and published by the Commision to whom the matter was referred by the legislature, giving the percentages of reversals on appeal of the judgments delivered by different judges of the trial courts. This disclosed what might naturally be expected, that the ablest judges, whose judgments on the whole commanded the most respect, were not those who had the smallest percentage of reversals.

In short, the tendency of this practice is to turn the administration of justice into a game, in which the keen and crafty on the whole have the advantage.

This defect in civil administration, has been very much aggravated by the facility of appeals in criminal cases. At common law and in the federal system, until recently, there was no right of appeal in criminal cases. The facilities which present legislation has given for such appeals and the technical rules which have come to be generally applied in the administration of criminal justice, have still further developed the technical tendency generated by the administration of civil appeals. A moment's reflection will suggest that it is not all in the interest of the public that the question to be passed upon by an appellate court n criminal appeal, should be whether or not some technical error has been committed in the court of first instance, but whether or not the culprit is guilty.

The law which allowed appeals in criminal cases to the Supreme Court of the United States has been a great detriment to that court. It has thrown upon it a volume of business which it could ill afford the time and thought to transact. The very fact of this pressure of business has led the court inevitably to restrict appeals in civil cases. *Certioraris* to review judgments of the Circuit Court of Appeals are very seldom granted; and in writs of error to the state courts, the practice has sprung up of dismissing them when there was the slightest color for saying that a question of fact existed in the case.

For example, when the pressure of business was less than it now is, the Supreme Court in Belden *v.* Chase (150 U. S. 674) heard a collision case upon the merits, although there were questions of fact which had been litigated in the court below. But latterly this practice has been changed, and in the Hamburg American Packet Co. *v.* Lennan (194 U. S. 628) a writ of error in a similar case was dismissed, although there were exceptions in the record quite as well entitled to consideration as those which were considered in Belden *v.* Chase.

Moreover, the existence of this right of review in criminal cases has led to suing out writs of error to review the judgment of the state court in criminal cases. Where there was no just pretext for the writ, it was sued out obviously solely for the purpose of delay. Such methods bring the whole administration of justice into contempt, and have much to do with the lynchings which are such a disgrace to American civilization.

We believe that if the right of review in criminal cases were greatly limited, and if in all cases of appeal, whether criminal or civil, the Appellate Court were required to render final judgment upon the merits, irrespective of any errors or mistakes in the

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court of first instance, which were not absolutely vital to the case, we should gradually find the whole system of American jurisprudence broaden, and the administration of the courts become more just.

There is one matter of minor importance to which attention will be drawn in conclusion. When the various codes of practice were adopted, there was a tendency to abolish the minor administrative offices, such as Commissioners or Masters in Chancery and the like, and to throw a great mass of routine work upon the judges themselves. One reason why the Federal courts, with a comparatively small judicial force, are able to discharge business so effectively is, that in these courts a great amount of routine business devolves upon Commissioners and Masters in Chancery.

It is greatly to be desired that in the state courts a similar practice should be revived. The repetition of routine administrative duties must always be odious to an able man, and only tend to make a small man smaller. A curious instance of the effect of this disposition to throw every detail upon the judge, came under our notice recently. A lawyer of real eminence, who ought to have known better, actually took the point that a decree was invalid because it was signed by the Federal District Judge outside the limits of his own district. Counsel had become so accustomed to the state methods that he had actually forgotten that a decree takes effect from the time of its entry by the clerk, and that the signature of the judge, which might equally well be expressed in any other way, is only a fiat expressing his satisfaction with the form of the decree, and authorizing its entry.

New York, N.Y., December, 1905.

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THE SPIRIT OF THE COMMON LAW[1]

By Roscoe Pound

NOTHING in the history of our common law is more striking than its tenacity in holding ground. Like our English speech, there seems to be something about it that commends it to men of diverse lands and races, and where it once goes, it stays. From the beginning, it has been in competition, if not in conflict, with other systems, and it has steadily gained ground. On its own soil, it had to meet and resist the canon law in the twelfth century, the Roman law at the Renaissance, the powers of the crown exerted against its fundamental doctrine of the supremacy of law in the sixteenth and seventeenth centuries, an influx of foreign law through the law merchant in the eighteenth century, the legislative reform movement in England and America in the nineteenth century, and in America, at the same time, a temporary but formidable agitation for French law, influenced by the spread of the Code Napoleon and the success of the Louisiana Civil Code. Not only has the common law as a system successfully resisted all attempts to bring in some other law in its place, but in those parts of our system where alien and more flexible methods have existed or have arisen, in contravention of the fundamental theory of the common law that litigation is contentious, and wherever arbitrary discretion has obtained a serious foothold, the common law ultimately has prevailed. Probate, administration, and divorce have been absorbed into our American common law. Case law and precedent have turned admiralty into a common-law mold. Equity and equity procedure have been legalized. Precedent and case law in the one, and the doctrine of contentious procedure in the other, have effectually made them over to the common-law model. Evidence in equity is now governed by rules framed to regulate the admission of evidence before juries; common-law executions are issued on decrees for the payment of money, though courts admit that contempt proceedings might sometimes be proper;[1] exemption laws, effective against executions, are defying equitable principles as to trusts and trust funds;[2] and more than one equitable doctrine has become so legalized as to run counter on occasion to the justice and equity which were its original foundation. So far has this gone, that an acute observer has laid it down as a principle of legal science, that the judicial administration of justice is intrinsically contentious.[3]

On what we may fairly term foreign soil, the common law has been no less aggressive and tenacious. Louisiana alone, of the states carved from the Louisiana purchase, preserves the French law. In Texas, only a few anomalies in procedure serve to remind us that another system once prevailed in that domain. Only historians know that the custom of Paris once governed in Michigan and Wisconsin. And in Louisiana, not only is the criminal law wholly English, but the fundamental common-law doctrines, supremacy of law, case law, and contentious procedure, are likely to make the legal system of that state a common-law system in all but its terminology. In Quebec, likewise, there are many significant signs of common-law influence. The Roman-Dutch law of South Africa is adopting English conceptions. Finally, even Scotland, which received the Roman law in the sixteenth century, is becoming a common-law country. Except as it lingers in their legal vo-

[1] Delivered before the Nebraska State Bar Association on November 23, 1905. A considerable portion of this address was published in the *Columbia Law Review* for May, 1905, in an article entitled, "Do We Need a Philosophy of Law?"

[1] Stuart *v.* Burcham, 62 Neb. 84.

[2] Green *v.* Simon, 17 Ind. App. 360.

[3] Salmond, "Jurisprudence," sec. 30.

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cabulary, the Scotch have almost abandoned Roman law in all their courts.[1] From these examples, it is easy to see what will be the fate of the existing system in Porto Rico and the Philippines. Whether it is the innate excellence of our legal system or the innate cock-sureness of the people that live under it, so that, even as Mr. Podsnap talked to the Frenchman as if he were a deaf child, we assume that our common-law notions are part of the legal order of nature, and are innocently unable to understand that any reasonable being can harbor conceptions that run counter to them, the Anglo-Saxon refuses to be ruled by any other law. Maine's supposition that the newer states of the Union would take the Louisiana Code for the substratum of their law, and his prophecy that Roman law would become the *lingua franca* of universal jurisprudence,[2] have proved wide of the mark.

An achievement strictly in line with the history of the common law is the intrenchment of its doctrines in our constitutions, state and federal, culminating in the Fourteenth Amendment, so that its fundamental and distinctive dogmas are beyond the reach of ordinary state action, and are to be dislodged in many cases only by amendment of the Federal Constitution itself. This was not achieved without a struggle. Jefferson, in 1815, denounced the common-law doctrine of supremacy of law, when applied by courts in holding legislative acts unconstitutional, as a theft of jurisdiction. Virginia, Kentucky, Pennsylvania, Georgia, and Wisconsin successively denounced it. A strong opinion to the contrary was pronounced by an able judge. As late as 1833, it was seriously proposed that the Federal Constitution be amended to provide a special tribunal for the determination of questions as to the authority of Congress and of the several states under the Constitution. But despite opposition, which at the time of the federal enforcement of the constitutional provision as to fugitive slaves became extremely bitter, the common-law principle has become firmly rooted in our polity. No state has departed from it, and one of the states which formerly agitated for referring constitutional questions to a special, non-judicial tribunal, has since adopted a constitution in which the courts are expressly directed to declare the invalidity of unconstitutional legislation.[1] In addition to this far-reaching principle, which fixes the common-law doctrine of the supremacy of law in our institutions, the common-law dogmas of inviolability of person and property, of the local character of criminal jurisdiction, of due process of law — a phrase as old at least as the reign of Edward III — that private property cannot be taken for *private* use, nor for public use without due compensation — a doctrine as old as Magna Carta — that no one shall be compelled in any criminal prosecution to be a witness against himself, and of the right of trial by jury, with all that was meant thereby at common law — all these dogmas are protected in state and federal constitutions so as to be substantially beyond the reach of legislation. If Coke were to come among us, he might miss the law of real property which he knew so minutely. Our law of contracts and our mercantile and corporation law would doubtless be unfamiliar, but he would be thoroughly at home in our constitutional law. There he would see the development and the fruition of his Second Institute. All that might surprise him would be that so much had been taken from and made of his labors with so little recognition of the source.

Superficially, then, the triumph of the common law seems assured. Nevertheless, jurists are by no means certain that this is so. The most obvious danger, and the one most frequently adverted to, is legislation.

[1] Professor Dove Wilson in 16 *Juridical Review*, 68.

[2] "Village Communities," 330.

[1] For an account of this agitation, see address by Judge Lurton, Proc. Bar Ass'n. Tenn., 1903, p. 125.

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Thus, Professor Maitland says that with some hundred legislatures busy at law-making in the various common-law jurisdictions, "the unity of law is precarious," [1] and that with unity much that is precious must disappear. Likewise, Brunner, writing, however, at a time when codes were more imminent than they are now, states that "the period of the uncontested supremacy of the common law appears to be now passing away." [2] I cannot think, however, there is any real cause for apprehension from this quarter. I come to such a conclusion for two reasons. In the first place, there is little in legislation that is original. Legislatures imitate one another. One may number on his fingers the landmarks of legislation in common-law jurisdictions, and copies or adaptations of them have gone round the world. Secondly, everything indicates that codification, as such, is still far remote. The gradual codification now in progress is but a legislative restatement of particular departments of the common law. It promotes unity. It does not affect the system itself — its basic dogmas and tenets — in the least. Each statute is but a fresh starting point for a new body of case law. Moreover, general codification, when it comes, is almost certain, unless an entire change of feeling intervenes, to be a restatement of the common law in improved form, pruned of archaisms and antinomies, to be construed according to common-law principles, and in due time overlaid by a new growth of adjudicated cases. The failure of the New York Draft Codes to meet the requirements of good code-making, has set back codification so thoroughly that none of us are likely to see a codified common law. But in any event, legislative innovations are impossible in America. For instance: the federal bankruptcy act goes a long way in mixing up legal, equitable, administrative, and criminal jurisdiction. But the most serious innovation, and the only one of special significance, is thwarted by the intrenchment of the common law in the Federal Constitution. The act provides that the bankruptcy court may punish bankrupts, trustees, and other parties for violations thereof. If this was meant, however, to give summary powers to the court, it failed to reckon with the Fifth Amendment to the Federal Constitution, which requires an indictment or presentment of a grand jury as an indispensable preliminary to prosecutions in any federal court.[1] If legislation, therefore, were all that was to be feared, I should feel confident that the common law was with us to stay.

To my mind, the real danger to the common law is in another quarter. Hitherto, the people have been with it. When Henry II put bounds to the jurisdiction of the church, when the barons exclaimed, *nolumus leges Angliae mutare*, when the commons petitioned against the Court of Chancery, when Coke for the judges of England told James I that he ruled *sub Deo et lege*, when the Continental Congress resolved that the several colonies were entitled to the common law of England, the common-law side was the national and the popular side. But to-day the popular side is not that of the individual, but that of society. To-day, for the first time, the common law finds itself arrayed against the people; for the first time, instead of securing for them what they most prize, they know it chiefly as something that continually stands between them and what they desire. It cannot be denied that there is a growing popular dissatisfaction with our legal system. There is a feeling that it prevents everything and does nothing. Commissions and boards, with summary administrative and inquisitorial powers are called for, and courts are distrusted. Partly, of course, this is due to impatience of thorough search for

[1] "English Law and the Renaissance," 33.

[2] "Sources of the Law of England" (Hastie's Translation), 176.

[1] Bankruptcy Act of 1898, sec. 2 (4), Mackin *v.* U. S. 117 U. S. 348, *Ex parte* Wilson, 114 U. S. 417.

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the truth, exact ascertainment of the facts, and strict justice. When everybody may learn all the facts in ten minutes from the morning paper, why should it take a court six months to reach a fragment of them? But in large part this dissatisfaction has a real basis, and is well founded. No amount of admiration for our traditional system should blind us to the obvious fact that it exhibits too great a respect for the individual, and for the intrenched position in which our legal and political history has put him and too little respect for the needs of society, when they come in conflict with the individual, to be in touch with the present age. A glance at one of the digests will show us where the courts find themselves to-day. Take the one subheading under Constitutional Law, "interference with the right of free contract," and notice the decisions. Three of them hold eight hour laws unconstitutional;[1] two more hold statutes limiting the hours of labor unconstitutional;[2] four deny effect to statutes fixing the periods at which certain classes of laborers shall receive their wages;[3] another passes adversely on a statute prohibiting the practice of fines in cotton mills;[4] another deals in the same way with a statute prohibiting corporations from deducting from the wages of employees to establish hospital and relief funds;[5] three overturn acts regulating the measuring of coal for the purpose of fixing the compensation of miners;[6] two hold void statutes designed to prevent the payment of employees in store orders;[1] another passes adversely on an act requiring laborers on public contracts to be paid the prevailing rate of wages;[2] another denies effect to an act requiring railway corporations to furnish discharged employees a statement of the causes of their removal;[3] while another decides it unconstitutional to prevent employers from prohibiting their employees from joining unions or from retaining membership in unions to which they belong.[4] I do not criticize these decisions. As the law stands, I do not doubt they were rightly determined. But they serve to show that the right of the individual to contract as he pleases is upheld by our legal system at the expense of the right of society to stand between a portion of our population and oppression. This right of the individual and this exaggerated respect for his right are common-law doctrines. And this means that a struggle is in progress between society and the common law; for the judicial power over unconstitutional legislation is in the right line of common-law ideas. It is a plain consequence of the doctrine of the supremacy of law, and has developed from a line of precedents that run back to Magna Charta.[5]

Men have changed their views as to the relative importance of the individual and of society; but the common law has not changed. Indeed, the common law knows individuals only. In the seventeenth and eighteenth centuries, when the theory of the state of nature was dominant, this feature of our legal system made it popular. But to-day the isolated individual is no longer taken for the center of the universe. We see now that he is an abstraction, and has never had a concrete existence. To-

[1] *Ex parte* Karbach, 85 Cal. 274; Low *v.* Rees Printing Co., 41 Neb. 127; *In re* Eight Hour Law, 21 Col. 29.

[2] Fiske *v.* People, 188 Ill. 206; Cleveland *v.* Clements Bros. Construction Co., 67 Ohio St. 197.

[3] Godcharles *v.* Wigeman, 113 Pa. St. 431; Frober *v.* People, 141 Ill. 171; Leep *v.* St. Louis I. M. & S. R. Co., 58 Ark. 407; Republic Iron and Steel Co. *v.* State, 160 Ind. 379.

[4] Com. *v.* Perry, 155 Mass. 117.

[5] Kellyville Coal Co. *v.* Harrier, 207 Ill. 624.

[6] Millett *v.* People, 117 Ill. 294; *In re* House Bill No. 203, 21 Col. 27; *In re* Preston, 63 Ohio St. 428.

[1] State *v.* Goodwill, 33 W. Va. 179; State *v.* Fire Creek Coal & Coke Co., 33 W. Va. 188.

[2] People *v.* Coles, 166 N. Y. 1.

[3] Wallace *v.* Georgia C. & N. R. Co., 94 Ga. 732.

[4] State *v.* Julow, 129 Mo. 163.

[5] *Articula super Chartas*, 21 Edw. I, Cap. 2; Anonymous, Y. B. 11 Edw. 3, No. 23; Reginald de Nerford's Case, Y. B. Hil. 12 Edw. 3, No. 34.

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day, we look instead for liberty through society. We no longer hold that society exists entirely for the sake of the individual. We recognize that society is in some wise a co-worker with each in what he is and in what he does, and that what he does is quite as much wrought through him by society as wrought by himself alone. To parody a well-known formula, we are not so much concerned with the liberty of each, limited only by the like liberties of all, as with the welfare of each, achieved through the welfare of the whole, whereby a wider and a surer liberty is assured to him. The common law, however, is concerned, not with social righteousness, but with individual rights. It tries questions of the highest social import as mere private controversies between John Doe and Richard Doe. And this compels a narrow and one-sided view as men look upon these questions at present.

To show that this is not overdrawn, let us turn to a classical statement of the common law doctrine:

"So great moreover is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community. If a new road, for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public, but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain it may be urged that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient or no. Besides, the public good is in nothing more essentially interested, than in the protection of every individual's private rights." [1]

Our criminal law is a growing cause of popular discontent with the legal system. But the difficulty here again is exaggerated respect for the individual. Procedure, civil and criminal, has been contentious with us from the beginning. This respect for the individual keeps it so. "Litigation is a game in which the court is umpire. The rules are in the knowledge of the court, and will be declared and applied by it as required. It is for the parties to learn the rules and play the game correctly at their peril." [1] As Manson has put it, "Law is in the nature of a cock-fight, and the litigant who wishes to succeed must try and get an advocate who is a game bird with the best pluck and the sharpest spurs." [2] In other words, the common-law theory of litigation is that of a fair fist fight, according to the canons of the manly art, with a court to see fair play and prevent interference. Americans have gone much further in developing this common-law notion than they have in England. We strive in every way to restrain the trial judge and to insure the individual litigants a fair fight unhampered by mere considerations of justice. To give them this fair play, we sacrifice public time and money; incidentally also — for if all men are equal, their pocket-books are not — giving certain litigants a conspicuous advantage in reality through a theoretical equality. This desire to leave a free field for contention reaches the extreme limit of absurdity in Nebraska, in the eminently common-law provision in the constitution that the right to be heard in the Supreme Court on error or appeal shall not be denied, a provision by virtue of which a claim for twenty-eight cents, after three trials, had to be passed on solemnly by the highest court of the state. [3] The individual, in short, gets so much fair play, that the public gets very little. There is nothing more glorious in our legal history than the judges of England telling the king that he ruled *sub Deo et lege*. And yet that very scene has resulted

[1] 1 Blackstone, "Commentaries," 139.

[1] Pollock, "Expansion of the Common Law," 32.

[2] 8 *Law Quarterly Rev.* 161.

[3] Peterson *v.* Mannix, 2 Neb. Unoff. 795.

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in constitutional doctrines that enable a fortified monopoly to shake its fist in the face of a people and defy effective investigation or regulation.

Is this common law respect for the individual inherent and fundamental? Does it represent a sixteenth and seventeenth century color, then acquired, or is it deeper-seated and intrinsic? In other words, what is the spirit of the common law? Three characteristic doctrines set off the common law system from all others, namely, (1) the supremacy of law, (2) case law and precedent, and (3) contentious procedure. The supremacy of law — the doctrine that all questions may be tried in the course of orderly litigation between individuals, and that no person and no act is beyond the law — is the Germanic principle that the state is bound to act by law. It is to be seen in Bracton's saying that the king is "under God and the Law," and is as old as our legal system. Our doctrine of precedents is almost as old. The first precedents were writs, and Glanvill's book is a collection of them. Bracton relied on the judgment rolls, and his Note Book is something like a report. Moreover, we find the doctrine of the authority of adjudications in like cases stated at the beginning of the fourteenth century. Contentious procedure is Germanic, and characterizes English law from before the Conquest. But these three doctrines resolve themselves to a fundamental proposition that law exists for individuals, and hence is to deal with every question as a contest between individuals, is to decide it on its individual facts, not arbitrarily, but as like cases have been adjudged for others, and is to allow the parties to fight out the contest for themselves, and as much as possible in their own way.

The contest between the people and the law reflected in our American constitutional law, has a parallel in the prior contest between the king and the law. At common law the king was *parens patriae*. He was charged with the duty of protecting the public interests, and he wielded something very like our modern police power. This power was limited on every side by the maxims of the common law, and the bounds set by the *lex terrae*. A few examples may be noted. King Henry VI granted to the company of dyers in London the power to search for cloth dyed with poisonous dyes, and to seize and confiscate it if found. This was held "against the law of the land" because there could be no forfeiture by virtue of letters patent.[1] Henry IV granted "the measuring of woolen cloth and canvas that should be brought to London by any stranger or denizen," taking a penny of the buyer and another of the seller for each piece measured. It was adjudged that "the said letters patent were in *onerationem, oppressionem, et depauperationem subditorum domini regis, etc., et non in emendationem ejusdem populi;* and therefore the said letters patents were voyd."[2] Thus, the common law, in the interest of the individual, is struggling with the prerogative of the people, represented by the police power, as it struggled with a like prerogative of the crown from Henry VII to James II. But times have changed. The individual is secure and new interests must be guarded. The common law renders no service to-day by standing full-armored before individuals, natural or artificial, that need no defense but sally from beneath its aegis to injure society.

How far does our legal system contain the power to meet these new conditions? We must admit that it has shown a marvelous power of regeneration in the past. From Richard II to Elizabeth, the rise of the Court of Chancery preserved it from medieval dry rot. Under James I and Charles I, the indefatigable zeal and uncompromising dogmatism of Coke saved it from subversion by royal authority. At the opening of the eighteenth century the outlook was dark. The modern business world was

[1] 2 Inst. 46–47.

[2] 2 Inst. 62. See also Davenant *v.* Hurdes, 2 Inst. 47; Darcy *v.* Allen, Mo. 671, 11 Rep. 84.

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springing up, and the law made no provision for its needs beyond a few obsolete rules framed for itinerant peddlers. But the common law rose to the occasion. It took over the custom of merchants, changed it from fact to law, and on that basis built a solid structure of case law that has endured. In America, after the Revolution, it had to contend with the odium of its English origin. Kentucky legislated against it.[1] Kent did not venture to cite its authorities in New York and was driven to justify his decisions out of French treatises.[2] Yet the common law prevailed, and before the century was over, the decisions construing the Fourteenth Amendment had completed the work of fortifying it in our Constitution. Hence, the common-law lawyer need not despair. He should only look about him to find within our law the means of bringing it once more abreast of the time and of ranging it where it belongs — on the side of the people. Indeed, the law has already discovered them, and is already moving in the right direction. The residuary power of the crown to do justice among his subjects has served to meet two crises in our legal history. When the old polity of local courts became impossible, it gave us the king's courts and the common law. When the common law was in danger of fossilizing, it gave us equity. To-day, when the sovereign people stand in the shoes of the sovereign king as *parens patriae*, this residuary authority has given us the police power. Not yet one hundred years old, and scarcely mentioned in the books until the last twenty-five years, this doctrine has been worked out slowly at the same time that the common law has been gaining its firm foothold in our constitutional law. It is furnishing the antidote for the intense regard for the individual which our legal system exhibits. And it is in the right line of our legal history and in full accord with the genius of our system to absorb and assimilate this principle as it absorbed and assimilated equity. In fact, a progressive liberalizing of our constitutional law is noticeable already, and to all appearance, a slow but sure change of front is in progress. But changes of front are attended with difficulty. The residuary power is ill-defined, and the common law is jealous of all indefinite power.[1] A compromise is necessary, and the event turns upon this compromise. Fortunately, the common law has a saving doctrine to apply to it. Our case law is not, and Dillon says it never can be, fixed and rigid.[2] Its cardinal doctrine is that law is reason and reason is law. "But," said James I, "have I not reason as well as my judges?" And may not the people say, "Have we not reason, as well as our courts?" Let Coke answer:

"To which it was answered by me that true it was, that God had endowed his Majesty with excellent science, and great endowments of nature; but his Majesty was not learned in the laws of his realm of England, and causes which concern the life, or inheritance, or goods, or fortunes of his subjects, are not to be decided by natural reason, but by the artificial reason and judgment of law, which law is an art which requires long study and experience before that a man can attain to the cognizance of it."[3]

It is in this "artificial reason and judgment of law" that the change must come. No one can read the Second Institute without a profound admiration for Coke. Our debt to him is inestimable. But we must reason with our own reasons and not with his. In his day the medieval scheme of society was decadent and the individual was just coming to his own. We can see now that the Middle Ages were right in holding that the individual depended on something

[1] See Reporters Note to "Littel's Select Cases."

[2] "Memoirs and Letters of Chancellor Kent," 117.

[1] Loan Ass'n *v.* Topeka, 20 Wall. 655, 662.

[2] "Laws and Jurisprudence of England and America," 28.

[3] Conference between King James I and the judges of England, 12 Rep. 63.

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wider and more lasting than himself. But the Middle Ages realized this idea only in fixed outward organizations. Hence, the revolt of the individual was inevitable. This revolt, however, when carried beyond its time and made the basis of a permanent theory of society proves false and dangerous. And those who still repeat its formulas are dealing in ideas of the past which have no application to the present age. Against Coke, then, let us put Hobbes:

"But the doubt is of whose reason it is that shall be received for law. It is not meant of any private reason, for then there would be as much contradiction in the laws as there is in the schools; nor yet, as Sir Edward Coke makes it, an 'artificial perfection of reason, gotten by long study, observation, and experience,' as was his. For it is possible long study may increase and confirm erroneous sentences, and where men build on false grounds, the more they build, the greater is the ruin; and of those that study with equal time and diligence, the reason and the resolutions are, and must remain, discordant; and therefore it is not that *jurisprudentia* or wisdom of subordinate judges, but the reason of this our artificial man the commonwealth, and his command that maketh law." [1]

The problem, therefore, of the present is to lead our law to hold a more even balance between individualism and collectivism. Its present extreme individualism must be tempered to meet the ideas of the modern world. As has happened more than once in our legal history, we must revert for a season to the residuary power of the *parens patriae* to do justice. The power of rejuvenescence, inherent in our legal system, must be invoked. We must cease to mistake seventeenth century dogmas, in which temporary phases of its individualist bent were formulated, for fundamental tenets of the common law. More than this we cannot do without casting adrift from our immemorial system of administering justice; and more we ought not to seek to do. As far back as we can trace the Germanic polity, of which our legal system is but a development, it shows a solid core of individualism. In the courts or moots of the Teutonic polity, every free man took part; the titles were in the memories of the free men of the vicinage and the law was a tradition held by them all, expounded by them all, and administered by them all. Every man was bound to bear his part in keeping the peace and in doing justice. "If the frith breach he committed within a *burh*" say the laws of Ethelred, "let the inhabitants of the *burh themselves* go and get the murderers." [1] It is not to a paternal central authority, but to the free action of the individual and of the local community that the common law entrusts the maintenance of right by the might of the state. Has a crime been committed? The common law leaves prosecution to the initiative of the individual. Do executive authorities neglect or abuse their offices? Mandamus at suit of an individual relator, an action for damages by the individual injured, or injunction by an injured taxpayer is the remedy. Do public service companies overcharge or discriminate against their patrons? An action for damages is the common-law remedy. In short, the common law conceives that the administration of justice so vitally concerns every man, that every man has a duty of taking part therein; not merely by an occasional perfunctory jury service, but by an honest and earnest individual attack upon wrong whenever it affects him.

In the exaggerated form which this individualism of our legal system sometimes takes, it is undeniably impracticable, archaic, and mischievous. Yet with all its faults, it is a tonic and salutary doctrine. The whole is no greater than the sum of its parts. The community it not likely to be more active in maintaining right and re-

[1] "Leviathan," Chap. XXVI.

[1] "Laws of Ethelred," II, 6.

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pressing wrong than the individuals who compose it. And if the individuals who are charged under our legal system with the maintenance of their own rights are too busy or too lazy or too indifferent to carry out this duty, is the community likely to prove more diligent or efficient in so doing for them?

An English lawyer tells us that in his earlier days he was an inspector of schools, and that when in the course of an inspection, he once asked some school boys to write in a page what they knew about Admiral Nelson, one of them closed an eloquent page with this significant statement: His last words were, *Every man expects "England to do his duty."* It is chiefly because of such a spirit, because of a feeling that responsibility is not and should not be upon each individual, but instead is and should be upon society, that the common law is out of touch with the times. The common law expects, as Nelson did, that every man will do his duty. It asserts that the individual is responsible for the preservation of the peace, the upholding of the law, and the maintenance of right. Granting that some modification of the extremities to which this spirit has been developed is inevitable, it is none the less manly and fortifying. We talk much and glibly of "the people" in the abstract. What we need to do is, as does the common law — to talk of the individual in the concrete. The rights and duties of the people are the duties of individuals.

Hence, this same obstinate individualism of the common law, which makes it fit so ill in many a modern niche, may yet prove a necessary bulwark against an exaggerated and enfeebling collectivism. When from the sixteenth to the eighteenth centuries the whole world was turning absolutist, England alone kept alive the local, individual, legal government of the Middle Ages. In consequence, the English Parliament has become the type of all the collegiate sovereignties of to-day. Bacon was modern and Coke was antiquated. Yet the constitutional ideas of Coke have triumphed. To-day the up-to-date economist and sociologist is as sure that the narrow individualism of the lawyer is a relic of the past as Bacon was that Coke's precedents from the reigns of the Plantagenets and from the Wars of the Roses were antiquated shackles by which a Stuart king could not be bound. The lawyers saved our Teutonic heritage of individual rights and individual responsibility in the seventeenth century, and unless our legal system is to be hopelessly decadent, they must do so once more to-day. Their obstinate conservatism in refusing to take the burden of upholding right from the concrete each, and put it upon the abstract all, may yet save for us a valuable — nay an indispensable — element in our institutions.

The greatest of modern Romanists found the strength and life of our rival Anglo-Saxon system in this very insistence upon the duty and responsibility of the individual. And comparing the easy-going Austrian, who shrugs his shoulders and accepts wrong as part of the order of nature, with the Englishman who litigates to the end in vindication of the most trivial rights, he exhorts his countrymen to a livelier individual interest in justice and individual participation in the battle for right. "Everyone," he says, in the very spirit of our common law, "Everyone has the mission and the duty of cutting off the head of the hydra of unreason and lawlessness wherever it shows itself. Everyone who enjoys the blessings of law, must for his share contribute to hold upright the power and the majesty of the law. In short, everyone is a born champion of right in the interest of society." [1]

LINCOLN, NEB., November, 1905.

[1] Ihering, "Kampfum's Recht" (14 ed), 52.

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THE CASE OF OLIVO

By Gino C. Speranza

LEGAL circles in Europe have been recently stirred up over a case of uxoricide in Italy, which presented unusual features, both as regards the act and actor as well as the verdict of the jury — a verdict which satisfied no one except the accused. The crime committed by Alberto Olivo belongs to the kind conveniently classed under the doings of Jack-the-Ripper. In the case of Olivo, it was his wife whom he killed by stabbing, and then having carefully cut up the body, threw the larger members into the sea. How this was done, was graphically described with scientific precision by the accused, who took the stand in his own behalf. In fact, he seemed to wish to aid justice even to the extent of setting the experts right. For experts are experts the whole world over!

"I used the same knife in dismembering her body," he testified, "that I used in killing her. But I had to have it sharpened twice, as the blade became dull in striking the bone."

The exact manner of death was uncertain, the accused himself, despite his frankness, not being clear on the point. When asked to explain the statement that after striking his wife, who was in bed, with a knife, he fell down — he replied that he meant that he fainted or lost consciousness — in the sense used by the poet Dante. And he cited two passages from the "Divine Comedy" to make his meaning clear.

He awoke from such faint or stupor in about an hour, when he saw that his wife had three knife wounds in the head. The medical experts, however, had ascertained that there had been a hemorrhage from a wound on the nose. Confronted with this testimony, the accused answered naively: "The experts state it was produced by a wound on the nose. It is and has been my opinion that such nasal wound was superficial. The experts declared it deep. All right. My wife, ever since she was a servant at Vercelli, was subject to frequent nose-bleeding — and also to heart trouble. I think these two combined to cause the hemorrhage in question. True it is, that I found a little puddle of blood in the middle of the bed; the blood had not spread. However, the hemorrhage was not as heavy as the experts would make it. Suffice it that I cleaned up the blood without trouble. At most, it must have been about a quart."

Again, the experts having testified that three ribs had been found broken and that such fracture must have antedated death — the accused gave his own views thereon.

"I do not believe that," he testified. "But it would be impossible for me to ascertain whether those ribs broken by me after my wife's death are those exactly which the experts claim were broken before her death."

Pressed by the question, "Do you or don't you know about this?" he set the audience laughing by this reply: "If the experts don't know it for certain, is it not natural I shouldn't be positive either?"

He must have taken a certain pride in his work of dismemberment, for he hotly denied that it took him twelve hours to cut up the body. "Two and a half hours, at the very most," he said. "Twelve hours would have been necessary for a large woman twice the size of my wife."

Motive, if motive it could be called for the crime, was that his wife was a fearful nag. He was a man of some schooling and a certain intelligence, while she was a rather common person, a domestic by trade, when he married her. This difference rendered the nagging very intolerable.

"When you married her," he was asked, "you knew that your wife was an ignorant woman, did you not?" His attorney objected to this line of examination; where-

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upon the accused spoke up loudly: "Keep quiet, counsellor; I am perfectly able to answer. Yes, sir; my wife was ignorant and my purpose in marrying her was exactly to redeem her from her doubly low condition — intellectual and moral."

"You are a man of some education; you have even written poetry," he was asked. "Did not this intellectual difference between you and your wife lead to conjugal troubles?"

"Not at all," he answered promptly. "You don't suppose that in order to be happy I should have married a poetess or a literary woman?"

"But conversation with her was impossible," he was pressed.

"Do you imagine I wished to enter into philosophical disquisitions with my wife!" he replied, to the enjoyment of the audience.

Asked by the presiding judge, "Were you not cross and stingy with your wife?" he answered: "I wager that with such a woman even Your Honor would have been cross. As to my being stingy — during my married life I earned exactly 21,175 lire, besides 600 for extra work. When that event we are discussing happened, I had not one penny saved."

Asked whether his wife was jealous of him, he smiled and replied: "I am very glad you have asked that question, because my wife was the daughter of a very jealous mother."

An objection was raised, on the ground that the question of hereditary jealousy was not an issue.

"Pardon me," said the accused in answer thereto, "but if it is true that genius and madness are inheritable — why not jealousy? My idea is that my wife was afflicted by a sort of mixed jealousy — partly hypothetical, partly hereditary, and partly fictitious."

These few extracts from the testimony of the accused would seem to suffice to prove both that the accused was a proper person for an asylum for the criminal insane, and that the jury in setting him free by their verdict, were false to their oath.

That such a charge cannot be made against the jury, however, is admitted by every one cognizant with the facts in the case, including men learned in the law. Nor has the claim been made, nor could it be made, that the verdict was a sentimental one. The crime was atrocious — its every horrible particular was admitted. Why then this miscarriage of justice? We are to find it, as so often happens even in our country, in a defective, or inelastic procedure. The jury system is not a spontaneous growth in Latin countries as it has been among Anglo-Saxons. It has been grafted, in comparatively recent times, upon Latin juridic systems of ancient origin not in harmony with the innovations from Northern countries. Under Italian procedure the jury, while sole judge of the facts as with us, do more than decide the guilt or innocence of the accused. The Court frames certain questions based on the indictment and the evidence adduced at the trial, which the jury must categorially answer affirmatively or negatively. It cannot go outside of those questions. This is made necessary to a great extent, by the elaborate system in the Italian Code of dividing and subdividing crimes into degrees and fixing the corresponding penalty for every possible eventuality in extenuation, mitigation, or increase in the crime. In the present case, the Court framed the following questions for the jury:

I. Is the Jury satisfied that the accused, Alberto Olivo, did, during the night of May 16, cause the death of his wife, Ernestina, by stabbing her with a knife or other weapon?

II. Is the Jury satisfied that the act described in Question I was committed by the accused while in such a defective mental state as prevented his consciousness and freedom of his acts?

III. Did the accused commit the act described in Question I with the intent to kill?

IV. Was it premeditated?

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V. Was it the result of sudden anger or profound sorrow caused by unjustifiable provocation?

VI. If there was provocation, was such provocation grave?

VII. Did the accused commit the act described in Question I while in such a defective mental state that though it did not free him from responsibility, yet it greatly reduced such responsibility?

To these seven questions regarding the charge of murder, the Court added four relative to the charge of disposing of the body, as follows:

VIII. Is the jury satisfied that the accused disposed of the body of his wife by throwing part of it in a cesspool and part into the sea?

IX. Were the acts described in Question VIII committed during such a mental state as to free him from responsibility for such acts?

X. Or was his mental state such as to greatly diminish such responsibility?

XI. Is the accused guilty of the acts admitted by an affirmative answer to both or either of the questions in Number VIII?

To this somewhat disconcerting set of questions, the jury brought to the following verdict; they replied affirmatively to questions first, eighth, tenth, and eleventh; negatively to the second, third, and eleventh, and left the others unanswered. In other words, they found that Olivo had killed his wife without the intent so to do; they admitted his disposal of the body, but found it was done in a partially defective state of mind.

Hence, the verdict found the accused innocent of criminal intent to kill, while recognizing the objective fact of the killing by him. Hence, he was acquitted of the charge of murder. On the charge of disposing of the body, the existence of the mental defect, during its commission, was so much in extenuation. For this, he was sentenced to eleven days' imprisonment and a fine of 125 lire.

This patent miscarriage of justice must be found, as stated, in a defective method of procedure. The questions, as framed by the Court, were defective in so far as they did not conform to the actual facts.

The jury were asked if the killing was done with intent to produce death; they found such intent lacking. They were not asked (and under the law were not allowed to go outside the questions framed by the Court) if there was an intent to produce bodily harm, which resulted in death. That was the fatal defect in the presentation by the Court. The press has been unanimous in its arraignment of the Court's lack of judgment. The prosecution has taken an appeal, but this has been done more to "save its face" than with any chance of a new trial. Certainly, Olivo's life and liberty cannot be twice jeopardized. This case will strengthen the hands of those in Italy who are working on a new Code of Procedure.

As to the man himself, he is probably as Lombroso, Marro, and other experts hold, a criminaloid with an epileptic inheritance. While agreeing with his attorney who, in his summing up, said that "Olivo belongs to that class of unfortunates half sane, half unbalanced, classed by science as epileptics, for whom society must have a feeling of pity rather than of revenge;" yet justice demands that such types be placed in a suitable asylum, and not be let free as an example of the weakness of the social defense.

NEW YORK, N.Y., December, 1905.

NOTE: — Since writing the above, the Court of Cassation in Italy made the unprecedented decision of reversing the judgment below and ordered a new trial. The jury at the new trial did an even more surprising thing by finding the accused "not guilty" as a protest against the interference of the Court of Cassation with the verdict of the jury that tried Olivo the first time. Olivo is now free.

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"SQUIRE PHIN" [1]

By L. C. Howard

" Away from the guile o' the town awhile,
Forgetting the grind o' gain;
And a truce to Care as we gayly fare
Back home, my dears, to Maine."

HOLMAN F. DAY has given us, in "Squire Phin," a vivid picture of a country lawyer. I do not say *the* country lawyer, for they of the country are as various in their characteristics, natural or acquired, as their brothers of the city, but in "Squire Phin" the author has chosen to portray the best of the widely differing models.

A big man is Squire Phin, gifted with a big brain and a big heart, in a big body, and the three animated and directed by a soul equal to the task. The same type of man, in various stages of evolution and degrees of elegance, is to be found in the city, and his good deeds shine like a candle "in a naughty world," as do those of the village squire. But in the clear air of the village the light of the candle may be seen from afar, while in the city the sun itself must struggle through smoke and dust before it can make even a poor showing. And in this fact lies the charm of this picture of New England country life. The author has given his story an atmosphere so clear that we need not tax the mental vision to apprehend its characters. They stand out before us so boldly, and move so naturally around us, that we find ourselves marching beside them, laughing at incident, or anxiously awaiting event.

And while the human nature of the village is not in itself essentially different from the human nature of the city, it is not swathed in the conventional, or masked by the artificial, and in this book of Holman Day's we see it undisguised, and hear it speak with refreshing and stimulating candor. Nor does it lack the charm of variety, for its range is wide and the peculiarities of its types accentuated and often in striking contrast, as exemplified, for instance, in the boy bridegroom, "in all his wretched, discouraging inefficiency," and the retired showman, who may be best described by the author's extract from his "Ballads of Gumption:"

" Old Zibe Haines walked out one day,
And a barbed wire fence, it stopped his way.
Never climbed over, never crawled through,
But he bit that wire right plumb in two."

One of Squire Phin's clients was Benson Wallace, who, as the Squire tells us:

"Had all his new grading washed away by a cloud-burst, and came bootin' down to the office here, and wanted me to sue Deacon Bassett, who had been praying for rain to fill his mill-pond. Laid the whole damage of the cloud-burst to the Deacon's power of supplication."

Unfortunately, we are not told what arguments the Squire used in refuting the Wallace theory, but in the case of Sumner Badger, old, rich and penurious, we cannot but admire the unselfishness and candor of the Squire's advice. Said Badger to the Squire:

"'You've been reasonable with me. Now I'll do something for you. It's goin' to be worth something for you to reelly know whether there's anything on the Other Side. So after I arrive there and git a little bit wonted to the place I'll come back and appear to you and tell you all about it.'

"The Squire leaned forward and shook his finger at Badger.

"'Let me advise you on one point, Sum. This advice isn't going to cost a cent. Now, if you ever get so much as one foot into

[1] "Squire Phin." By Holman F. Day. A. S. Barnes & Co., New York, 1905.

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heaven — even get your fingers through the crack in the door, you stay right there. Don't you ever take any chances on coming away to visit.'"

Much is said in this book as to the Squire's great knowledge of the law and of the important social questions of the world, but we are nowhere told that he was especially learned in the physical sciences. Yet he advances a theory so logical, and of such far-reaching and vital importance, that it might well engage the attention of the scientists and philosophers of the day. He is replying to the remarks of a too-inquisitive boy.

"'Bub!' said the Squire severely, 'you're anxious to grow up to be a nice big man, aren't you?'

"'Yep.'

"'Well, there's nothing that stunts growth like using your tongue too much. That's why so many women are shorter and slimmer than men. Now always remember that all your life.'

"The boy stared up and down the big man, and closed his lips apprehensively."

We who dwell in the city, whether of the legal profession or of other walks of life, are apt to associate the country with the simple life. We sigh as we say, with Saint Paul, "For what I would, that do I not; but what I hate that do I," and we look with envy or contempt, according to the strength or weakness of our natures upon those who, as we believe, are not subjected to the temptations and difficulties which beset and perplex us. It is well to realize that life is no more complex or difficult for us than for others; that doubt, perplexity, and temptation, are not matters of environment, but are encountered amid green fields, as well as in the shadowy offices of city sky-scrapers. And so to this country squire there came dark hours, and complicated situations, wherein the right bore a bewildering resemblance to the wrong.

"'There are people who talk of the right path,' broke out the lawyer, impatiently, 'as though it were like this village road, branching from the four corners here; that all you need is to look at the guide-board and go on.'"

Squire Phin is Mr. Day's first novel, and in it he fulfills the promise of his earlier books. There is a satisfaction, deeper and more abiding than interest, or even pleasure, in reading the successive productions of a writer whose work shows constant and marked progress toward the attainment of high ideals. Mr. Day has given us a book full of the charm of swiftly-moving pictures, the tang of the salt sea breeze, and the echo of the murmuring pines, but above and beyond all else it appeals to the reader by the kindliness which is the dominant note of the hero's character, and which is well expressed by the author's extract from his poem, "Job Brown, J.P."

"If we could write upon that gravestun's face
A list of what he'd done to help this place,
We'd have a roll of honor to his fame.
But we should publish all our village shame —
The shame that, thank the Lord, Job gently hid.
An' when 'twas boxed, shet down and locked the lid.
There'd be a list of heirs an' all their fights:
The sorrows an' the heart-aches over rights;
There'd be the frowns, the snarls, the sneers an' scorn
Out of the leavin's of our dead men born.
There'd be the threats an' mutt'rin's of divorce,
An' all the griefs that spring from Trouble's source.
'Twas better that this calendar was crossed
With note: 'By order of J. Brown *nol prossed*.'"

CHICAGO, ILL., December, 1905.

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The Green Bag

PUBLISHED MONTHLY AT $4.00 PER ANNUM. SINGLE NUMBERS 50 CENTS.

Communications in regard to the contents of the Magazine should be addressed to the Editor,
S. R. WRIGHTINGTON, 31 State Street, Boston, Mass.

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

The publishers of the GREEN BAG at the conclusion of the first year, under its present management, being desirous of ascertaining if the numerous changes which have been made in the scope and arrangement of the magazine in the last two years were, on the whole, meeting with the approval of our subscribers, with characteristic directness have prepared a circular, which the reader has doubtless received, asking if these changes have proved satisfactory, and inviting advice and criticism. They have been extremely gratified at the willingness of subscribers to answer the circular and at the interest they have shown in the development of the magazine. We, therefore, wish to take this opportunity of thanking them for their courtesy. Of the ten per cent of subscribers who have so far replied, all but a few have expressed in general their approval of the changes and we are, therefore, encouraged to continue our policy.

The most important suggestion by way of further improvement was a request for reviews of new books. In the past we found it very difficult to get impartial and competent men to thoroughly read and review important books within a reasonable time. The result was annoyance of authors and publishers, as well as reviewers, and distress of the editor, who was between the two fires. Partly for these reasons and partly because of the increased demands upon our space, the old system of book reviews was abandoned at the beginning of last year. It was understood, however, that later, some attempt should be made to cover this important field. The appropriate time seems the beginning of the new year, and the systematizing of other departments affords an opportunity to make a beginning. Hereafter, the department of Reviews of Current Legal Articles will be called Current Legal Literature, and will include reviews not only of magazine articles but of new books which are sent us for review. Books which appear to be merely accurate collections of decisions or convenient manuals for the lawyer will be given very brief notice. This is not because the value of such books is not appreciated but because a brief statement of the field covered and a word of commendation or criticism will suffice to call the reader's attention to the book so that when next he has occasion to investigate the subject of which it treats, he can use it and form his own opinion. Books which seem to present novel features, which a reader would be likely to overlook, will receive somewhat more extended notice. But only in very exceptional cases will text-books be elaborately criticised or summarized. We intend, however, to continue our custom of publishing occasionally, as leading articles, essays upon topics suggested by important or interesting new books.

The GREEN BAG has been fortunate in the last year in having an efficient and faithful printer, and the excellence of the work of its proof-reader has materially lightened the editor's labors. Occasionally, the best systems will break down, however, and December seemed to be fated with troubles. The most serious typographical error that we have so far committed occurred in Mr. Hubbell's article. Near the end of the first column, after some criticism of the insurance officials, he stated, "these men had the unlimited confidence of their fellow-men." Thinking this implied a little too sweeping criticism he wrote us at the last moment desiring us to add, "and it is only fair to say that most of them deserved it." We added it. But it is one of the mysteries of providence that the printer changed the "v" to "t" and, while leaving the sentence perfectly intelligible, completely reversed its sense.

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CURRENT LEGAL LITERATURE

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

ADMIRALTY (State Statutes). Under the title "State Statutes and Admiralty" an article in the *Yale Law Journal* (V. xv, p. 51) by James D. Dewell, Jr., calls attention to the perplexing questions occasioned by State statutes which give, and attempt to give, actions against vessels. It is within the power of a State to provide liens, and so far as state-created liens are confined to domestic vessels they may be enforced in admiralty for supplies or repairs, and the author believes that the United States Supreme Court might now be persuaded to overrule an earlier decision and consider the construction of a vessel an admiralty matter. Liens imposed on foreign vessels, or all vessels, are in direct conflict with admiralty jurisdiction and are unconstitutional. Where a State provides for the enforcement of a proper lien in the state courts the lien may nevertheless be enforced in admiralty. "It would be unreasonable to say just because the State has provided an unlawful means for carrying out the liens, that where the lien is good, one may not use it and select a proper form." Statutes which attempt to impose a tonnage tax are unconstitutional even though they be ostensibly to collect fees for the services of a harbor master or port warden. An interesting instance of the conflict between State statutes and admiralty is found in those statutes which absolve municipalities from liability for injuries done in performing a public service for the general welfare of the inhabitants. Such statutes are not recognized by the maritime law of collisions, but it is not clear whether an action for injury done by a fire-boat while proceeding to a fire would proceed *in personam* against the municipality or *in rem* against the vessel. State statutes which limit a lien to three years have no effect in the admiralty courts where due diligence in the pursuit of a claim is the only requisite in determining whether or not the right to take advantage of the lien has been lost.

AUTOMOBILES. "The Motor Car's Status," by Xenophon P. Huddy, in the *Yale Law Journal* (V. xv, p. 83) collates the painfully few decisions applicable to automobiles. While many of these are harsh, the swelling ranks of the automobilists may result in a reversal of feeling as is intimated by a California decision upholding an ordinance forbidding such vehicles the use of country roads by night where the court said, "Of course, if the use of automobiles becomes more common, there may come a time when an ordinance like the one here in question would be unreasonable. The writer makes the point that the car itself is not so much a source of danger as is the operator. Mr. Huddy, and the profession generally, are succumbing to the loose use of the words "motor car" which, technically, are applicable only to electrically propelled cars, for the gasoline engine is closely akin to the reciprocating engine, and is not a motor.

BANKRUPTCY (Trustee's Election). Lee M. Friedman has an article in the December *Harvard Law Review* (V. xix, p. 106) upon the "Debtor's Interference in the Election of a Trustee in Bankruptcy." In the continental systems of bankruptcy the Court appoints its own official administrator. Under the English system the creditors have the full control of the administration of the bankrupt's estate. In this country the policy has not been uniform. By the bankruptcy law of 1800, Congress gave the creditors the fullest liberty in the choice of trustee. In the Act of 1841, however, the continental practice was adopted. The Act of 1867 left the creditors to choose one or more assignees of the estate of the debtor subject to the approval of the District Court. The Act of 1898 was closely modeled after the Act of 1867, though the provisions regarding the selection of trustee are not wholly consistent. The Bankruptcy Court is invested with power to appoint trustees pursuant to the recommendation of creditors. On the other hand, the creditors themselves

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are given the absolute right to appoint one or three trustees. This conflict in the statutes has led to a curious result. For not only do the General Orders provide that no official trustees shall be appointed, but they have engrafted a limitation on the free right of selection of the trustee on the part of creditors so that the appointment is subject to the approval of the referee or judge. There is clearly no warrant for this usurpation on the part of the court.

The seven years of practice under the present statute has furnished an unbroken precedent of the selection of trustee by the creditors. One of the most important questions relating to the election of trustee has arisen in the class of cases where the bankrupt seeks to influence or control the selection of the person who is to be trustee. It is an easy matter for the bankrupt to elect his nominee to the office of trustee. Such an action is gross fraud upon the creditors, and every court to whose attention it is brought should make every effort to defeat such a scheme. In the English case of *ex parte* Shaw it is held that it is against the first principles and the whole policy of the bankrupt laws to permit the bankrupts indirectly to choose their own assignees, and it became a fixed principle of the English Bankruptcy practice that such interference by the bankrupt avoided the election, until finally the subject seems to be satisfactorily covered by express provision of their bankruptcy statute.

The courts in this country have not agreed upon either the theory or method of dealing with the problem. Where there is evidence sufficient to establish that the bankrupt or his representatives have interfered with the selection of the trustee, two possible courses seem to be open to the minority creditors. They may challenge the vote, or may demand that the referee disapprove the election. The real point is not whether the trustee chosen is qualified so as to be approved or disapproved by the referee, but whether the votes which were wrongfully influenced by the bankrupt shall be accepted. If the referee upon inquiry learns that the bankrupt is casting votes in his creditors' names, it is obvious that he may reject them. When a referee finds that the bankrupt directly or indirectly controlled the votes, he finds that the creditors did not cast the votes. And in such cases it is his duty to refuse those votes without passing on the qualifications of the appointee. There is an advantage in rejecting the votes rather than in disapproving of the trustee, for by rejecting the fraudulent or corrupted votes the ballots of the independent creditors will control the election, whereas if the appointee is merely not approved the same votes may control another election.

CONSTITUTIONAL LAW (Contract — Due Process — State Decisis). T. F. C. Demarest in the November *Albany Law Journal* (V. lxvii, p. 315) attempts to disentangle the labyrinth of the New York law relating to damages to abutters by the erection of elevated railways as finally affirmed in a recent decision of the Supreme Court of the United States. He concludes his suggestive study of the methods by which these courts have enacted judicial legislation with the following analysis of this new Federal case. It can be explained on two different but not inconsistent theories, each of which is dependent on holding to a phase of the early New York decisions as a step toward the conclusion that the United States Constitution has been infringed.

"Unless the peculiar tenet that a railroad viaduct over and along a street negatived the latter's being kept open as a public street, had been adhered to, a contract-obligation would not have been found to be impaired.

"Unless the peculiar tenets of the creating of private property in a street, and of the *taking* of that property by such a viaduct, had been adhered to, a deprivation of property without due process of law would not have been found.

"Hence, the essential and ultimate foundation of the recent interesting and important decision of the United States Supreme Court appears to be — a vested right, in one acquiring property, to an immutability of State judicial decision, where the value of his acquired property would be depreciated by an overruling of such decision — a view apparently in accord with judicial expressions contained in the dissenting opinion."

CONSTITUTIONAL LAW (Ohio — Elections). "Article XVII Amendment to Constitution," by Hon. Horace S. Buckland, *Ohio Law Bulletin* (V. 1, p. 442).

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CONSTITUTIONAL LAW (Rate Regulation). "The Question of Rates," by Otto Gresham, *Chicago Law Journal* (V. xxii, p. 481).

CONSTITUTIONAL LAW. (Treaties — Agreements). James F. Barnett concludes in the December *Yale Law Journal* (V. xv, p. 63) an article on "International Agreements Without the Advice and Consent of the Senate." He finds "that an arrangement with a foreign power, whether made by a State with the consent of Congress or by the President with or without that consent, is not a contract included under the term treaty, as used in the Federal constitution." Congressional senction is always necessary to the validity of agreements made by a State. The value of the distinction between obtaining the sanction of Congress and obtaining the advice and consent of the Senate is that the former is obtained by a bare majority in both houses whereas the ratification of treaties requires a two-thirds vote of the Senate.

He further finds that an agreement, if made by a State, comes within the former category, if it relates to local or temporary matters, and especially if it relates to property rights rather than to political objects. "That the President, under an act or resolution of Congress and by virtue of his duty to see that the laws are faithfully executed, may make agreements to carry such legislation into effect." This applies to reciprocal trade treaties, reciprocal protection of trade-marks, and since 1872, to postal conventions.

"The President may enter into an agreement, where it involves (1) the exercise of the military power," as by peace protocol and arrangements involving the disposition of military forces in whatever localities the President may select, as an arrangement for the reciprocal crossing of the frontier by the troops of the United States and Mexico in pursuit of marauding Indians, (2) "or an agreement which regulates temporarily a matter to be ultimately adjusted by formal treaty" as *modi vivendi* and other provisional agreements, (3) or "relates to private claims against foreign governments." These latter concern the private individual intimately, and if satisfactory to him are of no further interest to others. Since 1870, eighteen agreements of this nature have been entered into by the President without reference to the Senate.

"The President by virtue of a general arbitration treaty specifically enumerating certain 'causes' to be referred to arbitration may lawfully make the agreements necessary for that purpose without submitting the same to the Senate for its approval," which is not the case where the general arbitration treaty provides merely for the arbitration of "differences of a legal nature or relating to the interpretation of treaties."

CORPORATIONS. Annual Report of the Commissioner of Corporations to the Secretary of Commerce and Labor. Government Printing Office, Washington, 1905.

CORPORATIONS (Promoters' Contracts). In the December *Harvard Law Review* (V. xix, p. 97) H. S. Richards discusses the liability of corporations on contracts made by promoters. It is well settled that an agreement entered into between a third person and a promoter prior to the existence of the corporation does not bind it though made on account of the corporation and with the expectation that it will be liable. But the corporation may become liable on terms substantially the same as those embodied in the agreement antedating the corporate existence. He then refers to certain classes of cases in which corporate liability exists, viz: where statutes make the corporation liable for certain expenses attending the organization and promotion of the company, where the promoter contracts with a third person, and the corporation becomes a party to it by novation, there the corporation obtains rights under a contract by assignment. A class of cases also exists in which the corporation is liable on a theory that a trust fund has been created by the corporation for the benefit of third persons as a result of an agreement between the promoter and the corporation.

Aside from these exceptional cases the question is, how can a corporation be held liable upon an agreement entered into between a promoter and a third person? It is usually said to become liable by ratification or adoption, but ratification is possible only where the contract purports to be made for an existing principal. Furthermore, the promoter is not properly an agent. In England

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it was formerly held that the question is not whether there can be a binding contract at law, but whether the court will permit the Company to use its powers under the act in direct opposition to an arrangement made with a third party prior to the act upon the faith of which they were permitted to obtain power. The decision has been criticised for assuming any identity between the promoters and the corporation itself.

The view now taken in England is that the corporation is not liable on contracts antedating its formation, although made on its account, but that the corporation may become liable on a new contract. In determining whether or not such contract exists, steps taken by either party in the belief that the original agreement made through the promoter still exists, will not be considered. "The American cases both at law and in equity are overwhelmingly in favor of holding the corporation liable on the contract antedating its existence wherever it has ratified or adopted the same; ratification or adoption being shown either by express resolution of the managing body, or by accepting the benefits or fruits of the contract. The American courts insist on some act by the corporation subsequent to organization showing an intent to be bound."

Estoppel is the theory of some courts. In others the agreement between the promoter and third person is regarded as an open offer to the corporation, which it may accept when organized, and thus create a new contract between the third person and the corporation. "Both English and American decisions recognize the possibility of a new contract between the corporation when organized and the third person, the broad line of distinction between the cases being the manner in which such a contract can be made out."

"The American decisions, while practically unanimous in the result reached, are far from satisfactory as to the legal principles underlying the liability. The English cases, on the other hand, have developed a logical, consistent theory of liability. The consequences of the liberal American view on the question of proof are not unjust: the corporation is protected against improvident agreements made on its account by promoters, since it has the power of acceptance or refusal. It is submitted that an equally just result is possible without doing violence to recognized principles of agency and contract."

CORPORATIONS (Public Policy). The address of Hon. Peter S. Grosscup, before the Ohio State Bar Association on "The Corporation Problem and the Lawyer's Part in its Solution," is printed in the December *American Law Review* (V. xxxix, p. 835). The corporation is the great and all-powerful fact of our generation. Another great fact in American life, is the individuality of the American. One of the predominating influences in the development of the individual man has been his right to conquer and hold individual property. Two generations ago, this country was confronted with a great fact, the public-landed domain. This country, knowing that the individual was its greatest force and its greatest security, opened lands to men and women who would live there. At this time the corporation was creeping in, bringing a far larger domain than that represented by all the agricultural lands of this country. Had we dealt with this new domain of property as we dealt with the landed domain, we should not have had this outcry against corporations. The people feel that the men who own this property are, in a certain sense, alien to their way of living.

Corporations were first organized by special legislation, but after a while the special acts no longer filled the purpose. Then came our policy of general laws, and that policy has gone on, loosening the grip of government upon the corporation, instead of tightening it, states running a race as to which one could grant the freest and easiest terms to those wishing to incorporate, until it has come to pass that the granting of the seal to a corporation, is a mere empty administrative act of the Secretary of State. A corporation may be organized on any line it pleases. This is the worst feature of our present corporation law. The American people object that men shall make great sums dishonestly out of the corporation policy of the country. The problem is not how to regulate the corporation, in the matter of prices it shall charge, but how to make the corporation honest; how to make it serve its purpose as an agency or government as well

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as an agency of property; how to put the new domain of property it embodies within reach of everybody and make it the inheritance of the frugality of the people. We must begin by having a uniform national corporation law, for by the decision of the Beef Trust Case the nation was held to have the power to regulate and supervise wherever the general current of the business of a corporation was to manufacture in one state and sell in another. If the power of the National Government were exercised, corporations would be organized to compete with existing corporations. They would be organized under United States laws. The United States would open, in connection with such corporations, an exchange under the regulations and rules of which their securities would be sold. The difficulty is to arouse the people, and in that difficulty, in that great problem, the lawyer more than any one else, can be an apostle of the right, because a lawyer more than any one else, can take a long step in the direction of righteousness.

CRIMINAL LAW. "The Criminal Liability of an Inciter or Abettor of Suicide," by Sumner Kenner, *Central Law Journal* (V. lxi, p. 406).

CRIMINAL LAW. "Criminal Responsibility," by Charles Mercier, *Canadian Law Times* (V. xxv, p. 663).

CRIMINAL LAW. "Du Droit de Défense," par S. C. Rion, *La Revue Legale* (V. xi, p. 467).

CRIMINAL LAW (Conspiracy). "Combines," by Frank E. Hodgins, K.C., *Canada Law Journal* (V. xli, p. 849).

CRIMINAL LAW (Extradition). "The Effect of Australian Federation upon the Fugitive Offenders Act," by Paris Nesbit, *Commonwealth Law Review* (V. iii, p. 14).

CRIMINAL LAW (Practice). "The Justiciary Court," by Lord Solvesen, *Scottish Law Review* (V. xxi, p. 361).

CRIMINAL LAW (Practice). A very interesting and valuable paper by Robert Ralston entitled, "Some Remarks upon Charging the Jury in a Trial for Murder," is printed in the November *American Law Register* (V. liii, p. 675). After calling attention to the apparent simplicity and actual complexity of the definition of murder as laid down in the decisions he asks:

"In charging the jury is it better for the judge to tell them that if they find so and so to be the facts, the prisoner is guilty of such a crime, while if they believe the facts to be as maintained by the prisoner, he is guilty of such another crime or not guilty, as the case may be; or, to enter into a long dissertation upon homicide, defining murder at common law, explaining the meaning of malice, and many other things in no way applicable to the facts of the case?

"If the evidence in the case should warrant a verdict of manslaughter, the crime need not be defined, but the judge may tell the jury that a killing in the heat of passion, aroused upon sufficient provocation, explaining what that is, will reduce an intentional killing, which would otherwise be murder, to manslaughter."

DIPLOMACY. "The Recognition of Panama" is discussed by Alfred Spring in the *American Law Review*, for December (V. xxxix, p. 853). In 1846, the United States made a treaty by which New Granada guaranteed that transit across the isthmus should be free at all times. The United States agreed to protect New Granada from foreign invasion or attack. It did not undertake to allay civil strife.

Early in 1903 the Secretary of State, proposed a treaty with Colombia, which was rejected by the Colombian Congress. Our President, apprehending a revolution in Panama, and that if it occurred traffic would be obstructed, ordered the gunboat *Nashville* at Colon to maintain free transit on the isthmus. No steps were taken by him, however, except to order the railroad not to transport the troops of either party and to land forty men when the lives of the Americans at Colon were threatened by Colombian troops.

The government was changed on the evening of the 3d of November from a province of Colombia into an independent nation without any bloodshed, and no extraneous aid was required to accomplish this. The government was organized at Panama on the 4th as a distinct entity, a *de facto* government in full control, although the Constitution was not adopted until February following. On the 6th, our government authorized its representative on the ground to treat with the new government, and the Republic of Panama

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before the end of the month was formally recognized by seventeen governments.

What constitutes an independent sovereign state is the actual, governing, dominating authority in the defined territory. The length of time which sovereignty has obtained, the extent of territory, a constitution or the form of government, are not necessary factors. It is the prerogative of the President, to put the seal of approval to the sovereignty of a newborn nation, and is a matter of discretion, and in the present instance, the facts within the compass of every person cried out for the recognition of Panama.

DIPLOMACY. "The European Concert and the Monroe Doctrine," by James B. Angell, *Law Student's Helper* (V. xiii, p. 371).

EDUCATION. An interesting address entitled "Preparation for the Bar," on the work accomplished by the American Law School and on the need for better education of judges and lawyers to prevent the present frequent errors of practice and consequent miscarriages of justice and to raise the moral standards of the bar delivered by Lawrence Maxwell, before the last annual meeting of the American Bar Association is printed in the December *American Law Review* (V. xxxix, p. 822).

ESTOPPEL (Banking). "A New Phase of Equitable Estoppel" is discussed by Silas Alward in the December *Harvard Law Review* (V. xix, p. 113). The first distinctive enunciation of the modern doctrine of equitable estoppel was given by Lord Chief Justice Denham in these words: "Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

While the doctrine is a salutary one and founded in the main on equitable principles, it becomes odious when not justly or reasonably applied. Estoppel being a rule of evidence, a cause of action can not be founded upon it. Quite recently an important judgment was delivered in the Supreme Court of Canada, Ewing *v.* Dominion Bank, 35 Can. Supreme Court, 133, involving a principle of equitable estoppel. The judgment can not be said to be satisfactory for two reasons; first, the court was a divided one, second, the amount of judgment assessed for the bank was so manifestly inequitable as to suggest the odium which Lord Coke designated as attaching to estoppels generally. The plaintiff was a bank at Toronto and the defendants a firm of merchants in Montreal. A certain Wallace forged the name of the defendant Ewing to a promissory note for $2,000 at four months, payable to himself, at the plaintiff's bank. The note was discounted by said bank and the proceeds withdrawn in the course of three days. On the day on which the note was discounted notice was sent by the bank to the defendant that their note would fall due on a certain date, requesting that defendants provide for the same at maturity. The defendants communicated with the forger, who stated the circumstances, requesting that they do nothing about it and promising payment. But just before the note became due, finding he was unable to meet his promise the defendants notified the bank that the note was a forgery, and refused to pay. It will be observed that the notice was not sent by the bank to the defendants to elicit a response as to the genuineness of the signature, and that the fact that they did not receive an answer to the notice in no way influenced the bank as to the disposition of the balance of the funds in their hands.

Judgment was rendered for the plaintiff for the full amount of the note with interest, not on the ground of ratification of the forged note by the defendants but by reason of the defendant's conduct in denying the making of the note, and the court held it to be the legal duty of a person whose name has been forged to notify the holder of the forged instrument of the fact promptly after becoming aware of it, and that if such a person becomes liable upon it by reason of neglect of such duty the holder's position is altered for the worse.

In a dissenting opinion, it was stated that the bank should have given some reason to the defendant to suppose that it would be prejudiced by his silence. The case seems a particularly hard one for the defendants. They were brought not by their own seeking

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or concurrence into unpleasant relationship with the bank as one of its customers. When the note referred to reached them the damage complained of had in part been done. When three days later they learned that their signature to the note in question had been forged the whole damage had been done, and yet, in consequence of subsequent silence, they were compelled to pay the note in full and thus make full reparation for the entire damage.

As the damages assessed were neither exemplary or punitive, the judgment can be defended only on the ground of the application of a rigorous rule of evidence, which excludes a finding of the actual loss sustained by the plaintiff and places the person relying upon the estoppel in a better position than that which his own initiative materially assisted in generating. In fact, the estoppel goes to the extent of preventing an adjustment of the damage actually incurred or of ascertaining in how much worse condition the plaintiff has been placed by reason of the conduct of the one sought to be estopped.

EVIDENCE. "Photographs in Evidence," by J. C. M., *Law Notes* (V. ix, p. 165).

EVIDENCE (See Practice).

FEDERAL COURTS. "The Jurisdiction of Federal Courts in Actions in which Corporations are Parties," by Hon. Jacob Trieber, *American Lawyer* (V. xiii, p. 477).

HISTORY. "The Land of Newfoundland," by Alex. J. W. McNeely, K.C., *Canadian Law Review* (V. iv, p. 539). A collection of ancient rights and customs of its settlers.

INSURANCE. "Life Insurance: The Abuses and the Remedies," by Louis D. Brandeis, Policy-holder's Protective Committee, Boston, 1905.

INTERNATIONAL LAW. Theodore J. Grayson, in the November *American Law Register* (V. liii, p. 672) discusses "War in the Orient in the Light of International Law." Among other suggestions he insists that "fair play and the business interests of neutral nations demand that a definite time shall be fixed by the belligerents themselves as the starting-point of their controversy, and the only accurate and satisfactory way of fixing such time is by some kind of a declaration of war made prior to any military or naval operations whatsoever."

He thinks that the restrictions by Japan on the newspaper correspondents were justified in the present status of the law, though Japan probably exaggerated the necessity therefor. He believes that the correspondents should be neutralized as the surgeons and chaplains have been, for he thinks "that the world has a right to know the principal events of a great war just as they take place." In future wars wireless stations should be treated like the ordinary telegraph and cable lines by belligerents.

INTERNATIONAL LAW (Arbitration). In the December *Michigan Law Review* (V. iv, p. 92) W. P. Rogers writes of "War, Arbitration and Peace." He forcibly presents the unanswerable analogy between private combat and international war. He shows by statistics the tremendous burden of modern wars, and what might be done with the money now spent in preparation for war. He recounts the history of international arbitration, and shows the present status of the authority of the Hague Court in this respect.

INTERNATIONAL LAW (History). A commentary on the relative importance and achievements of the great writers on international law by Edwin Maxey entitled "The Development of International Law" appears in the December *American Law Review* (V. xxxix, p. 815).

JURISPRUDENCE (Custom). "Customary Law in Modern England" is the title of an interesting article by W. Jethro Brown in the December *Columbia Law Review* (V. 5, p. 56). He contends that custom will necessarily be a source of legal rules since the official agency for meeting the needs of new regulations will necessarily be imperfect. After calling attention to various views as to the relation of custom to law and as to the tests by which you may know a custom that is law he says:

"The general conclusion at which I have arrived may be expressed in a sentence. When judges, in applying a custom which is not yet judicially authenticated, declare the custom to have been law previously to the decision, they are merely displaying a special form of the fiction of judicial incompetence. In the relatively developed character of modern institutions, more especially in regard

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to the development of special organs for the amelioration and development of legal rules, it appears to me that the time has arrived for a clearer limitation of the contents of law, and for the development of a theory of those persuasive sources of law (including custom) in cases where there is an imperative call either for a new rule or for the variation of an existing rule.

"The general conclusion, therefore, is that Custom is law when it can be held that the judges are bound to enforce it. Though there may be some difference of opinion possible as to the moment when this can be said to be the case, I do not think there can be any difference of opinion on the point that judges are bound, not by any inherent intrinsic authority of custom, but by virtue of their own practice. To the question why custom is law, no better answer can be given than that the judges treat it as such. The custom of the people is law, in so far as it is law, by virtue of the custom of the courts.

"The people are not, what the judges are, an official organ. It seems to me not only possible, but highly important, to distinguish between what the judges do or may do, and what unorganized and unofficial groups within the community do or may do. It appears to me a right and important step in the direction of a sound theory to hold that popular custom enters the law, if not through precedent, at least through judicial practice; that precedent also becomes law by virtue of judicial practice, and that in consequence the authority of both popular custom and isolated precedent find a common basis in the authority of judicial practice. Whether that basis be ultimate or not is another question. In the view I hold of the matter, we have reached a stage in our legal history when a theory of customary law inevitably leads us on to a theory of judicial practice in general. Such a theory, however, cannot be dealt with in the present article, since it would imply, *inter alia*, an account of the prerogatives and limitations of the judicial office, and of the relation of the judges to the Sovereign, the State, and the People."

JURISPRUDENCE. "Liberty of Contract," by O. H. Myrick, *Central Law Journal* (V. lxi, p. 483).

LEGISLATION. "A Review of Legislation of the Year 1904–1905" the annual address of the President of the American Bar Association, Henry St. George Tucker at its meeting at Narragansett Pier, last summer, which was summarized in our September issue appears in the *American Law Review* for November-December (V. xxxix, p. 801) and *American Lawyer* (V. xiii, p. 469).

LEGISLATION. "Year-book of Legislation." Edited by Robert H. Whittlen, Sociology Librarian of the New York State Library. Contains (1) Digest of Governors' Messages, (2) Index of Legislation, (3) Review of Legislation by forty specialists from all parts of the country. New York State Education Department, Albany, 1905.

MEDICAL JURISPRUDENCE. "Statutes Regulating Medical Practice," by Lewis Hochheimer, *Central Law Journal* (V. lxi, p. 424).

PRACTICE (Expert Testimony). In the November *Albany Law Journal* (V. lxvii, p. 330) Albert S. Osborne writes of "Expert Testimony from the Standpoint of a Witness." He emphasizes the importance of a proper marshaling of the facts by intelligent counsel, the interference of the court in the preliminary examination for the purpose of qualification, and the selection of State experts for a limited time, as is the custom in England. He also calls attention to the important distinction between mere opinion evidence and rational expert testimony that may be understood and weighed by court and jury, and he criticises a disposition to construe the rules of evidence so as to prevent examination of the reasons of expert testimony.

PRACTICE (See Evidence).

PROPERTY (Conveyancing). The relation of "The Statute of Uses and the Modern Deed," are considered in the December *Michigan Law Review* (V. iv, p. 109) by John R. Rood who asks in opening, "to what extent does the modern conveyance of estates in land in the United States by deed derive its validity from the English Statute of Uses."

He concludes as follows:

"Questions concerning the necessity of a seal and words of limitation as required at common law to pass a fee by deed, are still met occasionally in modern cases, and seals and the word heirs seem to be still essential in

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a few states, though generally rendered unnecessary by local statutes. The rule that title to land in adverse possession can not be conveyed by deed, which arose by virtue of the common law against maintenance and assignment of causes of action, and by virtue of the statute of 32 Hen. 8, c. 9, known as the pretended title-act, is still the law in several states, though abolished in many. The common law as to capacity of parties in large part remains. Other common-law essentials to a valid transfer of lands by deed may still possibly exist. But in the main, our conveyances by deed are purely matters of local statute and usage."

The following conclusions may be drawn from the foregoing discussion:

"1. That the statute of uses, the doctrines concerning uses, and conveyances operating by virtue of the statute of uses, have little or nothing to do with the validity of the ordinary conveyance in the great majority of the states. It must be remembered that we are not discussing the importance of the old law to enable one to understand, or as still governing, trusts, whether created by deed or otherwise.

"2. That generally a conveyance satisfying the local statutes is sufficient, and one not satisfying such statutes is insufficient, regardless of the old common law.

"3. That in about a fifth of the states one or more of these old conveyances at common law and under the statute of uses, are still retained in modified form and effect by the local statutes.

"4. They may still have effect in a few states regardless of or notwithstanding the State statutes."

PROPERTY (Torrens Law). "Reform of Our Land Laws" an address before the Virginia Bar Association by Eugene C. Massie in the November-December number of the *American Law Review* (V. xxxix, p. 871) also previously printed in the *Virginia Law Register* for September, advocates the passage of a bill by the Virginia legislature establishing a Court of Land Registration under the Torrens System, so that real property may be made easily transferable and thus dealt in as readily as other property, and so that the method of sale of land to pay taxes may be improved. The decisions of the Supreme Court of the United States which are fully considered by the author, uphold the constitutionality of such a system.

PUBLIC POLICY (Railroad Rates). The attack by opponents of Congressional rate regulation upon the constitutional power of Congress is deprecated by David Walter Brown in an article in the December *Columbia Law Review* (V. v, p. 600) entitled "A Dangerous Position for the Railroads." He presents the unanswerable syllogism that regulation of rates is inherent in the sovereignty of the body politic, that if it has not been granted to Congress it remains in the states, and that the alternative to Congressional regulation is a multiplicity of State regulations which the railroads would like even less.

PUBLIC POLICY. "State Insurance of Lives," by Talcott H. Russell, *The Law* (V. i, p. 395).

PUBLIC POLICY (See Corporations, Constitutional Law, and Diplomacy).

TORTS. "The Legal Right of Automobile Drivers upon the Public Streets and Highways," by Sumner Kenner, *Central Law Journal* (V. lxi, p. 464).

TORTS (Negligence). "The Doctrines of Assumed Risk and Contributory Negligence as Defenses to Actions for Damage Resulting from a Failure to Comply with Express Statutory Provisions," by M. C. Freerks, *Central Law Journal* (V. lxi, p. 446).

WILLS (Equitable Conversion). Previous to 3 and 4. Wm. 4, c 104 land of a deceased person was not liable for his debts, and it seems surprising that courts should have held that the conversion of money into land by will enabled a testator to deprive his contract creditors of their right to be paid. These cases, however, seem not to be upheld by the authorities.

Taking up the question of contracts, the author states that it is desirable to enlarge upon his statement in a previous article, that a bilateral contract for purchase and sale of land is the only species of contract in which an agreement to buy or sell land is alone sufficient to create an equitable conversion, and furnishes the only instance of an equitable conversion which is always co-extensive with

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the actual conversion which is agreed or directed to be made.

The only other species of contract in which it is certain that an agreement to buy or sell land forms an element in an equitable conversion, is a unilateral covenant to lay out money in the purchase of land and to settle the land, or sell the land and settle the proceeds of the sale. The different effect of a bilateral contract to buy and sell, and a unilateral contract to buy or sell is due to the different effect produced by performance. The mutual performance of the bilateral contract causes a conversion not only of sellers land into money, but of buyers money into land, and also causes a transfer of the land and money. On the other hand, the performance of the unilateral covenant cannot cause more than one conversion.

In order that a unilateral covenant to buy or sell land may cause an equitable conversion, it must be a covenant to buy land of the covenantee, or sell land to him, or there must be added a covenant to make a gift of part or all of the land or proceeds of the sale of the land.

A contract for the purchase and sale of land is the only instance of equitable conversion which is always co-extensive with the actual conversion, because in every other case the actual conversion of land into money or vice versa must be made before any gift of the money or land can take effect.

Another species of agreement which has been held to cause an equitable conversion of land into money, is the agreement sometimes made between co-owners to join in the sale of the land. Such an agreement does not however cause an equitable conversion, for the only way in which one can convert his own land into money in equity in his own favor is by procuring some one else to contract with him to purchase the land.

There is an important distinction, which has exclusive relation to the creation of an equitable conversion, between a direction to sell land accompanied by a gift of the proceeds of the sale and the creation of a lien or charge on the same land either with or without a direction to sell the land to pay off the charge. A gift out of the proceeds of land requires a sale as only in that way can the amount be ascertained, but where land is charged with payment of money the charge bears no relation to the value of the land. A lien or charge never causes an equitable conversion of land into money, because (1) it never constitutes a step towards the alienation of the land: (2) a direction to sell land is only evidence of an intention to make a charge: (3) the land has nothing to do with bringing the debt into existence, nor with the debt during its existence. Where such charge is made by deed or will the surplus will be held to be land.

Courts have failed to distinguish charges on the land from gifts of the proceeds of sale of land and have given them the same effect in converting land into money in equity. The former are usually in the form of assignments for benefit of creditors, and the courts have generally answered that the direction to sell property to pay debts was sufficient to convert any land included into money in equity.

There is another class of cases in which money is directed to be laid out in the purchase of land and yet the ownership of the land when purchased will be just where the ownership of the money was when the purchase was made, namely, where land is settled, the legal ownership being in trustees and the latter are authorized to sell the land, but directed to invest proceeds of the sale in other land and after land is sold but before other land is purchased, the question arises whether the money is converted in equity into land from the moment of sale. This question has always been answered in the affirmative but the reverse seems to be true. Neither the direction to reinvest the money in land nor the actual reinvestment of it in land causes any change in ownership of the settled estate. Each person who will under the settlement have an interest in the land when purchased, has in the meantime the same interest in the money, and the land will, when purchased, simply take the place of the money, just as when the original land was sold the money took the place of the land.

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NOTES OF THE MOST IMPORTANT RECENT CASES COMPILED BY THE EDITORS OF THE NATIONAL REPORTER SYSTEM AND ANNOTATED BY SPECIALISTS IN THE SEVERAL SUBJECTS

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

AGENCY. (Special Police.) N. Y. S. C., App. Div. — Samuel *v.* Wanamaker, 95 N. Y. S. 270, is the most recent addition to the very limited number of cases involving the liability of a person employing a special police officer for the acts of such officer. The New York City Charter provides that the police board may, on application, appoint a special patrolman to do special duty at any place in the city on the persons applying therefor paying for his services. Such special patrolmen are to be subject to the orders of the Chief of Police, and to possess all the powers and discharge all the duties of the police force applicable to regular patrolmen. A patrolman so employed in defendant's department store arrested plaintiff without sufficient cause, but there was no showing that defendants ever expressly authorized him to make the arrest or that in doing so he was acting otherwise than in the exercise of the powers conferred on him by his appointment. Under these circumstances it is held that defendants are not liable for his wrongful act, and the court regards the officer as standing upon the same footing in every respect as any other police patrolman and not subject to the control of the person paying his salary. In support of the holding the following cases are cited: Dickson *v.* Waldron, 34 N. E. 506, Healey *v.* Lothrop, 50 N. E. 540, Hershey *v.* O'Neill, 36 Fed. 171, and Brill *v.* Eddy, 22 S. W. 488.

CONSTITUTIONAL LAW. (Crime-Commutation of Sentence.) Tenn. — The provision of Shannon's Code (Tennessee), Section 7423, allowing the board of commissioners of a county work-house, on the recommendation of the superintendent, to deduct for good conduct a portion of the time for which any person has been sentenced, is held to be invalid in Fite *v.* State, 88 Southwestern Reporter, 941. The particular fault found with the statute is that it fails to prescribe any schedule of credits to be allowed for good conduct, but leaves the whole matter to the arbitrary discretion of the board of work-house commissioners, and is, thereby, an unconstitutional delegation of legislative authority. A statute authorizing the commutation of a penal sentence for good conduct of a prisoner, such statute being in existence at the date of the prisoner's conviction, would, says the court, become a part of his sentence, so as not to be an invasion of the pardoning prerogative vested in the governor by the constitution. A number of cases are cited in support of this latter proposition, which seems to be well within the current of authority: State *v.* Peters, 43 Ohio St. 629, 4 N. E. 81; Opinion of Justices, 13 Gray, 618; State *v.* Austin, 21 S. W. 31; Woodward *v.* Murdock, 24 N. E. 1047; *In re* Fuller, 52 N. W. 577; *Ex parte* Nokes, 21 Pac. 548; State *v.* Patterson, 22 Atl. 802. Somewhat contrary holdings are to be found in People *v.* Cummings, 50 N. W. 310; Commonwealth *v.* Halloway, 44 Pa. 210, and State *v.* State Board of Corrections, 52 Pac. 1090.

CONSTITUTIONAL LAW. (Due Process of Law Costs.) Cal. — A rather obvious attempt at deprivation of property without due process of law is forestalled by the holding in Meacham *v.* Bear Valley Irrigation Co., 79 Pacific Reporter, 281. A rule of court fixed the compensation of the official reporter at a certain amount per day, and declared that the *per diem* compensation so fixed should, upon the opening of court, and before the taking of notes by the reporter, be deposited, one-half thereof by each of the respective parties. Defendant in ejectment failed to comply with an order requiring one-half of the reporter's fees to be deposited, and judgment was entered for plaintiff without trial. This proceeding is very properly held to be within the constitutional prohibition against deprivation of property without due process of law. Failure or refusal of a defendant to pay the costs of an action, or any portion thereof, in advance of the trial, does not, says the court, authorize the trial court to deprive him of his defense to the action. In support of the holding, the cases of Foley, *v.* Foley, 52 Pac. 122, and Younger *v.* Superior Court, 69 Pac. 485, are cited.

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CONSTITUTIONAL LAW. (Equal Protection of Laws — Discrimination in Selection of a Jury — Removal to Federal Court.) U. S. C. C. for E. D. of Ky. — A case which in its various phases in the state courts has attracted national attention makes its appearance in the federal courts in Commonwealth of Kentucky *v.* Powers, 139 Federal Reporter, 452. The facts of this case are so thoroughly known that no reference to them is regarded as necessary, and it is impossible within the limits of a note to give more than the barest outline of the decision of the Federal Court or the grounds thereof. The case arose on motion for a writ of *habeas corpus cum causa.*

The decision is really based upon a holding that a person charged with crime in a state court has the right to be tried by a jury selected from persons possessing the statutory qualifications of jurors without discrimination against those who belong to the same political party as himself, because they belong to such party, and that such right is one secured to him by the clause of the 14th Amendment of the Federal Constitution prohibiting a state from denying to any person within its jurisdiction the equal protection of the laws. It is also declared that U. S. Rev. St. Section 641 (U. S. Comp. St. 1901, p. 520), which provides for the removal of any civil suit or criminal prosecution against any person who is denied, or cannot enforce in the judicial tribunals of the state any rights secured to him by any law, providing for equal civil rights, while not as broad as the provision of the 14th Amendment because confined to the action of judicial tribunals is, nevertheless, not restricted to cases where civil rights are denied by legislative action of the state, but applies as well where, by rulings in other cases, or in the same case prior to final hearing, a rule of judicial decision has been established which will presumably so affect the judicial tribunals of the state as to cause a denial of civil rights to a defendant, or prevent their enforcement.

It is also held that this right of removal is not affected by the fact that such rights might be enforced ultimately by proceedings in error in the Supreme Court of the United States. The petitioner in the present case showed that he had been tried three times in Kentucky; that he had been convicted each time, and that each judgment of conviction had been reversed by the State Court of Appeals. It was also shown that the crime charged grew out of a political contest, that on the second and third trials petitioner had been discriminated against in the selection of the jurors by the officers having charge of the drawing of the panel, with the result that all the jurors were members of the opposite political party, and that objections to the panel and jury on that ground had been overruled by the court on the ground that as the jurors chosen possessed the statutory qualifications defendant had no right to object. Such discrimination is held by the Federal Court to deny the equal protection of the laws and to entitle the petitioner to the right of removal under the statute cited.

CONSTITUTIONAL LAW. (Eminent Domain — Public Purpose.) Me. — A state of facts furnishing an unusually clear illustration of the principle that a corporation, though chartered to perform a public service, cannot exercise the power of eminent domain for a purpose which is purely private is to be found in Brown *v.* Gerald, 61 Atlantic Reporter, 785. Under its charter a corporation was empowered to manufacture, generate, sell, distribute, and supply electricity for lighting, heating, traction, manufacturing, or mechanical purposes. It was authorized to build a dam or dams on a certain river and to take as for public use any water-rights or land, and to transmit electric power within certain towns in such manner as might be expedient, and to erect poles and wires for that purpose. The towns and the corporation were authorized to make contracts for public lighting. The corporation constructed a dam, erected a station, and prepared to install an electric plant. It contracted to deliver to a manufacturing corporation the entire electrical current or the energy developed by its plant for a period of ten years. The company, under its charter, proceeded to condemn land for the purpose of erecting its line of poles and wires to convey the current to the point where it was to be delivered. In commenting upon this situation, the court says that when the legislature grants the right of eminent domain for several purposes, for some of which the grant would be constitutional, and for others not, with discretion in the grantee to exercise the right when and where it chooses, within a large territory, that discretion must be used in good faith, and the taking must actually be for a constitutional purpose in order to be valid. Under the circumstances of the present case, it is held that land which was condemned for the line transmitting the power was taken for a private purpose. A subsidiary point raised in behalf of the corporation is disposed of by the holding that a corporation empowered by its charter to generate and transmit power for lease or sale, and having granted to it the right of eminent domain, does not, by accepting the provisions of its charter, become a *quasi* public corporation, and does not thereby become invested with the right to exercise the power of eminent domain for the purpose of supplying electric power for manufacturing purposes.

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CONSTITUTIONAL LAW. (Unreasonable Searches — Witnesses — Privilege — Anti-Trust Act.) U. S. C. C. for S. D. of N. Y. — Two points of interest and importance in connection with the recent efforts to enforce the national anti-trust legislation are contained in the decision *In re* Hale, 139 Federal Reporter, 496. The first holding is to the effect that an inquisition before a grand jury to determine the existence of supposed violations of the anti-trust act is a "proceeding" within Act of Congress, February 19, 1903, providing that no person shall be prosecuted or subjected to any penalty for, or on account of any transaction, matter, or thing concerning which he may testify or produce evidence in any proceeding under several statutes mentioned, including the anti-trust act.

A point of possibly more importance is involved in the statement that a supœna *duces tecum* commanding the secretary and treasurer of a corporation supposed to have violated the anti-trust act to testify and give evidence before the grand jury, and to bring with him and produce numerous agreements, letters, telegrams, reports and other writings described generically and in effect, including all the correspondence and documents of the corporation, originating since the date of its organization, to which nineteen other named corporations or persons were parties; for the purpose of enabling the district attorney to establish a violation of such act on the part of the witness' principal, constituted an unreasonable search and seizure of papers, prohibited by Federal Constitution, Amendment 4.

CONTRACTS. (Consideration — Parties.) N. Y. S. C. — The validity and enforceability of contracts of a public service corporation is the subject of consideration in Wright *v.* Glen Telephone Company, 95 N. Y. Supp. 101. Plaintiff in common with many others, had signed a petition for the granting of a franchise to a telephone company on the condition that the company should furnish service at a certain rate. Pursuant to this petition, a franchise was granted and accepted by the company in writing, by which franchise and acceptance the company was required to furnish service at the rate prescribed. Plaintiff was held to be a party to the contract and its consideration so as to be entitled to sue and to enforce performance of its provisions as to rates of charge for service. The validity of the contract was attacked on the ground that the New York Transportation Law gave to telephone companies the right to use streets so that it received nothing in addition by the franchise, wherefore its contract as to rates was without consideration. The owever, is of the opinion that as the statutes gave such companies no rights in public parks or other public places outside of the streets, and did not deprive the city of the right to determine whether lines shall be run upon poles or in subways, the city's permission to erect poles and string wires in the streets and other public places in return for which the company obligated itself to furnish service at certain rates, was supported by a sufficient consideration.

This case is interesting because in its opinion the court casts doubt upon the New York view that a gift or sole beneficiary, one to whom the promisee owed no duty to procure him the benefit in question, cannot recover. This sort of case is to be discriminated from that of a payment beneficiary, one to whom the promisee does owe such a duty. New York, of course, allows him to recover. Lawrence v. Fox, 20 N. Y. 268. But the gift beneficiary has been denied recovery. Townsend v. Rockham, 143 N.. Y. 516. While in the case of a payment beneficiary there is no reason for making an exception to the rule that only parties to a contract can sue on it (Williston, 15 Harv. Law Rev. 775 et seq.) in the case of a gift beneficiary to make an exception seems proper. This is so, because there is no other method by which the contract can be adequately enforced. If the promisor refuses to perform neither a suit by the promisee in which he could recover nominal damages, nor a rescission for the breach in which he could recover back merely the consideration he gave for the promise, nor a suit for specific performance, since the promise of the promisor might be one which equity would not specifically enforce, as an agreement to labor for the beneficiary, is an adequate remedy. The best solution is to treat the transaction as a gift to the beneficiary. Delivery is required for a gift. But the making of the contract may be considered as equivalent in formality, and, therefore, equally likely to make certain that the intention to give was real, the purpose in requiring delivery. The gift beneficiary should, therefore, be allowed to sue on the contract.

The New York courts have not kept strictly to their rule. Relatives who were gift beneficiaries have been allowed to sue on the argument that the promisee owed them some vague non-legal duty to aid them. Buchanan v. Tilden, 158 N. Y. 109. And where the State made a contract by which the publisher of the New York reports should sell them to other publishing houses at a fixed price, it was held that such other publishers could recover on it. Little v. Banks, 85 N. Y. 281. That seems the same in principle as the present case. Gift beneficiaries may recover on the contract in most American jurisdictions, 15 Harv. Law. Rev. 780, 804.

Clarke B. Whittier.

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CONTRACTS. (Consideration.) N. Y. Surrogate Ct. — A rather curious writing is enforced, apparently as a contract, in the case of *In re* Todd's Estate, 95 N. Y. Supp. 211. The evidence showed that decedent, who was a wandering peddler, had stayed at the house of claimant and her husband for several days at a time, five or six times a year during a number of years, and that no charge had ever been made for his entertainment and care. Before his death he executed an instrument which he entitled a "unique charity," which was as follows: "I promise Maggie Mattice $5,000 when I die, for all my trouble and all her kindness to me. I also killed her canary bird to-day for which she must have her pay, for this account must be paid after my death from my estate." It was contended by the administrator that the paper was not a promissory note and did not acknowledge an indebtedness; that it was without consideration, and was merely a promise to give and not to pay, and not being executed in accordance with the statutes, was not valid as a will. It is, however, held, that while the $5,000 was more than compensation for the services which had been rendered, and was undoubtedly known by the decedent so to be, yet he, nevertheless, had a right to give an exorbitant price if he saw fit to do so, and that though this amounted to a charity his promise was enforceable in the law.

Promises to give after death have been sustained in New York upon very slight consideration. Matter of Steglich, 91 App. Div. 75, 86 N. Y. Supp. 257; Bush v. Whitaker, 45 Misc. 74. 91 N. Y. Supp. 616. In the case digested above it is not made clear by the report whether the services had all been rendered as a mere matter of friendly hospitality before the promise was made. If so, there would seem to be no consideration, other than a past consideration, so far as those services were concerned. There would remain then only the liquidation of the claim in tort for killing the canary as a consideration for the promise.

CONTRACTS. (Employment by the Year — Corporations.) N. Y. S. C., App. Div. — The construction of a contract of employment and its binding effect upon various successors of an original employer and a rather unusual state of facts as contained in Baker *v.* D. Appleton & Co., 95 N. Y. Supp. 125. D. Appleton & Company, while a partnership, employed plaintiff for a year at an annual salary. He continued in the service of the firm for several years for the same compensation. The firm then formed a corporation and he worked for it in the same capacity and for the same compensation. The corporation passed into the hands of a receiver, and he discharged plaintiff without cause. The receiver transferred the property to a second corporation of the same name, subject to the payment of the debts of the first corporation and of the receiver. In an action against the second corporation, it was held that plaintiff had a yearly contract with the firm and the first corporation, entitling him to recover from the second corporation for his wrongful discharge under the assumption of the debts of the first corporation.

CONTRACTS. (Illegality — Employers' Association.) N. Y. S. C. — The legality of an employers' organization, somewhat corresponding to the labor union of employés, is collaterally involved in City Trust, Safe Deposit & Surety Company of Philadelphia *v.* Waldhauer, 95 N. Y. Supp. 222. Employers of labor in the building trades formed an organization to secure stability in conditions and certainty with respect to the performance of contracts by obtaining an agreement with their employés for arbitration instead of sympathetic strikes. Defendant, who was an employer, became a member of the association and gave a bond obligating him to obey its regulations and orders. Thereafter the association, endeavoring to provide against strikes, arranged with the men entering their employment to sign an agreement to arbitrate their differences, and sent to each member of the association a resolution that no members should employ workmen who had not signed. Defendant laid off his men for a few weeks, but afterwards took them back without the consent of the association, and without asking them whether they had signed the arbitration agreement. On demand of the association, the surety company, which had become surety on defendant's bond, paid the penalty provided therein. Referring to the line of cases holding that laborers have a right to organize for the purpose of securing higher wages, shorter hours, and improving their condition generally, and to strike to secure these benefits, the court declares that it must be equally true that employers also have a right to organize and refuse to employ for the purpose of accomplishing any lawful object. It is also held, that the particular order requiring defendant to abstain from employing laborers who had not signed the arbitration agreement was lawful and within the fair import of the constitution of the association, so that he was liable to the surety company because of its payment of the penalty accruing from the breach of the bond.

In Curran v. Galen, 152 N. Y. 33, it was held that an agreement between a labor union and an

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employers' union that the latter should employ only union men, is illegal. The present case holds that an agreement between members of an employers' union to employ only workmen who sign an arbitration agreement, is legal. It is difficult to discover the distinguishing feature between the two cases. Had a discharged workman sued the employers' union, and had the latter set up the agreement as a defense, the cases would have presented the question in precisely the same form. Both contracts are obnoxious to a sound policy of law, in that they are intended to coerce workmen to do some act not implicated in the contract of employment — in one case to join a union, in the other to sign an arbitration agreement.

CONTRACTS. (Illegality—Combination.) Mich. — Mich. Pub. Acts 1899, p. 409, No. 255, § 1, makes it unlawful to contract not to sell any commodity below a fixed value, or to keep the price of an article at a fixed figure, or to settle the price of any article so as to preclude unrestricted competition, or to combine or unite any interest connected with the sale of any commodity in order that its price may be affected. A number of master plumbers who were engaged in business in a certain city, incorporated an association known as a "Plumbers' Exchange." There was also incorporated a club, consisting of master plumbers belonging to the exchange and of wholesale dealers in plumbing supplies, comprising all manufacturers and dealers in the city. By the rules of the club, which rules constituted an agreement between the members, the price of supplies was to be fixed by a committee, consisting of one wholesaler and one master plumber, at which price all club members agreed to sell, without discrimination, to members of the exchange, and they, reciprocally, agreed to buy. It was provided that the wholesalers should sell only to qualified master plumbers whose names should be approved by the officers, and that non-members should be charged a specified percentage more than members. The members of the master plumbers' club agreed that they would not sell labor or material below the schedule fixed by the club; that no work should be done, or material furnished to any one who failed to satisfactorily settle with any member, and that in bidding for contract work, every plumber should make his estimates according to the price fixed by the club, and add a percentage, which was to be paid to the Exchange. Each member also agreed to submit his estimate to the clerk of the Exchange, who was also clerk of the club, and it appeared that the purpose of such submission was to prevent competition and enhance the plumbers' profit. This contract, it is held in Hunt *v.* Riverside Coöperative Club, 104 Northwestern Reporter, 40, was unlawful under the statute, even eliminating the provision obligating the wholesalers to discriminate and the provision obligating master plumbers not to sell labor and material below a scheduled rate, and notwithstanding that the monopoly was not complete and that the tendency had not, in fact, been to raise prices. The purpose of the two associations and the contract between them is, says the court, to be looked at as a whole, and when so viewed, the court finds no difficulty in determining that it was the intention of all the parties to fix prices and destroy competition. Other cases in which somewhat similar agreements have been considered are: Pacific Electric Co. *v.* Adler, 27 Pac. 36; Richardson *v.* Buhl, 43 N. W. 1111; People *v.* Sheldon, 34 N. E. 785; San Antonio Gas Co. *v.* Texas, 54 S. W. 289; State *v.* Laredo Ice Co., 73 S. W. 951; Harding *v.* American Glucose Co., 55 N. E. 577; State *v.* Armour Packing Co., 73 S. W. 645, and Walsh *v.* Association of Master Plumbers, 71 S. W. 455.

CORPORATIONS. (Forged Transfer of Stock.) 1905 Appeal Cases, 392. Eng. — A case which is of very great importance to corporations and to bankers loaning money on stocks and shares, was decided by the House of Lords just prior to the Long Vacation, and is reported in 1905 Appeal Cases, November 1, under the title "Sheffield Corporation *v.* Barclay." In April, 1893, Barclay & Co., bankers, forwarded to the Corporation of the City of Sheffield a transfer of Sheffield Corporation stock, purporting to be executed by two persons named Timbrell and Honnywill, who were the registered holders of the stock, in favor of Barclays, the bankers, with a request to the Corporation to register the stock in the name of the bank and forward new certificates in due course. This the Corporation did, and granted as requested a new certificate to the bank, which afterwards transferred the stock for value to third parties. All parties believed that the signatures to the transfer from Timbrell and Honnywill were genuine, but in 1899, after Timbrell's death, it was discovered that he had forged Honnywill's name to the transfer. Honnywill thereupon brought an action against the Corporation for rectification of the register and other relief, and recovered judgment. The Corporation then brought an action against the bank, upon an implied indemnity against the liability which they had incurred. Lord Chief Justice Alverston, who tried the action in the first instance, decided in favor of the Corporation, basing his judgment largely upon the ground that as between two innocent parties the loss should be borne by the bank who caused the

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Corporation to act upon an instrument which turned out to be invalid. But this judgment was reversed by the Appeal Court (1903, 2 K. B., 580) on the ground that as the transfer to the bank was registered and the certificate issued to them by the Corporation in pursuance of their statutory duty, and not voluntarily by reason of a request by the bank, there was no implied contract by the bank to indemnify the Corporation against the loss which they had sustained. Their view was based upon Balkis Consolidated Co. *v.* Tompkins (1893, A. C. 413); Simm *v.* Anglo American Telegraph Company (5 Q. B. D. 188), and Anglo American Telegraph Company *v.* Spurling (5 Q. B. D. 194). The House of Lords has now, however, reversed the Appeal Court and restored the judgment of the Lord Chief Justice in favor of the bank. In a judgment delivered by the Lord Chancellor and by Lord Davey it is, therefore, now finally determined that where both parties, in the circumstances mentioned, have acted bona fide and without negligence, a banker is bound to indemnify a corporation against the liability to a shareholder upon an implied contract between the bank and the corporation that the transfer is genuine. It will be noted that in England shares are transferred by a separate document under seal, and not, as in America, upon a transfer indorsed upon the back of the share certificate.

This decision affirms the proposition that a person who brings a transfer of a stock certificate to a transfer-office for transfer or registration impliedly warrants that all the signatures are genuine. In this country the practice has commonly been for a transfer-agent to require an express warranty of the genuineness of signatures by some known broker, or other responsible person, before transferring shares or issuing a new certificate. We submit that the present decision of the House of Lords is incorrect and that the better view is that of the Court of Appeals which is overruled. The decision rests on the common law principle that the person, who, at the request of another, does something that is not manifestly tortious, is entitled to be indemnified for injuries to the rights of third persons for which he becomes responsible. This, however, assumes that the first person is under some obligation to act, and does not have the right to exercise any volition or discretion as to whether he will, or will not, comply with the request. The duty of a transfer-agent is to keep the register correct and to look after the transfer between parties. There is no duty in the transfer-agent to transfer or register the stock unless the signatures attached to the instrument of transfer are, in fact, genuine. It can refuse to make any transfer until, and unless satisfied of, its correctness. There is no custom of the law merchant of an implied warranty of the genuineness of signatures to stock certificates, as is the case with signatures to negotiable bills or notes. So that if the transfer-agent does not require an express warranty of the signatures it then acts at its peril.

Lee M. Friedman.

This is, as stated, a case of very great importance. Where a transfer of shares has been made in reliance upon a forged assignment, a number of conflicting interests may arise, which it is difficult to reconcile. There is, first, the right of the true owner whose name has been forged, whose certificate has been surrendered and canceled, and whose position as a shareholder upon the books of the corporation has been temporarily destroyed. There is the bona fide purchaser (from the forger) who has surrendered the certificate and procured the issuing of a new one to himself. In many cases this purchaser, armed with this new and genuine certificate, has in good faith transferred it, before the discovery of the forgery, to another bona fide purchaser who has bought in reliance upon the new certificate. And lastly, there is the corporation which has, in good faith, but without right, canceled the original certificate for which it must make amends to the true owner (usually by restoring him to his original status) and which has also misled the second purchaser above referred to into parting with his money in reliance upon the new certificate which the corporation has innocently issued. If the authorized capital had already been fully issued, there is now an overissue. The whole subject is too large to be adequately dealt with in a note. But usually the outcome will be this: The corporation will restore the true owner to his rights, and it will pay damages to the second purchaser. It will then endeavor to get indemnity from the first innocent purchaser who bought the original certificate with the forged indorsement upon it and who surrendered it for cancellation and reissue. What are the rights of the corporation against him? The answer which the cases make is this: Where he comes in with a forged assignment and power of attorney to make the transfer, and is permitted, in person, or by the agent he selects, to make the transfer, as is customary in the United States, he is liable to the corporation upon an implied warranty of the genuineness of the authority: Boston R. Co. v. Richardson, 135 Mass. 473; Starkey v. Bank of England (1903) A. C. 114. See also Clarkson Home v. Missouri Pac. Ry. Co., 182 N. Y. 47, 74 N. E. 571; Hambleton v. Central Ohio R. Co.

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44 Md. 551. Where he sends in a separate deed of assignment and requests a transfer, as is customary in England, and this deed is forged, he is liable to the corporation upon an implied undertaking to indemnify it against the consequences of complying with his request: Sheffield Corporation v. Barclay (1905) A. C. 392, 74 L. J. Rep. K. B. 747 (overruling (1903) 2 K. B. 580). Lord Davey stated the governing principle to be "that where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty on the request, direction, or demand of another (it does not seem to me to matter which word you use) and without any default on his own part, in a manner which is apparently legal but is, in fact, illegal, and a breach of the duty, and thereby incurs liability to third parties, there is implied by law a contract by the person making the request to keep indemnified the person having the duty against any liability which may result from such exercise of the supposed duty. And it makes no difference that the person making the request is not aware of the invalidity in his title to make the request."

There is an interesting discussion of the question by Mr. J. L. Thorndike, in 17 Harvard Law Review, 373 (his general contention is now sustained by the House of Lords) and by Professor Ames in 17 Harvard Law Review, 543. Valuable cases upon the general subject are, In re Bahia R. Co., L. R. 3 Q. B. 584; Pratt v. Taunton Copper Co., 123 Mass. 110, 25 Am. Rep. 37; Pratt v. Boston, etc. R. Co., 126 Mass. 443; Machinists' Nat. Bank, v. Field, 126 Mass. 345; Brown v. Howard Ins. Co., 42 Md. 384, 20 Am. Rep. 90; Mayor, etc. v. Ketchum, 57 Md. 25; Metropolitan Bank v. Mayor, 63 Md. 6; Philadelphia Nat. Bank v. Smith, 195 Pa. 38; Scarlett v. Ward, 52 N. J. Eq. 197; Thomas v. Citizens' Nat. Bank, 111 U. S. 156; Allen v. South Boston R. Co., 150 Mass. 200; Trimble v. Bank, 71 Mo. App. 467; East Birmingham Land Co. v. Dennis, 85 Ala. 565, 7 Am. St. Rep. 73, 2 L. R. A. 836; O'Herron v. Gray, 168 Mass. 573, 60 Am. St. Rep. 411, 40 L. R. A. 498; Knox v. Eden Musee Co., 148 N. Y. 441, 51 Am. St. Rep. 700, 31 L. R. A. 779.

Floyd R. Mechem.

CRIMINAL LAW. (Bribery.) N. Y. Ct. Gen. Sess. — People *v.* Jackson, 95 N. Y. S. 286, shows that merely moral obliquity even in an officer is not always punishable. It is there said that the asking of money by a public officer to influence his action, which is not official and which he has no authority at all to perform, is not bribery. Defendant Jackson held the office of coroner in the Borough of Manhattan in New York and it was charged that he had asked and agreed to accept a bribe with the understanding that his official action would thereby be influenced in the matter of the death of a person in New Jersey. There was no evidence that the dead body had ever been in the Borough of Manhattan. This, the court says, does not constitute bribery or the offense of asking a bribe in violation of Penal Code, § 72. A coroner being an officer of inferior and limited jurisdiction, every fact necessary to give him jurisdiction must be alleged and proved, and where a coroner acts on a cause of death without the presence of the body within his jurisdiction, any act he does is null and void *ab initio*. Therefore, the agreement of the coroner to accept a bribe in the present case did not relate to his official action or to a matter which could come within his official cognizance, and did not render him guilty of an offense. This case is almost identical with the recent celebrated case of People *v.* Butler, 77 S. W. 560, the only difference being that in the Butler case defendant was offered a bribe to influence his action as a municipal officer with reference to a contract which, under the city charter, the board of which he was a member, had no authority to award or execute. The Missouri case cites and analyzes a large number of authorities, and the two cases together would seem to render fairly well settled the principle that a public official cannot be bribed to do an act which he has no authority in law to perform.

CRIMINAL LAW. (Conspiracy — Causation.) Ky. — A question which has been paralleled but once or twice before in the administration of our criminal law is disposed of by the Kentucky Court of Appeals in Commonwealth *v.* Moore, 88 Southwestern Reporter, 1085. Defendant was indicted for murder, alleged in the indictment to have been committed in the following manner: Defendant and another conspired to rob a house and while in the execution of this felonious design, the occupant of the house, endeavoring to protect his property, fired at defendant, missed him, and accidentally shot and killed an innocent third person who had no connection with the affair whatever. The two conspirators were indicted for the murder of the innocent bystander. The court refers to the well-known principle that if several persons confederate to accomplish an unlawful design, each one is responsible for every crime committed by any of his confederates in pursuance of the original conspiracy and which might naturally or reasonably be anticipated to result from it, but holds that this rule cannot be extended to include the present case because the homicide was

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not committed by either of the conspirators or in pursuance of the conspiracy at all, but was the act of the occupant of the house in opposition to the conspiracy and entirely contrary to the wishes and hopes of the conspirators. The only other case directly in point is that of Butler *v.* People, 18 N. E. 338, where the Supreme Court of Illinois made the same holding on a practically identical state of facts. Commonwealth *v.* Campbell, 7 Allen, 541, also contains a holding that where defendants conspired to create a riot and in quelling it the officers accidentally killed a bystander, defendants were not guilty of murder.

This decision seems inconsistent with the general doctrine that one who puts another wrongfully in a dangerous position is responsible for the results of a reasonable effort on the part of the latter to escape from the consequences: thus one who gives a wound is responsible for the death of the victim under the surgeon's knife, even if the surgeon is unskilful, during an operation deemed advisable on account of the wound. Reg. v. Davis, 15 Cox Cr. Cas. 174; Peo. v. Cook, 39 Mich. 236; Com. v. Eisenhower, 181 Pa. 470. So one who frightens another wrongfully is responsible if the latter in trying to escape injures himself or another. Rex. v. Evans, 1 Russ. Cr. 656; Rex v. Hickman, 5 C. & P. 151; Reg. v. Pitts, C. & M. 284; Reg. v. Martin, 8 Q. B. Div. 54; Reg. v. Halliday, 61 L. T. Rep. 701. Here the owner in a lawful attempt to extricate himself from the violence inflicted by the defendent, killed another. The cases of Do. Com. v. Hare, Whart. Hom. App. 477, and possibly Darlington v. S., 40 Tex. Cr. 333, support the conviction, and Gore's Case, 9 Coke, 81a goes much further. The court finds a certain absurdity in holding the defendant. It may fairly be suggested that the absurdity consists in holding that though a human life has been lost as the result of defendant's malicious violence, there is no murder committed. J. H. B.

These cases are to be distinguished from a case when in the perpetration of the criminal act the defendants voluntarily place an innocent third person in such a position that he is likely to be killed by the person opposing the unlawful act. Such a case is Taylor v. State, 41 Tex. Cr. Rep. 564. In this case the defendants in robbing a train compelled the fireman to leave the cab and go with them to the express car "to have the . . . express messenger open up." A passenger on the train shot at the defendants, and in an exchange of shots the fireman was killed by a shot from the passenger. Judgment on a verdict of murder was affirmed.

William E. Mikell.

CRIMINAL LAW. (Larceny — Property Subject to Lien.) Wash. — In State *v.* Nelson, 78 Pacific Reporter, 790, defendant is convicted of the crime of burglary in stealing his own horse. The horse was in possession of a livery stable keeper, who had boarded it, and had a lien on it for the amount of his claim. The court holds that while one cannot be guilty of stealing his own property when it is rightfully under the owner's immediate dominion and control, yet one may be the general owner of a chattel while another may have a special interest or property in it, together with the right to its immediate possession, and if, under such circumstances, the general owner takes the property from the person rightfully in possession, he will be guilty of larceny. The theory of the law, says the court, is that the person in possession has added a certain amount of value to the owner's property, which added value becomes property belonging to the lienor, and secured by possession. The wrongful taking of this added element of value seems to be the crime.

That one may be guilty of larceny of property belonging to himself but in the possession of another was recognized as far back as 1429 in an anonymous case, Year Book, 7 Hen. vi, 41, pl. 18, when it was said, "If I bail certain goods to you to keep and afterward I feloniously retake them, I shall be hanged, notwithstanding the property was in me." This doctrine has been reaffirmed in a number of modern cases, as in Henry v. State, 110 Ga. 750. The theory is that the bailee has sufficient property in the article bailed to fulfil the definition of larceny as the taking of the property "of another." The theory of the instant case that the bailee had, by feeding the horses stolen from him by the owner, added that much to the value of the owner's property, and that added value became property in himself, seems at fault. If that is the basis of defendant's guilt it would seem that the indictment should allege the larceny to be, not of the animals, but of the "added value" of the horses. At any rate the adjudged cases do not support the theory of the court in this case, for in many of them nothing had been added to the value of the property by the bailee.

William E. Mikell.

This case is in accord with the well-established principle of law that the person having the general property in goods may be guilty of larceny in taking them from the possession of one who has a special property in them. A. C. B.

The conclusion reached by the court seems clearly correct. It may be doubted, however, if

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the theory of the law is that taking from a bailee who has a right to possession is larceny because he has added value to the chattel, or whether it is not simply because of the fact that the property has been taken from the person who, as against the taker, is entitled to possession. Thus, a person holding goods under an obligation to pay duties on them, or a pledgee holding as collateral for a past debt, can hardly be said to have added value to the articles, yet a felonious taking from them is larceny. Rex. v. Wilkinson, Rus. & Ry. 470; Henry v. State, 110 Ga. 750, 36 S. E. 55. A thief cannot be said to have added value, either as against the owner or the world at large, yet a taking from him by a third person may be larceny. Ward v. People, 3 Hill (N. Y.) 395.

Harry A. Bigelow.

DAMAGES. (Evidence — Future Suffering.) Wash. — The Supreme Court of Washington has recently announced, in a very unpretentious manner, with little attempt at argument, and no citation of authority, a doctrine which appears to be essentially sensible, but which is a little outside the line of the authorities. Most briefly stated, the holding is that the fact that a mangled hand will cause future suffering is such a a matter of common knowledge that in an action for the injury the question of damages from future suffering may be submitted to the jury, though there is no evidence upon the question. It is difficult to see what practical value evidence as to future suffering could have, or, except in cases where expert evidence as to the possibility or probability of future complications is necessary, how even the amount of suffering that would probably result could be made much clearer to the jury by testimony than by their own judgment and experience. Kirkham *v.* Wheeler-Osgood Co., 81 Pacific Reporter, 869.

INSURANCE. (Construction of Policy — "Fire.") U. S. C. C. A. — Western Woolen Mills Co. *v.* Northern Assurance Co. of London, 139 Federal Reporter, 637, turns really upon the meaning of a word but is valuable as well as illustrating a general principle in the construction of contracts. It is held in general terms that the word "fire" as used in an insurance policy, in the absence of language showing a contrary intention, is to be given its ordinary meaning, which includes the idea of visible light and heat. The policy involved in the litigation insured a quantity of wool against loss or damage by fire. The wool became submerged for several days during a flood, which caused spontaneous combustion, with smoke and great heat, by which the wool was damaged and its fiber destroyed, but there was no visible flame or glow. It was argued that as the chemical process which destroyed the wool was that of combustion, the wool was destroyed by fire within the meaning of the policy. This contention, however, is negatived by the court, which holds that while the process is chemically the same, nevertheless oxidation is not referred to as fire unless it results in visible flame.

FEDERAL COURTS. (Jurisdiction.) U. S. C. C. for N. D. of N. Y. — Ingraham *v.* National Salt Co., 139 Federal Reporter, 684 involves an interesting and comparatively novel question relative to conflict of jurisdiction.

Plaintiff in an action in a federal court against defendant, a corporation, procured the issuance of an attachment, which was levied on real estate of the defendant. Pending the action, insolvency proceedings against defendant were instituted in a state court, which, through receivers, took possession of all of defendant's property, including that attached, and sold the same; the execution of a conveyance, however, having been deferred, for the convenience of the purchaser, until final settlement of the insolvent estate. Subsequently plaintiff recovered judgment in the federal court, and an execution was issued, under which the marshal advertised the attached property for sale. Thereupon the state court enjoined such sale in a suit instituted by its receivers against plaintiff, and the marshal, in which the validity of the attachment was attacked held, that while, under the principle of certain decisions of the Supreme Court of the United States, the authority of the state court to deprive the federal court of control of its own process and to draw to itself the determination of the validity of the attachment lien was doubtful, where its own jurisdiction over the property was acquired after the lien attached, yet in view of other federal decisions holding that the levy of an attachment on real estate does not give the court issuing the attachment either actual or construction possession of the land, nor prevent its subsequent seizure by a court of another jurisdiction, the federal court would not enjoin the receivers from further prosecuting their suit, but would await the final determination thereof by state tribunals.

Had this been an attachment of personal property of which the attaching officer takes actual physical possession so that the residue is in the possession of the Federal Court, that court having once taken jurisdiction would have retained exclusive control of the property so that no State court could subsequently interfere with it.

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Re Hall & Stilson, 33 Fed. 527.
Freeman v. Howe, 24 How. 450.
Moran v. Sturges, 154 U. S. 256.
Metcalf v. Barker, 177 U. S. 165.
Pickens v. Roy, 177 U. S. 177.
Weeks v. Fowler, 71 N. H. 221.
Covel v. Heyman, 111 U. S. 176.
Heidritter v. Elizabeth Oil Cloth Co., 112 U. S. 294.

But an attachment on real estate gives to the court which issues it neither actual nor constructive possession of the property, but only creates a lien in favor of the attaching creditor on the estate. Therefore, possession of the attached land may be acquired by any other tribunal in subsequent proceedings, and when so acquired will be exclusive to the extent that such tribunal may order the estate sold free and clear of all attachment liens, transferring such liens to the proceeds of the sale.

In re Christy, 3 How. 292.
Southern Loan & Trust Co. v. Bendow, 96 Fed. 514 at 527.
In re Waterloo Organ Co., 118 Fed. 904.
In re Union Trust Company, petitioner, 122 Fed. 937.
In re Shoe & Leather Reporter, 12 A. B. R. 248 C. C. A.

Lee M. Friedman.

LOTTERIES. (Element of Chance.) Mich. — A holding on the subject of lotteries, which will serve to make more clear a part of the question which has been shrouded in more or less uncertainty, is contained in People *v.* McPhee, 103 Northwestern Reporter, 174. Defendant, who was a merchant tailor, organized as a part of his regular business, a suit club, consisting of thirty members, who each paid a dollar a week. The club met each Saturday night and conducted a drawing, by which the successful member obtained from defendant a suit or overcoat worth twenty dollars. The successful member could then draw out and a new member be taken in. Members were, however, entitled to withdraw at any time and receive from defendant clothing of the value of the money they had contributed to the club, or credit for clothing to be subsequently purchased. This enterprise is held to be a lottery. This holding would seem to go somewhat beyond the ordinary definitions of lottery, such, for instance, as that of Bishop, which states that "a lottery is any scheme whereby one, on paying money or other valuable thing, becomes entitled to receive from him such return in value, or nothing, as some formula of chance may determine." The court, however, points out that it was not the intention of this, or of other definitions, to exclude cases in which there were no blanks. The case of Ballock *v.* Maryland, 20 Atlantic, 184, is cited, and its language expressly approved. It is there said, in effect, that the court is not justified in deciding a thing not to be a lottery simply because there can be no loss when there may be considerable contingent gain, or because it lacks some element of a lottery, according to some particular definition, when it has all the other elements, with all the pernicious tendencies which the State is seeking to prevent. A number of other cases dealing with the same subject are also cited, particularly, State *v.* Interstate Savings & Investment Co., 60 N. E. 220; Wooden *v.* Shotwell, 23 N. J. Law, 465; United States *v.* Olney, Fed. Case No. 15,918; State *v.* Mumford, 73 Mo. 647; McDonald *v.* United States, 63 Fed. 426, and Equitable Loan & Security Co. *v.* Waring, 117 Ga. 599, 44 S. W. 320.

PRACTICE. (Costs—Suing in Forma Pauperis.) N. C. — In Christian *v.* Atlantic & North Carolina Railroad Co., 48 Southwestern Reporter, 743, the Supreme Court of North Carolina agrees that an administrator is entitled to sue as a pauper, although there is some contrariety of opinion as to just what must be shown in order to entitle him to so sue. The main opinion by Clark, C. J., holds that an administrator is within section 210 of the Code, allowing any person to sue in *forma pauperis*, on making affidavit that he is unable to give security, and that where the action is for the death of intestate, it is not necessary to show that those who may share in the recovery cannot give security. The latter portion of this holding proceeds upon the theory that the recovery will not be assets of the estate, and that the plaintiff sues in his own right and is individually liable for costs. In view of this fact, it is concluded that it is not necessary to show that those to whom the recovery would be distributed are unable to give bond, but merely that the administrator is personally unable to do so. Douglas, J., concurring in the result, is of the opinion that it is not necessary for the administrator to be personally a pauper in order to sue as such, and construes the statute to mean that an administrator is entitled to sue as a pauper if he is unable to give a bond as administrator. Walker, J., with whom Montgomery, J. concurs, is of the opinion that an administrator, while entitled to sue as a pauper, must show that he is unable to comply with the requirement as to giving bond for costs, and must further make it appear that those for whose benefit the suit is really brought are also unable to comply with the statute.

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PRACTICE. (Waiver by Counsel in Argument.) **Neb.** — A peculiar trial point which we do not remember to have seen raised before, is disposed of in Langdon *v.* Clarke, 103 Northwestern Reporter, 62, on a principle analogous to that of estoppel. The action was for assault and battery, and plaintiff's attorney stated in argument, that the return of a verdict for nominal damages, as requested by defendant's counsel, would brand every person on the jury as dishonest, and that if they did not find the plaintiff entitled to substantial damages, he wished them to return a verdict for defendant. The assault was undisputed, and there was practically no question as to the existence of a cause of action for at least nominal damages. A statute in Nebraska provides that a new trial shall not be granted on account of the smallness of damages in an action for an injury to the person. Under this statute and the circumstances mentioned, the court holds that the returning of a verdict for defendant, although unsupported by the evidence, was not error, where a verdict for nominal damages would have been supported by the evidence, plaintiff being bound by the utterances of his own counsel, inviting the jury to return such verdict under such circumstances.

In some states the court will dismiss where the opening statement of counsel discloses facts preventing a recovery. This practice has never, the writer believes, been recognized in Nebraska. The case in hand, it is true, is one of inviting an adverse verdict rather than admitting the case away, but the analogy is strong. The evident propriety of this decision therefore suggests the soundness of the practice of dismissing on the opening statement.

Frank Irvine.

PROPERTY. (Franchise — Exemption from Taxation.) **Va.**—That an exemption from taxation embodied in the charter of a corporation is not property or a property right passing to its successor in interest on a foreclosure sale, is maintained in Lake Drummond Canal & Water Company *v.* Commonwealth, 49 Southeastern Reporter, 506. The Dismal Swamp Canal Company of Virginia was organized under a charter containing a perpetual exemption from taxation of all property rights and franchises of the company, its successors and assigns. The Virginia Statutes (Code 1887, §§ 1233, 1234) provided that a sale under a mortgage or trust deed executed by a corporation on all its works and property, should pass to the purchaser all the property of the corporation other than debts due to it, and that on such conveyance, the said company should be ipso facto dissolved, and that the corporation created in consequence of such sale and conveyance should succeed to all such franchise rights and privileges, and perform all such duties as would have been had, or should have been performed by the first company but for such sale and conveyance. The property of the Dismal Swamp Company was sold under mortgage foreclosure and it is held that, in spite of the charter and statutory provisions, the exemption from taxation did not pass to the purchaser at the sale.

PROPERTY. (Water Courses.) **W. Va.** — A very clear illustration of the distinction between surface waters and waters belonging to a natural water course is contained in Uhl *v.* Ohio River Railroad Company, 49 Southeastern Reporter, 378. It is there declared that overflow waters of a natural stream in times of ordinary flood or freshet flowing over, or standing upon adjacent low lands, do not cease to be part of the stream, unless and until separated therefrom so as to prevent their return to its channel. The practical effect of the decision is, of course, that such overflow waters, if regarded as part of the stream, cannot be diverted or their natural course otherwise impeded as may be done with surface waters. The specific facts to which the principle thus laid down is applied are briefly these: A railroad company constructed an embankment between a river and adjacent low lands, inserting in the embankment a culvert for the drainage of the lands and to permit the escape of overflow. This culvert, however, was not of sufficient size to permit water behind the embankment to rise and fall as fast as the stream did, with the result that at a time of flood the waters overflowed the embankment in great quantity, and with considerable force, and injured the premises and the person owning land on the other side of the embankment. This, the court holds, was an invasion of that person's rights and an unwarranted diversion of a water course.

SALES. (Liability of Assignee of Bill of Lading.) **Ala.** — No direct precedent seems to exist for the holding contained in J. C. Haas & Co. *v.* Citizens Bank of Dyersburg, 39 Southern Reporter, 129, although it was the outgrowth of a transaction not at all unusual in the ordinary course of business.

Plaintiffs purchased a certain number of sacks of corn meal which the seller consigned to them, having the bill of lading made out to himself. He then assigned the bill, accompanied by a draft on the buyer, to a bank, to which the draft was made payable and which paid the seller for the goods. The draft was sent for collection to

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bank in the city where plaintiffs lived and they paid it, before the arrival of the meal. When the meal came, it was found that the quantity was several sacks short and that a number of the sacks had been torn, allowing the meal to escape and become dirty and worthless. Under these circumstances it is held that the bank to which the bill of lading was assigned became, by the assignment, the absolute owner of the goods and of the debt due from the buyers, and that on payment by them of the draft the bank became liable for the shortage in quantity and for the injured sacks to the same extent that the original seller would have been had there been no assignment.

The case, however, is not barren of authority. The court cites, as fully sustaining its views, Eufaula Grocery Co. v. Mo. Nat. Bank, 118 Ala. 408, 24 South, 389; Finch v. Gregg, 126 N. C. 176, 35 S. E. 251, 49 L. R. A. 679, and Searles Bros. v. Smith Grain Co., 80 Miss. 688, 32 South, 287. To these may be added Miller v. Bank, 76 Miss. 84; Landa v. Lattin, 19 Tex. Civ. App. 246, 46 S. W. 48. Upon the other side, the court cites, Blaisdell v. Bank (Tex.) 75 S. W. 292, 62 L. R. A. 968; Tolerton v. Bank, 112 Iowa, 706, 84 N. W. 930, 50 L. R. A. 777, and Schlichting v. Railroad Co. (Iowa), 96 N. W. 959. To these may be added Hall v. Keller, 64 Kan. 211, 67 Pac. 518, 62 L. R. A. 758. See also 1 Michigan Law Review, 65, 690, note 49, L. R. A. 679.

F. R. M.

If followed, this case would be of great importance and likely to produce injustice. The principle involved is practically the same as that laid down in Landa v. Lattin Bros., 19 Tex. Civ. App. 246, which was followed by Finch v. Gregg, 126, N. C. 176. The former case even held that the assignee of the bill of lading became liable for breach of warranty in the contract made by the assignor. The case, however, was practically overruled by a later Texas case, S. Blaisdell, Jr. Co. v. Citizens' National Bank, 96 Texas, 626. This later Texas case is by far the better reasoned one. In line with it and contra to the case under discussion, is Tolerton & Stetson Co. v. Anglo-California Bank, 112 Ia. 706, which states clearly the probable intentions of the parties in all of these cases viz. — that "the assignment of the draft and bill of lading was to transfer to the bank" the vendor's "right to the price, and give it the possession of the goods as security." The case under discussion criticises this statement and holds that the assignment of the bill of lading transfers title to the goods, and that the court has no right to treat this as simple security. It bases its decision upon the technicality of the law that an unexplained transfer of the bill of lading transfers title. As the case went up on demurrer, no direct explanation of the assignment appeared.

The decision is far from satisfactory in its reasoning. It is hard to see how the defendant can be held liable on the contract made by the assignor to which he was not a party, or how he can be held to have made any contract of his own, when he simply collects the money due on the contract made by his assignor. It would seem that in order for him to be liable he must have been a party to the original contract, or have made one himself. We do not believe the case is likely to be generally followed.

This case should be clearly distinguished from the common case of taking the bill of lading in the vendee's name and sending it to a bank with a draft attached, which draft the vendee is obliged to pay before he can get the goods. In the latter case, of course, there can be no question that the bank is not liable.

Oscar Storer.

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THE LIGHTER SIDE

A LEGAL NIGHTMARE

By Donald Richberg

PRELUDE

The order of events was this:
A comic opera, floundering deep
In legal tangles, followed by
Two cocktails, lobster, restless sleep!

THE DREAM

I dreamed I came to try a case
Into a darkened room,
'Twas oceans broad and mountains high
And solemn as a tomb.

Then sudden, as by magic wand,
Blazed forth a thousand lights;
A judge strode out in royal robes,
A jury in pink tights!

The prisoner came from bar to bar,
And then my toil began;
I knew him guilty for he was
The chief comedian!

He hardly let me say a word,
He joked the judge until
I raised objection; when the judge
Roared out to me: "Keep still!"

And next the judge's "lady friend,"
Just off upper Broadway,
Danced in and joined him on the Bench
And stroked his locks of gray.

I made a motion to dismiss,
The lady said: "Absurd;
O judgie dear — my latest song
I'm sure you have not heard."

Then ten policemen did a dance
With ten new divorcees,
Who were in court to get more cash
To pay attorneys' fees.

I dreamed the judge's "lady friend"
Sung seventeen encores,
While jury, "cops" and divorcees
Marched up and down in fours —

I dreamed the judge did "buck and wing"
Upon his flat-top desk;
The minute clerk, as Father Time,
Did sixty seconds burlesque.

I dreamed a lobster came to court
And loudly wailed its grief;
It had been stolen and it swore
My client was the thief.

I tried to speak; the prisoner rose
And said he'd never seen
A lobster that was not well read,
While this was plainly green.

I tried to speak; the bailiff came
And beat upon my head,
Then took the prisoner from his box
And put me there instead.

I tried to speak; the court announced
Regardless of my fury,
That, for my bold contempt, I should
Be tried now by the jury!

The jury held me innocent
Of law and so in fact
Acquitted; which, for ladies, was
A gentlemanly act.

The judge said: "Bosh, try him again;
Hang him, 'twill please this lady;"
Which, as a court procedure, seemed
To me a trifle shady.

The jury all retired to
Effect a change of mind;
The judge kissing his lady friend
To show justice was blind!

I felt my doom impending when
There rose a mighty din;
The jury change had taken place
As soldiers they marched in.

The judge was seized and forced to eat
A deadly legal pill,
While all the crowd joined hands and sang
"The Flag of Bunker Hill."

Chicago, Ill., December, 1905.

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By the Way. — The crier had a bad cold, so that the duty of making the opening proclamation fell to another court-officer who, as it happened, had never acted as crier. This officer had heard the proclamation often enough and knew it by heart, but this is what happened. The deputy-sheriff opened the door and announced "Court!" The substitute crier rapped on his desk, and, within and without the bar, those present arose and stood in silence while the judge passed to his place.

Then the substitute began, — "Hear ye! Hear ye! Hear ye!" His voice seemed to him horribly loud, and all recollection of the words to follow suddenly left him, but he pulled himself together and went on bravely. "All persons having anything to do before the Honorable the Justices of the Supreme Court in the Jury Session thereof now sitting at Boston within and for the County of Suffolk may draw near and give their attendance and they shall be heard."

At this point he sat down, but seeing the judge looking up in surprise, he saw his mistake and springing to his feet, he added:

"*By the way, gentlemen*, God save the Commonwealth of Massachusetts."

Over Examination. — It was at the trial of a heavy damage suit in a Worcester court. A boy of about fifteen years, gave important testimony for the plaintiff, and when the lawyer for the defendant, a prominent Boston man, arose to cross-examine, the case looked bad. After a few preliminary questions, the lawyer pounced upon his witness, and asked with whom he had discussed the case before the trial. The witness answered that he had talked with no one.

"Do you mean to tell me that you have not talked with the plaintiff's attorney?" the lawyer asked.

"Oh, yes, I talked with him," was the reply.

"What did he tell you to say?" thundered the questioner.

"He told me to tell the truth, and I have told it," was the reply.

The plaintiff got a good verdict. — *Boston Record.*

Choate Went too Deep for Him. — Rufus Choate was once counsel in a suit on trial in Nantucket in which a large amount of ship property was involved. The opposition had as a witness Capt. Stephen Bailey, a local celebrity, whose every sentence told that he was sailor born and bred.

Mr. Choate questioned him politely, but in a way that the old sailor didn't quite relish, because he didn't understand what it led to. Finally the captain said, in reply to a question: "Mr. Choate, you remind me of an old right whale!"

Mr. Choate was, of course, astonished, and rebuked the witness for his impertinence. In defense Captain Bailey answered: "I don't mean any impertinence at all, Mr. Choate; but when you go down there's no telling when you are coming up!"

Mr. Choate excused the witness. — *Boston Herald.*

He Forgot His Creed. — At the conclusion of a murder trial before the late Judge K——, holding a central New York circuit a few years ago, the citizens filled the court-room to hear the verdict. A prominent attorney from another county, who was also a prominent official in the Presbyterian Church, and was well known to the judge, was retained in the following case. He entered the room just before the jury returned, and was directed by the sheriff to a vacant space behind the judge's chair. The throng, seeing his movement, followed him and crowded him against the chair. The verdict was guilty. The solemn duty of imposing the death sentence devolved upon the judge, but when he attempted to rise he was pinned fast. Annoyed, he cast an angry glance around to ascertain the cause of the obstruction. The attorney, disconcerted by the annoyance of the judge, pleaded the authority of the sheriff, saying: "I am here by grace," whereupon the judge retorted: "But I am here by election." — *Case and Comment.*

Naturally Dom Smart. — An Irishman with no education, having found that he had a natural gift of gab, had become something of a pettyfogger in a country "deestrict." One day he was engaged against a lawyer of

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education and learning, but little accustomed to the methods of the country pettyfogger or county justice, which, to say the least, would scarcely have passed muster in a court of record, but at the same time were popular in the country districts where this blatherskite held sway with conscious pride to an admiring throng, which always gathered when there was a "case on." The Irishman had come up to the expectation of his admirers and had caused several laughs at his citified opponent's expense during the trial, and by the time he got to the jury was pretty well puffed up with his own importance. On the jury was another Irishman, who seemed to have taken great interest in the proceedings. He was seated in the front row of chairs, looking up into the face of his swelled-up fellow-countryman, who, now began his address as follows: "Gintlemin of the Jury, it has not bin me fortchin to attind any ov the universities or the hoigh schools, or the noight schools, or the business colleges, an' its little iducation thot oiv had at all — faith an' it is not aven a common school iducation" — "but ye'r naturally dom smart," broke in our Irish juryman, while a roar of laughter punctured his inflated compatriot. Being defeated, he wabbled around for a few moments and then fell down completely, while his elated opponent walked off with the verdict. — *Ohio Law Bulletin.*

A Happy Jury. — Even the dreary job of searching for eminent domain cases is brightened occasionally by a vision of better things, and the heart of the moral reformer may be gladdened by evidences of the national rising against the grafter in the painful pages of the Annual Digest, from which this choice bit was culled. Does it not suggest a way to attract good men to jury duty? "In proceedings by a railroad company to condemn land for a right of way, it was error for the counsel, witnesses and jurors to mingle freely together, dining together, and for meals, cigars, and drinks to be furnished by petitioner's representatives. *Detroit & T. S. L. R. Co. v. Campbell,* 103 N. W. 856."

O'Conor to a Nantucketer. — Charles O'Conor, the distinguished New York jurist, passed the last year of his life on the island of Nantucket. He spent considerable of his time walking along the streets and crooked lanes of the quaint old town, and was a noticeable figure with his black frock coat, broad-brimmed black soft hat, and white hair. With hands clasped behind and head bent over, he would walk along seemingly in deep thought.

One day while thus engaged, on the opposite side of the street stood one of the town-fathers, who wishing to attract his attention, said: "Good morning, Mr. O'Conor. The walking is better on this side."

"Walk there, then," replied Mr. O'Conor, as he continued his tramp.

Russia Progressive in Litigation. — A decidedly curious and unusual litigation is now engaging the attention of a Russian civil court.

The widow of an officer killed in the battle of Mukden has sued the general in command of the division to which the head officer was attached for $40,000 damages for the loss of her husband, which, she claims, was caused by the defendant's gross negligence. Plaintiff declares that she has evidence to prove that when the general was withdrawing his forces in obedience to Kuropatkin's order to retire, he forgot all about the detachment commanded by plaintiff's husband, and sent him no orders. The detachment was, therefore, left behind alone, and was accordingly surrounded and annihilated by the Japanese.

Advice From Her Lawyer. — Timothy Coffin, who was prominent at the Bristol County bar half a century ago, once secured the acquittal of an old Irish woman accused of stealing a piece of pork. As she was leaving the court-room she put her hand to her mouth, and, in a audible whisper, said:

"Mr. Carfin, wha'll I do with the por-ruk? "

Quickly came the retort: "Eat it, you fool, the judge says you did'nt steal it! " — *Boston Herald.*

Perhaps More Appropriate than She Thought. — She was a nice, bright-looking young woman, and they were evidently talking politics. A former judge of the Municipal Court of Boston had been mentioned as a candidate for mayor of the city.

"No," she said, "I don't think it is right for a man who has been judge of a *criminal* court to be mayor. It doesn't seem to jibe.'

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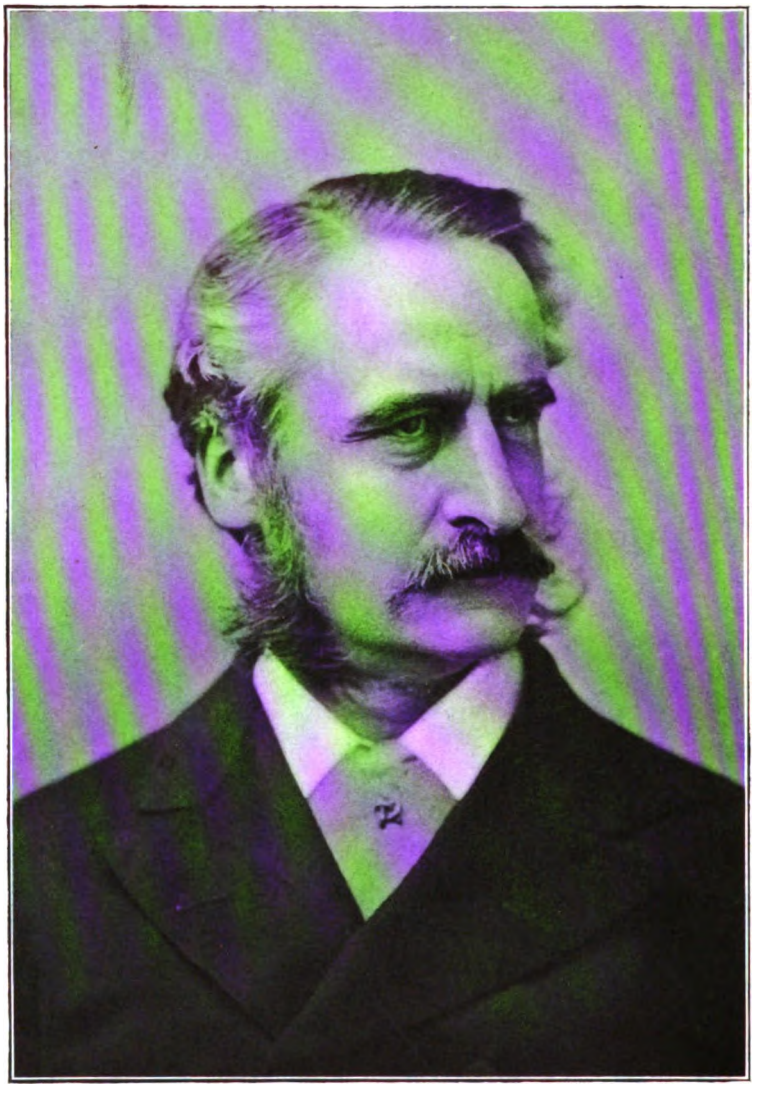

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The Green Bag

Vol. XVIII. No. 2 BOSTON February, 1906

WHEELER H. PECKHAM

By J. Noble Hayes

ANOTHER great legal light, which had burned steadily and brightly for half a century at the New York Bar, went out, when Wheeler H. Peckham, the "Old Roman of the Bar," as he was called, died, in harness, on the 27th of October last at the desk where he had labored during so many years of his useful and noble life.

Mr. Carter, his life-long friend, full of honor and years, had preceded him but a few months, and Mr. Peckham's memorable eulogy delivered at the Appellate Division of the Supreme Court upon his dead friend was still fresh in the memory of those who heard it, when the announcement of Mr. Peckham's death bereft the legal profession of the country of another of its great leaders, not less beloved and honored.

To attempt to give any adequate account of the long and active life of such a man, devoted as it was to the absorbing duties of his profession and to the public service, or to record its achievements, or to measure its great influence, in the brief limits of a magazine sketch, would be presumptuous indeed. The most that will be attempted here will be to sketch briefly its merest outlines, referring to some of his great cases, and to recall for the moment the marked characteristics of Mr. Peckham as a lawyer, a citizen, and a man.

In writing of Mr. Peckham, one recalls, first of all, his striking and distinguished personality. He was above the medium height, gracefully and compactly built, erect, broad of shoulder, with a massive and well-developed head of great power. His strong aristocratic face possessed beauty of feature and nobility of expression, and although it was habitually stern and wore a mark of austerity, it was susceptible of instantaneous illumination and the glow of kindly feeling and humor. He gave at once the impression of being a *mettlesome* creature, highly and delicately organized, with all his rugged strength. The color never forgot its way to his cheeks. He looked, as he was, a true American gentleman of the old school, and every inch the thoroughbred — a personality never to be forgotten.

He was born in Albany, January 1, 1833; his father being Rufus Wheeler Peckham, one of the foremost jurists of his day, a member of the Court of Appeals of the State of New York, justly honored for the probity and independence of his character and his devotion to the duties of his high office. Mr. Peckham's mother, Caroline A. Peckham, was a daughter of Dr. William B. Lacey, former rector of Saint Peter's Parish in the City of Albany. Judge and Mrs. Peckham perished on the steamer *Ville de Havre*, which sank in mid-ocean in November, 1873. But the story of the heroism of Judge Peckham and his wife in their last moments upon the sinking deck of the ill-fated ship, survived the wreck. His memorial will be found at the end of the 53d New York Reports.

In the Resolution presented by the Bar of the State upon Judge Peckham's death and adopted by the Court, we find this encomium upon the father of Wheeler H. Peckham:

"We find some consolation in the belief that during the short interval between apparent security and certain death, he viewed the frightful situation with character-

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istic serenity, and in the very moment of extremest peril, when the relentless waters closed over the sinking ship, he was still loyal to all the impulses of a brave and noble nature."

Young Wheeler was educated at the Albany Academy and Union College, which he entered as a Junior. His health broke down in 1851, and he was obliged to leave college and travel abroad, which he did until 1853, when he returned from Europe and entered the Albany Law School, from which he was graduated. In 1854, he went into partnership with his father and Lyman Tremain in Albany, where he took high standing in his profession and became a leader of the Junior Bar.

In 1855, Mr. Peckham married Miss Annie A. Keasbey of Newark, New Jersey, who survives him. He continued the practice of law in Albany until 1856, when he was again attacked with a hemorrhage of the lungs and was compelled to give up practice, and travel. He went a second time to Europe accompanied by his wife and brother, where he remained a little over a year. On returning he went West, and finally settled in St. Paul, Minn., where for five years he practiced his profession, and became one of the leading lawyers of that section.

Mr. Peckham loved, in later years, to recount his experiences at the Western Bar, where he engaged in general practice in the State and Federal courts, and received a thorough training in criminal law, which he there practiced quite extensively, as was usual with the leading lawyers of that day.

Having regained his health in the dry climate of the Northwest, Mr. Peckham returned to New York City in 1864, and entered the law firm which then became Miller, Stautenburg and Peckham, afterwards Miller, Peckham and Dickson, and finally, Peckham, Miller and King, so continuing until his death.

Mr. Peckham's fame as a lawyer rested upon the surest foundations, built up as it was out of the solid masonry of professional achievements, unaided by any attempts to bring himself into prominence. He was singularly modest and unostentatious. Few of his great compeers at the Bar had had so wide and varied an experience as he. His native talents had not been confined in practice to any particular department of law, but had ranged over the whole field. He was equally versed in constitutional law, the law of real estate, and trust, corporation, commercial, and criminal law, and occasionally appeared in important patent cases. His argument before the United States Supreme Court in the Bell Telephone Cases, reported in 126 U. S., is a model of clearness and force, and displays his familiarity with that branch of the law which is so generally relegated to the specialist. In all of these fields, and many others, he achieved brilliant success and established precedents that are landmarks in the law.

Mr. Peckham frequently appeared before the United States Supreme Court. The last case which he argued there was the case of South Dakota *v.* North Carolina (192 U. S. 290) in which he successfully maintained his contention that the original jurisdiction of the Federal Supreme Court under the United States Constitution (Art. 3, Sec. 2) over controversies between two or more states, extended to a suit by the state of South Dakota as the donee of bonds issued by the state of North Carolina and secured by mortgage of a railroad belonging to that State, to compel the payment of such bonds and subject the mortgaged property to the payment of the debt.

He also, at an earlier day, argued the celebrated case of New Hampshire *v.* Louisiana (108 U. S.) where a similar constitutional question respecting interstate controversies arose.

For many years Mr. Peckham was the counsel of the Union Trust Company of New York. He reorganized it after its temporary suspension in 1873, and continued its counsel down to the time of his death. During that period he saw its stock increase in value from

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below par in 1873 to its present market value of $1,400 a share. It is but fair to assume that its counsel played an important part in the building up of the institution. Mr. Peckham was the safest and most conservative of advisers, and became a great authority upon all questions of trust and corporation law, and he was constantly and laboriously engaged in advising upon and litigating such questions as they arose in many of the great financial operations of the day. The Reports are filled with his cases.

One of his celebrated cases for the Union Trust Company was the case entitled, The People *ex rel* U. T. Co. *v.* Coleman, 126 N. Y. 433. In that case the tax office had assessed the Union Trust Company upon the market value of its entire capital stock, with certain deductions. Mr. Peckham contended that the Company could only be taxed on the *actual capital* of the corporation together with its surplus, and that they, being invested in United States Securities, were exempt. The Court of Appeals so decided, reversing the courts below, and holding with Mr. Peckham that the company's capital stock and the shareholders' capital stock were two things essentially and in every material respect different, only the former and the surplus being within the purview of the taxing act. This is a *cause celèbre* and established a precedent of great importance.

It will be a surprise to the profession to know that of all the great cases in which Mr. Peckham had been engaged and the many briefs that he had written, his office does not contain a single one. While other lawyers were dotting their i's and crossing their t's in their learned briefs, hoping that posterity, if not the Court, would notice their perfection, and filing them away for future use and as a record of their life-work, Peckham, in the plenitude of his knowledge and splendid vigor of his mind, wrought them out in labor, used them and threw them away, utterly regardless of their value and his fame, leaving at the end of his long and brilliant professional career, "not a rack behind." Nothing could be more characteristic of him, and his modest estimate of his own work. Those who have had occasion to read his briefs and arguments, know them to have been models of clearness, learning and literary style, cleared as they were of all the rubbish of the case, and eternally to the point.

Rarely does it fall to the lot of any one lawyer, however well-equipped, to render such a great and conspicuous service to the cause of justice and the State as Mr. Peckham rendered to New York, with other great lawyers, in destroying the Tweed Ring in 1873.

Mr. Peckham had crossed swords with Charles O'Connor, the great leader of the New York Bar, in a suit in the United States Supreme Court in 1868 (7 Wall 16, 26) and Mr. O'Connor, always on the lookout for able men, was so impressed with him that when he was appointed counsel for the People in 1873, to prosecute Tweed and his associates, he selected Mr. Peckham as his chief assistant; and the principal burden of the great criminal trial, which resulted in Tweed's conviction, fell upon Mr. Peckham, although he was ably assisted by O'Connor, Lyman Tremain of Albany, Peter B. Olney, and the late Col. Henry C. Allen. Not only the criminal trial, but the civil suits brought against Tweed to recover the stolen moneys of the City were conducted by Mr. Peckham, he having been appointed Special Deputy District Attorney and Special Deputy Attorney-General for this purpose. For several years he devoted himself with Mr. O'Connor to the destruction of the infamous Ring. The actual conviction of Tweed, for which Mr. Peckham was mainly responsible, broke the power of the Ring, and its fragments were scattered to the four corners of the earth. Tweed escaped from his jailor, but was afterwards retaken, and ended his days in prison.

The most important result of the overthrow of the Tweed Ring was the reclama-

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tion of the courts by the impeachment of the Ring Judges, Barnard, Cardozo, and McCunn. Tweed and his lawless gang were not secure in power until they had debauched the Supreme Court; when that had been accomplished, the political subjugation of the City was complete. The task of overthrowing this thoroughly intrenched and corrupt régime was a Titanic one, but "there were giants in those days" and Wheeler H. Peckham was one of them; and the result proved that Charles O'Connor did not err in judgment when he selected him to lead the attack upon the redoubtable Tweed, defended as he was in the criminal suit by two such veterans as David Dudley Field and John Graham, and the then young, but brilliant, Elihu Root. It is doubtful if so able and stubborn a defense was ever made for any criminal at the American Bar as was made by the masterful and invincible Field, the greatest legal strategist of his day, and his associates, for Tweed.

Mr. Peckham was never heard to claim any particular credit to himself for this great legal victory, so far reaching in its consequences, so pregnant with the fate of American institutions. The eyes of all the world were upon New York in those days. Peckham's were on Tweed, the public enemy, and defiler of the courts of Justice, in which he practiced. Relentlessly he pursued him until he accomplished his conviction and the destruction of his band of plunderers. The service that Mr. Peckham and his associates rendered to the cause of good government during the Tweed régime was of national importance.

Thus, early imbued with the real spirit of Reform, Mr. Peckham never ceased to battle for good government and the protection of the courts until the day of his death.

He was appointed in 1876, by Governor Tilden, a member of the famous "Commission to devise a plan for the Government of Cities in the State of New York," of which Wm. M. Evarts was Chairman and James C. Carter, Simon Sterne, and other eminent lawyers, were members. Of this Commission Bryce says in his *American Commonwealth:*

"The Commission, of which Mr. W. M. Evarts was Chairman, included some of the ablest men in the State, and its report presented March 6, 1877, may be said to have become classic."

He was several times president of the Bar Association, and it was while he was serving in that capacity that he was largely instrumental in instigating the proceedings against Judge Maynard.

He was appointed district attorney of New York County by Grover Cleveland, but after a very short service retired in consequence of ill-health.

He was associated with the writer in 1900, as counsel for the *New York World*, in proceedings against Mayor Van Wyck and Dock Commissioner Charles E. Murphy, J. Sergeant Cram, and Peter F. Meyer, and in the subsequent proceedings before Governor Roosevelt for the removal of Mayor Van Wyck, growing out of charges in connection with the famous "Ice Trust." His examination of the mayor in proceedings before Mr. Justice Gaynor was a masterful performance and as successful as it was brilliant.

In 1904, he acted as counsel in the Bolte case and secured the removal of Civil Justice Bolte by the Appellate Division. He acted in this, as he did frequently in public cases, without compensation.

Mr. Peckham's last public service was as Chairman of the State Commission appointed by the Governor under an Act of the Legislature to inquire into the causes of the delay and expense of the administration of justice in the City of New York, commonly known as the Law's Delay Commission. He took the deepest interest in the work of the Commission, which he never lived to see entirely accomplished. His health began to break down during the last year of its existence, and he attended its sessions often by a great effort.

There has not been a time since the

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Tweed days when Mr. Peckham has not been a leader of the Reform Movement in the city of New York. He was untiring in his devotion to public duty, although he cared not in the slightest degree apparently for public applause, but was as indifferent to it as he was to official honors.

He was president of the People's Municipal League in 1893, and a leading member of the Committee of Seventy which elected Mayor Strong, and president of the City Club for many years. To enumerate his public services would require a review of the history of New York for the past fifty years.

Any just estimate of Mr. Peckham's abilities as an advocate must include most of the qualities that have distinguished great lawyers and advocates in all times — quickness of perception, comprehensiveness, analysis, memory, abstraction, and the power of generalization — these were parts of his natural equipment. But, perhaps, his most distinguishing and preëminent ability lay in his keen and quick perception of the vital point of a case and his extraordinary power of condensation and lucid statement. No one of his time surpassed or equalled him in this respect. He conveyed his clear thought in the purest and most unaffected English, seeming to have searched vocabularies for the fewest and most apt words with which his meaning could be expressed. His literary style was terse and epigrammatic, and often unintentionally picturesque, and was essentially modern.

The writer remembers hearing Mr. Peckham make an argument in the Court of Appeals in a most important case against a formidable opponent, the late Colonel James, in *twelve minutes*, which, in the opinion of the lawyers who were present, could not have been more perfect and complete and convincing had he taken an hour. The title of the case was "Matter of Steinway (159 N. Y. 250)." It involved the common law power of a stockholder of a corporation to examine its books, and came up from a divided court. When Colonel James had concluded a very able argument for the appellant, there were twelve minutes left before the hour for adjournment. Mr. Peckham began as if he had the whole day before him, but speedily warmed up, as was his habit. The very marrow of the subject was laid bare at once, the fallacy of his opponent's argument exposed, the principle and the law of the case tersely expounded, and the argument rounded out and completed within the allotted time, so that if there had been no clock in the room to point the hour, by common consent the argument should have concluded when and where it did. It certainly was a remarkable performance, and was the subject of much comment among the lawyers who came down to New York on the evening train that night.

Mr. Peckham was forceful rather than "tactful" in argument. His method was to conceive the just principle of the cause, and planting himself squarely upon it to fight his way by irresistible logic and eloquence to the truth, as he discerned it in its application.

As an orator and an advocate he had few rivals. Always interesting and convincing, on occasion, when thoroughly aroused, he attained great heights of eloquence and power, carrying all before him. He was master alike of the fiercest invective, or the warmest and most inspired advocacy. An example of the former is the peroration of his speech against Judge Maynard, which he delivered at a meeting of the Bar of New York held in Cooper Union in 1888, as follows:

"If Maynard is elected, it will mean that elections are not hereafter to be decided by popular vote, ascertained in the manner provided by law, but by the skill of the knave and the fraud of the cheat, and next, thereafter, by the man who commands the greatest physical force."

Of an entirely different order of eloquence was the speech upon the death of James C.

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Carter, which he delivered within half an hour after the news of Mr. Carter's demise reached him. It was as follows:

"James C. Carter has passed away within the last twenty-four hours. I have been requested to call the fact to your honors' attention, and I understand that I have the permission of the Court so to do.

"He was a man, great as lawyer, as jurist; greater still in his individuality, as a citizen of New York and of the United States. The whole Bar, throughout the whole country knows him well. There is not a court that ever sat to which he addressed himself that was not confident that light would be thrown upon the questions under consideration, and that not only of a purely intellectual character, but the light that shines because of the moral attribute of the man.

"I do not feel that I can do any justice to that which has been asked of me. I never felt so utterly inadequate to do anything I was called upon to do. I cannot speak properly and reasonably of him, for I not only suffered in common with the great mass of the Bar, with the great mass of the Bench, everywhere, but I have the personal peculiarity of the loss of the best friend I ever had. I know your honors will pardon me. Fifty years — forty years to be more precise — forty years we have been warm, close, personal friends — I the gainer always. He did everything for me that a friend could do for another. And therefore, when I come to ask the Court to recognize the great loss that we have suffered, I feel that you will excuse me, and I am compelled to say that I have suffered the greatest, and am utterly unable to picture as I should, the great merits of this man.

"I have but to ask that in commemoration of the man, whom we all regard as *princeps*, *facile princeps*, and who has been taken away from us in the full measure of a grand life, that we shall give to him the respect of an adjournment until such time as it may please the Court."

Many of his most effective and beautiful speeches were entirely lost. Such was the fate of his speech in the Senate Chamber at Albany in 1902 on the bill to prohibit political contributions by judicial candidates; and his great speech before the Board of Estimate and Apportionment in 1900, which killed outright the proposed Ramapo contract.

But after all, it was as a *man* that Wheeler H. Peckham exerted perhaps his greatest influence, and will be remembered by those who knew him with the deepest affection and reverence — an influence which he, in his extreme modesty, was entirely unconscious of. The exaltation of his character was felt by every one who came in contact with him. He would have nothing that was not the very *best*, and was the most inveterate and uncompromising foe of every sham and false pretense. Unsparing and relentless in his exposure of chicanery and fraud, and in his denunciation of whatever tended to lower the high standards of life, his heart was free from malice, and he was absolutely without continuing personal resentment, and the most humane and forgiving of men; charitable, generous, and in his final judgments, always just.

He was gifted with an abundant sense of humor and a ready and caustic wit, which made him a most delightful companion: one had to be ever on the alert not to lay himself open to his playful thrusts. The writer here desires to make confession that a few years ago, after a commemoratory ceremony in which he and Mr. Peckham had taken part with no little feeling, Mr. Peckham took him aside, and with the merriest twinkle in his eye and the pleasantest of smiles on his face said, "Hayes, whatever you do, don't ever attempt to write my obituary!"

One of Mr. Peckham's defects of character was his almost entire lack of hope, and yet it was allied to one of his greatest virtues. A man with hope in his heart is ready for any combat, but it is a strong and resolute soul that can fight when hope is dimmed. Such was Mr. Peckham. The sustaining

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power of hope was not essential to him if he but knew that he was right. His very hopelessness became the hope of others for they knew he could not be disappointed nor dismayed. Oppressed in later years with the gloomiest forebodings for the future welfare of the Republic which he loved so well, he was foremost in every movement to better existing political and social conditions in the city and state in which he lived, as well as in the nation. He was absolutely to be relied upon to support cordially and actively any just cause which needed a bold champion without regard to its popularity or the effect of its advocacy upon himself. It was his outspoken independence in the Maynard campaign that cost him a seat upon the United States Supreme Court Bench. But it was not in the nature of poetic justice, that it should have been lost to him entirely, through his efforts to defend the purity of the Bench of his own State; and he had the supreme satisfaction of seeing his brother, to whom he was devotedly attached, receive the appointment, which had been denied to him in all save its honor.

The unique and commanding position which Wheeler H. Peckham held at the Bar of the nation, and in the community in which he lived, was not the result of pre-eminent intellectual ability alone, but was equally a moral achievement. His pure and unselfish life stands out in bold relief against the debased commercialism and political degeneracy of his time.

Fearlessly he confronted the evils of his day wherever he encountered them. When the cause was weak and unpopular, and needed support, which more politic men withheld, his ringing voice was heard summoning citizens to their duty. It was in such crises, which have frequently arisen in New York in the past quarter of a century, that the people were accustomed to look to Mr. Peckham for aid.

The influence which Wheeler H. Peckham as a lawyer, a citizen, and a man, exerted in his unostentatious way upon the age in which he lived and upon those about him, can never be measured. He struck down vice and corruption wherever he met them, and upheld and defended virtue and truth, which he typified in his own life.

The death of such a man is not his loss; his works and his example remain to encourage those who in this and succeeding generations will be found striving to uplift the standards of professional and civic life.

Certainly, of such a man it may be justly said that the world is better for his splendid life, and his epitaph might be written in the words of Plato:

"There can no evil befall a good man whether he be alive or dead."

New York, N. Y., January, 1906.

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THEORY AND DOCTRINE OF TORT[1]

By Melville M. Bigelow

§1. Legal Right

THE sphere of action of a citizen, in his relation to the law, is found in his rights, privileges in the sense of permissions, and duties. What a citizen may lawfully do is determined by his legal rights and privileges; what he must do is determined by his legal duties. These duties, however, only correspond to the rights and privileges of others; hence a man's rights and privileges, limited as they are by like rights and privileges in others, express the extent of his sphere of action as a citizen under municipal law. But it will be found important to consider duties independently, in any endeavor to state the law of torts; indeed, it would be fairly out of the question to state the law adequately in terms alone of legal right.

It is of first importance then to get a clear conception of the meaning in law of right, privilege, and duty, as these terms are to be understood. Legal rights are of two orders; those of the first or highest order are available ordinarily as a general ground of action or defense, those of the second order only as defense, or as a very limited ground of action. The term "legal right" is, however, commonly used of rights of the first order, while those of the second are commonly called, or at any rate treated, as privilege in the sense of mere permission. That distinction will be followed in this book; the present section will deal with legal right accordingly, as right of the first order, to be called the higher legal right, or full legal right, or simply legal right.

What is meant by "legal right?"[2] The general answer is, whatever the judge, or judge and jury, in a particular case may decide. As a matter of fact, most cases in the higher courts are cases in which the judges must decide the question of right. Such indeed, is the complexity of human affairs that even "natural" rights, so-called, and rights already strictly defined, may be drawn in issue so as to raise a question which must wait upon the decision of the judge in regard to the law of it.

But it is important to know what governs the judge; for he is not permitted to decide a case arbitrarily. What then does, in fact, or at least, in theory, influence and determine the decision in regard to the particular right? Some of the influences, it is plain, may be of a personal or a sub-legal nature, such as the judge's own views of political economy, politics, ethics, the pressure of public opinion,[1] or whatever else of the kind the case may suggest. Such things must always be taken into account. These, however, are usually (though not always) minor influences. The greater influence, the paramount influence, in cases in which it comes into play, may be called the influence of the dominant force in society, so far as there is such an influence and in proportion to its power; law being conceived to be the resultant of the dominant force in conflict with other social forces — the dominant force as deflected by the conflict.

The dominating force in society may be equality of dealing and of access to the opportunities of life, as (apart from slavery and the position of the dependent classes) it was in America until in recent times; it may be inequality, as it is now; it may be some more special force, as has been the

[1] In advance of publication in the 8th ed. of the writer's work on the Law of Torts to be concluded in the March number of the Green Bag.

[2] Several paragraphs are now taken in substance from Lecture III in Centralization and the Law; that lecture being by the present writer.

[1] See Dicey, "Law and Public Opinion in England." According to Professor Dicey's admirable work, public opinion *influences* the law. This differs from the resultant of the dominating force, spoken of *infra*, in that the latter, as here conceived, *is* the law.

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case in English history, and may be the case hereafter in America. Bearing in mind this conflict of forces and their resultant, and remembering the personal factor in the judge, what determines the judge, or is supposed to determine him, in deciding the point of right is found in a general conception which may be put thus:

Legal right broadly is what the dominant force in society, deflected more or less by opposition, requires or authorizes; in other words, what it wills. As the term has been understood under conditions of equality, that is, as the courts under such conditions appear, in theory, to have taken it, it is based on the idea that, subject to existing rules of law and procedure, and the personal factor in the lawgiver, men should be free to live and to have, and to carry out their reasonable purposes in any reasonable way they will, or shortly, on the idea of freedom to do whatever is reasonable. And taking the word "reasonable" as meaning what the dominant force in society can, in the conflict of forces, maintain as expedient and desirable, which must be its meaning in law, the same idea of legal right must hold of inequality, or whatever force becomes dominant in the State. The difference will be found only in the application of the idea to concrete cases; freedom to do what is reasonable must obviously have narrower play under inequality than under equality, but that is all. In either case, on the idea of freedom to do whatever is reasonable rests, in theory, the whole law of rights, natural, judicial, and legislative; "in theory," but the practice has not always agreed with theory, for the law contains many anomalies, the survivals of spent forces in society, which are still more or less in operation, and these survivals, or anomalies, restrict freedom as it would not otherwise be restricted.[1]

[1] On that subject, see Lecture IV, of Centralization and the Law. The Benthamites fell into deadlock in regard to freedom. They held that a man should be permitted to do whatever he pleased if he did not violate the law. But to enter into contract, especially in combination, is so far to give up freedom. The word "reasonable," adopted by the courts, avoids the deadlock.

The dominant force in society differing at different times, it follows that the law of one period should not be taken as the guide for another, except in so far as, notwithstanding the change, the conditions of society remain for the particular purpose the same, or except in so far as the change may not have affected particular branches of the law. The subject of torts is largely, but not entirely, an example of the exception. The dominant force in society, whatever it may be, has, and probably will have, no quarrel in general with the law of torts, as a law of damages, as it has been laid down in the past to our own day. The law of this subject appears to be suited to most conditions and changes; not necessarily, but as a matter of indifference, as not worth the trouble of making over.[1] The result is that in dealing with the law of torts we need not, apart from the newer phases of combination, much concern ourselves with social changes, however great. Nothing short of a general upheaval and reconstruction of the law from the foundation is likely to disturb, in any substantial way, the present structure which we call the law of torts, as a law of damages.

As a matter of fact, the greater part, in point of bulk, of the American law of torts, was worked out during the nineteenth century under conditions of practical equality, so far as the white race was concerned. What the law would have been had inequality (in the North as well as in the South) or some other antagonistic social order prevailed, no one can tell; but it is probable

[1] And so it is not a matter of abstract principles or principles which are *per se* of an eternal nature. The law of torts, as we have it, does not much bar the way of social changes; so let it stand. *That* must be the attitude towards it of any dominating force. The limitations of logic, though still real, are, therefore, probably less in the law of torts than in most other branches of the law.

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that it would have differed materially from what it is, a hint whereof is given by the law in regard to the negro race in the Southern states of the Union under slavery. And, indeed, the only considerable part of the law of torts which to-day is unstable is that which relates to combinations tending to inequality, the subject, that is to say, of the contest going on between capital and labor and between the public and capital. Not until the social center of gravity on these subjects becomes fixed will the law become stable; tendency is all that at present can be seen.

We fall back now to the question, what is "reasonable" as the word is used above.

This must often turn on reasoning, wherein men may and will differ, lawgivers as well as other men. This is true even of rights sometimes called absolute, rights of life, liberty, and property. For, after all, complex elements constantly enter into the composition of what at first appears simple enough. When may life be taken, if at all? When, in a complex case, is a man wrongfully imprisoned? What of the legal right between two men in trade, where in a particular set of facts one of them finds that he has been deceived? In a certain peculiar case has another trespassed upon my land? Learned counsel may answer these questions one way, while the judge answers them another, both answering on defensible lines of reasoning.

It is plain then that the validity of reasoning cannot be the test of legal rights in such cases, for when men may well differ, how shall the real validity of the reasoning be determined? But there must be an end of question — *interest reipublicæ ut litium finis sit* — and hence the decision of the competent authority must be accepted and settle, so long as it stands, the question of right. In other words, the question of legal right, when a matter of reasoning at least, is, as we have already said, what the lawgiver declares.

That is somewhat indefinite, and alone would leave the question much at large. But the lawgiver has been constantly employed in deciding questions of legal right, and in so doing has found a way of providing, and has provided, a body of law, consisting of doctrines and rules growing out of the general postulate of freedom to do what is reasonable, which are calculated to aid in solving future questions of right.

These doctrines and rules make the first limitation upon freedom to do what is reasonable. So far freedom is hedged about and its meaning narrowed. The limitation itself may or may not rest upon good foundation; but in any case the field of doubt is narrowed, so long as the limitation holds. Under the pressure of sound theory, which should shift the center of gravity from mere precedent to custom and the pursuits of men generally, rules not well supported should be constantly passing away — "constantly," for the process must always be going on; still while they live they play their part in the determination of legal rights. Most of the settled rules of law, however, stand upon firm ground and so have properly narrowed the field.

The laws relating to tort furnish examples of both kinds of limitation. But whether of the one kind or the other, they afford great help in determining a question of particular legal rights. The *law* may not decide a given case, for the other limitations, procedure, and the personal factor, must be reckoned with, and the case may further be complex and require reasoning, beyond authority, where men may differ; but it will be found, nevertheless, that the law has much hedged about the difficulties and will go a long way towards settling the specific question. Still it must be said that, even with the help of the most definite rules of law, legal right, when brought in question before the courts, means, in all but the simplest cases, what the judge (or it may be the judge and a jury) decides.

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A general and fundamental limitation of right by law is found in the objects over which the right can extend. The general right "to have" imports, legally speaking, that the object of the particular right is within the control or the authority of the will. Indeed, so far as the question of the existence of the particular right is concerned, control or authority enters into the very constitution of the idea, as limited by law. Apart from cases of right of the lower order, I have no legal right to or over objects beyond my control or authority. Thus I have no legal right to or over light and air beyond me, in the general atmosphere. I have no legal right to the free fish in a stream, though the stream run through my land.

An object is within the control of my will, within the meaning of the foregoing paragraph, when I can exercise control over it. The object may or may not be in my hands or within my reach; enough that there is nothing to prevent my exercising control over it, so far as any interference by others is concerned. I have a contract for the purchase, and conveyance at a future time, of a house; the house is not mine yet, but no one can interfere with my right to become the owner of it according to the contract — *that* is within my control. So far the house is within the control of my will; so far I have a legal right over it. I have seed in the ground, from which a crop is likely to grow; I have control of seed and expected crop, if no one is preventing my exercise of it.

An object is within the authority, as distinguished from the control of my will when I am wrongfully deprived, in whole or in part, of my control over it, without losing title to it, as, for example, when my horse is stolen or otherwise wrongfully taken or withheld from my proper control.

So of the means by which I aim to exercise or obtain a legal right. The means must be commensurate with the end; and I have a legal right to use such means whether within the control or only the authority of my will. But if the means be beyond my control or authority, I can, of course, have no legal right over them and the end desired must as well be in suspense accordingly.

The second limitation upon freedom to do what is reasonable is found in procedure. Rights must always be subject to such modes of procedure as are provided for the administration of justice. As a matter of fact, this, until in quite recent times, has been, and to some extent still is, true beyond what might well be considered reasonable requirement. Historically speaking, and the historical side of the matter still lingers, procedure has been treated practically as if that were the principal matter, and rights have had to take second place, reversing the true order and handicapping justice.

The handling by the courts of the famous statute of Westminster 2, ch. 24, affords a striking example. Intended to ameliorate rules of procedure, the statute was frittered away by endless refinements, until matters became worse, if possible, than they were before; rights were sacrificed every day to the supposed requirements of procedure.

But rules and theories of procedure have undergone much change in recent times, and it is now true in the main that men are free to do what is reasonable, subject to rules of procedure operating only as a necessary narrowing of the field of legal right. It must not, however, be overlooked that these rules may, themselves, require interpretation; and so once more what constitutes legal right is for the judge to decide.

The third and last limitation is the personal factor, by which is meant the personal limitations of the judge himself, or of judge and jury — the bias of the judge, any lack of knowledge or sound judgment on his part, his views of the law, politics, political economy, ethics, public opinion, or other matter. This limitation need not be dwelt upon; it must be an obvious factor in determining questions of right by the courts.

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It is fair inference that the decision may miscarry, and this, too, though no sound objection could be made to the rule or rules of law by which the case may, so far, be determined; still the decision, while it stands, is, and must in the nature of things be, an answer to the question of the particular legal right. The distinction then should be clearly noticed between the general postulate of legal right, together with the rules of law growing out of it, and the determination of the question, by the lawgiver, of a particular right. It is no ground of impeaching the former that the latter has miscarried.

In the ordinary transactions of men the limitations above considered may have little influence. Men assume, and justly assume, that they have legal rights, though few of these may have been specifically determined by law, and act accordingly. This is confidence, without which the affairs of men could not be carried on. Fortunately but the smallest part of the daily transactions of the world ever calls for any legal determination of the matter of right. Indeed, in ninety-nine out of a hundred cases, in the ordinary affairs of life, men know what is meant by freedom to live and to have and to carry out reasonable purposes in reasonable ways. The hundredth case requires the legal counsellor and administrator, and possibly the decision of the judge.

As we have already seen, legal right of the higher order usually furnishes ground upon which one may bring an action against another. It is not always so; sometimes the right is available only in some peculiar way — it may not afford a ground of action at all, since that might not serve the purpose. Thus a man put on trial upon a charge of crime acquires thereby a right to have the prosecution carried forward to a verdict, in the hope, of course, of an acquittal, to clear his good name. Infringement would not, unless it were a case of malicious prosecution, give him a cause of action. But the right to have the prosecution carried through is as truly a legal right as any other; for if it is violated, the accused will be entitled by law to an acquittal.[1] Such cases, however, are exceptional, and for the purposes of this book need only to be mentioned.

It is a corollary of legal right that, among legal rights of the first order, all rights are equal. One right of the kind is as good as another; by the very terms of it any such right will sustain an action or a defense. It is not necessary or accurate therefore to say, as sometimes is said,[2] that when a man sues on a stated claim of right, he must be answered, assuming the claim to be true and existing, by a "superior" right. If a man sue upon such a right, he must prevail, upon proof that the defendant has infringed that right. If, on the other hand, it appears that his claim is answered by legal right, that is enough — the plaintiff's right has not been infringed, not because the defendant's right is superior, but because it is equal to the plaintiff's. The plaintiff has not proved his case. Legal right, in one and the same sense, may be shown by plaintiff and defendant alike.

It is necessary now to inquire what rights are within the domain of the law of torts.

Rights are either of substantive or of procedural law. With procedural rights we are not concerned; this book treats only of substantive law, not of the machinery by which the law is enforced. Rights of substantive law (and indeed of procedural law, but not on the same lines) in accordance with a division and nomenclature adopted from the Roman law, are *in rem* or *in personam*. Rights *in rem* avail against all the world; rights *in personam*, only against cer-

[1] Commonwealth *v.* Tuck, 20 Pick. 356, 365.

[2] Walker *v.* Cronin, 107 Mass. 555, 564; Read *v.* Friendly Society of Stonemasons, 1902, 2 K. B. 88, 96.

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tain defined or ascertainable persons. The typical example of a right *in rem* is a right of property; such a right may be enforced against any one and every one whenever occasion arises. The typical example of a right *in personam* is a right of contract; such a right can be enforced only between the parties to it and their successors. But just as one has the right to enter into contracts freely, so after a contract has been made each of the parties has a corresponding right that others shall not hinder the performance of it without just cause or excuse. It results that a right *in personam may* generate a (*quasi*?) right *in rem*. But the product, it should be noticed, is a very different thing from that which produces it.

The law of torts relates both to rights *in rem* and to rights *in personam*, though most torts are breaches of rights availing against all the world, that is, are breaches of rights *in rem*.

Another way of putting the Roman division of rights will be found helpful, as serving to explain the origin as well as the nature of rights; and that is by saying that rights are paramount or consensual; the first kind designating those which exist independently of the will of individuals; the second, those which come into existence by consent, actual or presumptive. Both kinds of right are paramount in a sense; but the one kind exists originally and of its own efficacy and is universal, while the other is brought into existence, typically speaking, by the agreement of two or more persons, and, generally speaking, governs them alone. Still, even with regard to the latter kind of rights, the judges have found it desirable to hold that the relations of the parties to the thing agreed upon are not in all respects consensual, in the sense that there can be no right or duty paramount to the will of the parties in the subject of agreement, a matter to which further attention will be called later on. The law of torts deals with both classes of rights; with the first class generally, with the second so far as the rights are treated as paramount to the will of the parties. In a word, the domain of the law of torts, so far as rights are concerned, lies in rights paramount, and hence tort, as a ground of action, consists in the breach of rights paramount, that is, of rights established by municipal law, as distinguished from rights created only by consent between two or more persons.

§ 2. Legal Privilege or Permissive Legal Right

Within the domain of torts fall also those legal rights of the second order already spoken of as privilege in the sense of mere permission; the rules for determining which are subject of the present section. Privilege may indeed include the higher legal right, as where it consists in special powers granted by law, of which riparian water privileges would be an example, or where it is absolute, of which exemption of a member of the Legislature from liability for words spoken in that capacity would be an example. In that sense it has been disposed of. But the term is also used, as we have already indicated, of mere permissions. In this sense it falls short of full legal right; towards the person granting it it is now purely negative in character; it does not furnish ground for an action against him. It imports protection, but protection only from an action by the party who has conferred it. Towards third persons it may indeed confer a right of action, as in the case of a license to enter land, where entry is interrupted by a stranger,[1] or in the case of a gratuity, such as gratuitous entertainment.[2] Indeed, this matter of the lower order of right rises in gradation until it reaches and culminates in the legal rights of a disseisor, available in many ways against all the world except the one person who has been disseised. But we are not now concerned

[1] Barnstable *v.* Thacher, 3 Met. 239.

[2] Williams *v.* Hill, 19 Wend. 305; Moore *v.* Meagher, 1 Taunt. 39.

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with the term under consideration in any of its aspects of right as a ground of action.

The conception of privilege thus set forth embraces permission of two kinds: first, permission "by the party," that is, by some person granting it; and, secondly, permission "by the law," or permission paramount, since it is independent of the will of the person against whom it is granted. In either of these cases the privilege may or may not amount to the higher legal right, as the examples already given show.

In the law books privilege in both senses is found under various designations. In the law of defamation it is called "privileged communication;" in the law of trespass to property it is called "license;" and so on. Often the word "justification," taken from the language of pleading, is used as a general, synonymous designation of the idea.[1]

It is important to understand the ground upon which privilege as permission rests, but nothing more than the general ground itself can be stated here. Privilege as mere permission must, of course, rest on terms; otherwise it would be "absolute;" thus amounting to full legal right. It is in effect, if not in terms, conditional on being acted upon in good faith. Permission (short of full legal right) would not otherwise be given; in other words, mere permission turns upon the motive or the intent of the person obtaining it — he has no permission except as his motive is rightful and his purpose in accord with the permission. The significance of this restriction between legal right and conditional legal right will appear later.

Upon what more particular ground privilege rests in special cases or in special classes of torts, can only be shown when the special subject arises in the "Specific Torts" following this General Part. The first class of cases of privilege, "by the party," calls for little comment here. The ground of the permitted party's exemption is consent, which is often expressed by a maxim adopted from the Roman law, "*volenti non fit injuria*" — the man who consents to what otherwise would be a wrong ("*injuria*") is barred of an action for it. Privilege "by the law," or privilege paramount, finds its origin either in duty or in interest[1] and is, of course, limited accordingly.

It will be necessary presently to speak of legal duty broadly, as the converse of legal right in general. Here it should be spoken of in relation to privilege. Duty as a ground of privilege may be official or quasi-official, or only moral, that is, of imperfect obligation. It requires no explanation to show that one must be protected from the necessary consequences, however harmful, of discharging a duty which one is expected to perform. A policeman making report to his superior, an officer serving process, a fireman endeavoring to put out a fire, must be exempt from liability for everything done in the discharge of his duty. The law could not be administered upon any other footing in the first and second of these cases; and, in the third, it would be difficult to find firemen to protect our homes if the law were otherwise than it is.

That privilege may also arise from moral duty is not so obvious; still the fact rests in principle as well as upon authority. The case springs in essence from an instinctive desire for the preservation of the race, a desire akin to that of self-preservation and equally well-founded. It is not directly necessary to put the case upon the ground of political prudence, which sees in it the welfare of the State, though that plainly is a consequence of the first ground. I may well

[1] "Justification" may be of legal right, as in the case of self-defense or defense of property, or it may be of mere permission.

[1] Hebditch *v.* MacIlwaine, 1894, 2 Q. B. 54, C. A.; Harrison *v.* Bush, 5 El. & B. 344; Jenoure *v.* Delmège, 1891, A. C. 73 (Privy Council); Gassett *v.* Gilbert, 6 Gray, 94; Joannes *v.* Bennett, 5 Allen, 169.

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enter my neighbor's premises to rescue his beast from the mire; much more may I enter to save human life; to hold me responsible for harm done in the reasonable discharge of such a duty would be to find the existence of a relation between my neighbor and me which would tend to anything but to bind us together in the organism of the State. Where moral (or indeed official) duty shades into pure voluntaryism, becoming impertinence, may often be a difficult question; but such considerations cannot avail against the existence of the immunity.

When it is said that privilege may grow out of interest, the word "interest" must be taken in the sense, it seems, of legal right, either in the higher or the lower conception of the term. I may have a duty towards my neighbor as my neighbor, from an instinct of humanity; but I have no interest in him simply as my neighbor, except, perhaps, the shadowy interest in his welfare as one of the multitude of men composing the State, and so sharing with me its burdens. The interest required must, at all events, rise higher than desire or even anxiety for another's general welfare.[1]

[1] See Sheckell *v.* Jackson, 10 Cush. 25.

BOSTON, MASS., January, 1906.

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THE THREE DEPARTMENTS OF GOVERNMENT AND THEIR RELATION TO EACH OTHER

By Hon. Charles E. Littlefield.

EIGHTY millions of people in the United States govern themselves, and some eight million other people, by three great coördinate, independent, and each within its legitimate constitutional sphere, supreme departments, the legislative, executive, and judicial. Perhaps it would be more accurate to say that fourteen millions, as, in round numbers, that was all that participated in the last general election, discharge that important function. While, theoretically and rhetorically, ours is a "government of the people, by the people, and for the people," in fact, it is a government of all the people by less than one fifth of the people.

In these three great departments is vested all the power delegated to the United States by the Constitution. All other inherent governmental power not "prohibited by it to the States" is "reserved to the States respectively, or to the people."

Any discussion of these exclusive factors of government involves to some extent a construction of the instrument from which they derive their power and by which they are created. The rules for such construction are perfectly familiar. It must be uniform; the intent must govern; the whole instrument must be examined; the common law is to be kept in view; its operation is to be prospective; necessary implication must be observed; the purpose to be accomplished will afford light; proceedings of the constitutional convention, antecedent history, and contemporaneous and practical construction in cases of doubt, are legitimate considerations. There is, however, one broad, universal rule, which leads all in its importance. "On this subject, also, the Supreme Court has taken such frequent occasion to declare its opinion, as to make it unnecessary, at least, to enter again into an elaborate discussion of it. To say that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers, is to repeat what has been already said more at large, and is all that can be necessary." (12 Wheaton, 332.)

"The framers of the Constitution employed words in their natural sense, *and where they are plain and clear*, resort to collateral aids to interpretation is unnecessary and *cannot be indulged in* to narrow *or enlarge* the text; but where there is ambiguity or doubt, or where two views may well be entertained, contemporaneous and subsequent practical construction are entitled to the greatest weight." (146 U. S., 27.)

This has become axiomatic, and Mr. Justice Harlan well said in a recent case (1900), "Cases almost without number could be referred to in which the same principles of constitutional construction are announced." (181 U. S., 321.)

It is not proposed in this address to discuss the Constitution with the technical accuracy of a brief, as its purpose lies along broader and more general lines than those of nice and fine distinctions. Its scope is to be suggestive rather than exhaustive.

In the light of experience and existing conditions we may consider these departments as great factors in practical government. To this end historical research, comparisons with other systems afford no light that is commensurate with the learned and laborious plodding involved. Beyond it, except in cases of doubt, we have no occasion to

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go. The Constitution itself is our ample foundation.

Legislative.

The legislative was first provided for. Article 1, section 1, says: "All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." Thus it follows that all federal legislative power is exclusively vested in the "Senate and House of Representatives." While acting within its constitutional limitations Congress is only restrained by the disapproval of the President, which can only be overcome by "two thirds" of each branch.

If a bill is held by the President for ten days (Sundays excepted), it becomes a law without his approval, unless Congress prevents its return by adjournment.

After providing for the manner in which these bodies shall be constituted, the qualification of the members, their organization and procedure, the first affirmative power conferred is found in section 7: "All bills for raising revenue shall originate in the House of Representatives, but the Senate may propose or concur with amendments, as on other bills."

It is significant that the first power conferred was the fundamental and vital power of taxation, and that its originating was expressly confined to the body that directly represents the people to be taxed.

Section 8 confers seventeen distinct affirmative powers upon "the Congress," and closes with the comprehensive grant of power "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof."

Section 9 contains eight limitations upon the powers of "the Congress." Further affirmative powers are conferred upon the Congress in three instances in Article II, relating to the executive; in four instances in Article III, relating to the judiciary, and two in Article IV. Nearly five eighths of the Constitution is devoted to affirming and limiting the legislative power. The first eight amendments are practically limitations of legislative power, and section 1 of the Fourteenth Amendment contains most important limitations upon State legislative power. This extreme care in establishing the legislative landmarks shows the importance attached to that department by the builders; and their belief in the necessity of guarding against its abuse. It is in harmony with their declared purpose. Morris "concurred in thinking the public liberty in greater danger from legislative usurpation than from any other source." . . . (Journal Con. Convention, Madison, Scott ed., 401). "Mr. Wilson, after viewing the subject with all the coolness and attention possible, was most apprehensive of a dissolution of the Government from the Legislature swallowing up all the other powers." (Id., 536.) Hamilton said: "We have seen that the tendency of republican governments is to an aggrandizement of the legislative at the expense of the other departments." (Federalist, 316.) That the stern and inexorable logic of events has amply demonstrated that without the controlling force of a written Constitution, these forebodings would appear to have been too well founded, is beyond question true.

The formulating of these specific provisions to been forced by an authoritative judicial tribunal was the highest manifestation of the wisdom which so fully characterized that great convention. Thus did it "make assurance doubly sure and take a bond of fate." It is doubtful if they realized the potentiality of the Constitution in repressing legislative ebullitions inspired by popular clamor based upon ephemeral excitement or unreasoning prejudice.

It constitutes the essential difference between a democracy and a mobocracy, and there is no tyranny and oppression so unen-

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durable and intolerable as that of the mob. It is no doubt true that ultimately the people reach wise and sane conclusions. Our system rests upon that idea. But in order that such conclusions may be reached, it has been found essential that the way thereto must be hedged in by such restraints as will make them the result of intelligence and reflection, rather than prejudice and excitement. If the temporary popular demand was always crystallized in legislation, regardless of constitutional limitations, we would have a choice assortment of incongruous, heterogeneous, extreme, draconian, conglomerate of law, disfiguring our statute books, State and Federal, in which it would take at least "a pair o' patent double-million magnifyin' gas microscopes of hextra power" to discern a trace of "the voice of God."

The most tragic event in our recent history shows the evanescent character of public sentiment. In September, 1901, President McKinley was foully assassinated. All christendom was shocked. The public indignation was intense. The dastardly crime was committed in the State of New York, whose laws wholesomely punished it with death. But many States have no death penalty, and there was much earnest discussion as to the inadequate protection furnished under such circumstances in those States. The courts of New York, orderly, firm, and dignified, rose to the occasion and meted out justice to the miserable assassin, "promptly and without delay" in a manner that left nothing to be desired, and that may well be emulated everywhere.

The demand for Federal legislation that would adequately protect everywhere was universal, insistent, and imperative. The statesman who did not have some specific waiting to be enacted into law did not measure up to the demand of the hour. It excluded for the time being every other idea from the public mind. It was the first question considered by acting President Roosevelt in his first message. After appropriate and eloquent reference to the murdered President, he insisted that "the Federal Courts should be given jurisdiction over any man who kills, or attempts to kill, the President, or every man, who by the Constitution or by law is in the line of succession for the presidency, while punishment for an unsuccessful attempt should be proportioned to the enormity of the offense against our institutions."

The crime was anarchistic and he declared "anarchy is a crime against the whole human race; and all mankind should band against the anarchist." . . . "This great country," he said, "will not fall into anarchy, and if anarchists should ever become a serious menace to our institutions, they would not merely be stamped out, but would involve in their own ruin every active or passive sympathizer with their doctrines."

The subject occupied about one tenth of the message and closed with this resounding period: "The American people are slow to wrath, but when their wrath is once kindled, it burns like a consuming flame." There can be no doubt the executive discharged its full duty. The House and the Senate engaged in a lively rivalry as to which would most promptly and completely meet the exigency. Both formulated and passed bills. The debates will show with what difficulty they were confined within constitutional lines and reasonable procedure and penalties.

Even then the Senate bill contained a unique section creating a Praetorian Guard, unlimited as to number, mysterious as to powers and duties, defined by regulations to be made by the Secretary of War, and to be kept by him a profound secret. This happy and hysterical thought emanated from the prolific brain of a distinguished Democratic Senator. These bills promptly died in conference. Their demise excited no remark, much less regret. Attention had been directed to other things.

Sessions have come and gone, and so far as I know there has been no demand

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from any quarter for this once indispensable legislation. How soon we forget. I can conceive of nothing better calculated to kindle that wrath and fan that flame than this foul deed, and yet this "consuming flame" fiercely and quickly burned itself to ashes that have long since been scattered by the four winds of heaven. I have no doubt we legislate overmuch. The fact that Legislatures are in session seems to involve the idea that they accomplish nothing unless they branch out in various and new avenues of legislation. The tendency of our system is to encourage the idea that an act of the Legislature is the panacea for every ill to which the body politic is heir. We are prone to disregard the fact that there is a zone controlled by natural law, immutable principles, in which legislation is either inoperative or disastrous. The line of demarcation exists, though it may be incapable of precise delimitation. There is a too much prevailing impression that the enactment of a law accomplishes the desired result, regardless of the fact that unenforced law is little better and oftentimes worse than no law. Popular energy is too often exhausted in procuring the enactment of law, and nothing is left to compel its enforcement. Effective, thorough, and continuous enforcement of existing legislation would probably render unnecessary a large portion of the new legislation persistently clamored for and result in the repeal of much ill-conceived legislation. For instance, what occasion is there for more drastic penalties, when existing moderate penalties have not been imposed? Additional machinery is not needed until the inefficiency of the existing machinery has been demonstrated.

Attention should be called here to a most vicious practice of loading up appropriation bills with all kinds of legislation, civil and criminal, public and private, in its character, that now obtains in the United States Senate. Through senatorial courtesy anything, "fish, flesh, or fowl," can be tacked on to an appropriation bill.

"No money shall be drawn from the treasury, but in consequence of appropriations made by law." (Con., Art. I, sec. 9, p. 7.)

And appropriation bills must therefore pass or the wheels of government cease to revolve. Many a bill or job that could not otherwise receive favorable action rides comfortably, serenely, and securely along on its appropriation vehicle. Very little of such legislation ever receives any consideration at the hands of a committee.

During the last two Congresses 574 acts of public, permanent legislation were passed, and 176, or thirty per cent of these, were carried through on appropriation bills. This indicates the extent of the abuse.

The original act conferring exclusive jurisdiction over navigable waters on the Secretary of War, giving absolute and unlimited control over weirs, wharves, bridges, and other structures in and over navigable waters, under which autocratic powers are exercised, affecting property rights millions in value, rode through on an appropriation bill without having been referred to or considered by any committee. As original propositions they would be ruled out of order in the House. The Senate does not hesitate to vote them in order, the rules to the contrary notwithstanding. It is the cause of more unwise and vicious legislation than all other devices combined. Abuses are so inevitable that this practice should be abandoned, and the House would be justified in resisting such amendments in a matter of public importance, even though an appropriation bill failed and an extra session became necessary. If Congress passed only the appropriation bills during a session it would do well; as it is well to remember that since the days of Hampden and Pym the power of taxation and the expenditure of the taxes raised has always been deemed essential to the preservation of the liberties of the people, and the proper exercise of that power alone is the discharge of the highest and most important constitutional

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function vested in Congress by the Constitution.

EXECUTIVE.

By virtue of Article II, section 1, "The executive power shall be vested in a President of the United States of America." His term is four years. Provision is made for his election; his qualifications are prescribed; vacancies are provided for. His compensation is not to be increased or diminished during the period for which he shall have been elected. He is to take an oath "to faithfully execute the office of President of the United States," and to "protect and defend the Constitution of the United States." He is commander-in-chief of the army and navy and of the militia of the several States when in the service of the United States. He may grant reprieves and pardons, except in cases of impeachment. He can make treaties "by and with the advice and consent of the Senate" . . . "provided two thirds of the Senators present concur." He can nominate and "by and with the consent of the Senate" appoint certain specified officials, and Congress is authorized to control this power, by vesting the appointment of such inferior officers "in the Courts of Law, or in the heads of departments," a substantial modification of the executive power. He has power to fill all vacancies "that may happen during the recess of the Senate." "He shall from time to time give to the Congress information of the state of the Union and *recommend to their consideration* such measures as he shall judge necessary and expedient; he may on extraordinary occasions convene both houses, or either of them, and in case of a disagreement between them, with respect to the time of adjournment, he may adjourn them to such time as he shall think proper. He shall receive ambassadors and other public ministers; he *shall take care that the laws be faithfully executed;* and shall commission all the officers of the United States." He is removable only by impeachment. His affirmative powers could be concisely stated in a short paragraph.

This summary clearly shows what "the office" is that he is sworn to "faithfully execute," and that he is not roaming at will upon a boundless sea, without chart or compass, as in these days is sometimes intimated. The oath neither adds to, nor takes from, his powers. Under the treaty-making power a persistent effort is being made to aggrandize the executive and the Senate at the expense of the legislative department. It is a vicious and unconstitutional pretension, and of necessity it must deprive the country of its greatest safeguard. The right is asserted by reciprocity treaties to amend tariff schedules. Standing alone, considered apart from the other provisions of the Constitution, the treaty-making power is unlimited and without any qualification. "He shall have power by and with the consent and advice of the Senate, to make treaties, provided two-thirds of the Senate present concur." (Con., Art. II, sec. 2.) "And all treaties made, or which shall be made under the authority of the United States, shall be the Supreme Law of the land." (Con., Art. VI.)

Is this power unlimited? Clearly not. A treaty, like an act of Congress, with which it stands on an equal footing, may be an unconstitutional exercise of power. For instance, if a treaty undertook to deny the essential rights of liberty, secured by the express terms of the Constitution to the people, it would, as would a like act of Congress, be unconstitutional and void. In order to be "the Supreme Law of the Land" it must be made "under the authority of the United States." It would be absurd to claim that it was the "Supreme Law of the Land" if made in express violation of the provisions of the Constitution, from which alone it derives its "authority."

This power, then, is necessarily limited by the provisions of the Constitution that expressly or by fair implication are inconsistent with the exercise of unlimited power.

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In other words, a treaty is only valid when it operates within its legitimately prescribed constitutional scope.

When any question of power is raised, we have only to examine the Constitution in that particular to see whether there is any provision that is expressly, or by fair implication, inconsistent with the exercise of that power. A treaty and a federal law are equal in degree. The last expression, whether of treaty or law, if consistent with the prior law or treaty, governs. They are alike subject to the supremacy of the Constitution. Otherwise treaties could amend or repeal the Constitution.

Tested by this standard you cannot amend or repeal tariff schedules by a treaty. It would emasculate two provisions of the Constitution. First, the first and greatest legislative power conferred upon the House of Representatives. "All bills for raising revenue shall originate in the House of Representatives." It is conceded that a bill lowering or raising a tariff schedule is a "bill for raising revenue." The exclusive right to originate these bills is conferred upon the House. The President and the Senate cannot originate revenue measures either directly or indirectly without depriving the House of Representatives of this exclusive right, expressly conferred to originate "all bills for raising revenue." That the measure is termed in one instance a "bill" and in the other a "treaty" is immaterial, as they both involve "raising revenue," are equally the supreme law when enacted, and are, therefore, in legal essence identical. Second. Such a treaty would be in direct violation of Article I, section 8, "The Congress shall have power, — To lay and collect taxes, duties, imposts, and excises." It is not open to argument that the power to levy and collect taxes, duties, and imposts is vested in "the Congress." Is it conceivable that the same instrument would at the same time vest the same power in the President, "by and with the advice and consent of the Senate," and place it within the power of the President, thus aided, to absolutely emasculate the Congress of a power that was believed to be the most vital and important conferred upon it, and make that provision of the Constitution a mere "sounding brass and tinkling cymbal."

It was always insisted in the Constitutional Convention that the people, through the House, should exercise this great power.

Mr. Gerry said "it was a maxim, that the people ought to hold the purse strings." (Journal of Con. Convention. Madison. Scott, 1st Ed., p. 158.) Dr. Franklin thought "that it was always of importance that the people should know who had disposed of their money and how it had been disposed of. It was a maxim, that those who feel can best judge. This end would, he thought, be best attained, if money affairs were to be confined to the immediate representatives of the people." (Id. 306.)

Gerry insisted again that "it was of great consequence. It was the corner-stone of the accommodation" (id. 348), and after a discussion of the treaty-making clause, Col. Mason declared that it was a part of the compromise, and as to the Senate, said: "The purse strings should never be put into its hands." (Id. 481.) Mr. Randolph "regarded this point as of such consequence, that, as he valued the peace of this country he would press the adoption of it." (Id. 518.)

Enough has been quoted to show that if the President and the Senate can originate and pass revenue measures and thus eliminate the House of Representatives, the builders of the Constitution unwittingly destroyed what they believed to be its chief corner-stone, which they had fashioned with extraordinary care. That is an unwarranted impeachment of their intelligence. The possible consequences of the doctrine emphatically negative it.

An act of Congress requires the concurrence of the House and Senate and the approval, direct or indirect, of the President. A treaty is an international contract requir-

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ing the concurrence of the President, the Senate, and some foreign nation or potentate. If one schedule can be raised or lowered, all can be. If one can be repealed in whole or in part, so may they all. It can be done with one or a number of treaties; with one nation or several. In this respect the power is unlimited. A revenue law enacted after full consideration by the House and Senate, and approved by one President, if this theory is sound, can be repealed by another President, the Senate concurring, with the aid of any foreign nation that will become a party to the international contract. It would be quite possible for the President and Senate, with the aid of a complacent foreign nation, to change our fiscal policy from protection to free trade. If there was no foreign nation sufficiently accommodating, who shall say it could not be created for the occasion while you wait, and the wait need not be unduly prolonged.

Moreover, it is to be borne in mind that such a change could not be overcome by the Congress and the will of the people re-established, because such action would require the concurrence of the Senate, and the Senate in such a case would hardly concur to reverse itself.

Here you would have the Congress tied hand and foot. Moreover, it can be argued with considerable force that this pretension is inconsistent with the power vested in Congress, "to regulate commerce with foreign nations." Why should plenary power to regulate commerce be vested by the same instrument in two different departments? I believe the pretension to be utterly without foundation, and that the House of Representatives never will abandon its greatest constitutional prerogative of originating revenue legislation.

While patronage and the sole power of removal by the executive had, in 1835, according to Webster, reached an "alarming height," I doubt if, as he feared, it "seriously threatens the government's future prosperity." His contention that the executive alone could not remove has long been exploded. The President now nominates, subject to confirmation by the Senate, 7,233 officials (not including the diplomatic and consular service). Twenty-six, who are not subject to such approval, and heads of departments and other officials, appoint 284,652; in all, 291,911. Nearly all of these 284,652 are under the civil service rules, and in theory, at least, not subject to removal for political reasons.

Under a recent order of the Postmaster-General 183,018, with salaries of over $25,000,000, are supposed now to have a right to reappointment on their merits, against even a congressional recommendation. It is said to be an effort to remove that service from politics, and should that prove to be the fact, as I trust and believe it will, will result in an extensive limitation of executive power, a limitation it is to be observed that has been voluntarily imposed by the President himself.

Popular discussion seems to have vested the President with prerogatives that were omitted in his constitutional grant of powers. His only constitutional connection with legislation, that I have been able to find, is the approval or disapproval of acts of Congress and from time to time giving to Congress information of the state of the Union and recommending "to their consideration such measures as he shall judge necessary and expedient." A recommendation once made, his full power is exercised, and its fate, from a constitutional standpoint, is of no concern to him. Beyond question, it is the duty of the Congress to consider carefully and respectfully his recommendations. The President's wishes or desires are also entitled to fair consideration. It is also the duty and privilege of each member of Congress to reach his own conclusions, as he alone is responsible for his action, even though his view of the public welfare requires him to reject a recommendation.

The judgment upon which a member acts

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should be his own and not another's. To that his constituents are entitled. The Executive recommends; the Congress legislates. A prevailing impression seems to ignore this relation as illustrated by the following quotation from the press: "According to most trustworthy accounts the President will begin the fight for his pet subjects of legislation with more or less advantage over his opponents." That is, the legislation accomplished by the Executive will be limited only by the degree in which he is able to overcome the opposition of any branch that can legislate, in this particular instance, the Senate. He is placed in the position of vigorously fighting, not to say lobbying, for legislation.

I do not understand that the President desires to be placed in or that he undertakes to assume this stand-and-deliver attitude. Some of his friends would put him in a position of usurpation, and the Senate in the humiliating position of being driven into registering an executive decree. It is no reflection upon the President that other men differ with him in opinion.

If it is assumed that it is legitimate for a President to coerce legislation by a "fight" for it, a failure might discredit him. His oath is to "faithfully execute the law," not to make it, and no true friend of the President will attempt to place him in the position of invading the province of a coördinate branch. The abuses inherent in such a course are too obvious for specification and discussion.

A paper evincing much research, learning, and ability, read before this Association last year, took, as it seems to me, rather extreme ground as to the executive power. It has the unique distinction of ascertaining the extent of those powers without once quoting, referring as a whole to, or relying upon the provisions of the Constitution defining them. When constitutional provisions are in the main clear and unambiguous as here, the value of results from research and reasoning *aliunde* the Constitution is not apparent, as the ripened fruit of the argument, to which brief reference will be made, will, I think, abundantly show.

As the culmination of the argument this proposition is laid down: "If Southern States abridge the privileges or immunities of Federal negro citizens, the President on his own initiative can and should prohibit such action, whether Congress legislates or not." This abridging could be done only by legislation, and that is already prohibited by the second section of the Fourteenth Amendment of the Federal Constitution. Such legislation would be absolutely void. If the President should also "prohibit such action," it would still be void and only void. Federal legislation would add nothing, much less a President's proclamation. Whenever such action was invoked to infringe the rights of a "Federal Negro citizen," or any other citizen, it would simply fall to the ground, and the President could not make the fall any greater or more signal by any effort of his to "prohibit" it. This appears to be a generalization that does not materialize.

Another proposition is, " If Southern States deny the right of suffrage to Federal negro citizens on the ground of race or color, the President, without waiting for penalizing statutes, can and should use every means, civil, military, or both, to stop it." Apprehending that this remedy is somewhat indefinite Andrew Jackson is invoked as to how this can be done, and it is said he "threatened to hang Calhoun and every other traitorous nullifier, and South Carolina's nullification went down under the mailed hand of a patriotic and dominating President." The inference, if I understand it, is that Roosevelt should call in the reporters, not confidentially but for publication, and *à la* Jackson, threaten to hang, draw, and quarter, without benefit of clergy, Vardaman, and every other recalcitrant, if they did not "stop it." The smile that would be evoked by such an inflammatory

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interview would hardly be confined to Vardaman and his co-conspirators. While Jackson did, and was capable of doing many extraordinary things, it ought to be said that he did not assume to be a law unto himself even in that crisis, as while he made use of some vigorous rhetoric, he did not expect to be understood as marking out an extra-constitutional method of procedure. The first thing he did when the news of Haynes' proclamation reached him was not to proceed, "without waiting for penalizing statutes," but to ask Congress *for an increase of powers adequate to the impending collision.* (Parton's "Life of Jackson," V. iii, p. 472.) He "was resolved, and avowed his resolve, that the hour which brought the news of one act of violence on the part of the nullifiers, should find Mr. Calhoun a prisoner of State upon a charge of high treason." (Id. 474.) Clearly contemplating a proceeding under and not independent of the law.

It was only in case of open rebellion that he intended under "martial law," to proceed to hang Calhoun, a proceeding that did not involve trampling the law under Jackson's feet. (Buell.) Trembling with emotion, with tears dropping on his knees, Jackson swore, "by the God of Heaven, I will uphold the laws" (Parton's, 462), not ruthlessly violate them.

We are not directly informed how the President is "to stop it." To be sure, he is "to stop it," but how? As he is to act independently of the law he cannot use the civil power, as that operates only by virtue of the law. He is not to wait or be hampered by such prosaic things as "penalizing statutes," and, as far as I can see, he is reduced to the "military" power. How is this to be made available for results?

Most of the obnoxious provisions that "deny the right of suffrage" are contained in Constitutions. He might order the people to call a convention and amend the Constitution, and if they refused, as they no doubt would, he might invade each offending State with the United States Army, remain on its soil until the convention was called and had acted favorably; the result of their action had been approved by the free and unintimidated voters, the Legislature had passed and the Governor had approved legislation in harmony therewith, and the election officers had carried out and continued to carry out in good faith the provisions thereof. This would, no doubt, require continuous occupation of the territory. Meanwhile he would, no doubt, suspend by proclamation the constitutional provision which guarantees "to every State in the Union a republican form of government" and "take care that the laws be faithfully executed" by depriving them of the protection of all law. It is difficult to imagine how he could use the military in any other way in discharging effectively what is claimed to have been demonstrated as his power and duty. The conclusion is so impracticable and extraordinary that it seems to discredit effectively the reasoning by which it is reached. It may be said, in passing, that either President Roosevelt was not impressed by the argument, or he was recreant to his duty, as during his recent triumphal progress through the South he did not anywhere refer to this denial of suffrage much less attempt "to stop it."

Absolute discretion within the proper constitutional limits is not peculiar to the Executive, but is equally applicable under the same conditions to the other departments. The enlarged constitutional powers of the President were not the supreme issue in the last national campaign. The Philippines, Panama, Isthmian Canal, and the trusts involved legislative and not executive power; at least no stretch of executive power. The pension order, while challenged, was, in no sense, a "supreme issue."

The assertion in the paper that extreme or extra-constitutional executive action received an "overwhelming endorsement by the people" in that campaign, proceeds upon an entire misconception of the facts,

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though superficially it might be thought correct. Roosevelt received 7,620,332 votes in 1904, as against 7,220,077 for McKinley in 1900. Before "an overwhelming endorsement" can be predicated upon these facts it should appear that under relatively similar conditions his vote at least exceeded McKinley's.

I assume that the growth in population since 1900 was at least in proportion to the preceding decade, and in that case it would be two per cent per annum, or eight per cent for the four years. No reason is perceived why the vote should not increase in the same ratio, so that Roosevelt's vote in 1904 to equal McKinley's in 1900 should be eight per cent, or 577,606 larger than 7,220,077, or 7,797,683. On the contrary, he fell short of that number 177,351. What created the general impression of "an overwhelming endorsement" was the fact that Parker fell short of Bryan's vote 1,280,985, giving Roosevelt an abnormally large popular majority. The total vote in 1904 was 435,723 smaller than in 1900, when, with an equally general expression of the people at the polls, there should have been eight per cent, or 1,117,176 more than in 1900, showing that 1,552,899 voters failed to vote, as compared with 1900.

The overwhelming result was not caused by more votes for Roosevelt, but by less for the other tickets, so that the people can hardly be said to have given an overwhelming endorsement of anything.

Judiciary.

"The judicial power of the United States is vested in one Supreme Court and in such inferior Courts as Congress may from time to time ordain and establish." (Con., Art. III, sec. 1.) Hamilton believed that the judicial was "beyond comparison, the weakest of the three departments of power." In the essential right which it has asserted and maintained to pass upon the constitutionality of legislation, it has demonstrated that it is all powerful, and in restraining the other departments within their constitutional orbits, it is the real guarantor of the rights and liberties of the people. Without the fearless exercise of this power "the distribution of its powers and the vesting their exercise in separate departments would be an idle ceremony."

Experience has demonstrated that there was never a more baseless notion than that the judgment of the Legislature upon the question of constitutionality of legislation is as reliable as that of the Court. I could cite an instance within my own knowledge of a distinguished lawyer of unusual courage and decision, voting as a legislator for a proposition, which, within two years thereafter, acting in a judicial capacity, he denounced with righteous and indignant vigor as unconstitutional, in making it unlawful for one class of men to do an act which another class of men, under like circumstances, were permitted to do. That is the difference between a limited and a life tenure. When you "control another man's means of living" you may control his will. "Alas, our frailty is the cause, not we." In a comparison of courage in resisting the popular demand for unconstitutional legislation the advantage would not be with the Federal as compared with the State legislature.

The rule under which an act will be held unconstitutional has been settled from Marbury *v.* Madison (1 Cranch, 177) to Fairbanks *v.* United States (181 U. S., 285), where Mr. Justice Brewer says:

"The constitutionality of an act of Congress is a matter always requiring the most careful consideration. The presumptions are in favor of constitutionality, and before a Court is justified in holding that the legislative power has been exercised beyond the limits granted, or in conflict with restrictions imposed by the fundamental law, the excess or conflict should be clear. And yet, when clear, if written Constitutions are to be regarded as of value, the duty of the Court is plain to uphold the Constitu-

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tion, although in so doing the legislative enactment falls." The importance of this power is emphasized by the frequency with which it has been necessary to invoke it. In at least thirty-two cases in Federal and two hundred and twenty in State legislation the United States Supreme Court has been obliged to declare legislative action void, as unconstitutional. In many more instances, for the same reason, State Courts have been obliged to set aside acts of State Legislatures. To this extent has Congress and the State Legislatures been numbered with those who have been "removing his neighbor's landmarks."

That this great Court does not always agree, and at different times, when differently constituted, reaches opposite conclusions on constitutional questions, is true, as a number of notable instances show. Just now a determined effort is being made to procure Federal legislation, which can only be sustained unless the Court shall reverse itself.

It is said that there is a widespread demand for Federal supervision of insurance. That there is need of "a more uniform regulation of the vast insurance interests of the country," and that we should have "national supervision of commercial interests which are clearly national in character," and that "the insurance business has outgrown in magnitude the possibility of adequate State supervision." It is insisted in many quarters that under the power vested in Congress, "To regulate commerce with foreign nations and among the States," that Congress should take charge of insurance, and especially life insurance. There is in our time an ever-increasing tendency to extend the Federal jurisdiction at the expense of the State, and in the effort to include everything "that is in the heaven above, or that is in the earth beneath, or that is in the water under the earth," this particular clause of the Constitution is in great danger of being overworked. The gross abuses in life insurance, which have been disclosed by the recent investigations, have very properly intensified the public demand for more effective regulation and control. As to which jurisdiction is best calculated to produce this result I shall not now discuss, though I am by no means certain that some of the men seeking for Federal control are not anxious for less rather than more rigorous supervision. Whether they can be subjected to Federal control depends upon whether "insurance," because it happens to be done in different States by the same company or in a State other than that of its origin, is interstate commerce within the meaning of the Constitution. If decisions of the Federal and State Courts establish anything, such insurance is not interstate commerce. In Paul *v.* Virginia (75 U. S., 183) the Court passed upon a statute prohibiting a fire insurance company from doing business in Virginia without complying with certain conditions, and the statute was attacked as a regulation of interstate commerce. It raised the specific question as to whether such insurance was interstate commerce. The Court said: "Issuing a policy of insurance is not a transaction of commerce. The policies are simple contracts of indemnity against loss by fire, entered into between the corporations and the assured for a consideration paid by the latter. Those contracts are not articles of commerce in any proper meaning of the word. They are not subjects of trade and barter, offered in the market as something having an existence and value independent of the parties to them. They are not commodities to be shipped or forwarded from one State to another, and then put up for sale. They are like other personal contracts between parties, which are completed by their signatures and the transfer of the consideration. Such contracts are not interstate transactions, though the parties may be domiciled in different States." . . . "They do not constitute a part of the commerce between States any more than a

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contract for the purchase and sale of goods in Virginia by a citizen of New York whilst in Virginia would constitute a portion of such commerce."

This case has been followed without dissent or criticism by the Supreme Court of the United States at least four times, where the question was specifically raised, and as late as 1901, and in thirteen State cases, so that it may justly be said to be firmly imbedded in our jurisprudence, State and Federal It has been well said that "twenty-three of the greatest justices that ever occupied the Bench of the Supreme Court of the United States have passed upon this proposition in six cases, and there has not been in any one of the six a murmur of disapproval. In Hooper *v.* California (155 U. S., 48) it was applied to marine, and in New York Life Insurance Company *v.* Craven (178 U. S., 389) it was applied to life insurance. In Hooper *v.* California the question was squarely raised again, and it was conceded that if marine insurance between the States was interstate commerce, the statute being considered was void. The Court sustained the statute, saying that the opposite contention was based upon "a fundamental misconception of the nature of the constitutional provision relied on." They held that an insurance contract was a "*mere incident* of commercial intercourse," and used this significant language: "It ignores the real distinction upon which the general rule and its exceptions are based, and which consists in the difference between interstate commerce or an instrumentality thereof on the one side and the mere incidents which may attend the carrying on of such commerce on the other. This distinction has always been carefully observed, and is clearly defined by the authorities cited. If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activity in any way connected with trade between the States; and would exclude State control over many contracts purely domestic in their nature." (Hooper *v.* California, 155 U. S., 655.)

These well-considered cases must be expressly overruled if this power is sustained. The case of Champion *v.* Ames (188 U. S., 321) may be thought to indicate that the Court is moving in that direction, but it does not infringe upon the authority of the insurance cases. The Court in that case sustained a statute that made it a penal offense to transport a lottery ticket "from one State to another." The statute did not proceed upon the theory that the lottery business, though carried on between the States, was interstate commerce, but operated only *on the ticket* while it was *in the act* of being carried from one State to another.

The Court held that the lottery ticket was a thing of value. That they were the "subject of traffic, they could have been sold, and the holder was assured that the company would pay to him the amount of the prize drawn." The counsel on both sides cited and argued the insurance cases, and they were discussed by Mr. Chief Justice Fuller in his able dissenting opinion, though he did not go so far as to intimate that they were necessarily inconsistent with the holding of the Court. The opinion does not even refer to them, and it is obvious that the Court did not find it necessary to distinguish between them and case at bar, much less to question them. It may be that they approved of the reasoning of Assistent Attorney-General James M. Beck, who insisted in his brief that "whatever be the true doctrine of these cases (insurance) it is enough to say that the lottery traffic is not analogous to insurance, as has been already shown," and "an insurance policy is not a commodity. It is not a thing which is customarily bought and sold, and recognized as a subject of such exchange." They evidently concurred with this asser-

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tion that he "had distinguished those cases." That the Court does not propose to enlarge the scope of that opinion is clear from Francis *v.* United States (188 U. S., 375), announced on the same day. Mr. Justice Holmes, who concurred in the Champion case, draws this opinion, where it is held that the same statute did not apply to the agent of a lottery company who carried to the company from Kentucky to Ohio a slip on which the purchaser of a chance had noted the numbers selected by him, keeping a duplicate as his voucher for his selection; the slip held by the company's agent and transported, being the property of the company, was not a ticket and did not represent a ticket, and, therefore, the statute did not apply.

The statutes thus far construed have been State statutes, and it is said the Courts have not been required to pass upon a Federal statute declaring insurance to be interstate commerce, and in that case a different result might be expected. This proceeds upon the theory that a Federal statute is attended with more solemnity, entitled to greater respect, and is more likely to deter the Court in the discharge of its duty, suggestions not warranted by experience, and that have no support, either in reason or authority. The suggestion degrades the Court, and is a gratuitous insult to forty-five independent States, each of which, within its sphere, speaks with as much authority, and is as supreme as the United States itself.

That there are vastly more policies issued, and that the aggregate is now enormous, does not change in the slightest the legal situation. Bigness and volume do not change the Constitution. The size of the controversy does not affect its legal character. The report of a majority of the Committee on Insurance to the American Bar Association endorsing the proposed Federal legislation is one of the most recent legal expressions on the subject. They seem to have had a conference with the President, not confidential in its character. They say he looked to the Association to keep the people properly informed on the legal phases of all public questions, and declared it "exerted a strong influence in molding public opinion," and that he was in favor of Federal supervision of insurance. The Committee began at once to "mold public opinion" by making its long and exhaustive report, favoring Federal supervision.

Among other things, they quote approvingly the remarks of Congressman Hepburn. A few days since, on the floor of the House, with an air of invoking an authority entitled to great weight, Congressman Hepburn cited this same report, made up, in part, of his own remarks. They endorse each other. How pleasant it is for brethren to dwell together in unity. The cheerful, mutual, inspiring, and approving enthusiasm evinced by these distinguished gentlemen for the opinions of each other, while adding nothing perceptible to the weight of the argument, no doubt contributes in a prodigious degree to the "molding of public opinion," and the intellectual effort involved therein is to some extent utilized.

It would be unprofitable to follow them through all the detail of their report. They seem to think if a carload of flour, which is interstate commerce, is insured, then the insurance thereof is interstate commerce, not because it facilitates or has anything to do with the act of transportation, but because in case of loss it aids the owner to continue in business by making good his losses and thus aids "interstate commerce," and hence is "interstate commerce." If so, then whatever aids or facilitates interstate commerce, in that sense, is interstate commerce, and the banker who loans the money on the property upon which the insurance is placed for his protection, is also engaged in interstate commerce, as he not only facilitates it, but in that financial sense is indispensable thereto.

They say that the telegraph and telephone,

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which are possible only by the transmission of electricity, a condition of matter, by the physical mechanism of poles and lines stretching from State to State, are interstate commerce; that, therefore, an insurance contract, which is nothing but the uniting of the minds of the parties, when they are in different States, a state of mind, must also be interstate commerce.

That one is tangible and the other intangible is immaterial. They do not think that the policy has any special significance "any more than the wrapping paper on a parcel of merchandise constitutes the business of the merchant who sells the goods." . . . "In other words the insurance is wrapped in the policy." That is to say, when the state of mind is done up in the policy ready for transmission to the other party, this particular state of mind which is thus "cabined, cribbed, and confined" becomes interstate commerce.

This gets down to first principles and is sufficiently diaphanous. Because an insurance agent recovered damages for a conspiracy to destroy his business on the ground that insurance was a commodity having value, they think it is "interstate commerce." If that is the test, then reputation may be interstate commerce, as it also has value.

They contend that "Congress has the exclusive power to determine the articles which may be the subject of commerce." If this means anything, it means that the determination of Congress that "insurance" is "commerce" is conclusive upon the Courts.

They rely upon the license cases and Leisy *v.* Harden (135 U. S., p. 125), where Mr. Chief Justice Fuller said, "We cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such," segregated from their context, and as quoted, these extracts might be thought to sustain the contention that a declaration of Congress would conclusively make a business transaction interstate commerce, which without that declaration would not be. Then the way to reach the question would be for Congress to declare first, that insurance was commerce and then proceed to legislate thereon constitutionally. A brief examination of those cases will show how utterly unwarranted such an inference is. They were cases passing upon the constitutionality of State statutes, regulating the liquor traffic. The contention of the State was "that the State had the power to declare what should be an article of lawful commerce in the particular States, and having declared that ardent spirits and wines were deleterious to morals and health they *ceased to be commercial commodities there*, and that the police power then attached, and consequently the power of Congress could not interfere." . . . "The exclusive State power is made to rest, not on the fact of the state or condition of the article, nor that it is property usually passing by sale from hand to hand, but *on the declaration found in the State laws and asserted as the State policy*, that it shall be excluded from commerce." (License Cases, 5 How., 600.) The question was, did the State have the exclusive right, under the police power, to invest an article of commerce with a quality that would deprive it of a commercial character. There was no doubt of its commercial character, independent of the attempt of the State, as in that case the Court said, "That ardent spirits have been for ages and now are subjects of sale and lawful commerce, and that of a large class throughout a great portion of the civilized world, is not open to controversy."

It was solely with reference to this claim of exclusive power by the State, to outlaw a conceded article of commerce, that the Court held that, as to interstate commerce, "Congress had the exclusive power to determine the articles which may be the subjects of commerce." The remark in Leisy *v.* Harden was made under the same circumstances, and for precisely the same purpose. It was not intended to go any farther. The

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attempt to wrench this remark from its legitimate setting and distort it to sustain an entirely different contention is hardly worthy a serious discussion of so grave a question, however necessary it may be to influence public opinion. It may be said, in passing that this report did not receive the sanction of the American Bar Association, as that body, without adopting or acting upon it by a vote of 113 to 29, referred it to the incoming committee. It is true that evolution is continually going on in the law, and that changes in conditions are factors in the legal development that applies and adjusts principles to meet existing business exigencies in an enlightened and progressive spirit. But to say, as is openly intimated by some insurance people, that the Court is likely to yield to a widespread public demand, intensified by great and justifiable indignation caused mainly, be it remembered, by a most thorough, effective, and successful State investigation, certainly not excelled by any Federal investigation, reverse itself, and thus judicially amend the Constitution, is to stultify the Court. The Court is bound to be affected more or less by existing conditions. That there should be by a portion of the press a deliberate propaganda to create a public sentiment for the express purpose of extra-judicially influencing the Court is intolerable. It is difficult to improve upon Cooley upon this point. He says: "Public sentiment and action affect such changes and the Courts recognize them; but a Court or Legislature which should allow a change in public sentiment to influence it in giving to a written Constitution a construction not warranted by the intention of its founders, would be justly chargeable with reckless disregard of official oath and public duty, and if its course could become a precedent, these instruments would be of little avail. The violence of public passion is quite as likely to be in the direction of oppression as in any other, and the necessity for bills of rights in our fundamental laws lies mainly in the danger that the Legislature will be influenced by temporary excitements and passions among the people, to adopt oppressive enactments. What a Court is to do, therefore, is to declare the law as written, leaving it to the people themselves to make such changes as new circumstances may require.

"*The meaning of the Constitution is fixed when it is adopted, and it is not different at any subsequent time when a Court has occasion to pass upon it.*" (Cooley's "Constitutional Limitations," pp. 88, 89.)

Story says: "What is to become of constitutions of government if they are to rest, not upon the plain import of their words, but upon conjectural enlargements and restrictions to suit the temporary passions and interests of the day?" . . . "They are not to be frittered away to please the demagogues of the day. They are not to be violated to gratify the ambition of political leaders; they are to speak in the same voice now and forever." (Story, V. ii, p. 653.)

The idea that the Court is to be swept from its constitutional moorings by any popular wave lashed mountains high, though it may be by hysterical ephemeral passion, is vicious and dangerous to the last degree. It is perfectly true that the people are sovereign, but let us be able to say of the Court —

> "Heaven is above all; there sits a
> Judge that no king can corrupt."

If swaying the court by public opinion were to become a part of our policy, its inevitable corollary would be national platforms pledging the President to fill vacancies by judges who could be relied on to carry out such constitutional views as demagogic platform makers might have seen fit to declare. This was thinly veiled in the Democratic platform of 1896, where, in connection with the income tax case, they declared that they looked for the reversal of that opinion "by the Court *as it may be*

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hereafter constituted." This is not the ideal way to

"Keep Rome in safety and the chairs of justice
Supplied with worthy men!"

It would result in a political Court, a judicial amendment of the Constitution, and be the end of stable and constitutional government. The security which has hitherto characterized our institutions under the courageous, intelligent, and patriotic action of its Courts would become a delusion and a snare. You may be sure, if we sow the wind, we shall reap the whirlwind. While the Judiciary was to be provided for, I believe it to be the first and greatest in importance and dignity and in the preservation of the rights and liberties of a great and free people. It is the keystone of the arch that supports the wonderful superstructure, "the greatest that ever came at any one time from the hand and brain of man." Unaffected by influence, undisturbed by clamor, unawed by power, undeterred by threats or denunciation, it will try every executive and legislative act, whenever they shall infringe rights that may become the subject of legal controversy, by the immemorial constitutional standard that "knows no variableness, neither shadow of turning." Then will its judgments be like unto those of the "Lord God Almighty, true and righteous" altogether. Thus and only thus shall we have preserved to us and our children's children, "now and forever," the ultimate achievement of human genius in all its pristine glory and splendor, "a government of laws and not of men."

WASHINGTON, D.C., January, 1906.

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CENTRALIZATION AND THE LAW[1]

By Harvey N. Shepard

THESE lectures are an admirable exhibit of the spirit of the new education, which now obtains in the School of Law of Boston University. They show the law to be not a loose aggregation of detached parts, but a consistent whole, having distinct members, and with each member so connected with all the remainder that together they make one body. They also show the law to be neither the commands of an outside sovereign, nor a collection of abstract principles in force by the nature of things for all ages, but the expression for the time being of the dominant force of the community. The law then, is to be learned not by the mere memorizing of statutes and decisions, and not altogether in the books, but by the tracing of the social and political processes at work in the community and the legal outcome of their conflicts. This is the scientific study of the law, and is the application to it of the methods which obtain in the investigation of nature. The laws of nature no longer are considered to be commands, but rather the rule or expression which explains the facts. So the study of the law can make no satisfactory progress when considered merely as an aggregation of commands.

The law, moreover, is not dead, but living, and must change constantly as the conditions of society change. The law, therefore, which was considered sufficient for the nineteenth century may not by any means be sufficient for the changed conditions of the twentieth century. It is our inheritance, but an inheritance for our use, not to be adhered to slavishly, but altered or put aside altogether, when not adapted to the present order of things. The vast economic changes, through which we are passing, are making a community altogether different from anything in the past; and the law of the nineteenth century is no more adapted to it than would be quill-pens and stage-coaches. Many of the so-called principles which prevailed in the past are outworn precedents now, and must be discarded. If the law is to hold its high place these principles will be modified or replaced by legislation and judicial decisions so as to be in accord with the present dominant force of the community, or the new conditions will rend them asunder in disorder and anarchy.

The remedies sufficient in a time when freedom of contract prevailed are grossly inadequate now, when vast combinations of capital have entered into control of the field, and fix the prices of commodities and wages at will. Competition, the vaunted reliance of the old remedies, is as useless as the armor of the Middle Ages against a park of artillery; for competition inevitably leads to monopoly. Damages are an idle remedy. Combinations in restraint of trade fear not these, and neither do they fear criminal prosecution.

So far as the public is concerned, relief must come from new legislation. According to the common law, a combination to restrain trade is illegal, but not criminal. Both the United States and many of the states have enacted statutes making such combinations criminal. A law school then must not neglect the great field of statute law. It will hold in the future a more important place than heretofore in its relation to the common law. To study the process and steps of the making of the common law is admitted to be essential. So also is it with the statute law.

The attempt to force all workmen into combinations in restraint of trade is declared by the Supreme Judicial Court of Massachusetts to be "against the policy of the law,

[1] "Centralization and the Law." By Dean Melville M. Bigelow. Little, Brown & Co., Boston, 1906.

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because it aims at monopoly;" notwithstanding the plea, that labor was combining only to defend itself against capital, and that such combinations are within the right meaning of competition.

The changes which in England have been wrought in the body of the law since the Norman Conquest can be understood intelligently, only as we learn the changes in the condition of society which preceded and made them. The old common law, which was sufficient for a feudal society, without cities and without commerce, gradually and slowly changed, both by statute and judicial decision, as the business and moneyed classes took the place of the martial class as the dominant power.

These changes in the law came nearly unseen, and with little recognition of their importance as they were made. Occasionally, though, the change was abrupt, and sometimes was accompanied by lawless outbreaks. These always indicate that the law lags too far behind the new conditions of society. The law must yield to the dominant force of the time, or it will be shattered. Its control depends upon the energy behind it. When it is the expression of that energy it is all-powerful; but if the conditions have changed, and it does not change, it can effect very little. Constitutions even mean little more than the conditions of the time of their interpretation require.

Take as illustrations, the liquor and lottery businesses. When they were considered to be reputable callings, a statute closing the business without compensation to the owners was held to be unconstitutional. When public opinion changed, such an act was held to be within the Constitution as an exercise of the police power of the State. Upon the same principle, Congress can make the business of the Beef Trust criminal, and close all its establishments without compensation.

It is not yet determined which is the dominant force in the vexed matter of the government regulation of railway rates, and so the law, relative thereto, is in transition. The forces are in conflict. Which will prevail is uncertain. When, however, one has conquered, it is inevitable that the law finally will become the expression of that dominant force. If the railways shall pass into one monopoly, and this monopoly shall prove its power to fix its rates at will, then the law will so declare. On the other hand, if the view of President Roosevelt shall prevail, then the rates will be determined by a body outside the railways, and these rates will be upheld by the law, even though the result should be confiscation of property without compensation.

One must not conclude, however, that the law is without guide and veers at haphazard with every change of the wind. It always follows some conception of right; and, if the conception is wrong, then there is a discrepancy between the law of the courts and the law of business, and a failure of justice.

This law of the courts, though, conformed to the pursuits of men at one time, and then followed a correct conception of right. It is because it has not changed to conform to the present pursuits that there arises the discrepancy. Courtesy and dower were adapted to feudalism, and the law then followed a correct conception. They are an incumbrance to-day, and bring reproach upon the law.

The rules of practice are a good illustration of both conditions. Practice, at common law, conformed to the prevalent conditions of society. Where it remains, it is an anachronism. In Massachusetts it conforms pretty closely to modern conceptions. In England it conforms altogether to, and allows a true expression of, the claims of business men. Codes are another good illustration. So far as they are the expression of the times they are sound. If, however, they become rigid and unchangeable they are obstructions, as no longer responsive to the altered conditions of society.

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We are too apt to forget that the law is a living thing, and therefore must forever and always change so as to adapt itself to its changing environment. When it ceases so to do it will be dead and an encumbrance of the earth. The laws of yesterday served their purpose, and they are of use to-day only so far as they are adapted to us. They do not live, and should not be expected to live, beyond their time. Here legal history finds its place. It should be learned, not to determine the law of the present because it has been the law of the past, and not as a study of binding precedents, but as a living growth, taking on this and shedding that, as it has followed the changing conceptions of right.

The well-equipped lawyer will know legal history; and also he will know what were the influences which the law has expressed, and what are the influences which are playing their part in the declaration of the law of the present. He will not be a narrow man, trained in one specialty only, but a broad-minded man, with knowledge of all the subjects related to the law, such as the several forms of business, like insurance and transportation, and the several concerns of government.

He will be a lawyer, and not merely a jurist, a man of affairs and not a philosopher. He will use the law of the past for its bearing upon the law of the present; and, when of no value, like the law of tithes, he will pass it by. He will learn modern business methods and the political and social conditions of the present, and he will study human nature.

A school of law, then, adapted to the scientific study of the law, will include in its faculty not only jurists and lawyers, but also men of affairs, that is to say, business men who will speak of railway rate-making, insurance, banking, and the like.

BOSTON, MASS., January, 1906.

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A ROMANCE OF THE COURTS

By A. D. Young

THE strange turns of life disclosed through court proceedings, must ever be a subject of deep interest to all persons not wholly lacking in sentiment, nor idly indifferent to each day's repeated wonders. The doings of every juridical day throughout the realms of jurisprudence are but cumulative proof that truth is stranger, if not always stronger, than fiction. The cases of civil nature in which the more romantic phases of litigation are displayed more often and forcibly are such as involve the settlement of estates of deceased persons. In this too, the subject of wills — as relating to the testamentary disposition of property — holds a distinctively important place.

Myra Clark Gaines, born in 1805, dying in 1885, one of the most remarkable women of this country, is a stalwart figure in the annals of its courts. For more than fifty years of her long life this woman inspired and pressed a continuous litigation, pre-eminent among notable exhibitions of blended reality and romance. She was the daughter of Daniel Clark, who died at the city of New Orleans, in the year 1813. During half a century and over, in the Probate Court, in the Supreme Court of her native Louisiana, in the Federal Circuit Court, and in the Supreme Court of the United States, she prosecuted a score of suits to establish her right to the enormous estate left by her father.

Clark was a native of Ireland, County of Sligo, educated in England, at Eton, emigrating to Louisiana when quite a young man. His parents followed a few years later, settling in Pennsylvania. Clark's attainments and business connections conspired to give him conspicuous standing in social as well as business and political circles. Exercising the office of American Consul at New Orleans for many years, until this country acquired Louisiana Territory, his aid and influence were potent in the consummation of that gigantic real-estate deal. He was the first representative in Congress from Louisiana. His wealth in money, slaves, and land was great, as the times went. Directly after his death, a will was found among his papers, sealed up in a package, inscribed: "This is my olographic will, New Orleans, 20th May, 1811. (Signed) Daniel Clark."

A few hours later, allegations were made by a friend of Clark that a later will had been made by him; a petition was presented to the Court of Probate asking that the different notaries of the city be cited to appear and certify whether any such instrument had been lodged with them by Clark, but none such was produced, and the will of May 20, 1811, was duly admitted. It was brief, devising all his property to his mother, Mary Clark, then living near Philadelphia. His surviving partners in business were named as executors. They qualified and took control of the estate. Purporting to act by authority of this will, and a power of attorney from Mary Clark, the mother, these executors disposed of a large portion of the estate; but no final report of their conduct of the trust had been presented to the Court of Probate up to the year 1834.

Clark numbered among his intimate friends at New Orleans, a man known as Colonel Davis, who removed to Philadelphia, and presently to Wilmington, Delaware, in 1812. One of the members of his family was a young girl named Myra, who passed as his daughter — natural daughter as generally supposed. She was born at New Orleans, in 1805, and placed in Davis' family a few days after her birth. In 1832, she was married to Mr. William W. Whitney, as the daughter of Colonel Davis. Presently afterwards, in looking over some

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old letters, then put in her hands by Davis, her parentage was first discovered. This correspondence included a letter written years before to Davis by an old-time friend of Clark, then residing in Cuba, in which the writer asserted that Clark had left a will, executed just before his death, by which he acknowledged Myra to be his legitimate daughter, and made her his sole devisee, saving an annuity to his mother. From the hour of that discovery until her eyes closed in death, Myra strove, without shadow of turning, for the vindication of her legal rights. She and her husband speedily visited the Cuban correspondent; upon further information which he imparted, they went to New Orleans, beginning instant investigations. Presently the friction landed Whitney in jail. More rational and systematic tactics were then adopted; her husband was released from prison, and a contest initiated, which, like the family altar fires of the ancients, outlasted her four-score years.

In September, 1834, a tract of 115 acres, owned by Clark at his death, was sold to the city of New Orleans by the man to whom it had been conveyed by Clark's executors. The city bought the tract in order to control the location of streets, and to subserve other public improvements.

In June, 1834, Myra, with her husband, W. W. Whitney, made her first formal appearance in the courts. This was twenty-one years after her father's death. She then filed a petition in a case then depending in the Probate Court of New Orleans, instituted by a creditor against Clark's executors for not accounting and settling up his estate. In this intervening petition, Myra alleged herself to be the child and heir of Daniel Clark, praying that the will of 1811 be annulled and set aside, and the executors be required to surrender to her possession of the estate. These executors were cited to answer the petition, but it was looked upon as a visionary claim, and created no public impression. Whitney died in 1837. His widow married General Edward Gaines, in 1839. He died in 1847. Children were born of both marriages. She was not married again.

Her first direct action against the city of New Orleans was commenced in 1836. Other suits were instituted against individuals who had obtained property from Clark's executors. Appeals in many, if not all of these actions were carried to the Supreme Court of Louisiana, and the United States Supreme Court.

Down to the year 1855, nothing substantial had been accomplished, but rulings or intimations of the Supreme Court of the United States had given a degree of encouragement. In that year, prompted, perhaps, by these rulings, Mrs. Gaines filed a petition in the Probate Court of New Orleans praying leave to make oral proof of the last will of her father made in 1813, just before his death, but which had been suppressed and destroyed. Seasonably this proof was formally made, and a decree entered establishing the will last made, declaring that of 1811 null and void. On appeal to the Supreme Court of Louisiana, that decree was affirmed, and in December, 1856, formally entered in the Court of Probate.

In the next succeeding appeal — the sixth — to the Supreme Court of the United States, in the course of this litigation, in the year 1860, when threatenings of the Civil War were growing louder and more loud, Mrs. Gaines achieved a momentous success. This was the case of Gaines *v.* Hennen, 24 How. 554. The opinion, delivered by Mr. Justice Wayne, closed with these words:

"When hereafter some distinguished American lawyer shall retire from his practice to write the history of the jurisprudence of his country, this case will be registered as one of the most remarkable in the annals of its courts."

Again, in 1867, that august tribunal, in the seventh of these successive appeals,

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speaking through the great justice Davis, in affirming the decision just quoted from, said:

"To the discredit of the friends of Daniel Clark, this child grew to womanhood in utter ignorance of her rights and parentage, and did not ascertain them until 1834, (then not fully), since which time she has been endeavoring to obtain her rightful inheritance. Owing to the length of time, it was difficult to reach the truth, and necessarily for many years she groped her way in darkness; but finally she was able to show the great fraud perpetrated against her, for in the judgment of the Supreme Court of Louisiana she established the validity of that very will which, forty-three years before, her father had executed in her favor. . . . The questions of law and fact applicable to those rights were determined in the case of Gaines *v.* Hennen. After argument of able counsel, and on mature consideration, we have re-affirmed that decision. Can we not hope that the rights of Myra Clark Gaines in the estate of her father, Daniel Clark, will now be recognized?"

That hope was disappointed, for in 1869, suit was commenced against Mrs. Gaines in the Court of Probate of New Orleans, by that city, and seventy-four individual suitors, to *revoke* the will of 1813, and reëstablish that of 1811. Mrs. Gaines' application to transfer the controversy to the Federal Circuit Court was denied, and in December, 1871, a decree was rendered against her in the Court of Probate, declaring such revocation. That decree was affirmed by the Louisiana Supreme Court, in an elaborate opinion, in 1873. But that decision was *reversed* by the Supreme Court of the United States in 1876, and in April, 1877, a final decree was rendered in the Federal Circuit Court for the District of Louisiana, to the effect that the will of 1813 was duly probated in 1855 upon veritable testimony. *That* question was then finally laid at rest.

It is not the purpose of this narrative to marshal details of this extraordinary litigation. Before it was definitely closed, ere that woman of indomitable will had realized the material fruits of repeated victories in the courts of her country, her tireless spirit was arrested in its course. Two million dollars, nearly, was the amount of a judgment rendered in favor of Mrs. Gaines in the United States Circuit Court, in Louisiana, against the city of New Orleans, in May, 1883. The case, as a matter of course, was appealed to the Supreme Court of the United States. There, six years later, the judgment was reduced to something less than six hundred thousand dollars. In that decision, it was said, through Bradley Justice, whilst adhering to former decisions affirming the claims of Mrs. Gaines, that "the evidence to sustain them was so full of obscurities and improbabilities that a possessor of land purchased from the representatives of Daniel Clark could not be blamed for not giving it credence, and for resisting her suits to the utmost," thus indicating that the margin of success had been dubious, after all.

On the 9th day of January, 1885, while on a visit to New Orleans, the city of her birth, Myra Clark Gaines was summoned by that invincible bailiff to that undiscovered jurisdiction where the law's delays are presumably unknown; where neither writs of error, nor appeals, nor petitions for rehearing are granted.

Alas! who is able to conjecture the irony of fate? A few days after Mrs. Gaines' death, an olographic will, dated January 8, 1885, purporting to have been "writtten, dated, and signed" by Myra Clark Gaines, was presented for probate in the proper court at New Orleans. On the same day, a will dated January 5, 1885, formally witnessed as that of Myra Clark Gaines, was proffered for probate in the same court. The proponents of the alleged will first filed contested the other, upon the ground that it was superseded by that bearing the later date; on the other hand, the paper first filed was

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assailed by the other proponents as being a *forgery*.

The Court of Probate ultimately sustained the charge of forgery, excluding the olographic, or Evans will, as it was styled; but rejected the other will also, upon the ground that it had not been executed and witnessed in the manner required of non-resident testators. What is known as a tutrix was then appointed by that Court, who was awarded custody of the estate. Later on, one of the grandchildren of Mrs. Gaines, arriving at legal age, was appointed administrator by the same court.

In the meantime, both these instruments were presented for probate in the Surrogate Court of Kings County, New York, the residence of Mrs. Gaines. The same objections were there urged against the olographic — Evans — will, the beneficiaries in it being in no way *related* to the decedent. That court decided it was a forgery, and admitted the other as the true will of the testatrix.

From these rulings, the defeated proponents appealed to the Supreme Court of New York. Thereupon the Surrogate appointed the public administrator of Kings County a special administrator of Mrs. Gaines' estate, pending such appeal. Shortly thereafter, that official presented his credentials and demanded authority from the New Orleans Court of Probate to take possession of the estate in Louisiana. From the order of that Court ignoring such credentials and refusing to make the order demanded, an appeal was taken to the Supreme Court of Louisiana. That Court reversed the Court of Probate, deciding that the will so admitted in New York was to be recognized in Louisiana as the valid will of the testatrix, notwithstanding the pending appeal in New York.

The New York administrator again petitioned the Court of Probate of New Orleans for an order entitling him to possession of the estate — the sole asset being a judgment against the City of New Orleans for something over nine hundred thousand dollars. This petition was disallowed, and another appeal carried to the Supreme Court, which again reversed the New Orleans Court of Probate, directing the surrender to be made. But on a petition for re-hearing, this decision was modified pursuant to stipulations of the respective parties, whereby the residuum of the estate only was ordered so transferred, after certain disbursements were made under authority of the New Orleans Court of Probate.

Pending these later proceedings in Louisiana, the Evans proponents made abortive efforts to have their opponents punished for alleged contempt of the New York Supreme Court in thus proceeding in the other state. In due time, the decision of the Surrogate was affirmed by the New York Supreme Court, on the broad ground, so far as the Evans will was concerned, that it was shown conclusively by the evidence to have been forged. From that decision an appeal was taken to the court of last resort in New York, the Court of Appeals, by which, in November, 1897, the judgment of the Supreme Court was affirmed unconditionally by a unanimous court.

San Diego, Cal., January, 1906.

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The Green Bag

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

CURRENT LEGAL LITERATURE

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

AGENCY (Estoppel). The controversy between Walter Wheeler Cook and John S. Ewart over "Agency by Estoppel," previously summarized on pp. 312, 370, of V. xvii of the GREEN BAG, is continued in an article by Mr. Cook in the January *Columbia Law Review* (V. vi, p. 34). He insists that Mr. Ewart did not fairly quote him, and that it is not merely a question of words whether we say that a principal may be bound by the executory contract made by the agent outside his actual authority because a contract is actually made with the principal within the apparent authority, or that the principal is estopped to deny that there was actual authority. He insists that agency may exist as an external relationship with reference to third persons when the internal relationship does not exist as between the principal and the agent, and that the cases make no difference between mere violation of instructions by an agent within his apparent authority and cases where he has no real authority under the circumstances, but only apparent authority.

AGENCY (Torts). The confusion in the decisions relating to "Liability for the Unauthorized Torts of Agents" is discussed by William R. Vance, in the January *Michigan Law Review* (V. iv, p. 199). The cases in which the difficulty has arisen have been the fraudulent issue of documents of title by agents; and owing to the fact that these acts involve usually a contract as well as a representation, some courts have been misled into applying as the test of liability the rules relating to contracts rather than the ordinary rule most commonly appearing in cases of master and servant, that the principal is liable for all torts of an agent committed while acting in the scope of his employment, whether the particular act was authorized by the principal or was done for the principal's benefit or not. He submits that the same rule in torts and in contracts should be applied to the acts of an agent as to the acts of a servant, or as he puts it, when the agent is acting tortiously he is acting as a servant and not as an agent. He meets the difficulty arising from the fact that the third party dealing with the agent has ordinarily an alternative action of contract in case of the issue of spurious documents of title, on the ground of *estoppel;* not that the principal is estopped by the agent's conduct to deny the authority of the agent, but that the representations of the agent are the representations of the principal and that thereby the principal is himself estopped to deny that a contract has been made. Upon his theory the New York doctrine would be sustained, though upon different reasoning, and the doctrine of England and of the Supreme Court would be changed to accord with desires of business men.

BIOGRAPHY (Asher). "The Late Dean of Faculty," a brief sketch of Alexander Asher, K.C., by Alexander Ure, December *Juridical Review* (V. xvii, p. 323).

BIOGRAPHY (Lincoln). The story of "Lincoln the Lawyer," by Frederick Trevor Hill, in the December, January, and February numbers of the *Century Magazine* (V. lxxi) is a careful study of the early life of Lincoln and its bearing upon his legal career, showing the influences that molded his character and

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trained him for his great work as a statesman. The author gives us also interesting pictures of the Bench and Bar in Indiana and in Illinois, which were in Lincoln's boyhood frontier states settled by honest, hardy men not given to form or ceremony.

Lincoln's ancestry, he tells us, had little or no influence upon his legal career. He read much in his early life and attended regularly the sittings of the courts, where, no doubt, in listening to trials and arguments of the lawyers, his ambition to become a lawyer was aroused in mentally matching his powers against them. In debating clubs and the country store he won a reputation as a dangerous opponent in argument.

At the time of the Black Hawk war he became acquainted with Major Stuart, his future partner, who encouraged his legal studies. He became a candidate for the legislature, but was defeated, being elected, however, the four following years. For a time he was engaged in the grocery business, but as he spent his time in study it was not a success, and it was not long before he was doing odd jobs to earn his living. He received an appointment as postmaster, and later as deputy-surveyor, the knowledge which he acquired of that subject standing him in good stead in his later law practice.

In 1837, at the age of twenty-nine, Lincoln moved to Springfield, having been admitted to the Bar in the previous year, and was offered a partnership by Major Stuart, with whom he remained for four years, and associated with a remarkably talented company of men, among whom Lincoln early became a leader.

As an attorney in the technical sense, Lincoln would never have distinguished himself. There was nothing methodical about him. But his mind was orderly and his thought passed to the vital point. There has been much misapprehension as to the nature of Lincoln's success. It did not lie in his good-comradeship, but positive proof of his professional recognition lies in the fact that he was singled out and offered a partnership by Stephen Logan, than whom no one's legal reputation is more secure. The influence of Logan upon Lincoln cannot be overestimated, for he laid the foundation of his legal career, inciting him to careful and diligent preparation for his work, and overcoming his natural tendency to rely upon his wits.

Lincoln was naturally independent, and outgrew the guidance of his preceptor. He determined to start out for himself the minute he felt strong enough, which occurred sometime between November, 1843, and March, 1844. In starting out alone, though he believed in himself, he was neither adventurous nor sanguine, in fact, he was naturally despondent, and all his life he fought this tendency with jest, joke, and story.

He took as partner William Henry Herndon, for, being himself utterly unfitted for office drudgery, he needed a good clerical assistant in the drawing of pleadings and the minutiæ of procedure.

This new firm met with fair success, for we find that in 1844–45 the senior partner argued no less than thirty-three appeals before the Supreme Court. At this time Lincoln became for the second time a candidate for the congressional nomination and was returned by a large majority.

At thirty-nine years of age, where the last issue leaves him, Lincoln's life had been eventful, his rise from absolute obscurity phenomenal, and his influence in his own state and party remarkable. The articles are to be continued.

CONSTITUTIONAL LAW. "Eleventh Amendment to the Constitution," by George C. Lay, *The Brief* (V. vi, p. 1).

CONSTITUTIONAL LAW. "The Equal Protection of the Law," by Isaac Franklin Russell, *The Brief* (V. vi, p. 24).

CONSTITUTIONAL LAW (Commerce, Corporations). "Congress and the Regulation of Corporations" is the title of an instructive article by E. Parmalee Prentice in the January *Harvard Law Review* (V. xix, p. 168). Of the grant of power to regulate corporations he says that it was originally not regarded as of an absorbing nature. There was little opposition to the grant as it was regarded as a simple power to regulate trade. "Recently, however, the power seems wholly to have changed its character. The right to engage in foreign and interstate commerce, it is now said, is derived solely from the Federal government." It is said that Congress has

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uncontrolled power to tax, regulate, or even prohibit interstate commerce, and that it may use its power to accomplish results which are wholly beyond its jurisdiction.

"If these two views of the Constitution represented merely the doctrines of present and opposing schools of constitutional construction, such a difference of opinion upon fundamental questions would still be unfortunate. If, however, this difference be not so much between schools as between present and past, if it mark a fundamental change in the national conception of the Constitution and in the spirit of its administration, the significance of the policy toward which the country is moving becomes apparent; for important as undoubtedly are the economic questions whose agitation has given rise to new constitutional doctrines, the preservation of the Constitution is more important still."

The author deprecates the growing impatience with the safeguards of the constitution and the desire that the Federal government should assume doubtful powers.

"Power to regulate commerce, then, was not given as an indefinite jurisdiction, but was intended as a specific authority to effect certain well-understood ends.

"The great purposes which it was sought by the Constitution to accomplish were four in number. It was necessary to establish a federal authority capable of raising a federal revenue, to regulate foreign relations, to prevent the imposition of duties by particular states upon articles brought from other countries, or from or through other states, and to control navigation. These four great purposes were each covered by express provision."

The meaning of the commerce clause must be ascertained from the situation and methods of commerce as then conducted. This was chiefly by sailing vessels with foreign nations, and the power to retaliate on foreign nations for unjust commercial dues was a chief reason for conferring this power on Congress. As between the states the purpose was to prevent restrictions on commerce. From these small beginnings the author traces the growth of the present broad doctrine. Owing to an unfortunate limitation of the words "exports and imports" in the clause forbidding the state to tax these subjects, it became necessary to found the prohibition of regulation of interstate rates upon the commerce clause, and when it was decided that the states were deprived of this it was assumed that the power had been granted to Congress. This the author regards as a strange inversion of the principle still taught in the schools for construction of state and federal constitutions, and he insists that the federal power has not so developed as to confer upon Congress the power of restriction which has been denied to the states, and that there are two express provisions preventing Congress from assuming this jurisdiction. The first is the right of citizens to engage in trade, which is a part of the liberty or property protected by the fifth and fourteenth amendments of the Constitution. The author shows from the political theories most influential upon the framers of the constitution that the right of industry was included under liberty and property. This right to engage in commerce is subject to the federal jurisdiction in foreign affairs and to police regulations which Congress has the power to impose within constitutional limitations. Congress cannot deprive any person of liberty nor exclude proper articles from interstate transportation, nor distinguish between proper occupations by reason of the personality of a shipper or consignee. The second limitation is the prohibition of taxation of exports from any state by Congress. The author admits, however, that owing to the narrow interpretation given to the word "exports" in another clause, this may be held in contradiction of its obvious meaning to apply only to exports to foreign countries. Verbal interpretation, however, and the obvious purposes of the provision in view of then existing conditions of commerce, show that it should apply also to interstate transactions. In conclusion the author again objects to the assuming of powers by Congress and to the use of constitutional powers for unconstitutional purposes.

"It is clear, then, that the Constitutional Convention did not intend to give Congress power to tax or to prohibit commerce among the states, and that the nature of the power upon which it is sought to found such a jurisdiction fails to support it. As Mr. Chief Justice Fuller very forcibly remarked, 'under the Articles of Confederation the states might have

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interdicted interstate trade, yet when they surrendered the power to deal with commerce as between themselves, to the general government, it was undoubtedly in order to form a more perfect union by freeing such commerce from state discrimination, and not to transfer the power of restriction.'"

CONSTITUTIONAL LAW (Commerce). In a contribution to the New York *Sun* of January 8, 1906, entitled, "Has the Federal Government Constitutional Power to Establish Rates for Interstate Transportation," Edward L. Andrews contends that it has not, for reasons very like those more fully set forth by Mr. Prentice.

CONSTITUTIONAL LAW (Corporations). "Power of Congress to Regulate Corporations," by Chauncey J. Halmin, *The Brief* (V. vi, p. 14).

CONSTITUTIONAL LAW (Insurance). "Can Congress Regulate the Business of Insurance," by I. M. Earle, *Central Law Journal*, (V. lxii, p. 28).

CONSTITUTIONAL LAW (National Quarantine). W. E. Walz analyzes the cases on the constitutionality of federal regulation of quarantine in the January *Michigan Law Review* (V. iv, p. 189). Admitting that quarantine primarily comes under the police power which, as it has not been specially delegated to the Federal government, is reserved to the states respectively or to the people, he submits that under the accepted doctrine of the United States Supreme Court as to the extent of the power to regulate interstate commerce, Congress has power indirectly to regulate interstate quarantine because it admits and requires uniformity of regulation. Such regulation, moreover, is an imperative necessity for the entire nation in the interest not only of interstate commerce but national health. Of this he says:

"That the power of Congress to regulate commerce may be used by it, not only for the advancement of commerce, but also for the promotion of other objects of national concern, even to the partial or total destruction of commerce itself, as in the days of the Embargo Act, cannot easily be doubted. The power has certainly been so used in the past, although its exercise to this extent, while still constitutional, represents an extreme that could be justified only by the exigencies of a national crisis such as existed in the early days of the Republic."

There have been dicta in the cases dealing with transportation of both persons and property which sustain this view. He further contends, in accordance with the doctrine of the late Professor Thayer, that the question whether the regulation of quarantine is a national question within the scope of the interstate commerce clause is one which should be determined by Congress and not by the courts.

CORPORATIONS (Partnership). Francis M. Burdick discusses, in the January *Columbia Law Review* (V. vi, p. 1), the effect of failure to complete an attempted incorporation, in an article entitled, "Are Defectively Incorporated Associations Partnerships?" He contends that they should be so regarded, and that this result is just inflicting no more hardship than where one who supposes he is a special partner in a limited partnership finds that he is a general partner, owing to failure to comply with the statute. Since incorporation has become the act of the individuals organizing the association, compliance with the statutory requirements is the only condition of obtaining the franchise, with the consequent limitation upon the corporators' liability for the association debt, and there is no longer any reason for the rule that the validity of a corporation shall not be attacked collaterally. Nor is this right to sue the individual members a change of their contract any more than the right of a creditor to sue a dormant partner of whom he did not know at the time of the making of the contract. There is no ground for any estoppel of creditors. The principal objection to holding them as partners has been the unfairness of imposing upon them a relation which they not only did not intend to assume but which they expressly intended to avoid. There is, however, an intent to carry on a common business with the capital contributed, and by agents designated by the contributors in accordance with the will of the contributors for their profit. The author submits that nothing here is lacking but the intention to incur the liability of partners, and the absence of this he thinks should make no difference. "The intention to secure this ex-

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emption is not in truth and ought never to be considered the equivalent of an intention not to form the relation which the law regards as that of partnership. It is the failure to distinguish between these two intentions and consequent confusion of thought that have led so many judges to hold that defectively incorporated associations are not partnerships."

He finds that in almost all jurisdictions the exemption from partnership liability is limited to cases where incorporation has gone so far as to form what is called a *de facto* corporation. Massachusetts, however, seems to go even farther.

CORPORATIONS (Stockholders). "The Issue of Corporate Stock for Property Purchased — A New Phase," by Leonard M. Wallstein, in the January *Yale Law Journal* (V. xv, p. 111), discusses the familiar rule of corporation law embodied in the New Jersey statute, that "in the absence of actual fraud in the transaction the judgment of the directors as to the value of the property purchased shall be conclusive." He explains that this was really only the statement of the common law of New Jersey as it existed prior to the statute, and that the doctrine was essential to relieve business men from the dangers incident to applying the stricter doctrine of some states allowing recovery of the difference between the price as paid in stock and the fair value of the property purchased. The more liberal rule has been availed of by promoters for the purpose of stock watering, since the question of value is entirely a matter of opinion, and most courts have regarded the mere fact of over valuation as no evidence of actual fraud except in the most extreme cases. The question now arises whether the customary method of the corporation shops of having the property valued by a board of dummy directors who know nothing about it except what they are told is a compliance with the statute. The author contends that while this of itself is not actual fraud within the meaning of the statute it is not a "judgment."

"By 'judgment' all who use the term mean the conclusion reached by one who takes the attitude of a judge, that attitude implying, first, knowledge of or acquaintance with the matter to be judged, and secondly, collation of and deliberation upon the various elements of fact upon which a conclusion must be based."

He insists that the word "judgment" is important and should be given its proper meaning.

"Accordingly, in the hypothetical case, evidence tending to show that the directors were 'dummies' is admissible, and on proof of that fact complainant should recover. But let this be clearly understood. The ground of complainant's recovery is not, that by failing to exercise their judgment the directors were *ipso facto* guilty of actual fraud. That is not the contention. The contention is, that in order to make the action of the directors in taking property for stock conclusive, two requirements must under the statute have been fulfilled — namely, an exercise of judgment must have been present and actual fraud must have been absent; that failure to satisfy *either* of the requirements renders the stockholder liable, and that in the case under consideration the stockholder is liable because the former was not satisfied.

"In conclusion, it may be well to point out that, if the contention that the statute requires the directors to act in a judicial capacity in order that their action in exchanging stock for property may be conclusive is sound, it follows, since no man may be the judge in his own cause, and since this maxim applies not only to judges *eo nomine* but also to all persons exercising judicial functions, that, even though the 'dummy directors' did come to a judgment, properly speaking, such judgment, if they were 'dummies' in the true sense of the term, is not conclusive, because they were the creatures of one of the parties interested in the matter to be judged."

CORPORATIONS (see Constitutional Law).

CRIMINAL LAW (Capital Punishment). In the December *Virginia Law Register* (V. xi, p. 625), William E. Ross discusses "The Death Penalty — Reasons for its Abolition," and forcefully states the familiar arguments that the death penalty not only does not attain the purposes of criminal punishment but actually prevents their attainment by serving as an incentive to the morbid vanity of criminals, and reducing the certainty of punishment, owing to the dislike of juries to convict where the punishment is death. Much

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interesting evidence on these points is cited. He contends that life imprisonment is a sufficient protection of society, is more likely to be imposed on the guilty, and leaves a loophole for the rectification of the occasional mistakes inevitable in the process of justice. The danger of escape and the abuse of pardons he regards as avoidable evils not important enough to justify our retention of the death penalty. The experiences of those communities where it has been abolished seems also to sustain his contentions.

CRIMINAL LAW (Intent). "Limitations upon the Rule that Criminal Intent may be presumed from the Act itself," by D. W. Crockett, *Central Law Journal* (V. lxii, p. 1).

EDUCATION. In an article entitled "Law as a Culture Study" in the January *Michigan Law Review* (V. iv, p. 179), Edson R. Sunderland contends that an opportunity for the study of law should be given undergraduates in our universities and that it should not be monopolized by professional students. As a means of mental discipline and a preparation for a useful life, which are the basis of modern university education, he submits that the study of the law is superior to many courses now offered in the colleges. As the study of the physical sciences is more important than pure mathematics owing to the interjection of concrete elements which make certainty of result more difficult and hence enhance the difficulty and interest of the problem, so the law deals with a still more complicated situation.

"When, however, we reach the domain of human experience, and try to formulate rules of human conduct, we find the most complicated field of all. The impulses and motives of men are as countless as the sands of the sea. Every person stands in a more or less intimate relation to his family, his neighbors, his friends, his business associates, his church, his party, his city, his state. His conduct is directed by considerations of love and hate, generosity, avarice, ambition. He moves in a society made up of men, women, children, friends, husbands, wives, laborers, idlers, the rich, the poor, politicians, farmers, merchants, corporations, teachers, public officers. He is influenced by the people he meets, the books he reads, the religion he professes, the work he does, the places he visits, the misfortunes he suffers, and the pleasures he enjoys. Out of the midst of such a myriad of shifting, uncertain, and unknown conditions, where no two persons are ever subject to the same forces, and no two situations are ever alike, the law endeavors to bring order and system. And order and system it has brought, but only through the toil and trial of centuries.

"A field so vast and so intricate, whose problems are so closely interwoven and interrelated that an adequate handling of one implies familiarity with the principles underlying all, is a field rich in possibilities for mental culture. The technical features are incidental, not substantial. Beneath them always appears the broad practical question, What legal principles are applicable to the facts of the given situation? To take the facts in a given case, study them in their relation to the various principles of law which seem to bear upon them, segregate the material and relevant facts from those which are irrelevant, weigh the former and judge of their comparative importance, apply to this sifted and coördinated group of facts appropriate and correct legal principles, and present the whole case in logical and well-reasoned completeness, is a task which calls for a high order of mental effort."

He also relates the history of the separation of the study of law from the other courses, and finds that it was due largely to accident and to medieval prejudices which have no modern application. The courses on commercial law now given in some colleges he regards as wholly inadequate.

ESTOPPEL (see Agency).

EVIDENCE (Witnesses). "Memoranda to Refresh Mind of Witness and as Substitute for Witness's Recollection," by John D. Lindsay, *Bench and Bar* (V. iii, p. 97).

EXECUTIONS (Exemptions). In the December *American Law Register* (V. liii, p. 721), Stanley Folz discusses "Exemption Laws and Public Policy." After tracing the history of the relaxation of restrictions on the collection of debts as England changed from a feudal to a commercial state and the subsequent humanitarian movement to relieve debtors from the drastic operation of this liberty, he shows the various modern

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forms of exemptions. These were founded upon the theory that it was detrimental to the best interests of the state to completely impoverish a debtor and thus make him and perhaps his family a burden on the public. Once started on this tendency popular legislatures have, as might be expected, run to the opposite extreme. This is especially true in the western and southern states which, until recently, were debtor communities and desired to attract settlers.

"The exemption laws seem thus to be founded upon sound principles of public policy. Whether framed with a view to the protection of families alone, or contemplating the protection of the debtor himself besides, these laws are an expression of the regard of the state for its own highest interests, in preserving the efficiency of its citizens from total impairment. When exemption laws so far restrict the scope of execution as to accomplish more than this, they unduly limit the rights of creditors, with mischievous results in debasing commercial and moral standards and bringing the efficacy of the processes of the law into disrepute. Such excessive exemptions cannot be justified. On the other hand, the exemption laws should be broad enough and should be so construed as to accomplish their object. The right of a creditor to complete satisfaction is one that the law should permit to be pursued to the fullest extent, saving only that in its pursuit, for its own welfare, the state should not permit the debtor to be so far impoverished as to render him and those dependent upon him a charge upon the community without the means of subsistence or of continuing at some gainful occupation."

The author criticises the doctrine of some states which permits a debtor by contract to deprive himself of the benefit of the exemption laws. He thinks that so far as such laws are desirable they should be enforced like the usury laws which are based upon the same public policy, and that a debtor should not be allowed to contract away their protection.

EXECUTORS AND ADMINISTRATORS (Judgments). A recent decision of a United States Circuit Court in a case involving the fees of the late Colonel Ingersoll, is criticised by Thaddeus D. Kenneson in the January *Columbia Law Review* (V. vi, p. 15) in an article entitled "The Relation to Each Other of Different Administrators of the Same Deceased," in which he contends that a judgment for or against an administrator in one jurisdiction should be binding upon an ancillary administrator of the same estate in another jurisdiction. In the case in question, however, after failure of one administrator in an action in one jurisdiction, another administrator in another jurisdiction was allowed to recover on the ground that the administrators in different jurisdictions were not in privity of estate. The author admits that they were not in privity of estate and calls attention to the fact that successive administrators in the same jurisdiction are not, but he submits that the judgment is conclusive for another reason, namely that they may be said to be in official privity or that each is in privity with the decedent whom he represents, and that just as successive administrators in the same jurisdiction are bound by a judgment for or against the prior administrator so ancillary administrators in different jurisdictions should be. An examination of the authorities seems to sustain his contention and upon principle it seems just whether the administrator be regarded as the representative of the deceased or as the representative of the creditors.

HISTORY (Public Policy). In the January *Harvard Law Review* (V. xix, p. 151) Prof. C. C. Langdell elaborately reviews Professor Dicey's recent work entitled, "The Relation Between Law and Public Opinion in England During the Nineteenth Century," in an article entitled "Dominant Opinions in England During the Nineteenth Century in Relation to Legislation as Illustrated by English Legislation or the Absence of it During that Period." It is this latter title which the reviewer deems more truly expressive of the real scope of Professor Dicey's book. The book declared, "that the dominant current of opinion peculiar to the first third of the century was a combination of the optimism of the time of Blackstone and that dread of innovation and revolution which had been inspired in England by the French Revolution. This opinion ceased to be dominant on the passing of the Reform Bill of 1832, and Professor Dicey says it would have ceased to be dominant several years sooner but for the fact that the

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unreformed House of Commons was not sufficiently responsive to public opinion. Professor Dicey calls the period during which it was dominant the period of quiescence or stagnation, or the period of old toryism, as distinguished from the new toryism, which calls itself conservatism. Of course the legislative characteristic of the period was the absence of legislation.

"On the passing of the Reform Bill of 1832, the period of quiescence gave place to the period which Professor Dicey calls the period of individualism, or Benthamism, or of Benthamite liberalism. It was called the period of individualism because, during that period, the leading aim of legislation was to secure to every person the greatest practicable amount of individual freedom, and, on the other hand, to impose upon every one the sole responsibility of taking care of himself.

"Individualism ceased to be dominant at about the beginning of the last third of the century, and then gave place to what he calls collectivism, and sometimes socialism. With him, however, the term 'collectivism' seems scarcely to mean more than *anti*-individualism, though the term would seem to have at least this affirmative meaning, that it favors the interference of the state in behalf of some persons or classes, and, therefore, at the expense of others.

"A conspicuous and most interesting feature of the book is the manner in which the author brings out the fact that a dominant current of public opinion and also one or more counter-currents commonly exist side by side, the latter constantly opposing and modifying, in a greater or less degree, the action of the former."

The period of individualism contrary to what might be expected, was a period of great legislative activity in contrast with the legislative quiescence of the preceding period. This, however, was due to the necessity of removing restrictions upon liberty previously existing. The method by which individualism was finally overthrown was through an alliance between toryism and the working classes, as the old toryism had been overthrown in 1832 by an alliance between the Benthamites and the Whigs. This was at first unconscious but later an express alliance working in the field of legislation in the study of factory operatives.

"It must not be supposed, however, that collectivism has advanced itself by the same method as individualism, nor that it has produced the same effect upon the conservative party that individualism did upon the Whig party. Individualism was a doctrine and a theory; was loudly proclaimed and aggressive. Collectivism, on the other hand, is not a theory, but a practice. It is an influence which is not openly acknowledged.

"In short, the conservative party has never adopted socialism as part of its creed, as the whig party did individualism. It has courted the working classes, but it has done so, not by adopting their theories, but by making concessions to them, and by conferring upon them great practical benefits, or at least, what the latter so regarded. It is to be remembered also that paternalism in government was always a part of the tory creed."

The book also discusses by way of illustration, some of the cross currents of opinion effective during the period such as that relating to the established church. Of the book as a whole, the reviewer says: "Any American who wishes to know the England of the nineteenth century as if he were a native, will find in Professor Dicey, who is the worthy successor of Blackstone, an incomparable instructor.

INSURANCE. "Briefs on Insurance," by Roger S. Cooley, West Publishing Co., St. Paul, 1905. The title to this book is somewhat misleading as it contains not merely a collection of disconnected briefs but an analysis of the entire field of insurance law supported by full citations of cases and in many instances by extended abstracts. The form of the book is decidedly novel as is indicated by the title. Unlike many text-books it frankly confesses to be a collection of abstracts of cases arranged under appropriate analytical headings. Though the work will prove of little value to students, it will be very useful to the practitioner who has to prepare briefs on insurance law, and from an examination by the reviewer in the course of his practice he found it useful and reliable as a means of rapidly collecting the American authorities, including the most recent decisions.

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INSURANCE (see Constitutional Law).

INTERNATIONAL LAW. In the December *American Law Register* (V. liii, p. 738), Theodore J. Grayson concludes his commentary upon "The War in the Orient in the Light of International Law." In it he briefly discusses a number of widely different problems which have been involved in the conduct of the war, and in general finds that both parties in certain directions have exceeded their rights under a correct interpretation of the spirit of the existing international law. He suggests several points which must come up for decision at the next international conference, which he regards as an absolute necessity in the light of recent events, in view of the necessity they have raised for a decision of these questions. He believes that the present war has been an inestimable boon to international law, and will in all probability make for general peace.

LANDLORD AND TENANT (see Negligence).

LEGAL ETHICS. Alfred Hemenway's address before the American Bar Association entitled "The American Lawyer," published in the September GREEN BAG is printed in the December *Albany Law Journal* (V. lxvii, p. 347), and the December *American Lawyer* (V. xiii, p. 531).

NEGLIGENCE. "The Law of Passenger and Freight Elevators," by J. A. Webb. The F. H. Thomas Law Book Co., St. Louis, 1905. Price, $4.75 net. This is a convenient collection of tort cases arising out of the use of elevators. As these cases multiply it becomes necessary to have the cases classified with reference to facts as well as reference to law, and this is the characteristic of this book. There is almost no discussion of principles in the book. Indeed its scope would hardly admit it.

NEGLIGENCE (Landlord and Tenant). "Liability of a Landlord for Injuries to a Tenant Caused by Defects in the Leased Premises," by M. C. Freerks, *Central Law Journal* (V. lxii, p. 43).

PARTNERSHIP (see Corporations).

PERSONS (Domestic Relations). "A Question of Martial Rights," by M. J. Gorman, *Canadian Law Review* (V. v, p. 13).

PERSONS (see Property, Torts).

PRACTICE. "Brief Making and the Use of Law Books," by William M. Lile, Henry S. Redfield, Eugene Wambaugh, Alfred F. Mason, and James E. Wheeler, edited by Nathan Abbott, Dean of the Leland Stanford, Jr., University School of Law, West Publishing Co., St. Paul, Minn., 1906. This is a series of articles on the subject defined in the title. It includes "The Brief on Appeal" by Mr. Redfield, discussing the nature of a brief, the contents of a brief, and the preparation of a brief. "How to Use Decisions and Statutes" by Mr. Wambaugh, "American Law Publications," by Mr. Mason and "How to Find the Law," by Mr. Wheeler.

The book contains little that an experienced practitioner is not familiar with, but should be very useful to the beginner and to the clerk in a large office, whose work is usually largely brief making, and it will also be useful to students in the schools in connection with their study of cases. Mr. Mason's article contains a convenient collection of the local names of state reports, and the appendix contains a very valuable alphabetical list of abbreviations of reports. Mr. Wheeler's article consists of a classification of the law and a suggestion of various analogous subjects in which cases may be found treating upon particular subjects. Mr. Wambaugh's article, like his previous book on the same subject, is of great value to the student of cases. The book is essentially practical and covers a new field.

PRACTICE (Probate). "The System of Probate Courts in Connecticut with Some Suggestions for its Improvement," by James Kingsley Blake, *Yale Law Journal* (V. xv, p. 131).

PROCEDURE (Arbitration). R. D. Melville discusses "Alternative Awards in Arbitrations" in the December *Juridical Review* (V. xvii, p. 360) with reference to Scotch procedure. He objects to the necessity of further reference to the arbitrator after a finding on points of law by the court.

PROCEDURE (Criminal Law). In the December *Juridical Review* (V. xvii, p. 332), Honorable Lord Salvesen discusses "The Justiciary Appeal Court, its Anomalies and Limitations," an account of the Scotch system of criminal appeals by a member of the court. The most serious limitation he says

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is that the members of the court have no control over the findings of its members sitting as single justices, even as to rulings on points of law. It is, however, entitled to inquire into the regularity of procedure in inferior courts. It investigates with scrupulous care regularity in procedure, but if the forms have been complied with it can take no cognizance of the most monstrous injustices. He also finds that the exercise of its functions in respect to procedure are largely beneficial.

PROPERTY (Domestic Relations). "The Community Property Law of Washington and Non-Residents," by George Ladd Munn, *American Lawyer* (V. xiii, p. 520).

SALES. "C. O. D. Sales of Intoxicating Liquors," by B. R. Webb, *American Lawyer* (V. xiii, p. 515).

TORTS (Domestic Relations). "Action by Married Woman for Alienation of her Husband's Affections," by H. N. E., *Law Notes* (V. ix, p. 186).

TORTS (see Agency, Negligence).

WILLS. The Scotch cases on "The Exercise of Powers of Appointment," are collected and analyzed by J. Hossell Henderson in the December *Juridical Review* (V. xvii, p. 371).

WITNESSES. "The Privilege of Witnesses," by John A. Inglis, in the December *Juridical Review* (V. xvii, p. 340), is a criticism of a recent decision of the House of Lords which refused to extend the privilege of a patient as to confidential communications to a physician to testimony at a precognition, which seems to be a sort of preliminary hearing in Scotch practice.

WITNESSES (Self-Crimination). In the January *Yale Law Journal* (V. xv, p. 127), Henry T. Terry advocates the abolition of "Constitutional Provisions Against Forcing Self-Incrimination." He argues that this was a development of a time when punishments were particularly severe and ignorance of defendants was greater than now. The dangers which it was supposed to defend, however, are shown by experience to no longer exist, for under the statutes permitting defendants to testify, innocent persons usually avail themselves of it and seldom suffer in consequence. The protection is availed of by the guilty to obstruct the process of justice.

His most important reason is that crimes most prevalent and injurious to the community now are of a fraudulent and secret nature such as conspiracies and combinations. These are easy to cover up and at present are not punished, largely owing to the impossibility of compelling testimony. He emphasizes the importance of developing the means of punishing those offences because of the effect on the morals of the community of failure to enforce the laws in such cases.

WITNESSES (see Evidence).

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NOTES OF THE MOST IMPORTANT RECENT CASES COMPILED BY THE EDITORS OF THE NATIONAL REPORTER SYSTEM AND ANNOTATED BY SPECIALISTS IN THE SEVERAL SUBJECTS

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

ADMIRALTY. (See Shipping.)

CONFLICT OF LAWS. (**Liability of Shareholders.**) — The case of Risdon Iron and Locomotive Works *v.* Furness, to which reference has already been made in the GREEN BAG, has now been decided by the English Court of Appeal (Nov. 10, 1905) adversely to the plaintiffs, thus affirming the judgment of Mr. Justice Kennedy in the court below. In this case the Copper King (Limited), a mining company, was organized under the English Company Laws, with its registered offices in London, and with its capital fully subscribed and fully paid up, and by its memorandum of association (charter) was authorized to acquire mining rights and lands in the United States, and to purchase and to hire machinery, and by its articles of association (by-laws) was empowered to appoint any person as its attorney for the transaction of any business abroad, with such powers as it might deem necessary to enable the Company's operations to be validly carried on abroad, and to do all such acts and to take such steps as might be necessary to comply with any statutory enactment, rule or regulation of any country where the company might carry on business. The company, as a matter of fact, carried on business in California, and for that purpose it had to be registered there, and it incurred local debts to the plaintiff in the purchase of machinery in that State. By the law of California, each stockholder of a corporation is individually liable for debts contracted by the corporation during the time he is a shareholder, according to the proportion which his holding bears to the subscribed capital of the company, and no corporation organized outside the limits of the State is allowed to transact business within the State on more favorable conditions than are prescribed by law to similar corporations organized under the laws of the State. The company's debt of $10,404.96 to the plaintiff not having been paid in San Francisco, and the company having gone into liquidation in London, the plaintiff brought its action in England against Sir Christopher Furness, one of the largest shareholders of the defunct company, to charge him for liability for the plaintiff's account under the provisions of the California statute. The case, which involved a new proposition of law, so far as the English courts were concerned, was very carefully argued both in the King's Bench Division and the Appeal Court. Mr. Justice Kennedy, by whom the case was tried in the first instance, held that the defendant's liability was limited by the English Company's Acts, under which the Copper King was registered, and an English Court could not recognize, as a valid cause of action, a claim in respect of the debts of the company arising by virtue of the law of a foreign country which was inconsistent with the limitations of the shareholders' liability according to English law; and that any proceeding by the company in California to enlarge the liability of the shareholder beyond that fixed by the charter of the company was *ultra vires*. In arguing the appeal for the California Company Mr. Montague Lush, K.C., contended that the cause of action against the defendant was transitory, and if he was liable in California he was liable in England; that when persons become members of a company they were bound by the articles; that the articles in this case empowered them to carry on business abroad and to take such steps as might be necessary to comply with any statutory requirement in any country where the company might carry on business; that the defendant had inpliedly given the company authority to contract in his behalf in California, and that he could not be heard to say that he had no knowledge of California law. The Lord Justices, without calling upon counsel for the defendant, dismissed the appeal. The Master of the Rolls, in giving his judgment, said he agreed with Mr. Justice Kennedy that it might be that there was a general power given to the company to carry on business in a foreign country, but underlying that power was the fundamental fact that the company was a limited liability company, and whatever power it possessed must be

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taken as not inconsistent with the constitution of the company. All the English authorities were consistent with this view. He distinguished Bank of Australia *v.* Harding (9 C.B. 661); Bank, etc. *v.* Nias (16 Q.B. 717), Copin *v.* Adamson (L.R. 9 Ex. 345) and Pinney *v.* Nelson (183 U.S. 144) which were relied upon by the plaintiffs.

The extraordinary provisions of the California statute can hardly have extra-territorial effect; nor is joining such a company a submission by the member to the local laws of every state in which it has power to act. Pinney v. Nelson is confined to the case where the corporation is expressly formed to do business in California. Even if we could suppose that the law of California had power to impose a liability on the defendant, such a liability would hardly be enforced in another jurisdiction. Mandell v. Fogg, 182 Mass. 582.

J. H. B.

CONSTITUTIONAL LAW. (Corporations — Amendment of Charter — Insurance.) N. Y. S. C. Sp. Term. — The legal aspect of the controversy as to the control of the Equitable Life Assurance Society is presented in Lord *v.* Equitable Life Assurance Society of the United States, 94 N. Y. S. 65. A statement of some of the facts relative to the organization of the corporation is necessary to a correct understanding of the holding of paramount importance in this case. The company was organized under New York Laws, 1853, p. 887, c. 463, authorizing companies formed thereunder to provide by charter the mode of exercising their corporate powers in the manner of electing directors and officers, and the time of their election. Its charter provided that the shares of its capital stock should be personal property; that the holders might receive a semiannual dividend not to exceed 3½ per cent; that the earnings and receipts of the company should be cumulated; that the corporate powers should be vested in a board of 52 directors, and should be exercised by them and such officers and agents as they might appoint and empower; that they should elect annually from among their number a president; that each member of the board should be the proprietor of at least five shares of stock; that the number might be reduced by its action to at least 24; that directors should be elected by ballot, a plurality of votes electing; that every stockholder should be entitled to one vote for every share of stock held by him, and that the vote might be given in person or by proxy; that the board, after giving notice at the two previous meetings, might, by a vote of three-fourths of all the directors, provide that each life policy-holder who should be insured for not less than $5,000, should be entitled to one vote, but that such vote should be given personally and not by proxy; that the business should be conducted on the "mutual plan"; and that each policy-holder should be credited with an equitable share of the net surplus after its ascertainment by the officers. The company's business resulted in the accumulation of a surplus. In this situation it is held that a proposed amendment of the charter providing that the Board of Directors might be diminished to 28; that the directors, each of whom should be a policy-holder or a proprietor of at least five shares of the capital stock, should be chosen by ballot by the stockholders and the policy-holders, six vacancies occurring annually to be filled by a plurality vote of the stockholders, and the other seven to be filled by a plurality vote of the policy-holders, each policy-holder having been such for twelve months prior to the election, being entitled to one vote, which might be given in person or proxy; was as to stockholders objecting and who claim an interest in the surplus, repugnant to the Federal and State constitutional provisions forbidding the deprivation of property without due process of law.

CONSTITUTIONAL LAW. (Due Process of Law — Imprisonment of Insane Defendant after Acquittal.) U. S. C. C. for W. D. of Wash. — A holding as to the validity of a statute of the State of Washington, which is of more than local interest, because of more or less similar statutes in other states, is contained in the case of Brown *v.* Urquhart, 139 Fed. Rep. 846. The Washington statute (2 Ballinger's Ann. Codes of St., § 6959), provides that where a person tried for crime shall be acquitted by reason of insanity, the jury in their verdict shall state that it was given for such cause, and that thereupon, if the discharge of such insane person shall be considered by the court manifestly dangerous to the peace and safety of the community, the court may order him to be committed to prison. This statute is held to be constitutional and valid when construed in harmony with the general provisions of the Criminal Code, which require a conviction in orderly proceedings, and after a fair trial, prior to the rendition of the judgment under which a person may be imprisoned. It is, however, held that it does not authorize the judge of a trial court to commit a defendant to jail after a verdict of acquittal on the ground of insanity without a new arraignment upon a formal complaint and the opportunity to defend; and an imprisonment on an order so made, based entirely on the verdict of acquittal and proceedings in the criminal case, is without due process of law, and in viola-

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tion of the prisoner's rights under the 14th Amendment of the Federal Constitution.

CONSTITUTIONAL LAW. (Due Process — Taxation — Situs.) U. S. S. C. — A decision of some moment as to the power of the State to tax property not actually within its jurisdiction, is contained in Union Refrigerator Transit Company *v.* Commonwealth of Kentucky, 26 Supreme Court Reporter, 36. A statute of Kentucky provides that all real and personal estate within the State, and all personal estate of corporations residing in the State, and of all corporations organized under the laws of the state, whether the property be in or out of the State shall be subject to taxation unless the same be exempt from taxation by the Constitution, etc. The Union Refrigerator Transit Company was the owner of 2,000 cars which were employed by the company by renting them to shippers who took possession of them from time to time at Milwaukee, Wis., and used them for the carriage of freight in the United States, Canada, and Mexico, the company being paid by the railroads in proportion to the mileage made over their lines. The company insisted that the correct method of ascertaining the number of cars to be assessed for taxation in Kentucky, was to ascertain and list such a proportion of its cars as under a system of averages upon their gross earnings, were shown to be used in the State of Kentucky during the fiscal year. The lower court approved of this method of assessment, but the Kentucky Court of Appeals held that the entire 2,000 cars were assessable in Kentucky. The Federal Supreme Court holds that it is essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power, and that by the taxation in Kentucky of the cars used in other states, the corporation was denied due process of law. The cases are analyzed, and it is pointed out that the cases which hold that personal property is taxable at the domicile of its owner nearly all relate to intangible property such as stocks, bonds, interest, and other choses of action, and that as real property is visible, easily found, and difficult to conceal and the tax readily collectible, it should be taxed at its situs.

In this case, as Judge Holmes hinted in his dissenting opinion, the court appears to have allowed its economic theories to get the better of its legal principle that the result reached is good economically may be granted. But as the same court has often pointed out the common law is familiar with three kinds of taxation: on property, on persons, and on business. It is clear that Kentucky could not duly lay a property tax, strictly so-called, on all these cars; but as the corporation was a Kentucky corporation the common law was familiar with a practice by which it should be taxed by Kentucky in proportion to all its personal property everywhere. This is the first decision in which it is even hinted that a state may not so tax its own corporations. A legal process which is familiar to common lawyers is due process of law.

J. H. B.

This case, affirming D. L. & W. R. Co. v. Pennsylvania, 198 U. S. 341 (1905), seems definitely to commit the United States Supreme Court to the doctrine that a state cannot constitutionally tax tangible personal property owned by a resident, but situated out of the taxing state — certainly a wholesome rule. Most of the judicial statements to the contrary, are, as the court points out, dicta. To the solitary decision it finds opposed to its view should probably be added Bemis v. Board of Aldermen, 14 All. 366 (1867), which, under the Massachusetts statutes then in force, seems to be a case of a tax on chattels outside the state and not merely one on a partner's intangible interest in a partnership. The state cases cited in favor of the court's opinion nearly all turn upon the interpretation of tax laws and involve no constitutional question; but the decision is a logical and desirable step in the direction the court has so long traveled, of construing the Fourteenth Amendment to forbid substantially all arbitrary and oppressive interference with personal and property rights.

It should be noticed, however, that the statutes the Federal courts have so far dealt with have been construed as intended to impose taxes on property as such. A stronger argument could be made in favor of a tax imposed on the person of a resident, measured by the value of his personal property wherever located. Such a tax would bear some resemblance in principle to an income tax. State v. Bentley, 23 N. J. L. 532, 542 (1852). Of course, any state granting a franchise to a corporation can virtually escape the effect of the principal case by measuring the tax on the franchise by the value of the corporate property wherever located.

James P. Hall.

CONSTITUTIONAL LAW. (Sales in Bulk — Statute.) **N. Y. C. of A.** — In Wright *v.* Hart, 75 Northeastern Reporter, 404, the Court of Appeals decides that New York Laws, 1902, p. 1249, c. 528, providing that a sale of any portion of a stock of merchandise other than in the ordinary course of trade in the regular and usual prosecution of the seller's business, or the sale of an entire

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stock of merchandise in bulk shall be fraudulent as against the creditors of the seller unless at least five days before sale a full and detailed inventory is made and the purchaser makes explicit inquiry of the seller as to the names of creditors and notifies them, etc., is in conflict with New York Constitution, Art. 1, §§ 1, 6, and United States Constitution Amend. 14, § 1, guarantying the equal protection of the laws and forbidding deprivation of property without due process of law. This law, the court says, finds no justification in the police power, but so interferes with the freedom of contract as to be in violation of the Constitution. It is pointed out that the practical effect of the law is to require the seller to pay all his debts before he can dispose of his property, and this whether the debts are due or not, and whether they are in dispute or not. He is required to pay creditors who have no legal, equitable or moral claim on the proceeds of the property, and if he depends upon the proceeds of the particular sale to pay his debts he must pay them before he gets the money. Thereby, an intending seller is under the necessity of practically obtaining the consent of his creditors before he can make a sale. The purchaser must also pay claims that are in dispute, whether he is right or wrong in the dispute. This, the court says, may not be a literal taking of property without due process of law, but is an annihilation of its value and a destruction of its attributes, so that while the owner is permitted to retain his property in name, he is deprived of its essence and substance.

Sales in Bulk Acts in substantially the form of the New York statute have been enacted in over twenty states. The highest courts of the states of Tennessee (Ness v. Borches, 109 Tenn. 398), Washington (McDaniels v. J. J. Connelly Shoe Co., 30 Wash. 549), Connecticut (Walp v. Mooar, 76 Conn. 515), and Massachusetts (J. P. Squire Co. v. Tellier, 185 Mass. 18), have sustained the constitutionality of such legislation, while in Ohio (Miller v. Crawford, 70 Ohio St. 207), and Utah (Block v. Swartz, 27 Utah, 387), the courts are in accord with the New York decision. In the New York case the court was divided four to three against the constitutionality of the act. The principal majority opinion, written by Judge Werner, holds that the statute is class legislation imposing upon merchants, manufacturers, and jobbers, burdens that are destructive of their legitimate business. Not differentiating between sales that are honest and those made with intent to defraud the statute sweeps away vested constitutional rights of liberty and property, and transcends the common limits of the police power of the state. In addition to these reasons, Judge Haight, in a concurring opinion, adds, "that the statute unnecessarily and unreasonably restricts the power to contract." In an able dissenting opinion, Judge Vann believed the statute constitutional. "Such interference with liberty and such limitations upon the use of property, although arbitrary and inconvenient, have always been regarded as valid in order to prevent fraud and promote justice." The Court has only to pass upon the question of power, not of policy. The enactment of such a statute is clearly with the police power of the State. Although the question is a close one the better view seems to favor the constitutionality of the act. A statute is not objectionable as applying to a particular class if it applies to all who come within the reason for its enactment.

Commonwealth v. Danziger, 176 Mass. 290.

Rideout v. Knox, 148 Mass. 368.

Moore v. Mo., 159 U. S. 673.

Atchison, etc., R. v. Matthews, 174 U. S. 96, 103.

"It is within the undoubted power of government to restrain some individuals from all contracts, as well as all individuals from some contracts."

Frisbie v. U. S., 157 U. S. 160, 165.

Generally this statute may be sustained by the same line of arguments that have justified oleomargarine statutes.

Plumley v. Mass., 155 U. S. 461.;

or prohibitions of marginal stock transactions.

Otis v. Parker, 187 U. S. 606;

or a hundred other similar limitations on personal liberty or the enjoyment of property under the police powers of the State. It is not for the court to judge whether the statute is commercially wise or unwise, desirable or undesirable. That is for the legislature alone.

Lee M. Friedman.

The long list of statutes regulating the sale of merchandise in bulk is given in the dissenting opinion. Acts of this nature have been declared unconstitutional in Utah (76 Pac. 22) and, as to certain features, in Indiana (72 N. E. 119); but have been sustained in the majority of jurisdictions (Connecticut, Massachusetts, Ohio, Oklahoma, Tennessee, Washington) the opinions delivered in the New York case reveal the usual and hopeless divergency of views as to the extent of the police power.

In view of the fact that the prevailing opinion lays stress upon the failure of the act to differentiate between sales that are honestly made and sales that are made with intent to defraud, attention should be called to an amendment of the law made in 1904 (ch. 569) and not passed upon by this decision by which sales not complying with the act are

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made only presumptively fraudulent, and not absolutely void.

E. F.

This decision is important, as the latest judicial pronouncement upon a novel species of legislation which has swept over the country during the last five years. Statutes designed to accomplish the same end and similar in form and provisions have been adopted during that period in twenty-one states and in the District of Columbia. (Illinois should be added to the list given in the principal opinion. Laws of Illinois, 1905, page 284.) Some of these statutes differ in one important respect from the original New York statute, in that they provide that sales in violation of their requirements shall be only presumed to be fraudulent, whereas the New York and some other statutes make sales in violation thereof absolutely fraudulent and void. Since the action in the present case was instituted, the New York statute has been amended so as to correspond in that particular with the first-mentioned class of statutes on this subject. (Laws of New York, 1904, ch. 569, p. 1385.) The New York Court of Appeals held the statute, in its original form, invalid by a vote of four to three, and the vigorous dissenting opinion is well worth reading. Eight of these statutes have been passed upon by courts of last resort, with varying results, as to their constitutionality as shown in the opinion in the principal case. The Massachusetts statute, almost identical with the original New York statute was declared constitutional in Squire & Co. v. Tellier, 185 Mass. 18; while the Utah act also very similar to the New York statute except that it made a violation of its terms a crime was held invalid, Block v. Schwartz, 27 Utah 387.

All of the other statutes thus far declared constitutional provide that sales not complying therewith shall be only presumptively fraudulent and void, though the Tennessee court apparently gives no attention to that term in the act, which it upholds in Neas v. Borches, 109 Tenn. 398. The Wisconsin court on the other hand places great emphasis upon that clause in the Wisconsin statute. Fisher v. Herrmann, 118 Wis. 424. Professional opinion is likely to divide more or less evenly as to the validity of statutes in the form of the original New York act. On the one hand it seems clear that these statutes, passed as they undoubtedly were, largely through the influence of trade and mercantile associations to "protect a particular class in the community," do place restrictions upon freedom of contract and the right of property. But, on the other hand one calls readily to mind many statutory restrictions upon that freedom and that right, which courts of last resort have expressly held to be not violative of any constitutional provisions, e.g., "fixing the price of elevating grain" (Munn v. Illinois, 94 U. S. 113), the prohibitions of options (Booth v. Illinois, 184 U. S. 425), and the numerous statutes making chattel mortgages and "conditional sales" void, unless recorded. But it seems reasonably clear that those statutes which make sales in violation of their terms, only presumptively fraudulent and void, are safer without being materially less effective than the first New York statute above referred to.

Henry M. Bates.

CONSTITUTIONAL LAW. (Trade-marks — Use of Arms or Seal of Commonwealth.) Mass. — In Commonwealth *v.* R. I. Sherman Manufacturing Co., 75 Northeastern Reporter, 71, the statute of Massachusetts declaring that no person or private corporation shall use the arms or the great seal of the Commonwealth for advertising or commercial purposes, is held constitutional. It is also maintained that the statute is not in conflict with the provision of the Federal Constitution investing Congress with power to regulate commerce among the states. It is held that the statute does not apply to articles manufactured before the passage of the act, but that in a prosecution for violation of the statute the fact that when it went into effect the defendant had contracts for the manufacture, sale, and delivery of goods bearing the prohibited device as a trade-mark, was no defense.

The act sustained by this decision avoided one of the objections which the Supreme Court of Illinois, in Ruhstral v. People, 185 Ill. 133, held fatal to a somewhat similar statute of that state, by not attempting to control the use of the national symbol, but confining itself to the arms and great seal of the Commonwealth; it also avoided the interference with vested rights of property, which caused the New York statute to be declared unconstitutional (People v. Van De Carr, 178 N. Y. 425), by postponing the date of taking effect, one year from the date of the passage of the act. The decision reiterates the principle previously established, that a valid police regulation may supersede existing contracts for the doing of the acts which it forbids.

E. F.

CONSTITUTIONAL LAW. (Waters — Commerce — Contracts.) N. J. Ch. — An interesting holding as to the right of a State to retain within its boundaries the waters of its streams is contained in McCarter *v.* Hudson County Water Company, 61 Atlantic Reporter, 710. It is maintained in this case that the State, as the lower riparian owner on tidal streams by virtue of its owner-

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ship of the bed thereof, so far as the tide ebbs and flows, has the right to have water in the streams reach its property undiminished in quantity, except as it is used by upper riparian owners as part of the public, and that it may regulate the manner of the disposition of its property rights in the water. In consequence of this, it is said that New Jersey Pub. Laws, 1905, p. 461, making it unlawful for any person to transport through pipes water of any fresh water river of the State into another State for use therein is not void as a violation of the interstate commerce clause of the Federal Constitution, inasmuch as the right of the State to preserve the common property cannot be destroyed merely because the unlawful abstracter of the water intends to transport it into another State for use therein. It is also held that the statute, though enacted subsequent to the organization of a company organized under the General Incorporation Act, and having the right to transport and sell water as a lawful business does not impair the obligation of a contract of such company to transport water outside the State.

CONSTITUTIONAL LAW. (See Insurance.)

COPYRIGHTS. (Musical Composition.) **U. S. C. C. for S. D. of N. Y.** — Two copyright points of some importance arise in White-Smith Music Publishing Co. *v.* Apollo Company, 139 Federal Reporter, 427. The composer of a piece of music placed it in the hands of a publishing company for publication and sale. The company afterward copyrighted the publication in its own name, which action the composer ratified. It is held that it might be reasonably inferred that the composer intended to authorize the company to copyright the publication, and that after his ratification the company was vested with the legal title to the copyright, which would support an action for its infringement. A more novel point is involved in the proposition that a musical composition, as an idea or intellectual conception, is not subject to copyright, but only its material embodiment in the form of a writing or print may be copyrighted, and a copyright of such a printed composition is not infringed by a perforated record or sheet designed for use with mechanism to play the composition on a musical instrument.

The reproduction that it was claimed was an infringement was designed for use in a mechanical piano-player, and consisted of a sheet of paper with perforations, which it was impracticable to read for the purpose of singing or playing the composition represented by the perforations The theory of copyright is extensively entered into, and it is stated that a copyright gives the author or publisher the exclusive right of multiplying copies of what he has written or printed, and that to be an infringement, the infringing article must be a substantial copy of the whole or of a material part. Analogous cases involving the right to reproduce compositions by means of phonographs are cited, and it is held that as the perforated sheets can be used only in connection with a certain mechanism and not as a substitute for the printed composition, they do not constitute an infringement.

COPYRIGHTS. (Price Restrictions.) **U. S. C. C. for S. D. of N. Y.** — In Bobbs-Merrill *v.* Strauss, 139 Federal Reporter, 155, it is held that where the publishers of a copyrighted book printed a notice on the page following the fly-leaf, that the price of the book at retail was $1 net, and that no dealer was licensed to sell it at a less price, and the sale at a less price would be treated as an infringement of the copyright, such notice did not purport to reserve to the publisher any interest in the book or any right to control it or the action of its owner in the use and disposition thereof, and was insufficient to constitute a license agreement or contract restricting or modifying the absolute title acquired by purchasers. It is also maintained that where the publisher voluntarily parted with all control over the books by selling them to purchasers, such purchasers were neither licencees nor agents of the publisher, though buying the books for resale, and that consequently such resale did not, in spite of the notice, constitute an infringement of the copyright under Rev. St., § 4964 (U. S. Comp. St., p. 3413), declaring that it is an infringement of a copyright to print or publish a copyrighted book without the consent of the proprietor given in writing, or knowingly to sell, or expose for sale, a copy or copies of such copyrighted book when unlawfully printed or imported.

CORPORATIONS. (See Constitutional Law Equity and National Banks.)

CRIMINAL LAW. (Forgery — Telegrams.) **N. Y. C. of A.** — A holding based on a statute which, so far as the writer knows, is peculiar to the State of New York, is contained in People *v.* Abeel, 75 Northeastern Reporter, 307. Penal Code of New York, § 514, subd. 3, provides that any person who shall alter or utter any telegram or other written communication purporting to have been written or signed by another person

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by which the sentiments, opinions, conduct, character, prospects, interests, or rights of such other person shall be misrepresented, shall be guilty of forgery. Under this statute it is held that the false making of a letter of introduction misrepresenting the identity of the defendant and asking the employés of the corporation of which the purported signer was an officer, to show defendant any favors they could, constituted the crime of forgery, although there was no injury to the person whose name was forged to the letter. The facts of this case are somewhat peculiar, and the admission in evidence of all of them seems to furnish some ground for the statement in the dissenting opinion that defendant was in fact, convicted of a crime of which he was not charged. It appears that defendant accidentally met a certain Miss Anderson who was a telegraph operator in a hotel, and becoming enamoured of her, represented himself to be a son of a wealthy and prominent resident of New York City. Afterward, defendant wrote a note to Miss Anderson stating that he desired to become acquainted with her and afterwards, in an interview, said that he would try to get some one to give him a letter of introduction. Later, he presented such a letter purporting to be signed by one of the vice-presidents of the Western Union Telegraph Company by which Miss Anderson was employed. The presentation of this letter was followed by a rather brief courtship and engagement to marry, which failed of consummation because of defendant's sudden disappearance. All these matters were admitted in evidence, although the crime charged was the making of the letter, and as previously remarked, some color is thereby given to the statement in the dissenting opinion of Cullen, C. J., that the defendant was indicted for one offense and tried, convicted, and punished for a totally different one. The chief contention of the dissenting opinion is that the statute was enacted solely to prevent injury to the purported author of the falsely-made or uttered instrument, and that as no such injury was shown in this case, there was no offense.

CUSTOM DUTIES. (Forfeitures — False Statements.) — C. C. A., 8th Circ. — A construction of act June 10, 1890, c. 407, § 9, is to be found in the case of United States *v.* Ninety-Nine Diamonds, 139 Fed. Rep. 961. The conclusion at which the court arrives is one which seems to be in accordance with the principles of common sense and natural justice, as well as correct legal reasoning. The statute referred to provides that if any owner, importer, consignee, agent, or other person shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice, or false statement or practice, by means of which the United States shall be deprived of the lawful duties accruing upon the merchandise, it shall be forfeited. Under this statute an action was brought by the United States against one Bockstruck upon the ground that he, in making his entry, had declared that he was the owner and that one Fink was the seller of the merchandise, when the truth was that Bockstruck was the consignee and Fink was the consignor. The diamonds had been sent and invoiced to Bockstruck from Antwerp by Fink, under an agreement that he should pay the duty and the expense of transportation from New York and should have the option to keep and buy them at the invoice price, or return to Fink any or all the diamonds. He paid the duties and the transportation charges from New York, and had a lien on the diamonds for those amounts. Under these circumstances it is held that the word "false" in the statute means more than "incorrect" or "erroneous" and implies wrong or culpable negligence, and signifies knowingly or negligently untrue. It is also held in general terms that the words "false" and "falsely" in statutes and contracts which impose forfeitures or penalties for false acts or acts falsely done, generally imply culpable negligence or wrong; they signify more than incorrect or incorrectly, and mean knowingly, or intentionally, or negligently false; in the absence of express provisions in the statutes or contracts, or reasonable implications therefrom, their subjects and the circumstances to the contrary. In view of these principles, it is held that as Bockstruck's statement did not deprive the government of any lawful duties, it did not constitute an offense under the statute.

CUSTOMS DUTIES. (Illegal Importation of Free Goods — Forfeiture.) U. S. D. C. for N. D. of N. Y. — A case which appears to be somewhat in conflict with United States *v.* 99 Diamonds, is that of United States *v.* 50 Waltham Watch Movements, 139 Federal Reporter, 290. In the latter case it is held that proceedings for the forfeiture of merchandise illegally imported may be sustained under Rev. St., § 3082 (U. S. Comp. St. 1901, p. 2014), though the United States has not been defrauded of any sum, and there has been no intent to defraud. The facts, to be sure, are somewhat different, inasmuch as it appears in the present case that certain watch movements which had been sent into Canada by the manufacturer were returned into the United States without any change whatever having been made in them either materially or as to their value. The regulations of the treasury department required in such cases a consular certificate in proof of identification of

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the goods as having been previously exported into Canada from the United States. The goods were not dutiable. The object of the owner in not properly entering the property was to prevent the manufacturer from learning that he was returning it to the United States. Under these circumstances it is held that failure to enter the articles at the custom-house was an offense which rendered the merchandise liable to forfeiture in spite of the fact that the United States was not injured in any way.

EQUITY. (Injunctions — Stockholders' Meeting — Abuse of Process.) U. S. C. C., S. C. — The case of Lucas *v.* Milliken, 139 Fed. Rep. 816, contains a holding relating to the unfair use of injunctive process, which seems to be founded upon general principles of equity. It appeared that two days before the annual election of directors by the stockholders of the corporation the president of the corporation instituted a suit against certain stockholders for the specific performance of an alleged verbal contract of sale by them of a certain number of shares of stock. He also alleged that since making the contract they had conspired to purchase other stock and thereby obtained control of the corporation for ulterior purposes detrimental to its interests. Without notice, and on an *ex parte* showing, an order was granted restraining the stockholders from voting any stock held by them, and restraining the corporation from allowing them to vote. This order was by the president's direction withheld until after the stockholders' meeting had been organized with the necessary quorum, and then served; the result being to leave the president and his supporters in control, though they held only about one-third of the stock. They refused to adjourn until a full hearing could be had before the court, and chose a board of directors who reëlected the president. Under these circumstances, it is held that the order was unwarranted, and in addition, that the use made of it by the president was unfair and an abuse of legal process, and that it should be dissolved, especially in view of the fact that on the complainants own showing his right to relief on his alleged contract was doubtful.

EXECUTORS. (Right of Retainers.) Eng.— In *in re* Marvin-Crawter *v.* Marvin, 54, W. R., p. 74, an interesting point arose on the question of the right of an executor to retain his debt against a judgment — creditor of the deceased. It appeared that the plaintiff had obtained an ordinary common law judgment *de bonis testatoris* against the executrix and thereafter commenced an administration action. The executrix had not pleaded *plene administravit* or her retainer. It was said that it was obligatory in the executor or administrator either to plead a retainer for his own debt or give it in evidence under a plea of *plene administravit*, and that if the executor does not set up the retainer in one form or the other a judgment *bonis testatoris* against an executor or administrator is conclusive proof that he has assets to satisfy it. It was held, therefore, that in an administration action an executor is unable to retain his debt against a judgment creditor in case of insufficient assets, the judgment *de bonis* is conclusive between the two, and that the case is distinguishable from one in which there has been a judgment to pay out of assets in the hands of the executors "to be administered in due course of administration." The rule being that whenever there is a judgment for a definite sum against an executor or administrator such person must, if he claims to retain a debt due to him from the deceased, plead *plene administravit* or a retainer. The following cases were cited during the argument: Wheatley *v.* Lane 1, W. M. S.; Saund 216 a, 219 b; *In re* Hubbach 29, Ch. D. 934.

FEDERAL COURTS. (Removal of Causes — Diverse Citizenship — States.) Ind. — A recent case apparently in line with the current of authority on the subject of diverse citizenship as a ground for removal of causes is Southern Railway Company *v.* State, 75 Northeastern Reporter, 272. There it is held that a state not being a citizen of any state an action in which a state is the real party in interest cannot be removed from a state to a Federal court solely on the ground of diverse citizenship. In support of this holding the court cites the following cases: Upshur County *v.* Rich, 135 U. S. 470, 10 Sup. Ct. 651, 34 L. Ed. 196; Postal Telegraph Co. *v.* Alabama, 155 U. S. 482, 15 Sup. Ct. 192, 39 L. Ed. 231; Indiana *v.* Alleghany Oil Co. (C. C.) 85 Fed. 870; Huntington *v.* Attrill, 146 U. S. 672, 13 Sup. Ct. 224, 36 L. Ed. 1123; Ames *v.* Kansas, 111 U. S. 449, 4 Sup. Ct. 437, 28 L. Ed. 482; State *v.* Tolleston Club (C. C.) 53 Fed. 18; 18 Ency. Pl. & Prac. 190.

INSURANCE. (Spontaneous Combustion of Wool.) Kans. — A case which seems to be in conflict with a similar case noted in the last number of this magazine is that of Sun Insurance Office of London, England *v.* Western Woolen Mills Co., 82 Pacific Reporter, 513. In the former case it was held that the destruction of a quantity of wool by the action of water, resulting in spontaneous combustion was not a fire within the meaning of the insurance policy unless accompanied,

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as the court phrased it, by visible flame and heat.

In the present case the Supreme Court of Kansas holds that it was not error under similar circumstances to refuse to give an instruction that wool cannot set fire to itself, nor to define fire as necessarily accompanied with visible heat or light, or to charge that no degree of heat short of ignition, producing an actual burning, is covered by the policy. In both cases it was contended for the insured that as the chemical process which destroyed the wool was that of combustion it was a fire within the meaning of the policy, even though there was no flame, and the Kansas court upholds an instruction that a definition of the word "fire" was unnecessary, and that it would make no difference if there was fire, whether it was in the form of flame or merely smoldering.

INSURANCE. (**Constitutional Law — Anti-Trust Law.**) **Ark.** — An interesting holding as to the effect of an anti-trust statute of Arkansas is contained in Hartford Fire Ins. Co. *v.* State, 89 Southwestern Reporter, 42. A statute of the state of Arkansas (Act January 23, 1905) provides that any corporations who are or shall thereafter create, enter into or become members of, or be parties to, any pool trust agreement, etc., whether made in Arkansas or elsewhere, with any other corporation, partnership or individual, to regulate, either in Arkansas, or elsewhere, the price or premium to be paid for insuring property, etc., or who shall enter into or become members of any pool, combination, association, or confederation to fix in Arkansas, or elsewhere, the price or premium to be paid for insuring property shall be guilty of conspiracy and be subject to the penalties provided by the act. This statute, it is held, prohibits the doing of business in Arkansas by a foreign insurance corporation belonging to a trust or pool to fix insurance rates for places outside the State of Arkansas. It is also held that the legislature had power to enact the statute inasmuch as it was entitled to fix the terms and conditions on which such companies should be permitted to do business within the State.

NATIONAL BANKS. (**Stockholders' Right to Inspect Books — Mandamus.**) **U. S. S. C.** — Guthrie *v.* Harkness, 26 Sup. Ct. Rep. 4, is authority for the proposition that any legal right which a stockholder of a national bank may have to obtain an inspection of its books, may be enforced in the State courts by mandamus, in view of the provision of the Act of August 13, 1888, that for actions against national banks at law or in equity, they shall be deemed citizens of the State in which they are located, and that in such cases the Federal, Circuit, and District courts shall have jurisdiction only as in cases between individual citizens of the same State. A more novel contention in this case is that which is answered by the holding that the common law right of a stockholder, for proper purposes and under reasonable regulations as to place and time, to inspect the books of the corporation of which he is a member, is not restricted as to national banks by U. S. Rev. St., § 5211, requiring such banks to make reports to the Comptroller of the Currency, or by section 5240, providing for the appointment of examiners to investigate the condition of such banks, or section 5241, providing that no such bank shall be subject to any visitorial powers other than such as are authorized by the statute, or are vested in courts of justice. It was rather strenuously contended that an examination of the books was an exercise of visitorial power, but this denied in accordance with the strict definition of the power of visitation, which seems to be applicable only to ecclesiastical and eleemosynary corporations. Even if it was conceded that power to inspect books was a visitorial power it would, says the court, belong to that class vested in courts of justice which are expressly excepted from the inhibition of the statute.

NUISANCE. (**Noise.**) **Eng.** — The right of relief from annoyance caused by noise in a crowded neighborhood, was the question for decision in Rushmer *v.* Polsue and Alfieri (limited) Dec. 14, 1905, 22 T. L. R. It appeared that the plaintiff was a person who lived in a locality chiefly occupied by printing and other like trades, where noisy machinery was used, and that he had lived there for some twenty years without being disturbed unduly at night by noises arising from machinery, although in the daytime he had been subject to noises arising from printing-works in his immediate neighborhood, and that for a house in the middle of such a locality he had been fairly undisturbed by noise. Some short time before this action was commenced the defendants, who were printers, went into occupation of the house adjoining his and there set up some noisy machinery which, being worked at night, caused a serious disturbance to the plaintiff and his family, such as previously had not been experienced by them. The plaintiff thereupon claimed an injunction to restrain the defendants from so working their engines and other machinery as to cause a nuisance or annoyance to the plaintiff by reason of the noise. It was contended by the defendants that a person living in a district specially devoted to a particular trade could not complain of any nuisance from noise caused by the carrying on of any branch of that trade without carelessness

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and in a reasonable manner. It was held that the standard of comfort differs according to the situation of property and the class of people who inhabit the locality, and that a resident in such a neighborhood, such as that in which the plaintiff lived, would have to put up with a certain amount of noise, but that, whatever the standard of comfort in a particular district might be, the annoyance might be so material as to create a legal nuisance, if the noise was caused by the carrying on of a particular trade not in the particular and established manner of the trade in the district. In other words, it was held that where there was a substantial addition to preëxisting noises it is no defense that the neighborhood is a noisy one and that the machinery causing the noise is of the most modern pattern and of first-class character. The following cases were cited: Sturges *v.* Bridgman, 11 Ch. D. 852; St. Helens Smelting Co. *v.* Tipping, 11 H. L. C. 642; Crump *v.* Lambert L. R. 3, Eq. 409; Walter *v.* Selfe, 4 De G. & S. 315; Colls *v.* Home & Colonial Stores, 1904 A. C. 179, 185. The injunction was granted.

PRACTICE. (New Trial — Jurisdiction.) Minn. — The case of Kroning *v.* St. Paul City Ry. Co., 104 Northwestern Reporter, 888, contains a very brief decision upon a point of procedure which does not often arise. It is there held that the general grant of appellate jurisdiction in all cases, both in law and equity, to the Supreme Court, carries with it by necessary intendment every other power reasonably necessary for the complete exercise in all cases of the jurisdiction conferred, and gives the court jurisdiction and power to remand a case and the record thereof to the trial court, to enable the appellant to renew a motion for a new trial on the ground of evidence which was newly discovered since the filing of the return in the Supreme Court.

PRACTICE. (Peer's Privilege.) Eng. — Students of the history of legal practice will be interested in the arguments of the Committee of Privileges of the House of Lords in the application of Lord Kinross to be permitted to practice before the House of Lords, he being himself a peer. The debate is reported in 1905 Appeal Cases, 468. Lord Kinross is the son of the late Lord Justice General of Scotland, and is a practicing barrister. The only case in which a member of the House of Lords has become a practicing member of the English Bar, was, until very recently, that of the present Lord Coleridge. In *in re* Kinross the Lord Chancellor moved: "That according to the practice of the highest Court of Appeal, the House of Lords, there is no reason why a peer should not be heard as an advocate to argue questions of law before your Lordship's House." In his argument supporting the motion the Lord Chancellor referred to the heretofore anomalous position of Lord Coleridge, and said that he assumed that there is nothing in the position of an advocate before the courts to prevent a peer from practicing at the Bar, but that then the question arose, is there anything to exclude him from appearing also before the highest Court of Appeal? He went on to say: "Whatever may be said about that now, there is no doubt that in earlier times there was not a strong partition between the Bench and the Bar. If anything is to be said about the traditions of the Bar, my impression, derived from the old reports, is that in the times of our early legal history a man was one day an advocate and the next day a judge. In fact, when you use the old reports for the purpose of authority, it is difficult, without making some sort of antiquarian inquiry, to ascertain whether or not the words you quote are words of authority coming from one of the judges, or whether they are merely the arguments of counsel which may have been altered the day before in his capacity as counsel, and not as a judge at all. From time to time they went from the Bench to the Bar and from the Bar to the Bench during all those years." All of the Lords, except Lord James, supported the Lord Chancellor and the resolution to admit peers to practice, with the amendment that such privilege should not extend to appearing to argue before Committees of the House, or before the House when sitting on a criminal case when a peer is on trial, was unanimously carried.

SHIPPING. (Abandonment — Contract of Affreightment.) U. S. S. C. — In *The Elisa Lines*, 26 Sup. Ct. Rep. 8, it is held that the justifiable abandonment of a vessel in consequence of the dangers of the seas is such a renunciation of the contract of affreightment as entitles the cargo owners to refuse to go on with the voyage, at least, where the master has not rejoined the ship before some one else has taken possession, or has not obtained the vessel and cargo from the salvors before the cargo owners have announced their decision to terminate the contract. The opinion is by Mr. Justice Holmes and proceeds upon the theory that though the master's act in abandoning the ship was justifiable, it nevertheless was a voluntary act and constituted a rescission of the contract of affreightment. Justices Brown, Harland, McKenna, and Day, dissent and lay down the doctrine that the compulsory abandonment of a ship at sea should be treated merely as a relinquishment of the voyage and of any present intention to continue it, but that if the vessel be subsequently rescued and taken into an interme-

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diate port the master retains the same right given to him by an ordinary disaster at sea, unattended by abandonment, to resume possession of the ship and cargo, subject to a claim of the salvors, and to carry the cargo forward to its destination, provided he act with promptness and before any intervening rights have accrued.

SHIPPING. (Bill of lading, Harter Act.) Eng. — In Compania Naviera Vascongada *v.* Churchill and Sim-Compania Naviera Vascongada *v.* Burton & Co., 1905, Nov. 23, 22 T. L. R., 85, action was brought to recover freight on some timber shipped, according to the bill of lading, from Port Arthur, Texas, to London. The bills of lading stated that the timber was "shipped in good order and condition." It also stated that the "quality and measure" were unknown and that it was to be subject to the provisions of the Harter Act of Congress, 1893. The timber on arrival was found seriously damaged, and had, in fact, been noticed as so damaged when it was shipped, and the action was brought by the endorsers of the bills of lading against the ship-owners, whose liability in such case had never yet been settled. The judgment held that the statement that the timber was shipped in good order and condition was not neutralized by the statement that the "quality and measure" were unknown, and that the contract was one to deliver the goods in the same condition in which they were shipped coupled with an acknowledgment that the condition at the time of shipment was good. It was also held that whether the Harter Act was incorporated or not in the bill of lading, the master had authority to state in the bill of lading that the goods had been shipped in good order and condition and that this statement bound the ship-owners, who were thereby estopped as to the endorsees of the bill of lading, from denying that the goods were in good condition at the time of shipment, and that they must therefore pay the damage which was found on delivery to be done to the goods. It was also held that section 4 of the Harter Act, when it provided that the statement of the captain as to the condition of the goods was to be *prima facie* evidence, did not prevent any estoppel because the act did not provide that the evidence was only to be *prima facie*, and it was consistent with the section that, upon something further happening, the evidence might become conclusive. It also pointed out that the object of these words was to preserve the doctrine of Grant *v.* Norway, 10 C. B. 665, a case which since the Harter act, was recognized as law in America. The following cases were cited during the Grant *v.* Norway (10 C. B. 665; 20 L. J., C. P. 93); Cox *v.* Bruce (18, Q. B. D., 147; 56 L. J., Q. B., 121); Howard *v.* Tucker (1 B. & Ad., 712); Sears *v.* Wingate (85, Mass. Rep. 103); Seduc *v.* Ward (20 Q. B. D. 475); The Prosperino Palasso (29 L. J. 622); The Taa (32, L. T. 541); Craig *v.* Delary (6, Rettie, 1, 269).

TORTS. (Boycott — Injunction.) U. S. C. C. for N. D. of Cal. — Loewe *v.* California State Federation of Labor, 139 Federal Reporter, 71, contains a holding upon a subject of ever-growing importance, which though in line with a number of former adjudications, presents the subject involved very clearly. It is there decided that the fact that the ultimate object of a combination is to benefit the parties thereto in their business or property which is in itself lawful, will not prevent such combination from being an unlawful conspiracy where its immediate object and purpose is to injure or destroy the business of another by means of a boycott, nor is such combination rendered lawful because the acts contemplated and done pursuant thereto might lawfully be done by an individual acting for himself. In consonance with this principle it is held that the concerted action of labor organizations, state and local, in declaring a boycott against the business and goods of a manufacturer of another State, to compel him to unionize his business as demanded by an affiliated organization, followed by the sending out of circulars and agents announcing such action, and that dealers buying or selling the goods of the manufacturer would also be treated as unfair, and by attempts by other means to interfere with and destroy his business constitutes an unlawful conspiracy which the courts will enjoin.

TORTS. (Imputed Negligence.) Conn. — Willmot *v.* McPadden, 61 Atlantic Reporter, 1069, holds that negligence of a parent cannot, by the doctrine of imputation, be made a defense to an action by the administrator of an infant for damages for negligence causing the infant's death. This holding is based upon Connecticut Public Acts 1903, p. 149, c. 193, authorizing the bringing of an action by an administrator on a cause of action for injuries which accrued to his intestate, and entitling the administrator to recover damages on the same grounds and measured by the same rule as if the action had been brought by the injured party in his lifetime. An infant, as well as an adult may, says the court, recover damages for injuries caused by the negligence of another. In such a suit the plaintiff must prove that his own fault did not concur with the fault of the defendant as a proximate cause of the injury, but the fact that the fault of the third party may have concurred with that of defendant in

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producing the injury does not prevent the plaintiff from pursuing his remedy separately against the defendant for his tort, and it is immaterial that this concurring fault of a third party is that of an infant plaintiff's parents in negligently permitting their child to be unattended in a place of danger.

Under the Connecticut statutes (§§ 398, 399) a judgment obtained in the above action would be equally distributed between the parents. They are therefore permitted to profit from their own negligence. But if the judgment rendered is regarded as a part of the estate of the deceased person this cannot be a fatal objection since, in some jurisdictions, even one who intentionally murders his ancestor is permitted to inherit his estate. Cardenter's Appeal, 170 Pa. 203; Schellenberger v. Ramson, 41 Neb. 641 (overruling 31 Neb. 61); Owens v. Owens, 100 N. Car. 240. The rule is different as to taking under a will (Riggs v. Palmer, 115 N. Y. 506) or a life insurance policy (Cleaver v. Mutual, etc., Ass'n, 1892, 1 Q. B. 147). The question in cases like the above is therefore whether the statute makes the right of action a part of the deceased person's estate or whether it creates a right of action for the special benefit of designated beneficiaries. If the latter, beneficiaries who have by their negligence contributed to the death, ought not to be permitted, as the real parties in interest, to profit by their own wrong under the guise of an action by the administrator for their benefit. But in such a case a difficult question is raised when one of several beneficiaries has negligently contributed to the death and there is no provision for separate verdicts for the benefit of each. Wolfe v. Lake Erie, etc., Ry., 55 Oh. St. 517; Air-Line Ry. v. Gravitt, 93 Ga. 369.

Under statutes in Iowa, New Hampshire, New Jersey, New York, Tennessee, Vermont, and Virginia the contributory negligence of the beneficiary has been held, as in the above case, to be no bar to recovery by the administrator. It has been held to be a bar under statutes in Arkansas, Alabama, Indiana, Nebraska, North Carolina, Ohio, and Pennsylvania, and there are dicta to the same effect in other states. Of course the question of imputing the negligence of a parent to an infant so as to bar his own recovery in case he should survive, and therefore the recovery of the administrator after his death, should be kept distinct.

E. W. H.

TORTS. (Strike — Injunction.) Ill. — The right of a labor union to declare a strike in order to compel an employer to unionize his business is denied in O'Brien *v.* People, 75 Northeastern Reporter, 108. It appeared that a manufacturing corporation conducting an open shop in which both union and non-union mechanics were employed was approached by the agents of a labor union and requested to sign a contract wherein it was agreed that the corporation should employ none but mechanics belonging to the union; that a steward of each craft employed should see that the employees belong to the union and that a business agent of the union should have the privilege of interviewing members of the corporation at its offices during business hours. The contract further provided that all apprentices should belong to the union, that their number should not exceed one for every ten mechanics or less of the different crafts; and that a sympathetic strike so protect union principles should not be contidered a violation of the contract. The corporation refused to sign the agreement, whereupon the agents of the union threatened to and did call a strike. In this situation it was held that the attempt to coerce the corporation into signing the contract by threats to order a strike was an unlawful interference with the business of the corporation. It also declared that acts of strikers in coercing, intimidating, and beating the corporation's employees was a violation of a strike injunction sufficient to sustain a judgment for contempt against persons guilty thereof.

The end must justify the means. Even in New York which under its judicial decisions is a paradise for those who wish to control the business of others, it has been held that the interference with contracts or business could not be justified if the end sought was to compel the plaintiff to deliver up certain books or papers (Connell v. Stalker, 21 N. Y. Misc. 609); or to join a union (Coons v. Chrystie, 24 N. Y. Misc. 296; Curran v. Galen, 152 N. Y. 33); or to employ only union men (Davis Machine Co. v. Robinson, 41 N. Y. Misc. 329). But probably some of these sound conclusions are impeached by the reasoning in National Protective Ass'n v. Cumming, 170 N. Y. 315. To induce employees to strike for higher wages or shorter hours is quite a different matter from inducing them to strike in order to compel their employer to discharge or not to employ such workmen as he may choose to keep or to engage. It is not every remote advantage to A and his associates that will justify A in inducing his associates to quit their employment with the plaintiff. Able judges differ as to whether a particular end or object is too remote, for example, the strengthening of the labor union as a preliminary to a contest with the employer about wages. (Plant v. Woods, 176 Mass. 492.) The principal case seems to reject the strengthening of the labor union as a justification for interference with the employer's business.

E. W. H.

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THE LIGHTER SIDE

"Tom" Reed and the Little Judge. — In the days when his brain and body were bigger than his reputation, "Tom" Reed was taken in hand by a friend who sought to make him acquainted with a somewhat noted Maine judge, whose influence, it was hoped, might prove valuable. As a precautionary measure, the struggling young lawyer was warned not to offend the eminent jurist, who was extremely sensitive with regard to his diminutive size.

The introduction took place at an auspicious moment. The judge condescendingly offered his hand, when, from his superior height, Mr. Reed looked straight over the head of the little great man, and, with a comical side glance at his friend, asked blandly: "Where is he?" — *Boston Herald.*

Why Lawyers Multiply. — An attorney sends us a clipping containing the following, which is said to have been written by Richard Peters, the first reporter of the United States Supreme Court, and preserved by John Adams in his diary. It was handed by Peters to Judge Willing in Philadelphia one day in court while the convention of 1774 was in session, in reply to a question which the judge had asked in pleasantry at dinner.

"You ask me why lawyers so much are increased,
Though most of the people already are fleeced;
The reason, I'm sure, is most strikingly plain —
Tho' sheep are oft sheared the wool grows again,
And though you may think e'er so odd of the matter,
The oftener they're fleeced the wool grows the better.
Thus down chin'd boys, as oft I have heard,
By frequently shaving obtain a long beard."
— *Ohio Law Bulletin.*

The Judge was Puzzled. — The late Judge Stevens of Lawrence was noted for the choice English which he always used, and in spite of his long term on the bench, where all sorts of culprits were brought before him, he never understood the English of the slums.

On one occasion an Irishman was being tried for assault and battery on another Irishman. The plaintiff took the stand and told his story, getting as far as, "He give me a clout on the mouth," when the court inquired: "What did you say he gave you?"

"A clout on the mouth, sor," the witness replied.

"But," said Judge Stevens, "where did he get the clout?" — *Boston Herald.*

Plenty of Time for Action. — The police magistrate so often admonish women complainants to come back and report any further wrong-doing on the part of husbands who have been released that they fall into the habit of repeating the admonition on every occasion in which a man and wife are concerned. The other day a woman told Magistrate Moss that her husband had threatened to kill her.

"Very well, madam, if he does, you come back and tell me and I will punish him," replied the magistrate mechanically. — *New York Sun.*

A Cross Examiner. — If all lawyers and ministers knew when to stop, our trials and our sermons would be shorter. As it is, the ministers can go on too long with impunity, but the lawyers are, now and then, shown their error rather forcibly, as happened in a case on trial the other day in one of our courts. Much evidence had been offered, going back to the original Indian grants, but the real point of the case was the location of a certain boundary line. A former owner was produced by the defendant, who testified that he and the adjoining owner had gone out together onto the land, made a careful examination, and had located the line. Cross-examination simply brought the same evidence more emphatically, the last answer being.

"We both agreed that this line was correct." Then to ram the fact home a little harder, our young friend arose and asked his witness, expecting of course an answer in the negative, — "Was anything else said by you at that time?"

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The witness answered, " Oh, yes. I had forgotten, but going over it this way, makes me think of it." He said, ' Of course, if we ever find the *real* line, what we have done to-day don't count,' and I said, ' Of course.' "

No Such Word. — At a hearing before an Irish dispenser of justice in Pennsylvania the 'Squire stopped the proceedings and began writing industriously.

" What are you doing, 'Squire? " asked the attorney for the prisoner.

" I'm committing the man to jail," answered the 'Squire.

" But you can't do that," asserted the astonished attorney.

" I can't, can't I? and me a-doin it," was the calm reply. — *Lippincott's.*

Novel Way of Preventing Litigation. — A nervous old lady was riding down a dangerous looking trail with a California stage-driver, when she noticed a hatchet lying in the bottom of the stage, and inquired why he carried it. " I use that hatchet to knock injured passengers on the head," replied the driver. The old lady gasped with astonishment. " We have a good many accidents on this 'ere line," he continued; " the stage's allus tippin' over and rollin' down precipices, and every time a passenger gits hurt he sues the company for damages. These here damage suits uses up all the profit of stagin', and we've had to stop 'em, so every driver carries a hatchet. When a passenger gits hurt we simply knock him on the head and throw the body over a precipice, and then there ain't no lawsuit. See? " — *San Francisco Argonaut.*

The Rooster's Privilege. — A recent action in a New York village before a justice of the peace was tried on a claim of damages for injuries to the plaintiff's health caused by the crowing of defendant's rooster at an untimely hour in the morning, and the consequent loss of sleep by the plaintiff. After a day spent in the swearing of witnesses on both sides the jury brought in a verdict of no cause of action. This appears to establish, so far as a village jury can do it, that a rooster by immemorial custom has the privilege of crowing at such hour as he pleases in the morning.

Non Compus. — Another sample of the impertinence dispensed from the New York bench by Magistrate Pool, whose removal is petitioned for, is furnished by his indignation at a police officer who testified that in his belief a boy complained of for a minor offense was insane.

" You mean he is *non compos mentis*," shrieked the magistrate.

" I don't believe I understand," said the policeman.

" What! You don't know what *non compos mentis* means? How long have you been on the police force? "

" Twenty-five years," replied the officer.

" A detective twenty-five years and don't know what *non compos mentis* means? "

" Yes; if I understood that language I would not be a policeman," was the pat retort. — *Boston Herald.*

Decisive. — The late Judge Charles Doe was engaged as an attorney previous to the time he became a justice of the New Hampshire Supreme Court. The case was all in, the arguments heard, and the judge had instructed the jury to retire and bring in a verdict.

When the sheriff reached the jury-room he discovered that he had but eleven jurymen. Returning, he found the twelfth man complacently occupying a seat in the jury-box. He explained to the juryman that he should retire with his associates and bring in a verdict.

" Hain't got to retire," said the juryman. " Squire Hoar says it's so, and it must be so."

A Scandal Averted. — The following example of cross-questioning, I have been told, occurred in this town about twenty years ago.

" Mr. Tucker, will you have the goodness to answer directly and categorically a few plain questions? "

" Certainly, sir."

" Well, Mr. Tucker, is there a female living with you who is known in the neighborhood as Mrs. Tucker? "

" There is."

" Is she under your protection? "

" Yes."

" Do you support her? "

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" I do."

" Have you ever been married to her? "

" I have not." (Here several of the jurors scowled on Mr. Tucker.)

" That is all, Mr. Tucker."

" Stop, one moment, Mr. Tucker," said the opposing counsel; " is the female in question your mother? "

" She is." — *The Boston Herald.*

Another Enterprising Lawyer. — A Texas lawyer adds the following to his professional card:

" Correspondence solicited in English, German, French, and Spanish.

" Notary Public ——— County.

" Cable address ——

" Storage, Insurance, Real Estate, Foreign Banking, Steamship, Manufacturers' and Shippers' Agent.

" Sells Cabin and Steerage Tickets over the following S.S. Lines: American Line, Compagnie Générale Transatlantique, Netherland American S.S. Co., New York & Texas S.S. Co., Norddeutcher Lloyd and Red Star Line; also sell Railroad Tickets over the Southern Pacific in connection with European S.S. Tickets. Exchange sold on any part of the World and Money transfers made at low rates.

" If you need any OIL, COAL, BRICKS, LUMBER, SHINGLES, WALL PAPER, MACHINERY, write to me for prices." — *Case and Comment.*

Curious Claims. — When the newspaper man walked into the local agent's office, the agent said:

" What do you think of that for a claim," picking up a paper from a pile on his desk.

The newspaper man asked for information.

" Well, it was this way," was the reply.

" A lady called at the office of a physician to have her eyes examined. The light wasn't quite right and the doctor gave her an umbrella to hold over her head while he surveyed her optics. She brought the open umbrella in contact with a gas-jet and burned a hole in it. Here's a claim for damage to office furnishings, $1.50."

" The only one I know that beats it," continued the agent, " is the story of the woman who left a roast of beef in the oven and went out to talk to a neighbor over the fence. When she returned the meat was burned to a crisp. She put in a claim for a fire loss on eight bounds of beef. But that wasn't my office, and I can't swear to the truth of it. The umbrella claim, however, is straight goods." — *Investigator.*

Real Evidence. — This is why one New York lawyer believes that it is possible for a man to testify to what is not the fact and still be an honest and upright citizen. His father is a man well-known and prominent beyond the circle of his business and social acquaintances, and his financial standing is such that his transactions involve thousands where most of us handle dollars. Some months ago this elder gentleman, on a surface car, failed to produce a transfer check when the conductor called for it. He said in explanation that there was no transferman at the proper place and he quietly, but firmly, declined to pay his fare under such circumstances. The conductor talked to him as conductors in New York have been known to talk under provocation, threatened to put him off, to call a policeman, and much more, but except a promise of being reported for insolence he got nothing more. Finally a policeman boarded the car, and the conductor appealed to him. The policeman, after one look at the passenger, made a few suggestions to the conductor, the substance of which was that he had better let that particular old gentleman alone, and that if that man said anything was so, it *was* so, as was well known to New Yorkers generally. That was the end of it as far as the conductors' efforts were concerned. The passenger, however, was thoroughly angry and after dinner sat down in his library and wrote a long letter to the president of the road, who was a warm personal friend, informing him how passengers on his road were treated by his employees. He put this letter in his pocket and, still indignant, went out to post it with his own hands. Reaching the box, he pulled out the letter, and with it came the *transfer check.*

Monuments of Title. — During the early construction period of the Wachusett reservoir in the towns of Clinton, Boylston, and

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West Boylston, the property owners, mostly farmers, protested quite earnestly against the right of the metropolitan water-board to take their lands by "eminent domain," a power they never before heard of.

One day during this period of agitation, a minister driving through the Nashua valley, the future site of the reservoir, came to a hill where a fine view of the surrounding country could be had. Daniel Carville, a farmer, who for seventy years had lived in that region, suspecting that the occupant of the carriage was an official who was looking over his premises for the purpose of seizing it later by "eminent domain," walked up to the carrige with an inquiring look.

The minister, putting his head out in a pleasant tone inquired if he owned "this beautiful hill."

Carville, desiring to impress the supposed agent of the water-board with his idea of ownership, replied: "Yes, every foot of it right straight down to hell."

Websteriana. — A subscriber kindly sends us the following copy of an original memorandum of a case endorsed on an old envelope by Daniel Webster. The hungry stripling at the Bar will feel a touch of sympathy at the thought of that eight dollar fee.

CASE

Mary Beck, wife of Samuel Beck, died
Decr 1811, seized of certain real
Estate, intestate
She had no children, nor descendants
She had neither Father nor Mother —
She had no sister or brother
She left 28 nephews & nieces
viz. 5, the children of her Brother Miles Randall
4, the children of her Brother Nathl Randall
6, the children of her Brother Simon Randall
6, the children of her Brother Jonas. Randall
4, the children of her sister Elizabeth
3, the children of Anna her sister

28—

Qu. How is this Estate to be divided —
Answer. Each of the twenty-eight nephews & nieces will have his or her 28th part of the Estate — This is not a case for the application of the rule of Representation —. C C CC C

D. WEBSTER

Endorsed on back

Case of
Mary Beck
Recd of Jonas Demine
eight dollars, in
full for fees in
this case

D. WEBSTER

Courts are not always severe with women who shoot their husbands, as was seen in the case of Mrs. Elizabeth Wilson, who tried to kill her brutal husband. The jury not only returned a verdict of "not guilty," but passed the hat, the judge chipping in a $10 bill as a starter, and the poor woman was sent out of the New York court room free to begin her life again and with a little nest egg of $41.55. — *Boston Herald.*

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LORD LOREBURN

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The Green Bag

Vol. XVIII. No. 3 BOSTON March, 1906

THE NEW LORD CHANCELLOR OF ENGLAND: LORD LOREBURN

By Edward Manson

THE name of Reid is already illustrious in Scottish annals. When, in the reign of James IV, Blackadder, Archbishop of Glasgow, summoned the "Lollards of Kyle" to appear before him on a charge of heresy, all of them persons of note, including the Ladies Stair and Polkellie, their defense was conducted by their leader, one Adam Reid, of Burskimming, conducted so ably and with such strong judgment and ready wit that the King, who was present, treated the proceedings with ridicule, and the accused were dismissed with a caution to beware of new doctrines and content themselves with the faith of the Church. Reid, Bishop of Orkney, was as good a patriot as Reid of Burskimming was a reformer, and as commissioner to negotiate the marriage of Mary with the Dauphin in 1558, firmly resisted the claim of the French chancellor that the crown matrimonial should be conferred on the Dauphin and the rights of a legitimate sovereign vested in his person. There is a natural lineage and there is a spiritual lineage; and whether the blood of the reformer and the patriot runs in Lord Loreburn's veins or not, he may claim spiritual kinship with them as a man of deep and earnest political convictions and staunch in his adherence to such convictions even in the nadir of their unpopularity.

Balliol College in the sixties had become under the inspiring influence of Jowett the Mecca of the "intellectuals"; the Balliol the most coveted of all scholarships. Among the college's distinguished alumni of that period were Lord Bowen, the eminent judge; Algernon Charles Swinburne, the poet; Sir Courtenay Ilbert; Andrew Lang, the brilliant litterateur, whose examination papers were even then, report said, finished magazine articles; Sir Francis Jeune, the late president of the Divorce Division; Mr. Justice Farwell; Sir Kenneth Muir Mackenzie; Sir Arthur Godley; Mr. Asquith, and Sir Thomas Raleigh, "Bob Reid" as he has always been affectionately known among his friends, had, in 1864, been elected from Cheltenham to a demyship[1] at Magdalen, and, much to the disgust of the Magdalen dons, who knew what a good man they had got, had resigned the demyship to enter for the greater prize of the Balliol! "He, Bob Reid," says one of the most distinguished of the Balliol Common Room of that day, "first became known to us at Balliol by the plucky way in which he threw up a Magdalen demyship to stand for the Balliol scholarship which he won. He soon became widely known and extremely popular as a first-rate cricketer and racquet player, as well as a brilliant scholar. He is, and always has been, one of the simplest, cheeriest, and pluckiest of mortals." It is, or was then, rare indeed for a Balliol scholar to figure as an athlete. His arena was "the schools." He was weighed down with the responsibility of his own greatness; the sense that much was expected of him. "Bob Reid" was a splendid exception. For three

[1] Scholarships at Oxford have many names. At Magdalen they are known as demyships, at Christ Church as studentship, at Merton as Postmasterships.

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successive years (1866–68) he played on the University eleven. His wicket keeping was superb, the finest in England. For three successive years he championed Oxford against Cambridge in racquets, and all this without detriment to his academic studies. He got his first class in "Nods." He was *maxime accessit* for the Hertford, the university scholarship for Latin. He won the Ireland, the university scholarship for Greek, and the same year (1868) he took a first in the final classical school of *Literæ Humaniores*, familiarly known as "Greats," and with all these blushing honours thick upon him, he united an independence of mind in the matter of chapel and lectures, and in the frank expression of his opinions, which, even in those undergraduate days, foreshadowed his maturer radicalism in the sphere of politics.

Three years after taking his degree, in 1871, he was called to the Bar. The *Cariere auverte au talente* joined the Oxford Circuit under the auspices of Sir Henry James, now Lord James of Hereford, and began to climb that long hill which lies before every barrister — was there ever a longer? — on the summit of which "Fame's proud temple shines afar." Academic honours count for little at the English Bar. A reputation as a long-distance runner, like the present Lord Chief Justice, or as a first-class oarsman, like the late Lord Justice Chitty, or as a crack cricketer and racquet player, like the present Lord Chancellor, go a great deal further than wranglerships or first classes as a recommendation with the dispensers of briefs, and "Bob Reid" undoubtedly owed some of his earliest appearances in court to solicitor admirers of his athletic prowess. But a beginning once made he soon showed that he had stuff in him which needed no adventitious aid from his Oxford triumphs in the "Schools" or at the wicket. He had, and has, what Lord Russell of Killowen described as the best qualification for success at the Bar, "clear-headed common sense." He was an able advocate, an effective speaker, with a firm grasp of legal principle and great business capacity; and these qualities soon made his services appreciated in the commercial cases in which his practice has chiefly lain.

In the middle seventies, says a writer in the *Solicitor's Journal*, the late Mr. Southgate, Q. C., the well-known leader in the Rollo Court, was briefed in a Scotch appeal on a question of Scotch trusts with Mr. Reid, then of five or six years' standing at the Common Law Bar, as his only junior. After a very long consultation Mr. Reid left, and Mr. Southgate's first words after his departure were, "That young man will be Lord Chancellor if he lives!" A somewhat similar story is told of Cairns. "That young man," said Lord Westbury to the solicitor, after a consultation with Cairns, then an obscure junior, "that young man will undoubtedly rise to the top of his profession." In both cases the prophecy was fulfilled. Perhaps the most notable incident in Sir Robert Reid's professional career — he was knighted on becoming Solicitor-General in 1904 — was the Venezuelan Arbitration; for his services in which he was, in 1899, created a Knight Grand Cross of the Order of St. Michael and St. George.

But it has been in the House of Commons that Sir Robert Reid's interests have mainly centered. Lawyers, as a race, are eminently conservative: they have been so since the days of the "scribes." It is not merely that the law is sacrosanct in their eyes — that it ought to be in the eyes of all right-minded citizens — but that the letter of the law exercises over the mind of the lawyer a sort of spell. Habitual concentration on a microscopic examination of cases and sections, the details of the law's edifice, divert the lawyer's attention from the architectural whole, the larger lines of state policy. It is in this sense that "the letter killeth." A young Radical lawyer, with aspirations after this perfect state, and not merely ambitious to seat himself on the woolsack, gravitates inevitably to the House

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of Commons as the only gateway leading to Utopia; for our law has now reached a condition of complexity where reforms of substance can no longer be looked for from the expansion of the common law or the moulding discretion of equity judges, but must come, if they come at all, from the legislature. How impotent, for example, are the doctrines of the common law or even equity, to protect children, to ameliorate the lot of the worker, to grapple with intemperance, to reclaim the criminal or satisfy the just demands of labor, and these were the sort of reforms — social and humanitarian — with which Sir Robert Reid has been specially in sympathy all his life, and to aid which he early in his professional career sought the suffrages of the electors of Hereford to send him to Parliament.

In the wooing of constituencies, fraught with ill luck to many eminent lawyers like Lord Darcy and Lord Halsbury, his — Sir Robert Reid's — course has been remarkably smooth. From the day, in 1880, when he became member for Hereford till he received the Great Seal, at the end of 1905, he has kept his seat in the House of Commons, with only one brief interval between, the autumn of 1885 and the summer of 1886. At the general election in 1886 he was returned for Dumfries Burghs, and ever since then, for twenty years, the "Queen of the South, Maggie by the banks of Nith" as Burns calls Dumfries, has remained faithful to him. No wonder that on attaining the woolsack and choosing his territorial title as a peer, the new Chancellor should have made a graceful acknowledgment of all he owed the city by identifying himself with its traditions as Lord Loreburn of Dumfries. The uninstructed marvelled at the name. The Lord Chancellor said: "One has broken the record in the matter of titles so far as the locale of any title is concerned. Peerage titles have been taken from the merest hamlets or deserted castles, but no one has ventured to adopt the name of a street until Sir Robert Reid became Lord Loreburn of Dumfries, Loreburn being a leading thoroughfare in the town." Alas! for the critic! He had missed the most significant point in connection with the word. It is quite true that Loreburn is the name of a street in Dumfries, but independently of the street, it is the most distinctive word connected with the town "A Loreburn!" being the old war cry of the citizens in many a border fight.

The office which Lord Loreburn now fills is one of venerable traditions — a "heap of anomalies" Mr. Bagehot calls it in his English Constitution. It is an office which, being an ancient one, can only be granted, Lord Coke tells us, "as it hath been accustomed." This was in the days of Henry II, by the King "*appendendo magnum Anglice Sigillum at Collum Cancellarii electi.*" In modern times it has been by the King simply delivering the Great Seal to the person to hold it, verbally addressing him by the title which he is to bear, followed, in either case, by the taking of the oath which is itself a curious relic. It runs thus: The Chancellor is to swear:

1. That well and truly he shall serve our Sovereign Lord, the King, and his people in the office of Chancellor:

2. That he shall doe right to all manner of people, poore and rich, after the lawes and usages of the Realm:

3. That he shall truly counsel the King and his Counsell he shall layne (old French word signifying hide) and keep:

4. That he shall not know nor suffer the hurt or disinheriting of the King, or that the rights of the Crown be decreased by any means as far as he may let it.

5. And if he may not let it, he shall make it clearly and expressly to be known to the King with his true advice and counsel:

6. And that he shall do and purchase the King's profit in all that he reasonably may, as God him help, and by the contents of this Book (the Bible).

Here, in the form of oath, we have illustrated the complex nature of the office. The Lord High Chancellor of England is not

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only a judge of the highest degree, but Guardian of the King's Conscience, Keeper of the Great Seal, and Speaker of the House of Lords: a Peer too, nearly always, but not invariably for, singular as it may seem, the Speaker of the House of Lords is not necessarily a member of the House. It has even happened that the Lord Keeper has officiated for years as Speaker without being raised to the Peerage. Sir Robert Henley is an instance. He presided, as Keeper of the Great Seal, in the House of Lords, but not being a Peer, he could not enter into debate as a Chancellor Peer does, and therefore, when there was an appeal from his judgment in the Court of Chancery, and the Law Lords then in the House moved to reverse his judgment, the Lord Keeper could not state the grounds of his opinions given in judgment and support his decisions. The explanation of this strange anomaly is that the woolsack is not technically within the House; the Lords may not speak from that part of the chamber, and if they sit there during a division, their votes are not counted. It is for the same reason that the Lord Chancellor, when addressing the House, always quits the woolsack and advances to a spot within the House.

At the moment of writing, Lord Loreburn, though fully interested in his office of Lord Chancellor, is not yet fully ennobled. His apotheosis as a Peer will be on this wise. When Parliament meets, the leading representatives of the Government present, Lord Ripon presumably, will state that His Majesty has been pleased to raise Sir Robert Reid, Lord High Chancellor of England, to the dignity of a Peer of the Realm. The Lord Chancellor, on hearing this news, will withdraw to reappear in a moment clad in the robes of a Baron and accompanied by his sponsors or introducers. He will present his patent of nobility which will be read; he will be escorted to the Baron's bench and take his seat thereon, and then the oath having been administered, he will resume his seat on the woolsack.

The new Chancellor has not, however, waited for his apotheosis to initiate reforms. Of late years, under the demoralizing influence of the fashionable week end, Saturday has been coming to be treated as a *dies non*, a whole holiday in the courts, and so arrears accumulated. On the first Saturday, under Lord Loreburn's régime, sixteen effective courts were sitting, the Lord Chancellor himself presiding in Appeal Court No. 1. Such an array of judicial efficiency has not been seen for many years, and it is of good augury. A few days later, the Chancellor paid a visit to the Royal Courts of Justice, and had interviews with the King's Bench Masters, the Crown Office Masters, and other officials of the central office. He afterwards went through the various rooms of that department and had the course of business and the procedure explained to him. This again looks like business. So all great generals have familiarized themselves with the smallest details of military organization. It is especially necessary in England where the recognized order of precedence is costs first, then practice, and last, merits. The system of judicature, introduced by the Judicature Act, has now been in working for a generation, and the machinery needs to be thoroughly overhauled, and the defects which have discovered themselves in it — costliness, complexity, the multiplication of appeals — remedied, if possible. Among other things, county courts, which have won golden opinions, might well be made branches of the High Court. The time has also come to consider whether something cannot be done to improve the chaotic condition of English substantive law — at present little short of a national reproach; to ascertain, too, what are the real obstacles to a successful system of land registration, and whether such obstacles are insuperable; how it is that there are as many or more persons in prison for debt since the abolition of imprisonment for debt than before; why prisoners should be confined ten or twelve or sixteen weeks before their trial and then be released

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as innocent, without any compensation. Then there is the long vacation question. Everybody is agreed that the "light of justice is waning" in August, and that a week in October is worth a fortnight in midsummer. The only drawback to this reform is that, were it accomplished, the Bar Counsel would be left with no topic to discuss at its annual general meeting.

One of the most remarkable things incident to the Chancellorship is the enormous patronage vested in the Lord Chancellor. He appoints the five Justices of Appeal, the twenty-two Justices of the High Court, the sixty County Court Judges, and occasionally the members of the Supreme Court and many minor officials. The total of the salaries annexed to these offices is about £225,000 a year, and this is irrespective of his ecclesiastical patronage! A correspondent of *The Times* has lately, in an amusing and sarcastic letter, asked the question what is the theory on which all the patronage — this "wealth of place and profit such as no other official in Europe has at his disposal"— is held. Is it held as some of us, he says, think it ought to be, upon an implied trust to maintain the dignity and efficiency of the judicial staff by rewarding professional merit, by judicious preferment; or is it, as others think, a sort of "Secret Service Fund," distributable as "party spoils" among those lawyers who have deserved well of the party to which the Chancellor happens to belong? Not quite either. The true theory, the writer suggests, is this: the patronage is left in the Chancellor's hands to be disposed of as he thinks best, but with a tacit understanding that the bulk of it shall go to the lawyers: first to such as have deserved well of the party, and then to those who have deserved well of the public, and then, as to anything over, "towards satisfying the ravening horde of relations, friends, and acquaintances, which are as a drop of bitterness in the cup of all Lord Chancellors;" but would it not be wise, adds the writer, "in the last two cases to provide for the occasional commutation of professional advancement by a payment in cash, so that the status of the bench may be preserved from all danger of profanation?"

The irony is just, the system is anomalous, but the men who administer it have generally been better than the system, and it is in the character of those who have filled the Chancellorship that we have the best, if not the only guarantee against abuse. Lord Loreburn comes to his high office with an unblemished record both at the Bar and in Parliament. No man is more trusted by opponents as well as friends. He is credited with an utter aversion to jobbery of any kind, and we may be satisfied that he will use his great powers with a single eye to the public weal. As a judge he has a clear head, strong sense, and a firm will. As a minister of justice and a legislator he has the reforming spirit which will seek to leave the law and its administration better than he found them. Such a combination of qualities in the woolsack may well inspire both confidence and hope.

LONDON, ENG., February, 1906.

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THE JUVENILE LAWS OF COLORADO

By Ben B. Lindsey

THERE are four principles involved in the juvenile court law.

The first is the principle of probation, and, in this country was first applied in Massachusetts. One of the three probation officers provided by the city of Denver is constantly in the office, while the other two are constantly on the go, investigating all kinds of cases in the city affecting children, and looking after those children who have been brought to the court under the system devised.

The city of Denver has two school attendance officers, appointed by the school board under the compulsory education act. These officers are factory inspectors, and they are active in the enforcement of the school law. One of the school attendance officers is a woman, as is also one of the probation officers A part of the work of the probation department is obtaining work for boys of working age, and relieving needy children. Much of this work is done through the Juvenile Improvement Association, which is an auxiliary body to the Juvenile Court.

The second is permitting a child to be corrected in a chancery court of an act which would otherwise constitute crime, if prosecuted in a criminal court, by charging the child with being a delinquent or a juvenile disorderly person. So far as I know, in this country, this principle was first embodied in a statute known as the school law which went into effect April 12, 1899, in the state of Colorado, and in what is known as the juvenile law, which went into effect June 1, 1899, in the state of Illinois.

This court has unlimited jurisdiction to deal with all chancery cases or criminal cases, involving children or those who offend against children. In this court, before the same judge, is enforced the child-labor law, the compulsory school law, the adult delinquent law, the juvenile delinquent law, the dependent and neglected child law, the laws for the protection of children against cruelty, the nonsupport laws — and, in fact, every law affecting a child or an adult who has offended against the child. Of course, as a rule, adult cases are tried on different days from children's cases. The same court happens to be at the same time the busiest civil court in the state, which has somewhat handicapped the judge of the court in as much personal work as might be done; but when one becomes truly interested in the children's court, and can see the wonderful results which we can see now — after nearly six years of experience — it is not a difficult matter to spend after-hours and evenings for the sake of the work with and for the children, and their work with and for you. A special court for children's cases is in my judgment very necessary in large cities, and if created it should have general common law powers and jurisdiction in order to handle the parent cases. In small cities it is believed to be better to designate some court already existing, having unlimited jurisdiction, as the "Juvenile Court," and set aside special days for children's cases.

Third is the law, which, in substance, holds parents and other citizens legally responsible for the moral welfare of children under sixteen years of age. The first law of a general character of this kind was passed in the state of Colorado, as a part of its so-called juvenile laws, and went into effect three years ago, although before that time the school law in the state of Colorado was very particular, more so than in most states, in holding parents responsible for the truancy and disorderly conduct of their children. This law was, during the winter of 1905, adopted in Illinois, Indiana, Nebraska, New York, New Jersey, Utah, Oregon, Kansas, and, I believe, several other states. It is substantially similar to the Colorado

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law, which has been termed "the adult delinquent law." The purpose of this law is to compel careless homes to take care of their children.

The fourth feature of the court, as it has developed in Colorado, Illinois, and some other states, is what I have termed a system of efficiency, which seeks to avoid brutality on the one hand — which was the charge and conviction of crime, the jail and the criminal court — and to avoid leniency on the other hand, which was a mere kind talk — a pat on the head — and letting the child go, with strange notions of law and law enforcement, and a chance to mistake kindness for weakness. Both methods were equally faulty, though the faults were of a different kind. We seek to make the child a co-worker with the state for his own salvation, which, of course, in the end, is the salvation of the state; for the child is the state and the state is the child. He is taught, literally, to overcome evil with good. He is taught his duty to society, the meaning of law — why ordinances are passed, and by a system of education, he is taught to know how to help himself, and to make himself honest and industrious. We can't do it for him. We can only, by proper methods, point the straight and narrow way. We can't carry him; we can help strengthen and develop his character. It will thus be seen that our institution is a school-court. Its methods are purely educational and not penal. We work through the heart and seek reform from within and not from without.

I have frequently said that two things were necessary to the success of the so-called Children's Court or Juvenile Court: first, people who know and understand children, and will therefore do the work required by the juvenile laws, and second, the juvenile laws, for really, much can be done without any law at all, where there is the heart, disposition, patience, and will to do.

Section 1 of the adult delinquent law of Colorado is the most important feature of our juvenile laws. Among other things, it provides:

"Section 1. In all cases where any child shall be a delinquent child or a juvenile delinquent person, as defined by the statute of this state, the parent or parents, legal guardian, or person having the custody of such child, or any other person responsible for, or by any act encouraging, causing or contributing to the delinquency of such child, shall be guilty of a misdemeanor, and upon trial and conviction thereof shall be fined in a sum not to exceed one thousand dollars ($1,000), or imprisoned in the county jail for a period not exceeding one (1) year, or by both such fine and imprisonment. The court may impose conditions upon any person found guilty under this act, and so long as such person shall comply therewith to the satisfaction of the court, the sentence imposed may be suspended."

This section should be read in connection with section 1 of the act concerning delinquent children. This act was, in substance, originally embodied in the school law of April 12, 1899; but, in the winter of 1903, it was found that the definition of a juvenile disorderly person of the act of 1899, needed some explanation and enlargement, and so in defining delinquency the Illinois Juvenile Court Act was partially resorted to, as a good model to follow; with the addition, however, that the definition of delinquency, as made in Illinois, and the definition of a juvenile disorderly peron as stated in the Colorado statute were more or less combined; and, in addition to the good features of both, a number of acts on the part of the child were added to the definition, as constituting delinquency.

This definition of delinquency must be borne in mind as having reference to the act relating to adult delinquents, and, as between the two, it is ascertained what a parent or any other person may do to encourage, cause, or contribute to the delinquency of a child. The definition of delinquency is as follows:

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"The words 'delinquent child' shall include any child sixteen (16) years of age or under such age who violates any law of this state or any city or village ordinance; or, who is incorrigible; or who knowingly associates with thieves, vicious or immoral persons; or who is growing up in idleness or crime; or who knowingly visits or enters a house of ill-repute; or who knowingly patronizes or visits any policy shop or place where any gambling device is, or shall be, operated; or who patronizes or visits any saloon or dram shop where intoxicating liquors are sold; or who patronizes or visits any public pool room or bucket shop; or who wanders about the streets in the nighttime without being on any lawful business or occupation; or who habitually wanders about any railroad yards or tracks, or jumps or hooks on to any moving train, or enters any car or engine without lawful authority; or who habitually uses vile, obscene, vulgar, profane, or indecent language, or is guilty of immoral conduct in any public place, or about any school house. Any child committing any of the acts herein mentioned shall be deemed a juvenile delinquent person, and shall be proceeded against as such in the manner hereinafter provided. A disposition of any child under this act, or any evidence given in such cause, shall not in any civil, criminal, or other cause or proceeding whatever in any court, be lawful or proper evidence against such child for any purpose whatever, excepting in subsequent cases against the same child under this act. The word 'child' or 'children' may mean one or more children, or the word 'parent' or 'parents' may mean one or both parents when consistent with the intent of this act."

For instance, it will be noted that if a child merely *enters*, *patronizes*, or *visits* certain places, no matter how innocent the purpose of the child may be, any person who directed the child to go to such place, or even sent it there upon an errand or message, contributes to its delinquency. "Delinquency" is simply a condition into which the child enters innocently or purposely, but it is presumed to be a condition which, if continued in, may make the child a criminal, or otherwise bring evil to its life. "Delinquency" is not intended to be a term of opprobrium or reproach, as "criminality" would be, and so the child is not charged with being a criminal, but, as will be noted by section 12 of this act, as needing aid, help, assistance, etc. The Juvenile Court in dealing with a "delinquent" child, acts rather in the capacity of a chancery court and not as a criminal court. The petitions or complaints are filed in the interest of the child and not to degrade or punish it. The state is simply acting in its capacity as *parens patriae* — for the welfare of its ward.

Section 12 provides that the act shall be "liberally construed" in order that the care of the child may approximate as near as may be, the care which should be given it by a wise and just parent and that the child shall be treated "not as a criminal, but as needing aid, help, assistance, and encouragement." The effect of this is to change the entire purpose of former laws, which merely dealt with the thing — the crime — having the effect of putting the court on an entirely new basis, requiring it to deal with the child through personal work for its own good. It therefore follows that the judge of such a court must do a great amount of personal work with the child if he follows the spirit of the law. It thus follows in construing this section in connection with section 1 of the adult delinquent act, that the court may adopt a liberal construction where it is in the interest of the child. If a child smokes cigarettes on the public street or about the school house, or if it uses profane or obscene language on the public street, it is "immoral conduct," and any person contributing thereto, or encouraging such conduct, is guilty of a misdemeanor under section 1 of the adult delinquent law. The court has ruled — under the liberal construction — that the mere giving or sale of tobacco, or of cigarette paper to a child is an "act causing,

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encouraging, or contributing to the delinquency of the child," and such person is therefore responsible since the smoking of tobacco injures the child and is therefore immoral conduct. In addition, Colorado has a positive law, passed in 1891, forbidding the sale of tobacco to any child under 16 years of age. If a child wanders on the railroad tracks more than once, or "hops" the cars, it endangers both its life and limb as well as its morals, because it is a short step from stealing coal, to stealing out of the box-car and the corner grocery, and finally tapping the till. The first acts of delinquency in the case of a young murderer — who shot a man when caught in the act of robbing the cash drawer — have been traced back only five or six years to running on the railroad tracks and stealing from the cars in which he was either encouraged by his parents, or what is the same thing, where the parent made no determined effort to correct him. Such a man has been known to have served a short sentence in jail for such offenses at the age of 12 or 13. It was simply the beginning of a criminal career. And so in Denver we have brought in the parents of such a possible future criminal when he is a mere child, and fined them $25 and costs, or sentenced them to thirty days in the county jail. We do this when the efforts of the officer fail to keep children from going on the railroad tracks, stealing coal, or entering the box cars, or playing about the trains. Such a case is only an illustration of many. This fine is generally suspended on condition that the parent look after the child and keep it off the tracks. In quite a number of cases, however, in Denver, fathers have been sent to jail on Saturday and released on Monday night, under a thirty days' sentence in jail, upon condition that three days be served and twenty-seven days suspended, so long as the child is kept off the tracks, not sent to the saloon for beer or liquor, not sent to any gambling house or house of ill-fame upon any message or otherwise — the conditions of the suspended sentence against parents varying according to the form of delinquency of the child sought to be corrected. There have been but about two children out of a hundred who have returned to the Juvenile Court in the course of two or three years' work under this law, where the parent was thus dealt with, and the exceptional case is generally where there is no father and some poor mother who works all day and simply cannot look after the child, and therefore parental responsibility does not really exist. The child is without a home. It is such children that are generally sent to institutions. This is avoided in many cases, however, by help given the poor mother by the Court, through co-operation with the school.

Of course the definition of "delinquency" in other laws may be either broadened or made less severe. One objection — though really never seriously urged — to this definition of delinquency in Colorado was that it was putting too great a power in the hands of the court, and that it would be abused by the probation officers and the courts because the definition is so broad that almost any child in any community could be brought within the terms thereof. Such fears have proved entirely groundless, since out of hundreds of cases brought to the Juvenile Court, no such charge has ever been made, and no exception has ever been taken to, or appeal from, a single judgment. On the contrary, as delicate as the relation between the parent and child is conceded to be, and as ready as people naturally are to resent any unwarranted or unjust intrusion, under this law in Colorado we do not know of a single case where any such abuse has been charged, and there have been several thousand cases under the law in the state. Such has been the real experience under these laws. The whole *spirit* and *purpose* of the law is to *help* and *assist* the child in the home, where it needs assistance, and to *compel the parents* to perform their duty where they are neglecting the child. It stands to reason that neither the court nor the probation officers are desirous of bothering with a child

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whose parents can and will take care of it. The parents of an offending child are generally first given a warning of their *legal responsibility* for its *moral welfare* and given a chance to correct it. It is rather the wish and effort of probation officers to obtain the assistance of the parents, and in all proper cases to be relieved of the burdens of cases which properly belong to the home. It is intended — and in practice has demonstrated, that it strengthens and preserves the home. Its purpose is to compel parents to perform their duty where they are neglecting it, and to help those parents who need help. Parents who are true to their own home and children are entitled to have the benefits of a law that will insure the performance of such duties by other homes, for the scantity and security of each home depends a great deal on how well neighboring homes are also conducted. You cannot prevent children associating together, and they are often influenced by their associates, and the character of that influence depends on how well each child is reared and this, of course, depends largely on its home and parents. It thus follows that this court is an effort at character building in dealing with the child, and at home building, in dealing with the parent. The practical operation of this law in Colorado has more than demonstrated that such is its effect. Responsible parents are given every opportunity to correct the faults of their children, on the theory that such correction should be made by the parent, and the court simply sees to it that the parent is performing that function and that duty. It has no desire to usurp it. The trouble is, especially in the large cities of this country, that there are thousands of fathers who have deserted the mother, or through divorce, drink, or some other fault, have deprived children of their birthright — the care and control of a wise, kind, and firm father. The lack of this in the home is one of the most potent causes of the great increase of crime in this country.

We must recognize that over half of the criminal inmates of prisons and institutions are from the youth of the nation, who arrive at the prison through neglect in childhood, and bad habits formed at the formative period of life, between eight and sixteen years of age. The purpose of this law therefore, is to make a *broad definition* of *delinquency* and thus give the court and its officers power to aid, help, assist, and otherwise firmly and kindly deal with the children and their parents, especially in the large cities, where the intervention of the state is necessary. In this way and by this system, wisely operated, we are positively preventing crime. It is much better that the state should perform this function wisely, humanely, and well, *while there is an opportunity to prevent crime*, than to be compelled to postpone the evil day until the child has become a criminal, for the state is to-day taking care of tens of thousands of its young men after they have become criminals, when they might have been saved from lives of crime by sane, sensible, and sympathetic interest by the state in boyhood. From one-fifth to one-fourth of all arrests in cities (excluding common drunks and disorderlies) have generally been among boys under seventeen years of age, and in proportion to ages of our population, by decades, this means that more boys are being arrested in cities than any other class of citizens, and these boys are mostly the criminals of to-morrow unless wisely corrected and protected to-day. The cost of detecting and convicting criminals for a period of three years, in the city of Denver, through the criminal courts, was $1,020,000, as appears from the tables in the booklet on the "Problem of the Children." The saving to the people in actual dollars and cents during three years under the juvenile court system was over $250,000 cash. The governor of Colorado, in his message to the assembly two years ago, declared that in a period of eighteen months the juvenile system in Denver alone had saved to the state and county over $80,000, and this statement was made after investigation set on foot by the governor.

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The juvenile law is a good thing, but there can be little chance for its entirely satisfactory operation unless it be accompanied by the following: *A law holding parents and others responsible for delinquency and dependency of children, as such laws now exist in Colorado; a wise child labor law; a good compulsory school law; a detention school in cities in place of the jail; the enforcement of all laws relating to children in one court before one judge, and a corps of paid and efficient officers who are sincere and earnest in their work.* The best work can never be accomplished by depending entirely upon voluntary probation officers. Whatever degree of perfection may be credited to the juvenile court system of Denver, Colorado, is largely due to the fact that the law permits three paid probation officers for the city of Denver, and that these paid probation officers are not politicians and never were and never will be, and were never known to take any part in politics, but were selected because of the fact that they were educators, and heart and soul interested in the problem of the children, knowing and understanding it, and because of a compulsory school law which permits us to keep children in school and thus out of idleness and consequent crime upon the streets. All of these things did not come at once, nor is it claimed that they are yet perfected in Colorado, but they will never come unless the fight is made. Even if the fight shall only win one at a time, and the progress has to be gradual and in the face of difficulties, disappointments, and misunderstandings, the gaining of one will merely demonstrate in time the necessity of the others, and thus convince the sceptical. The press, pulpit, schools, and all the people in Colorado, are thoroughly convinced of the wisdom of the juvenile court laws and juvenile court system as one of the most potent factors in the solution of the great problem of crime, and while the saving to citizenship is the most important thing, at the same time, nothing has saved to the state more of its wealth as well as of its men and women of to-morrow.

DENVER, COL., February, 1906.

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THEORY AND DOCTRINE OF TORT[1]

By Melville M. Bigelow

§ 3. Right in Defense, How Defeated — Absence of Right.

ASSUMING now that A has a particular legal right which B has invaded by conduct *prima facie* wrongful, it is plain that A is entitled to maintain an action against B unless it appears that B's conduct, though *prima facie* wrongful, was in reality rightful, and it is equally plain that to be rightful it must have been of legal right, either in the higher or the lower sense of that term,[2] for, of course, no right except such as the law will recognize as a defense, in other words nothing but a legal right, will be of any avail to B.

It is plain that if I have exercised my legal right by wrongful means — acts or words — though not in themselves torts, I have usually no defense.[3] To say that I had a defense would be a contradiction in terms and inconsistent with the idea of legal right as freedom to do what is reasonable. A legally wrongful thing could not be a legally reasonable thing. Now the lawgiver has furnished a category of things amounting to wrongful means, some of which may here be named by way of suggesting the nature of such means: Fraud in general, false representation, intimidation, threats of bodily or other harm, or duress; not to mention acts which of themselves would be torts and not (as are those just named) merely constituents of tort.[4] But intimidation and threats of harm are also expressions of malice, and may be dealt with properly under that head.

The term fraud may for the present be shortly disposed of. The wrong consists of two sorts of cases; one in which the person committing it is now dealing or communicating with the person upon whom it is committed, the other in which he is not. In the first of these cases the person defrauded is induced by the misrepresentations or like acts of the wrongdoer to change his position to his hurt, by entering into new relations with the wrongdoer himself or with some one else. Here the two, the one harmed and the wrongdoer, are face to face, personally or by agent, and the wrongdoer holds out some deceptive inducement which is acted upon by the other. In the other cases of fraud, the wrongdoer is seeking through some third person to circumvent the party to be wronged from enforcing his rights against him. The wrongdoer is putting his property out of his hands, for instance, to defeat the rights of his creditors. The first of the cases then is deception, the second circumvention only.

The first of the two, deception, leads to an action for damages; the second does not in ordinary cases. The first alone is a tort in that sense; with the second we are no further concerned. Fraud in the sense in which we are concerned with the term is one of the elements of a specific tort called deceit; in relation to which it has a definite, settled meaning. What that is will appear in the chapter relating to that subject.

One more remark concerning fraud should here be made. The word, even in relation to deceit, is used in two senses, a broader sense in which it is here used, as denoting the means by which a lawful act is made unlawful — the whole artifice by which the result is accomplished; and a narrower

[1] In advance of publication in the eighth edition of the writer's work on the Law of Torts. Continued from February.

[2] *Ante*, p. 64.

[3] See qualification, p. 138.

[4] Of course, if the means in themselves constituted torts, it would not be necessary to go further to find liability. To make a question, it must be understood that negligence, wrongful means, and malice, are not of themselves actionable, but only constitutents of a right of action, to be helped out by other facts.

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sense of intent — the "fraudulent intent" of the books. In this latter sense, when the intent is inspired by an evil motive, fraud differs little, if at all, from malice as motive. The same evidence will suffice to prove either.

Deceit will be the only example of wrongful means specially dealt with in this book.

It is also plain doctrine that if one's conduct violates common standards of care, skill, or diligence, this will destroy what otherwise might be a defense of legal right. I have a legal right to drive in my carriage, I have a legal right to send my produce to market in my market wagon; but if I drive my carriage without reasonable care, skill, or diligence, whereby I am brought into collision with another who is acting reasonably, or if my servant similarly drives the market wagon with like result — in these and a thousand other cases of the kind my legal right will avail me nothing in an action by the person who has suffered harm. I have been guilty of negligence.

In regard to this term negligence, the fact should be emphasized at the outset that the conception is not to be taken in law as it is ordinarily understood, that is, as consisting of a state of the mind — a sort of negative state of the mind. However common in reality it may be that such a mental state exists in cases of negligence, in law negligence must be found in conduct, consisting either of acts or omissions; these being followed too by the harm as a mere event, not as an intended result. In this latter particular, negligence differs from all other kinds of misconduct in tort; where the result may be, and often is, intended, and further, the misconduct in other cases is always an act.[1] The subject need not further be pursued in the present place.

Now let it be supposed that no wrongful means were employed, and that the general standards of care, skill, and diligence, were observed — that all conduct of the kind was legally rightful; it will still remain to consider whether one's intention or motives, or both together, when morally culpable, may affect one's defense of legal right. In a word the question is, of the place of malice in the law of torts. This question may be one of reasoning — logic — or one of social determination. In the first aspect consider the matter of intent: B intended to inflict the harm of which A complains — that is, A says that, notwithstanding the fact that B had a legal right to do or omit what he did, B is liable to him because he brought on the harm intentionally; the intent to inflict the harm destroyed his right.

The distinction between intent and motive should not be overlooked.[1] The intent is, purpose or object in the concrete — the stretching out (such is the figure) of the mind towards the end desired; while the motive is that which inspires and causes that stretching out. Now the intent may be morally culpable, while the motive is good enough; the intent may be to inflict harm, while the motive is one of benefitting another, or one of ordinary self-interest. The motive, if not the highest, would not, in either case, be generally considered legally culpable.[2]

Two questions may then arise; first, can the intent to harm where the motive is good, destroy B's defense of legal right; if not, can B's intent, when inspired wholly by a bad motive, such as hatred of A, have that effect? Theoretically, a third question might

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[1] "Act" in the proper sense, and as generally understood in the law, is a thing done or word spoken as the effect of psychic or mental process, that is to say, in consciousness — of purpose — as distinguished from mere reflex or automatic action, such as movement in sleep. Hence to speak of an "intended act" is a pleonasm; an act is necessarily intended, though its consequences may or may not be intended. See Ziehen Physiological Psychology, 29 (London, 1892).

[1] See South Wales Miners' Fed. *v.* Glamorgan Coal Co., 1905, A. C. 239, 252, Lord James.

[2] Lord James, in case just cited.

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arise, to wit, can the intent to harm, where no motive good or bad appears, affect the defense? But this third question is the same in effect as the second, since when no motive is shown for causing intended harm, the case, in point of civil liability — in tort — is treated as the equivalent of one arising from a bad motive. It is doing the harm recklessly, and that, in the law of torts, is equivalent to malice in the ordinary sense of an evil motive. The point will be referred to again.

The first question, whether intent to harm, where the motive is good, will destroy the defense of legal right, is answered in the negative both in this country and in England.[1] This probably is true, though in addition to the proper motive, such as a desire to promote one's welfare, there is also an intent to harm another out of ill-will, and not merely as a means of promoting one's welfare: B may sink wells, or dig trenches in his land, for the improvement of his estate,[2] though he knows and intends that this will do harm to A. Clearly B is not liable where his intent to harm A is only with a view to promoting his own (B's) interests. That is a very common case of competition between rivals in business.[3] B has a legal right to promote his own welfare, if he use no wrongful means, though he intends to drive his rival to the wall. His motive being lawful, his legal right, speaking by logic, is not lost by his intent. Such is the common law; but one should not fail to notice that this reasoning leads to a justification of monopoly, for competition which drives the rest of the world out of the field becomes monopoly. Social forces are arraying each other on the one side or the other of this point; with what result cannot yet be seen.[1]

The second question, whether intent to harm where the motive is bad will destroy one's defense of legal right, has been found more difficult. Some courts hold that the answer should be in the affirmative — that the law should go no further than to protect a man when his motive is just, and not where, though in the exercise of a legal right, he intends to do harm to another and does it.[2] This view does not rest on logic for its validity. But the English courts, and most of our own, hold that it makes no difference that the motive as well as the intent is bad — enough that what was done was done in the exercise of a legal right. In other words, and in common language, malice (in the worst sense) will not overturn (full) legal right.[3] Such is the view resulting from logic.

Which of the two conflicting rules is correct? It may be urged that the question is one of morals in the sense of ethics. If that be true, it is plain that B is liable — his legal right is overturned by his bad motive. Is the moral or ethical view the one followed in law?

Undoubtedly the moral and the legal view agree in most cases; but that is because the moral conforms to the legal view as the dominating purpose of society, rather than that the legal is made to conform to the moral view as an object of the law. The law does not profess to enforce morals as such. The

[1] Of course, the absence of legal right in the defendant's conduct makes a different sort of case, as in South Wales Miners' Fed. *v.* Glamorgan Coal Co., 1905, A. C. 239, 252.

[2] If he does not tap streams, above or below ground, flowing down in defined channels to A.

[3] Mogul Steamship Co. *v.* McGregor, 1892, A. C. 25.

[1] Hence the law must meantime be unstable. Ante, p. 66.

[2] Sweet *v.* Cutts, 50 N. H. 439; Bassett *v.* Salisbury Manuf. Co. 43 N. H. 569; Graham *v.* St. Charles R. Co. 27 L. R. A. 416 (Louisiana, modern Roman law).

[3] Plant *v.* Woods, 176 Mass. 492; May *v.* Wood, 172 Mass. 11; Rice *v.* Albee, 164 Mass. 88; Frazier *v.* Brown, 12 Ohio St. 294; Payne *v.* Western R. Co. 81 Tenn. 507; Paine *v.* Callender, 134 N. Y. 385, 390; Boyson *v.* Thorn, 98 Calif. 578; Quinn *v.* Leathem, 1901, A. C. 495; Allen *v.* Flood, 1898, A. C. 1; Bradford *v.* Pickles, 1895, A. C. 587; Mogul Steamship Co. *v.* McGregor, 1892, A. C. 25; and other cases cited post, p. 138.

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law is the resultant of social forces working in the State, which resultant may very well conform to moral standards; but where the social resultant falls below the moral standard, the case is a matter for the ethical and the religious teacher rather than for municipal law. When the higher moral and religious impulse becomes the dominating energy in society, then the legal standard may be expected to rise accordingly.

What then is the controlling idea as manifested in the social standard or predominating energy of the present time? Is it not that the weaker may be pushed to the wall? And if this is not done by the coarser methods of brutality or deception, or by malicious combination, is not the legal standard in agreement with the social? Recent cases leave no doubt.[1] This may import a low standard of ethics, but if the law is to be better from a moral point of view, the dominating power must first become better. Exceptionally some strong lawgiver may lift a small part of the law above the common level; but generally the law will correctly represent the prevailing standards, changing only as those standards change.

The social energy may indeed differ at different times; to-day capital may dominate society, to-morrow labor may prevail, the next day morals, or religion, as in the seventeenth and eighteenth centuries was the case under the New England theocracy;[2] or there may be such an even-handed struggle that nothing is settled, and the law vacillates in uncertainty so far as it relates to such conditions. But when energy in any one direction predominates and makes good its hold upon the State, the result will be determined. The law is the servant of the dominating social energy;[3] and malice accordingly may at any time be held enough to overcome the "legal right" of common law reasoning, that is, to declare that that which reasoning would fix upon as legal right is not legal right at all.

So much for full common law legal right. Unfolding further the general idea of right, we have now to consider privilege as mere permissive legal right. The question whether such right as a defense is affected by intent or motive is much simpler than the other. The answer, indeed, is found in the very terms of the permission. The permission, as has already been seen, is granted on the terms, express or implied, that it shall be acted upon in good faith — that the motive shall be the one supposed. A gives B license to enter upon A's land, or invites B to accept hospitality at A's house, or extends some other favor of the kind, in derogation of his own rights. B accepts, or is assumed to accept, the favor in the way it is given; his motive in accepting it is, or is assumed to be, in accord with A's kindly act — his intent, to act upon the favor in good faith. If then his motive be inconsistent with what A understands it to be — if it be a bad motive, a malicious motive — or if, while the motive may be said to be good, as where it is merely self-interest, the intent still is bad, as when B is endeavoring to get some advantage over A which A would not grant — in either case the terms on which the favor is granted have not been complied with, and B has no standing in law against A. The license, the right of hospitality, or like favor, never took effect; B is a trespasser.

When, therefore, it is said, as sometimes it has been, that an evil motive (malice) will not effect an act which otherwise is lawful, the word "lawful" must be understood in the

[1] Mogul Steamship Co. *v.* McGregor, 1892, A. C. 25; Plant *v.* Woods, 176 Mass. 492.

[2] Centralization and the Law, 6, 12, 23, 45–47, 63, 64, 150, 151.

[3] This dominant social energy, under the New England theocracy, was not much troubled with nice questions of the remedy; it made use of transportation, injunction, mandamus, or whatever else suited the purpose. It is a perfect illustration of law as the expression of the prevailing social energy, in this case in full power.

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sense that the act in question was one of full legal right.

Malice as an evil motive or the like, has accordingly a proper and necessary place, even in the present law of torts. This fact has not always been understood, or, when admitted, its significance has not been fully appreciated.

The term is used in the books in different and confusing senses, which accounts for much of the misunderstanding in regard to the place of malice in the law, especially in the law of torts. It has, indeed, been treated as an exceptional element of liability upon the idea that in some cases it overturns full legal right,[1] a mistake as the foregoing remarks, if sound, plainly show, except as this may be the will of the dominating force in society. An explanation of the various uses of the term should be made.

The term has been used, and still is occasionally used in the law of torts and elsewhere in at least four different senses. It is used to signify (1) an evil motive, as in ordinary speech; (2) reckless conduct, or wanton or heedless disregard of consequences where there is or should be knowledge that mischief will follow; (3) in the case of false statement in general or by suit, that this was made with knowledge of falsity; (4) nothing more than knowledge or notice of the existence of some special relation which accordingly the person said to be guilty of the "malice" interrupts.

A remark has already been made on the second of these meanings of the term; in the law of torts to do a harmful act with reckless or wanton disregard of the consequences, or heedless of them when they are present to the mind, is considered as satisfying the purpose of malice equally with doing the act under an evil motive.[2] And there is some ground for saying that such a matter amounts in most cases practically to the same thing as malice in the ordinary sense. A man can hardly be said to have no motive at all when doing an act in reckless, wanton, or heedless disregard of another's rights; if he has so done the act, he has done it under the idea — motive — that it may afford pleasure to him or someone else, or because he cares not for any harm that may follow, and in either case there is usually something closely akin to an evil motive in his conduct. Acts done in such a spirit might well be considered to destroy any permissive right to do them.

It is not always true, however, that to do an act in reckless, wanton, or heedless disregard of another's rights is to do it with an evil motive. To prosecute a man with knowledge that there is no just cause of prosecution would afford an example. This might be done in a reckless, wanton, or heedless spirit with what is commonly regarded as a good motive; it might so be done with the motive of gaining a reward. A man again might tell a falsehood with the sole motive of helping a friend, indeed with regret that harm to any one should follow. It is clear that such cases satisfy any requirement in law of proof of what is called malice in fact. The result, so far, is that the conception of malice as evil motive does not quite meet the legal idea of the term. "Malevolence" has been suggested,[1] though that too falls a little short. On the whole, it appears to be enough to say that, for the purpose of overturning permission, the term "malice" may properly be used in any of the three senses above given.

Malice, in the fourth sense, is a different thing altogether. To make B liable for interrupting a certain relation between A and C, as for instance that of master and

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[1] It actually does overturn such right in some cases, according to New Hampshire authority and the Roman law. Ante, p. 134, notes.

[2] Gott *v.* Pulsifer, 122 Mass. 235; Wren *v.* Weild, L. R. 4 Q. B. 734, 736; Allen *v.* Flood, 1898, A. C. 1. It is a curious instance of the likeness of things different that recklessness, wantonness, and the like are also considered sufficient to satisfy an allegation of negligence.

[1] Moran *v.* Dunphy, 177 Mass. 485; 59 N. E. Rep. 125, Holmes, C. J.

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servant, it is necessary to prove that B knew of the existence of the relation. Then, with such knowledge, interrupting the relation, it has been usual in the past, to say that he did it "maliciously." It is plain, however, that may not have been the case in the sense either that he did it with an evil motive or in reckless, wanton, or heedless disregard of rights. It is plain that malice in the fourth sense is quite emptied of its natural meaning, and that to use the word in that sense is confusing and misleading. Accordingly, it is now considered by careful judges that the custom of calling such a case malice, should be dropped — in other words, it is now held that to procure a breach of contract-relation is actionable without proving malice.[1] Proving knowledge of the relation is simply proving the existence of a legal duty — that is, knowledge of danger to the plaintiff's rights.

It has been noted above that malice (as motive or the like) has in regard to some cases been thought to be an exception to general doctrines of law, in that in regard to those cases it is supposed to overturn legal right. The law of malicious prosecution has been particularly pointed to as an instance of such exception. But, laying aside the suggestion that the dominating energy may determine for itself what is legal right, and what will defeat legal right, if the remarks before made in regard to permissive right are well founded it is clear that malicious prosecution falls into line with general principle. A few words will make the matter clear.

The term is only a title; the wrong for which an action lies is a malicious prosecution begun without reasonable or probable cause. These facts (with proof of the termination of the prosecution) must be proved by the plaintiff. Now, a man can have no legal right, in the sense of full legal right, to prosecute another without cause; but a man is *permitted* to do so, which is all there is of it. The person so prosecuting is merely exempt from liability — that men may not be discouraged from resorting to the courts to settle their disputes.

That the matter does not rise higher than permissive right may readily be shown. Suppose that by fraudulent misrepresentation, whether by the person intended to be prosecuted or by another, a civil prosecution, without reasonable or probable cause, is put off until it is barred by the statute of limitations; could an action be maintained for the fraud? Clearly not, for as there was no ground for the intended prosecution there could be no violation of right in causing it to be put off — the intended prosecutor had no legal right in the matter. That the prosecutor in a civil case may be mulcted in costs, as in early times the prosecutor in a criminal case could be,[1] shows the same fact. It is lawful, in the sense that it is permitted, to prosecute without cause; the permission is on the footing that prosecution shall be in good faith. Proof of malice in fact, in either the first or second sense, shows that the prosecution was not so begun.

The action for slander of title is another case of the kind. This is an action for false and malicious disparagement of property. False and disparaging statements of property are permitted;[2] B *may* falsely declare that A has no title to a certain piece of land claimed by A, or make other false statements concerning A's property — no action could be maintained against him for doing so. But that is not because B had full legal right to do such a thing; the law simply permits. B could not maintain an action against one who, by using wrongful measures, prevented him from doing the thing, as by tearing up notices or handbills making the false statements. But B

[1] South Wales Miners' Federation *v.* Glamorgan Coal Co. 1905, A. C. 239. In this case Lord Lindley expressly refrains from using the word "malice" because of its ambiguity.

[1] In early times the false prosecutor in all cases was "in mercy."

[2] Gott *v.* Pulsifer, 122 Mass. 235, 238; Wren *v.* Weild, L. R. 4 Q. B. 730; Halsey *v.* Brotherhood, 19 Ch. D. 386.

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may make the statements unless A can show that he made them with malice in fact.

The idea that the law of malicious prosecution is exceptional in requiring proof of malice would have to be put thus: Every one has *prima facie* full legal right to sue or prosecute; hence wrongful means, in accordance with the very doctrine of the foregoing pages, must be shown to make a case for redress. But proof of wrongful means should be enough; malice is unnecessary. The same reasoning would apply to the law of slander of title. I have full right to speak the truth; hence as above, in regard to malicious prosecution.

The answer is, that there are cases in which the mere means or measures alone have always been considered, and justly, to be insufficient to overturn the legal right — something is needed in addition. Deceit furnishes a ready example; to prove that the result was brought about by means of false representation is not enough — knowledge of falsity, or some just equivalent, must also be proved. In a word, what in other cases, and sometimes indeed in deceit,[1] is called malice (in a proper sense of that term) is required to make the case. The same may well be true of actions for malicious prosecution or slander of title. The wrongful means would be the false charge or claim; but a man should not be liable in tort for making a false charge or claim, in court or out of court. To wrongful means something must be added; it should not be enough in the case of a prosecution, that it was not well-founded, for that would discourage resort to the courts — the law has always and justly required that malice should be proved. And so of false statements out of court in regard to property; proof of falsity ought not to be enough — the statement may have been made in good faith.

[1] Pasley *v.* Freeman, 3 T. R. 51, Buller J.: "The gist of the action is fraud and deceit; and if that fraud and deceit can be fixed by evidence on one who had no interest in his iniquity, it proves his malice to be the greater."

The requirement of proof of malice does not then make the law of malicious prosecution and of slander of title exceptional, however true it is that legal right is overturned in other important cases by wrongful means alone.

In slander and libel, the law of malice lies somewhat further afield, but it rests on the same sound footing. The plaintiff is not required in the first instance to prove malice, because defamation is in itself unlawful — there is no case of right, overturned by wrongful means; — but if the defense is an attempt to set up a (qualified) privilege, the plaintiff cuts the ground from under the defendant's feet by showing that he made the defamatory statement maliciously. His permission was not properly accepted.

There is then no place in the current common law of torts in which malice alone can be said to overturn full legal right;[1] and the subject, therefore, is to be considered as occupying a normal place in the law.

It need only be added that where in certain cases, such as slander and libel, the making of a *prima facie* case is sometimes said to establish malice though no evidence

[1] Quinn *v.* Leathem, 1901, A. C. 495; Allen *v.* Flood, *supra*; Bradford *v.* Pickles, 1895, A. C. 587; Mogul Steamship Co. *v.* McGregor, 1892, A. C. 25 (that the motive of benefitting the defendant at the expense of the plaintiff, is not malicious or unlawful, overruling on that point Bowen *v.* Hall, 6 Q. B. Div. 333, 338); Chasemore *v.* Richards, 7 H. L. Cas. 349, 388; Stevenson *v.* Newnham, 13 C. B. 285, 297; Paine *v.* Chandler, 134 N. Y. 385, 390; Frazier *v.* Brown, 12 Ohio St. 294; Payne *v.* Western R. Co., 81 Tenn. 507; Boyson *v.* Thorn, 98 Calif. 578; Glencoe Land Co. *v.* Hudson Co. 138 Mo. 439, 445; Kelly *v.* Chicago R. Co. 93 Iowa, 436, 452; Bohn Manuf. Co. *v.* Hollis, 54 Minn. 223, 233; Chatfield *v.* Wilson, 28 Vt. 49; Jenkins *v.* Fowler, 24 Penn. St. 308; Rideout *v.* Knox, 148 Mass. 368, 372; Rice *v.* Albee, 164 Mass. 88; May *v.* Wood, 172 Mass. 11. But see Wheatley *v.* Baugh, 25 Penn. St. 528, 533; Swett *v.* Cutts, 50 N. H. 439.

Conversely, good motives will not make that lawful which otherwise is unlawful. Bradford *v.* Pickles, 1895, A. C. 587, 594, 598; South Wales Miners' Fed. *v.* Glamorgan Coal Co. 1905, A. C. 239.

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of malice has been given, the language is to be taken as a lingering archaism. All that is meant is that *wrongfulness* is established, which wrongfulness in cases having a traditional nomenclature is called malice.[1]

In such usage of the term, malice is the mere name of a legal conclusion. It is not an entity; it is only "malice in law" or "implied malice," that is, it is a downright fiction. "Malice in fact," required to overturn permissive right, is an entity to be established by evidence.

To sum up the discussion: —

That which is not in itself a tort is so far lawful. A lawful thing may be of full legal right or only permissive; how is this lawful thing to be converted into a thing unlawful? By wrongful means, by negligence, and in some cases regularly by malice in accordance with some such formula as the following:

1. I have full legal right (under freedom to do what is reasonable) to endeavor to buy, to sell, to contract, and to do other things; this right I may lose by the use of wrongful means to accomplish my purpose, or by negligence, but not, according to current legal doctrine, by malice alone.

2. I have permissive right to do a thing — for instance, to enter my neighbor's land in certain cases, or to bring an unfounded prosecution; if I accept the permission in a malicious spirit (towards my neighbor, or the person prosecuted, that is, towards the plaintiff) I do not accept it according to its terms, and I am liable for what I do as if no permission had been given.

Eliminate now (from the defense) legal right altogether, full and permissive, and assume that I have inflicted harm upon my neighbor intentionally; has my neighbor a right of action? The answer in ethics is without doubt in the affirmative; and that too is the answer in law in many cases. But is it always so in law, or so generally that it can be laid down as a legal rule that to inflict harm intentionally creates civil liability, in the absence of any defense of right? An affirmative answer has been given.[1] But if the case is to turn on logic, there is ground for doubt. The rule, it will be seen, would create liability though nothing wrongful was done beyond the intentional inflicting of harm.

B inflicts harm upon A by telling him something which is true, with intent to harm him. For instance, after A has, by expense and effort, prepared himself to enter into partnership with C, according to C's desire, not yet consummated however by any contract, B informs C truly that A has been in financial difficulties several times — this B does to induce C to break off further negotiation with A, and with intent to harm A; and succeeds in his purpose. It has been maintained that B is liable in damages to A;[2] the contrary too has been decided.[3] To take the first view of the case is to say that a true representation made with intent to harm, and doing harm, is actionable; but that is contrary to the law of deceit. The rule in question, therefore, is not a logical rule to that extent; and it should be observed that the law of deceit has a large and important place in the law of contracts as well as of torts.

It cannot be said that there is a defense of "justification" to an action in such a case. "Justification" signifies that some particular fact is pleaded in defense of a suit, which fact, it may be, brings the case within a particular rule of law applicable to such cases. But the case in question is not one of the kind. B would not have to plead any fact to bring himself within the particular rule of law; he would demur; he would call

[1] See remarks of Lord Watson in Allen *v.* Flood, 1898, A. C. 1.

[1] Plant *v.* Woods, 176 Mass. 492; Mogul Steamship Co. *v.* McGregor, 23 Q. B. D. 598, 613, Bowen, L. J.

[2] May *v.* Wood, 172 Mass. 11, in dissenting opinion of Holmes, C. J. See also Plant *v.* Woods, 176 Mass. 492.

[3] Rice *v.* Albee, 164 Mass. 88.

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upon the court to decide in his favor, upon the very claim of A, as it stands, and the court would uphold him. This the court would do on the ground that there was (not a particular rule to be shown by justifying, but) a general rule applicable to everybody — that for the consequences, though intended, of a true statement, no one is liable by municipal law.

The same would be true of the action called slander of title, and of the action for slander or libel, of the action for malicious prosecution, and probably of other cases. In none of these cases can an action be maintained where it does not appear or is not presumed that what was said or done was false; and that for the same reason in each case, to wit, because of a general rule of law, not of a particular rule applicable only to persons bringing themselves within it by showing facts in "justification." If, then, the case is to turn on logic, there is too much of the law which would have to be treated as exceptional, to make good the rule in question. The defendant B is protected in such cases because indeed he has a right to say and do such things, according to common law reasoning. And so A cannot make a *prima facie* case against B in the way proposed; he must go a step further and show that B has done something itself wrongful or wrongful by reason of other facts.

Such appears to be the result, if the case is to rest on logic. But there are, as we have seen, plain limitations to logic; rules of law are not necessarily rules of reasoning. The dominant power of a given time may break up and give place to another or to an unsettled state of things; and this requires, or may require, a new beginning in the course of the law. The old order is a spent force, and reasoning from it falls to the ground. The present may be a case of the kind; it may be that a new dominating force requires the rule in question; if so, there is an end of the matter. And that appears to be the view finally taken in Massachusetts of cases of *combinations* having a malicious ("malevolent") purpose; *capital* as the new social force, displacing equality as the social force of the "classical" period of the common law.[1] That position can well be accepted as sound.[2]

In many cases it is plain upon ordinary common law reasoning that to inflict harm intentionally is to create liability in tort. It is now plain too on what footing such cases stand, as cases of logic; they are cases which do not fall within the protection of any *general* rule of law — they are cases in which protection is to be found, if at all, in justification as already explained. The defense rests on a particular ground of legal right — permissive or full, it matters not — which brings the subject within some special rule of law applicable to cases of the kind. A applies to B, a druggist, for dandelion, a harmless preparation, and B, or a stranger in the shop, intending to harm A slightly, by way of a practical joke, makes a present to him of a bottle containing more or less of belladona, a somewhat dangerous preparation, as dandelion, which A uses to his hurt;[3] B puts up a chandelier unsafely, with intent that it shall fall upon and harm A,[4] which it does; in such cases (and in many others, such as license or other permission "of the

[1] Berry *v.* Donovan, 188 Mass. 353, 359; Knowlton, C. J., for the court saying that if combinations of labor for a malicious purpose were to be held lawful, "employers would be forced to yield to all their demands, or give up business." See Centralization and the Law, 9–12. In Berry *v.* Donovan combination was held not to constitute competition.

[2] Whether the new energy is to be preferred to the old is another question, with which we are not here concerned.

The conception of the dominating power may, of course, invalidate the whole elaborate structure of common law reasoning over malice in relation to legal right.

[3] Compare Thomas *v.* Winchester, 6 N. Y. 397, where the drug was *sold*; but that was treated as immaterial.

[4] See Collis *v.* Selden, L. R. 3 C. P. 495; George *v.* Skivington, L. R. 5 Ex. 1; Langridge *v.* Levy, 2 M. & W. 519; S. C. 4 M. & W. 338.

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party") of intent to harm as the only element of wrongfulness, B (or the stranger in the belladona case) is *prima facie* liable to A. The motive of B would be immaterial. In some cases of the kind, the motive might conceivably be good; as where in the case of the chandelier, the article being light in weight and of little value, was unsafely hung to fall on and slightly hurt A as a warning to him to be careful, where he had been careless, in attending to the lamps. But that would make no difference. B would have to justify in this and the other cases, if he could, by facts bringing him within some special rule of law.

Finally stripping away malice, negligence, wrongful means — everything necessary in other cases to turn rightful into wrongful conduct — it is plain that all that will be left will be cases in which there can be nothing lawful in the defendant's conduct so far as his conduct itself, or his conduct together with its consequences, is concerned. The defendant was not doing or omitting anything which, apart from the way of doing or omitting it, was lawful — he was doing or omitting what in itself, or with its consequences, was unlawful. The plaintiff no longer has to show that the defendant was inspired by an evil motive, or that he failed to exercise care, or skill, or diligence, or that he resorted to wrongful measures; he simply shows that the defendant did, or omitted, something which in itself and on its face, or with its result, was a breach of legal duty. As these remarks indicate, the illegality of the act or omission is sometimes dependent upon damage resulting, sometimes not.

There is still another class of cases, in which the defendant's conduct was in no ordinary, and indeed in no proper, sense wrongful, and yet because of the special danger attending or following it, it is thought proper that he should be liable for any damage which may result. In other words, he is justified if no damage follows; his acts are at his peril.

§ 4. Classification of Breaches of Duty in Tort.

In accordance with the foregoing line of thought the classification of breaches of duty in tort may be put fundamentally as follows:

Breach of duty (in connection with other ingredients) by,

I. Wrongful Means.
II. Negligence.
III. Malice.
IV. Illegal Acts.
V. Damage from Acts at Peril.

Thus, the unfolding of the conception of legal right, with which we started, spreads out into the whole law of torts.

Boston, Mass., February, 1906

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INSURANCE AS A COMMODITY

By Eugene A. Gilmore

IN the way of those who would bring the business of insurance under Federal control there are several troublesome decisions of the Supreme Court of the United States. "Issuing a policy of insurance is not a transaction of commerce. . . . These contracts are not articles of commerce in any proper meaning of that word. They are not subjects of trade and barter. . . . They are not commodities. . . . Such contracts are not interstate transactions. . . . They are local transactions, and are governed by the local law." [Paul *v.* Virginia, 8 Wall. 168 (1868)]. "The business of insurance is not commerce. The contract of insurance is not an instrumentality of commerce. The making of such a contract is a mere incident of commercial intercourse, and in this respect there is no difference whatever between insurance against fire and insurance against the 'perils of the sea.'" [Hooper *v.* California, 155 U. S. 648 (1894)], "or against the uncertainty of man's life." [N. Y. Life Ins. Co. *v.* Cravens, 178 U. S. 389 (1899)]. As the authority of the Federal government to assume control of the business of insurance must be found in the Commerce Clause of the Constitution, great ingenuity has been shown by those advocating Federal supervision in finding a way to avoid the effect of these decisions.

It is contended that the remarks of the court in Paul *v.* Virginia to the effect that insurance is not commerce are dicta, for the reason that there is another good ground on which the decision might have been placed, viz: at the time of that case the Supreme Court had never squarely decided that the power of Congress over interstate commerce was exclusive as to subjects national in their character or requiring uniformity of regulation, and that the silence of Congress as to such matters was equivalent to a prohibition on State action. As Congress had not acted, the regulations of Virginia could be upheld. Further, that the courts had not then worked out to any extent the distinction between commerce and its instrumentalities, on the one hand, and the incidents and conveniences of commerce, on the other, and the regulations of Virginia, affecting only an incident, should be upheld until Congress acted.

It is also said that until Congress has actually attempted to regulate insurance the question cannot be considered closed. The court will not determine indirectly the extent of the power of Congress over commerce by decisions upholding State legislation affecting the same matter. While the court will not be bound by definitions of commerce as given by Congress in a statute, still what is commerce and what are its instrumentalities and facilities is primarily a legislative question, and the court will not disregard the legislative determination unless it is clearly unreasonable.

But even granting that the court meant to decide in Paul *v.* Virginia that the issuing a policy of insurance is not a transaction of commerce, it is said that the reasoning by which that result is reached would, if followed to its logical limits, cut out from Federal control, practically, all commerce. The Court says: "These *contracts* are not articles of commerce. . . . They are not subjects of barter and sale as something offered in the market having an existence and value independent of the parties to them. . . . They are not commodities to be shipped or forwarded from one state to another and then put up for sale." That is, because the contract of insurance is purely a personal matter between the parties, a local transaction, and is not a thing to be bartered and sold, there is no commerce. This reasoning would apply to all commerce arising out of contract. It is not the contract that is sold. The contract is not

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interstate. There could be no contract among the several states. A contract always has a *situs* and is a local transaction. When a drummer from one state comes into another and solicits orders for goods on behalf of his principal in the other state he makes a contract for his non-resident principal. The making of the contract is not an act of commerce; the exchange which will follow that contract is commerce; and if the exchange involves crossing state lines it is interstate commerce. If, as a result of a contract between persons of different states, something tangible must pass between states or a service or intercourse must take place between states, such as a telephone message or the carriage of goods, interstate commerce has taken place. The contract, however, which has brought about the result has its *situs* in one state and is itself not the subject of "trade or barter offered in the market" and is not a commodity "to be shipped from one state to another."

It would seem to be well settled by Robbins *v.* Shelby County Taxing District, 120 U. S. 489 (1887); Brennan *v.* Titusville, 153 U. S. 289 (1893); Stockard *v.* Morgan, 185 U. S. 27 (1902), and similar cases, that a state cannot tax or prohibit the occupation of one who comes within its borders, or who resides there permanently, for the purpose of making contracts on behalf of a non-resident principal, the performance of which contract will require the exchange of tangible property or the rendering of a service across state lines.

This criticism on the reasoning of Paul *v.* Virginia seems beside the point, because a contract of insurance is essentially different from a contract for merchandise. To bring insurance contracts within the principle of the Robbins and similar cases it is necessary to show that a contract of insurance, while itself not the subject of sale, results in interstate traffic or exchange of a commodity, using that word in its narrow sense as meaning something tangible, or in its broader sense, as any convenience, profit, or privilege. Is it possible to treat insurance as a commodity in any sense? There is very little support to be found in the decisions. There is, however, one case which by giving the word commodity a broad meaning includes insurance within its limits. A recent decision of the Supreme Court of the United States (Carroll *v.* Greenwich Insurance Co., 26 Sup. Ct. Rep. 66, Nov. 27, 1905) while not at all deciding the question, did take notice of the fact that a state might, as a part of its general scheme for the regulation of monopolies and combinations in restraint of trade, regard insurance as a commodity. The decision involved the validity of the "anti-compact" law of Iowa, forbidding combinations among insurance companies as to rates, commissions, etc. In answer to the contention that the statute was invalid because it applied only to insurance companies, and therefore denied them the equal protection of the law, the Court called attention to the fact that the particular statute in question must be considered as a part of a general plan of legislation in that state regulating combinations in all businesses, and that it could not be said that insurance companies had been singled out for regulation. To show this, the Court calls attention to a decision of the Supreme Court of Iowa [Beechley *v.* Mulville, 102 Iowa 602 (1897)] where it was decided that a general statute of Iowa forbidding combinations "to regulate or fix the price of oil, lumber, coal, grain, flour, provisions, or any other commodity or article whatever" would include insurance. The Iowa Court says: "Insurance is a commodity. 'Commodity' is defined to be that which affords advantage or profit. Mr. Anderson, in his Law Dictionary, defines the word as 'convenience, privilege, profit, gain; popularly, goods, wares, merchandise.' We see no reason why, in the act, the word should be restricted to its popular use. It is common to speak of 'selling insurance.' It is a term used in insurance business." The word commodity undoubtedly is used in a

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broad sense and is not limited to tangible objects. For example in Portland Bank *v.* Apthorp, 12 Mass. 252, speaking of the banking business, the Court defines the word as "convenience, privilege, profit and gains, as well as goods and wares, which are only its vulgar signification." Also, in Minot *v.* Winthrop, 162 Mass. 113, the privilege of receiving or transmitting by will or descent property on the death of the owner is a commodity within the meaning of that word in the Massachusetts Constitution providing for a tax on commodities. In the same way the word "trade" in a statute forbidding combinations in restraint of trade has been held to include insurance. *In re* Pinckney, 47 Kan. 89. In a later case, however, (State *v.* Phipps, 50 Kan. 60), while still holding that "trade" includes the business of insurance, the Court said: "The word 'trade' as used in that decision meant then, and means now, trade between citizens of this state — domestic trade, if you please — and not trade or commerce between citizens of different states, or interstate commerce." In the last case it was argued that in Paul *v.* Virginia the court failed to notice the distinction between an executed and an executory contract. The policy of insurance is an executed contract. A man from New York goes into Virginia and sells something (indemnity, in the case of fire insurance) to be delivered in the future from the home office in New York upon the happening of a certain event, and the party in Virginia promises to send money to New York. That is, the man in Virginia purchased from the insurance company in New York a "convenience, privilege, profit, gain" — a commodity.

In Queen Insurance Co. *v.* the State, 86 Tex. 250 (1893) the Court said: "The word 'commodity' has two significations. In its most comprehensive sense it means 'convenience, accommodation, profit, benefit, advantage, interest or commodiousness' . . . The word is ordinarily used in the commercial sense of any movable and tangible thing that is ordinarily produced or used as the subject-matter of barter or sale; and we think that this was the meaning intended to be given to it by the Legislature in the statute in question." It was held, therefore, that a contract of insurance could not be considered a commodity and the statutes forbidding combinations to fix the price of commodities had no application.

In this case and the two preceding, the court is dealing only with the particular statute and does not decide that the Legislature could not so frame a statute as to give to the word commodity its broad meaning. If the power to regulate commerce includes, as it would seem from the Lottery Case (188 U. S. 321) it does, the power to prohibit commerce or to declare what are suitable subjects of commerce, it might be argued that Congress could enact that the word commodity should have the broad signification and should include insurance, and such enactment would not be so unreasonable as to justify the court in disregarding it. It is doubtful, however, whether a transaction which is not commercial in its nature can be made so merely by legislative declaration. It is apparent that if the word should come to have such a broad meaning it would bring within the control of the Federal government practically all contracts of different states. Such tremendous consequences afford very strong reason for saying that the word will never receive such a meaning, either by legislative action or judicial interpretation.

It has also been contended, on the strength of the Lottery Case that, that although insurance is not commerce, the policy itself which evidences the contract might be declared to be an article of commerce, but the statement of the bare majority in that case as to the nature of a lottery ticket and why it is to be regarded as a vendible article does not afford much strength to the contention. The majority said lottery tickets "were the subjects of traffic; they could have been sold; and the holder was assured that the

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company would pay him the amount of the prize drawn . . . even if the holder did not draw the prize, the tickets, before the drawing, had a money value in the market among those who chose to sell or buy lottery tickets." The idea seems to be that the ticket itself, irrespective of the parties concerned, had some value because of the possibilities which it represented. This, however, cannot be said of an insurance policy, which is only the tangible evidence of a personal agreement between two parties.

If, however, insurance cannot be designated as a commodity in this extended sense, can it be called a commodity in the limited sense? It is said that the contract of insurance contemplates an exchange of property between the insured and the insurer and *vice versa*, and such exchange, not the contract, is the real business of insurance. In fire insurance, for example, the undertaking of the insurer is to indemnify the insured against loss of a certain kind. This involves the transfer of money or property. If the insurer elect he may transfer a sum of money as indemnity or he may provide another house or supply other things to take the place of those destroyed; or the insurer may, in the case of personal property, take the things damaged and in return give other things. In life insurance the insured transfers money to the insurer who in turn undertakes to accumulate the same for a certain period and return its equivalent to the insured, or in the event of his death during the period of accumulation, to transfer a certain sum to his representatives, deducting a certain portion for his services. This interpretation of the nature of the business of insurance seems artificial and strained, and has no judicial sanction. The real business of insurance, the essence of the insurer's contract is not the exchange of property, tangible or intangible; it is an undertaking to do an act at a particular time and place. Although the performing of the stipulations in the insurance contract may result in the exchange of property across state lines, such a consequence comes about only in an incidental way. In a fire insurance contract, between parties residing in different states, the obligation of the insurer is to indemnify the insurer against loss. He may perform his obligation by giving to the insured other property of like kind and value as that destroyed, or a sum of money. The contract does not require that he bring the money or the property from another state. If A of New York agrees with B of Virginia to build for him in Virginia a house of Indiana stone, the performance of the contract may result in bringing stone from Indiana to Virginia. Such a consequence arises, however, only incidentally out of A's principal undertaking, namely, to do a particular act in Virginia. As the insurance business is usually carried on, there is practically no authority and very little reason for calling it a commodity, or in saying that the performance of an insurance contract results in the interstate exchange of a commodity, defining that word as it is ordinarily used in connection with commerce, and a legislative *fiat* cannot make that an interstate commercial transaction which is not such in its essential nature.

MADISON, WIS., January, 1906.

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THE GARY COLLECTION

By Frederic B. Crossley

THE Gary Collections of law books in part already installed and in part being acquired for the library of the Law School of Northwestern University in Chicago are the gift of Hon. Elbert H. Gary, an alumnus of the School of the Class of 1867, and formerly a well-known Chicago jurist, now a resident of New York, embrace the following subjects:

a. Modern Continental Law.
b. English Historical Material.
c. Ancient and Oriental Law.
d. American International Law.

a. *Modern Continental Law.*

The collection of Modern Continental Law, now substantially complete, represents twenty-three independent countries with their dependencies: Austria, Hungary, Belgium, Bulgaria, Denmark, France, Germany Greece, Italy, Liechtenstein Luxembourg, Monaco, Montenegro, Netherlands, Norway, Portugal, Roumania, Russia, Servia, Spain, Sweden, Switzerland, and Turkey. In the Austria-Hungary collection are included the separate laws of Bohemia, Bosnia, Croatia, Herzegovinia, Slavonia, and other principalities. The laws of Finland, Esthland, Kurland, Livland, and Poland are included under the Russian classification.

Some of the unique parts of this collection which would probably be difficult to duplicate are the full set of "Russian Supreme Court Reports," the "Statutes of Iceland," and the "Laws of Liechtenstein" (smallest independent state in Europe).

The collection for each of the countries covered is divided into six heads:

First, The codes or systematic laws in the original language.

Second, The same in translation, either in French or in German.

Third, A complete file of the decisions of the Supreme Court of Justice.

Fourth, The leading law journals or periodical publications.

Fifth, Treatises, systematically expounding the whole body of contemporary law or important single topics.

Sixth, Treatises upon the history of the law.

The only other collections of this kind of any size, are included in the Harvard Law Library, the Massachusetts State Library, and the Congressional Library. The Harvard Law Library has little in the way of statutes and covers only about one-half the countries mentioned above. The Massachusetts State Library has only statutes, not always down to date; but is especially strong in South American laws, which the Gary collection does not yet cover. The Congressional Library has only made a beginning of its collection.

It may be asked, "What are the specific uses to which such a collection of foreign law can be put?" Certainly, three at least. In the first place, the presence of such a library is a constant reminder of the cosmopolitanism of legal problems and an incentive to broader legal thinking. Quite apart from the needs of a general course of legal instruction in comparative legislation or legal history (for which perhaps the profession in this country is yet hardly ready), there is always something to be gained by a comparative view. Whether it concern the formation of contracts by correspondence, or the parol evidence rule, or the liability of employers for injuries to workmen, or the nature of limited partnerships, in these and countless other departments, scarcely any legal problem appears as a native and exclusive one of our own. New solutions approved and old ones found wanting are chronicled for our advantage in the records of other systems of law. The time is coming when we shall wish and shall need to compare them. The opportunity to do so will create

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the inclination and the demand. This library will make it possible to satisfy such needs.

In the second place, the history of our own Anglo-American law, directly rooted as it is in the history of the Teutonic peoples, requires for its investigators an acquaintance with the early legal ideas of Germany, France, and Scandinavia. The work of Brunner, Heusler, Stobbe, v. Amira, and Esmein, forms the preface to the work of Ames, Maitland, Pollock, and Thayer. A complete library of American law must include the history of French, German, and Scandinavian law. This is essential if a sound legal scholarship is to be built up in the West.

In the third place, and in one aspect most important of all, the daily practice of the law is profitably served by this collection

THE LIBRARY OF THE LAW SCHOOL OF NORTHWESTERN UNIVERSITY

The varied immigrant population of this country, especially in the Central West and the Northwest, has created a need for it. In the city of Chicago alone the foreign-born population reaches these figures: Bohemians, 36,000; Dutch, 19,000; Poles, 60,000; Danes, 10,000; Hungarians, 5,000; Germans, 170,000; Italians, 16,000; Russians, 25,000; Norwegians, 22,000; Swedes, 49,000; others not British, 40,000. Among this large population of foreign birth (and those of foreign parentage will increase these figures) many individuals from time to time become affected by legal questions of inheritance, of marriage, of commercial paper, of military service, and of other sorts, in which the tenor of the law of a foreign country is material or decisive. Hitherto, in such cases, either the investigation of that law has been fore-

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gone, as too tedious or too expensive, or a few casual sources have been summarily made to suffice, or the whole matter has been placed in the hands of a continental lawyer. It will now be possible to ascertain adequately here at home the foreign law; and thus either a resort abroad will become wholly unnecessary or the foreign attorney's services will be needed only for proceedings taken abroad. In any event, much time and expense may be saved, and a more intelligent handling of the case will be possible. The probabilities of the Library's practical usefulness in this direction have come markedly to the surface since the first announcement of its acquisition, and appear now to be much greater than was originally expected.

In the selection of materials and the planning of the library's uses, the school has sought advice from the consuls and other skilled persons here who are in touch with this particular need. The school is prepared to place the library at the service of those of the profession who thus would utilize it, without other than a nominal charge to cover the expense of making known its resources. The plan, as at present formed, is to permit the use of the Gary collection to any member of the bar in Chicago upon only this nominal charge; and, for the benefit of practitioners in other parts of the country, to appoint a staff of local practitioners, one for each foreign country, skilled in the respective languages, and to commit to them for investigation any case stated which may be sent to the school, charging for this a small minimum fee and handing it to the particular local practitioner who makes the investigation and supplies the opinion. No doubt a considerable service can by this means be rendered to the profession as well as to the entire community in the West and Northwest.

b. *English Historical Material.*

The scope of this collection now being installed is to include all printed material before 1700 which is not already in Chicago.

c. *Ancient and Oriental Law.*

This collection is to include (1) for Europe, the printed sources of Germanic, Scandinavian and Slavic Law up to the end of the Middle Ages; including the Lex Salica and kindred laws and ordinances; the legal documents, records of local customs, etc., so far as printed; (2) for Asia and Africa, and Oceanica, the laws and customs of primitive or extinct tribes and peoples, and the more developed systems, such as the Hindu and Mohammedan.

Geographically, therefore, this will cover Afghanistan, Armenia, Caucasus, Persia, India, East Indies, China, Japan, Siam, Mongolia and Siberia, African tribes, Oceanica, and Australia. By systems, it will include the Hindu, Mohammedan, Hebrew, Babylonian, Egyptian, Greek, Chinese, and Japanese systems. It will not include in the present plan the modern colonial law of Germany, France, Great Britian, Spain, Netherlands, Denmark, Portugal, and Italy, so far as the legislation of those countries has affected the indigenous law of their colonies; but it will include the modern legislation of the above great systems in the independent countries which still maintain them, *i.e.* Turkey, China, Japan, Siam, and Persia. So far, however, only Turkey and Japan are thus represented in the collection.

The nucleus of this department has been a collection formed from the libraries of Professors Dermesteter, Gaston Paris, and three others, recently coming into the market in Paris. This collection was rich in those rare pamphlets and old editions, which are difficult to procure on demand in the market, and contained few of the large treatises which may be procured on order without difficulty. It thus furnished the best sort of a nucleus for such a library. Among these may be mentioned Chasseand's account of the Manners and Customs of the Druses of Lebannon (1855); Rogiere's Formules Inedites (1853), from documents in the Monastery of St. Gall in Switzerland, the greatest

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repository of mediæval charters; Meyer's Esprit des Institutions Judiciaires (1823); Carrere and Holl's account of Senegambian Customs (1853); Mignot's Memoir on the Phenicians (1770); Clot-Bejs Memoir on Egypt (1842); Olon's Memoir on Moroccan Customs (1695); Spiegel's translation of the Persian Avesta (1852), and his treatise on Iranic Antiquities (1871); Baluzius' edition of the Frankish Capitularies (1780).

The collection also includes two of the leading repositories of French mediæval customary law — Philippe de Beaumanoir's Coutumes de Beauvoisis, and Loisel's Institutes Coutumiaires; together with a very full set of the books of the charters and privileges of the French mediæval towns. Another interesting title is Kukuljevitch's edition of the Slavic sources, Jura Regni Croatiæ, Dalmatiæ, et Slavoniæ, printed in 1861; and this is fitly complemented by the great collaborative work, recently furnished after twenty years' gradual publication, of Bogisith, Jirechek, and other notable Slavic scholars, the Monumenta historica-juridica Slavorum Meridionalium, in nine volumes; covering the early sources of all the South Slavic communities, — Servia, Bulgaria, etc. The complementary volumes, by Jirechek, on Bohemian, Moravian, and Polish sources of the West Slavs, is already in the Gary collection; and the remaining set, comprising Russian sources, is yet to be acquired.

A specially interesting title is the recent fresh edition (by Karst) of an early Armenian code made by the sage Mekhitar for Prince Vakhtang, dating back to 1184 A.D. This code has long engaged the attention of European scholars, and has been described by such eminent writers as Kohler and de Hube, in legal periodicals, and by Dareste, in his Studies in Legal History. It first included only Armenian customs; was then enlarged by the Constable Sempad, who added in translation a part of the Germanic law of the Crusaders' Kingdom of Antioch, in 1265, the original of which has never been found elsewhere. Then in the 1700's, other additions were made from the Jewish Byzantine and Syriac laws. Portions of the whole were printed in 1876, in 1880, and in 1886, separately in Armenian, in Russian, and in French. Now finally the entire wonderful mosaic has been edited from the original sources and translated. These are merely examples of the wide range of possibilities in such a library. The value of such a collection, when fairly completed, to students of comparative law, and to researchers in all branches of history and politics, it is hardly necessary to point out.

d. *American International Law.*

The work of selecting and acquiring this collection has but just commenced. When completed it is proposed to include all printed material relating to American International Law and Diplomacy not now available in the West.

CHICAGO, ILL., February, 1906.

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THE PROPOSALS FOR THE AMENDMENT OF THE INTERSTATE COMMERCE ACT

By John B. Daish

STRIPPED of the publicity features and the substantive law proposed in them — both good enough in themselves and doubtless needed at this time, the proposals for the amendment of the Interstate Commerce Act, as shown by the bills now pending in Congress, divide themselves into two main heads. On the one hand, there is a proposal to clothe an administrative body with power, when after complaint and investigation it shall have determined that a rate is unreasonable, to substitute therefor another rate to take effect within a reasonable time and the observance of the order enforceable by virtue of a penalty at so much currency per diem. On the other hand, it is proposed to allow the correction of rates and practices to be determined by the courts. The former plan seeks only to correct unreasonable and unjust rates, while the latter aims to correct not only rates, but as well to provide a remedy for practices, if they shall produce discriminations forbidden by law. It is true that each of these schemes have their advocates, and that as there are many advocates, so there are shades of opinion. Advocates of the former have their own individual and peculiar views concerning detail; those who favor the latter plan are equally as zealous in their individual opinions of detail on the grounds of expediency.

Before considering which of these classes of proposals will furnish the best remedy, it is well to consider what it is that the Congress is trying to correct. It seems to be taken for granted that there is enough law, if properly invoked, to produce the death of rebates in transporting goods at less than the published tariffs. Recent movement by the government has shown *prima facie* the existence of rebates, but as there are at least three ways of preventing and correcting the pernicious practice, it can hardly be urged that there should be additional weapons placed in the hands of the executive. There is, however, no adequate remedy for the correction of an unreasonable and unjust tariff, nor for the discontinuance of practices which are found to produce discriminations now forbidden by law or forbidden under the substantive provisions of the bills now before Congress. We are then to seek to prevent two classes of abuses; first, unreasonable and unjust rates, and second, the discontinuance of practices which produce unlawful discriminations or compel the allowance of a practice to another person or locality, if allowed to one person or at one place. The relief to be sought is to be preventive as far as rates are concerned, and both restraining and mandatory in the matter of practices.

The proposition to clothe an administrative body with power to correct rates and substitute a reasonable rate in lieu of one found to be unreasonable is truly unique. Unique, for the reason that it does not appear what the advocates mean by an administrative body; the term lacks precise definition in this country, and even the existence of administrative law has been denied by eminent writers both in England and America. Where it is allowed at all there is no unanimity of meaning, due to "the fact that the function of administration, whose discharge administrative law regulates, has itself only recently been differentiated from the general function of government." What the advocates of this system appear to mean by the term is that there be a body under political appointment, to which can be committed the power to do omnibus work. It must be borne in mind that the fixing a rate for the future is a legislative act; that the ascertaining whether or not an existing rate is reasonable, is a judicial function. Can it be that we are to seriously consider the placing of

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the functions of two of the coördinate branches of the government into one body? Are we to overrule the Supreme Court in its opinion that "one branch of the government cannot encroach on the domain of another without danger" and that "the safety of our institutions depends in no small degree on a strict observance of this salutary rule?"

It has been argued that because the fixing of rates is a legislative function, because the state legislatures have created railroad commissions with power to name rates, and because the Supreme Court has sustained such action as a correct exercise of the powers of the state legislature, therefore the Congress can do the same. This is argument only and poor logic and is not substantiated by any decision of the courts — for there has been no decision of the United States courts announcing this doctrine. In truth the text writers are unanimous in stating that the powers of Congress are far different from those of the state legislatures. The former has *enumerated* powers, subject to certain limitations; the latter have all the powers of legislation resting in the state sovereignty and are only limited by the constitution of the state.

But, as the proposal seeks to cover only rates, the least of the causes of complaint, it would fall short of the mark, were it not unconstitutional. The advocates of the "court plan" are divided into two main lines; one seeks to allow the machinery of the judicial system to be started by the individual, and paid for by him as well; here is to be determined the reasonableness of the rate and then, if the question be resolved in the negative, the petitioner is remitted to a commission to have it ascertain the amount in units of currency and weight what will constitute a reasonable rate. The other class would have a body, in whom would be detecting, investigating, and prosecuting powers, to whom the injured party may complain and if justified in his position, to institute, in the name and at the cost of the United States, a proceeding in a special court with equity powers.

The objection to the first mentioned court plan is that one would never arrive at a definite conclusion. Assume there be in force a twenty-cent rate. Assume that there is some shipper whose pugnacity, bank account, and time were so constituted that he would undertake to employ counsel and prove that this rate is unreasonable. Assume that he prove his case. He must undertake another proceeding before the commission and prove what would be a reasonable rate, and we will assume that the commission order the carrier to put in a fifteen-cent rate. The carrier, whatever may be the right of the matter, will feel that a reduction of twenty-five per cent, is too much. It will file a bill to enjoin the operation of the order of the commission, on the grounds that the proposed rate is confiscatory, that the carrier has not had the constitutional guaranty of "due process of law" and perhaps allege other reasons. The courts are preëminently the guardians of constitutional rights. The operation of the order is stayed and the case goes merrily on until the time occupied in Jarndyce *v.* Jarndyce would be as but a day.

The other court plan merits careful consideration. It provides for retaining all the weight of the present commission in mediation between the shippers and carriers, and it must be remembered that about 8,000 cases have been amicably settled by it since its creation. It retains all of the detecting and investigating powers of the present commission, so that there is no necessity of a complaint to it to bring about a correction. It provides for the correction of rates, if they be unreasonable and unjust, and for the discontinuance of practices which are productive of discriminations forbidden by law. It does not seek to initiate or make or substitute rates, but to correct them, through the same process which has characterized the disputes of parties for centuries. It proposes that the carrier shall have the right to

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name rates for transportation and to institute practices. When these are challenged by the public, a body for the purpose seeks to secure a correction of the rate or the abolition or extension of the practice — the abolition, if pernicious, the extension, if it be a wholesome practice. The body is to prosecute in a special court at government expense. A special court is required in order to expedite the decision, for commercial conditions cannot and ought not to be made to wait for any great length of time for the decision of matters affecting them; a special court for the reason that there is needed judges familiar with transportation — a subject acknowledged to be *sui generis*, both as to fact and law. The prosecution to be at government expense or the expense to be borne by the carrier if the government contention prevail, on the ground that no individual can afford to spend money for the benefit of the public. The prosecution by the government for the reason that unless undertaken by the government the wrong will live and thrive uncorrected.

Upon the whole, as the proposal to have an administrative body with power to substitute a rate is both unconstitutional and seeks only a correction of a portion of the causes of complaint; as the inadequacy of the plan to require an individual shipper to prosecute his case first in court, and then before a quasi-legislative body is manifest; and as it is constitutional for a court to prevent by injunction or other process the charging of excessive or unreasonable rates and to correct unjust practices or enforce just ones, the duty of the Congress in this behalf is clear.

WASHINGTON, D.C., February, 1906.

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THE WORLD'S MOST CELEBRATED TRIALS

By Elmer E. Rogers

THE martyrs of former time sought to have monuments erected by civilization to their memory. Without education, except that begun and finished in rural life, and without books, the noted criminals of the world, indeed, deserve consideration. The arch criminal of the age at his trial saw testimony admitted, and that without objection, which now is incompetent, immaterial, irrelevant and irreverent, though a part of the *res gestæ*. Such conduct is calculated to give heart disease to the present day practitioner — or to his defendant client. In the phraseology of the lawyer the situation was phenomenal and without precedent; but it is the true version. On convening of court by the self-constituted bailiff, considerable confusion seemed to be in the court room, and the judge grew much perplexed to distinguish between defendant and principal witness, and accessory; then it looked as though the crime had been committed before defendants had an understanding of the law, or at least before the law was codified or the first book on criminal law had been printed and published. And in one case the law may have been *ex post facto*. But ignorance of what the law ought to be is no defense.

The defendant and his accessory before the act were caught redhanded, and by enforced agreement tried at an early date, convicted, and sentenced — railroaded to the penitentiary. The court appointed no lawyer to represent the interests of the defendants because then there were no law offices and so no attorneys. No chance was given defendants to prove an alibi, for a new trial, arrest of judgment, appeal to courts of last resort, sue out writ of error, *habeas corpus* and so on.

Besides, little was done afterwards to guard against the commission of similar crimes by others. The reform organizations seem not to have gotten into working order.

Degeneracy ran in the family of these criminals, for subsequently the eldest son slew his brother with malice aforethought and moreover with no provocation whatsoever, excepting chagrin and envy because the brother had been more successful in business than himself, so the rumor goes.

The murderer was arrested. Then came on the first remarkable homicide trial of the kind. The verdict of the jury in my belief was fair and the sentence just, just such as the criminologists ought to study. The condemned was not put to death on the gallows nor by electrocution. A peculiar feature of the sentence was the ostracizing of the murderer; and lest relatives or friends of the victim take vengeance in their own hands to murder the murderer, the court enjoined any such precipitate action by promulgating that any such assassin should be put to death in the most barbarous manner.

Here was a case of a black sheep in a blacker family — a veritable bottomless pit of depravity and corruption — politically, industrially, and socially outrivaling that of New York, Chicago, London, Paris, Berlin, and Pekin combined, relatively to population.

The parent regretted that his son was the very image of himself. I presume he wished he had patterned after some one else. Probably there is a little devil in us all, and with bad blood, it very likely will cut a bad figure in our genealogy.

At the time of these memorable trials the railroad, telegraph, telephone, newspaper, lawyer, gossiper were unknown. Nothing existed to point the finger of scorn, create sympathy, or get anything wrongly reported. The court was, in itself, exercising the functions of judge, state's, or prosecuting attorney, witness, sheriff, and clerk; and no grand jury to complain. Truly the scene is without precedent.

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The accessory before the fact received the sentence to keep out of flying-machines, to lie low, and without use of either his hands or legs to diet on mud.

People have no license to commit even the crime of trespass by vaulting a partition picket fence to steal fruit; that was infraction of criminal laws. Here came the man's eternal doom, but not for murder. The arch convict remained in prison during his natural life, 930 years, only 39 years less than the lifetime of the oldest man that ever lived, Methuselah, thus shattering all our theories of longevity that it proceeds from a pure and blameless life. Imprisonment seems to have lengthened the individual's life in this case instead of abridging it; most of us out of the penitentiary meet perplexing situations in attempting to keep life within our bodies for the 70 years.

But the condemned prisoners never murmured at their forlorn state; didn't rail at the court nor the proceedings (writing was an undiscovered art); nor that the jury were prejudiced against them, or returned an unfair verdict, but cheerfully did they accept their outcast state. The greatest punishment is imprisonment with one's own conscience.

CHICAGO, ILL., February, 1906.

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EXEMPTION OF PRIVATE PROPERTY AT SEA FROM CAPTURE

By Edwin Maxey

THE United States has for nearly a century contended for the principle of the exemption from capture of all private property at sea, contraband excepted. The acceptance of this principle by the powers of Europe was urged by Secretary Marcy when the United States was invited to adhere to the declaration of Paris. Yet for some reason his counter-proposition was rejected. In 1870 Mr. Fish urged the acceptance of this "as another restraining and humanizing influence imposed by modern civilization on the art of war." The following year a treaty was concluded between the United States and Italy embodying this principle. It has also been applied by Prussia and Austria, and accepted in principle by Russia, provided it was accepted by the other states of Europe. But it cannot as yet be said to be a part of international law. The reasonableness of the rule, together with the fact that it has been successfully applied to warfare on land among all civilized nations, will undoubtedly secure its extension to warfare on sea. It is true that certain very able writers, particularly Hall, argue for a continuance of the present rule; but their arguments are by no means conclusive. The gist of the arguments of this school is that the present rule is the established law, that it is not as bad as confiscations of private property on land, and no worse than some other things now practiced in war. This, however, does not touch the real question, which is, Would the exemption contended for be a substantial improvement over the present rule? That it accords with the theory that war is a conflict between states — a theory that has contributed much toward ameliorating the harsh conditions of war — does not admit of doubt. The nation which stands the most in the way of a change is the English, which, because of the strength of its navy, feels that it would be poor policy to give up the means of crippling an enemy which the present rule affords. Yet England may come to see that the present rule cuts both ways, as it would tend materially to cut off her food supply during a war between her and a country possessing a reasonably strong fleet of commerce destroyers. The change would render the cutting off of her supply of food and raw materials for manufacture impossible, except by a blockade of her coast. Therefore, selfishness, which, it is claimed by England, is the motive which has impelled the United States to champion the new rule, may yet impel England to abandon the old.

That England is gradually coming to this opinion is shown by the conclusions of the Royal Commission appointed in 1893 for the purpose of investigating the question of the supplies of food and raw material during a naval war. These, they concluded, were endangered in the following ways: "(1) The seizure by the enemy of ships and cargo belonging to this country; (2) The possible establishment of a blockade of our coasts; and (3) The possibility that certain foodstuffs might be held by certain nations to come under their definition of contraband."

Of these, they considered the first to be by far the most important; and upon this basis a very respectable minority reached the logical conclusion that "if the proposed conference were to result in the abrogation of the existing rule, all the difficulties we have been instructed to consider would disappear, and all proposed remedies would disappear. In our opinion the evidence laid before us tended to show that the rule no longer does, if it ever did, subserve the real interests of this country. We desire

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accordingly to qualify our acceptance of the report by the reservation that a full consideration of this most important question should precede the adoption of any suggested remedy. And we may add that the severity of the existing rule had much effect in inducing us to accept the conclusions of the report on the subject of indemnity."

That the present rule would not be of very great value to Great Britain was the general opinion of the Commissioners, who as a result of communications with the admiralty, expressed the conclusion that "even if an attack on commerce were attempted, it probably could not last long, since the vital importance of obtaining supremacy at sea is now so well understood by all maritime nations, that it seems unlikely any of them would deliberately spend their strength in attempting such an enterprise as a general attack on commerce until the main issue had been decided."

In contemplating the effect upon the British carrying-trade of a maritime war to which Great Britain was a party, Englishmen are considering seriously the reasoning of John Stuart Mill, that "if our commerce would be safe in neutral bottoms, but unsafe in our own, then if the war were of any duration our whole export and import trade would pass to the neutral flags, and most of our merchant shipping would be thrown out of employment. A protracted war on such lines would end in national disaster. It will then become an actual necessity for us to take the second step and obtain the exemption of all private property at sea from the contingencies of war."

Even more direct and positive is the expression of opinion made by the representatives of trade before the Royal Commission: "It is difficult to overrate the seriousness of the danger to our shipping. There is, so long as private property at sea remains liable to hostile capture, no single, complete way out of the difficulty."

The result of the investigations by the Royal Commission on food supply is summed up by Mr. Robertson as follows: "This rule has been retained in International Law mainly by the refusal of Great Britain to consent to its abolition, at a time when her economical and even her naval position in relation to other nations was quite unlike what it is now; that the rule has been gradually falling into discredit — partially in this country, generally in others; that there is good ground for thinking that the right of capture is of no great value to us, and also that it will not in fact be exercised to any great extent until the closing stages of the war; that there is also good ground for thinking that, apart from the mere mention of supplies, the rule, taken in connection with the Declaration of Paris, must have the effect of transferring a large portion of our vast carrying trade to neutral flags."

That other nations would probably consent to the abolition of the old rule may fairly be inferred from the expression of their representatives at the close of the Peace Conference of 1899. Before adjourning they expressed their sentiments as follows: "The Conference expresses the wish that the proposal which contemplates the declaration of the inviolability of private property in naval warfare may be referred to a subsequent conference for consideration."

MORGANTOWN, W. VA., February, 1906.

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CURRENT LEGAL LITERATURE

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

AGENCY (Ratification). In the February *Michigan Law Review* (V. iv, p. 269) Prof. Floyd R. Mechem publishes an adaptation from his forthcoming new edition of his treatise on agency under the title of "The Effect of Ratification as Between the Principal and the Other Party." It is impossible to adequately summarize the greater part of this closely reasoned article. The most important discussion in it relates to the right of the principal to ratify a contract for the purpose of enforcing rights against the third party. It is contended that until such ratification there is no mutuality in the contract, and, therefore, no consideration to bind the third party, and that, therefore, the right to ratify for this purpose should be denied in the absence of something showing the other party's present adherence to the contract. This is the Wisconsin rule. The English courts admit a ratification within a reasonable time even though the other party has previously attempted to withdraw. The other American courts allow ratification within a reasonable time unless the third party has previously signified his withdrawal.

BANKRUPTCY. "Interstate Chaos," an address before the Commercial Law League of America by William H. Hotchkiss, is published in the January *American Lawyer* (V. xiv, p. 7). It urges the maintenance of the national bankruptcy act.

BAR ASSOCIATIONS. The new "Association Internationale des Advocats" is described by Professor Simeon E. Baldwin in the February *Yale Law Journal* (V. xv, p. 163). He regards it as a result of the general tendency of the times during the last half century towards collectivism and as the natural result of the local and national bar associations formed during that period. The first Congress at Brussels, in 1897, was a purely European one, and its chief work was to establish a permanent committee on organization, and to provide for the calling of a second meeting. For various reasons the second meeting was delayed until last summer. It was participated in chiefly by Europeans, though a representative of the American Bar Association, who was unable to be present, gave his adhesion in writing, and it is expected that in future Americans will be identified with the new association which the Congress of last summer decided to form. It was decided that the next meeting should be held in three years.

CARRIERS (Passengers). The cases relating to "The Creation of the Relation of Carrier and Passenger" are quoted and analyzed by Joseph H. Beale, Jr. in the February *Harvard Law Review* (V. xix, p. 250). After classifying and discussing the cases under the several heads of "Payment of Fare," "Waiting at Station for a Train," "Boarding a Moving Train," "Boarding a Street Car or Omnibus," "Riding in a Place Not Intended for Passengers," "Stealing a Ride," and "Guest of a Servant of the Carrier," he concludes that "the cases follow closely the principle that to prove himself a passenger one must prove either actual acceptance as such by a servant having authority, or else, an exact compliance with the terms of an invitation extended by the carrier to the public."

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Under the head of "Boarding a Street Car or Omnibus" he criticises a recent Massachusetts decision that, though the car stops in response to a signal, the person for whom it stops does not become a passenger until he reaches the vehicle. In this case an approaching passenger was hit by a falling sign. The author thinks there is really no proper distinction between the person who has not yet put his foot on the step and the person who has just done so. The consensual relation dates from the moment of mutual consent, that is, from the moment of response to the signal.

CONSTITUTIONAL LAW. "The Law of the Constitution in Relation to the Election of a President" by J. Hampton Dougherty, an address before the New Jersey State Bar Association, is begun in the January *American Lawyer* (V. xiv, p. 21).

CONSTITUTIONAL LAW. "The Constitutionality of State License Laws for the Privilege of Doing Business, Involving Classification and Discrimination," by Eugene McQuillin, *Central Law Journal* (V. 62, p. 124).

CONSTITUTIONAL LAW (Liberty). "Christian Science and Religious Liberty" is discussed by Edward W. Dickey in the February *Michigan Law Review* (V. iv, p. 261). He insists that Christian Science healing is a religious belief and not a practice of medicine. That since freedom of religion is granted by nearly all of our constitutions, the various statutes which have been passed to restrict this practice under the guise of preventing spurious medical treatment, are unconstitutional. He further says that the denial of the right to choose one's own physician is an unconstitutional restriction of liberty. Of the more important subject of the treatment of children, he merely says that the parent is the best judge.

CONSTITUTIONAL LAW (Police Power). The case of People *v.* Lochner is again discussed by S. Whitney Dunscomb, Jr., in the February *Columbia Law Review* (V. vi, p. 93) under the title of "Police Power and Civil Liberty." He classifies legislation of this sort as follows:

"(1) Those which fix what shall be regarded as a full day's labor in the absence of any contract between the parties.

"(2) Those which fix the hours of adult laborers and prohibit contracts for longer hours without special rates or pay for overtime.

"(3) Those which fix the hours of labor of persons not fully *sui juris*, as minors, or in some states woman of all ages.

"(4) Those which fix the hours of labor under the police power in occupations especially dangerous or unsanitary, or in which the safety of the public is especially concerned."

So far as the public is concerned, he finds that the makers of bread should be guarded no more than the maker of the ingredients that go into the bread, and he sees no greater danger to the baker than in many other trades, and praises the attitude of our Supreme Court in viewing "with disfavor the intrusion of governmental force and inquisitorial power into private life and business, except in cases where the public interest is plain and palpable."

CONSTITUTIONAL LAW (Unwritten Constitutions). A very suggestive article by Judge Emlin McClain entitled "Written and Unwritten Constitutions in the United States," appears in the February *Columbia Law Review* (V. vi, p. 69). The author first explains the difference between the modern conception of unconstitutional statutes which the courts may declare void, and the old colonial and English conception of unconstitutionality, which, owing to the absence of a written constitution, the courts could not enforce. Under our recent decisions respecting the applicability to the Philippine Islands of the limitations of the amendments to the Federal Constitution, the author finds a necessity for reverting to this conception of constitutional law in our own jurisprudence. Though our courts have frequently been asked to go beyond the construction of the written instruments, and to declare the general purposes for which constitutional governments in the American sense are created, and impose restrictions not warranted upon most liberal interpretation, they have always emphatically declined. The reasoning which has held that the fifth and sixth amendments do not apply to our territories would logically include the other similar amendments. While there are dicta to the effect that the two amendments above speci-

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fied are not fundamental, but relate to procedure merely, yet, if the court may at its discretion determine which of these amendments are not fundamental, it must be on some distinction not found in the written instrument, and we have heard the first suggestion that there is an unwritten constitution regulating exercise of power by Congress.

"All will concede that even though the general constitutional guaranties for the protection of life, liberty, and property found in the Federal Constitution are not applicable in terms, many of them are applicable in principle to the federal government in legislating for the subjects of the United States wherever they may be, and whatever may be their condition.

"But the constitutional restrictions thus resting on the exercise of federal power with reference to the territories will be the restrictions of an unwritten, not those of a written, constitution, and if we are not mistaken as to the foundation on which rests the power of the courts to declare acts of coördinate branches of the government to be invalid because in violation of constitutional restrictions, it will necessarily follow that the limitations of this unwritten constitution cannot be enforced by judicial action, but must depend for their enforcement upon the same influences which have enforced the rules of the unwritten constitution of Great Britain. It will not be safe nor expedient to recognize the power of a court to determine what acts of the executive or legislative department are in contravention of these unwritten and necessarily somewhat indefinite restrictions."

CONSTITUTIONAL LAW (see **History Jurisprudence**).

CONTRACTS. "Acceptance of an offer by Post," by Priya Nath Sen, *Calcutta Law Journal* (V. iii, p. 1[n]).

CONTRACTS. "Are a Knowledge of an Offer and Intent to Accept Essential to the Recovery of a Reward Offered?" by Hugh Evander Willis, *Central Law Journal* (V. lxii, p. 105).

CONTRACTS. "Modus et Conventio Vincunt Legem," by Charles Morse, *Canada Law Journal* (V. xlii, p. 49).

CORPORATIONS (Exclusion from a State). In February *Michigan Law Review* (V. iv, p. 257) John G. Park writes of "The Evasion of State Laws by Mail Order Insurance Companies." In this he calls attention to the recent extension of the modern commercial phenomena of mail order business to insurance. Companies excluded from doing business in states resort to the mails for every conceivable purpose and avoid the expense of commissioned solicitors. Many of these schemes are fraudulent.

"A correction of these evils was sought in the last Congress in the offering of a measure to withhold the use of the mails from insurance companies not authorized to transact business at their respective home offices. But it is obvious that this remedy is inadequate. It merely provides for the supervision by the officers of one state of all companies domiciled therein, and transacting business by mail. It makes no provision against unfair competition; it provides no protection to non-resident policy holders; it makes no requirement of obedience to the statutes of the policy holders' states; it permits a continued defiance of the laws of those states.

"The proposed legislation should go further; it should prohibit the sending by mail of an insurance policy into any state where the insurer has not complied with all the statutory regulations. Such an enactment would inflict no hardship; it would protect policy holders in the respective states; it would avoid unfair competition, and would prevent the mail being an instrument of fraud and a means of breaking the law.

"A remedy lies also with the courts under the firmly established doctrines of general law. A company collecting premiums on out-standing policies in Tennessee was held to be doing business in that state, although it had assumed to withdraw therefrom, and had refused to write new policies. By issuing a policy on property located in Wisconsin, another company was held to be transacting business in that state. The solicitation of applications and the collection of advance fees in Missouri was held a doing of business in that state.

"It would, therefore, seem that companies adopting the scheme under consideration are doing business wherever they solicit insurance, collect premiums, or adjust losses.

"No proposition is better established than that the legislature of any state may prescribe

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the terms upon which foreign insurance companies may do business there."

The author contends that there is no substantial difference between using the post-office agency and using a special insurance solicitor, and that such business should be declared fraudulent and prohibited from the mails when the companies are not authorized to do business in a particular state.

CRIMINAL LAW (Literature). "Some Curious Criminal Cases," Anon., *American Lawyer* (V. xiv, p. 17).

CRIMINAL LAW(Practice). An interesting criminal case of international significance is criticised by Herman Cohen in an article entitled "The False Passports Case" in the January *Law Quarterly Review* (V. xxii, p. 34). In this case Englishmen fraudulently took out a passport which was used by a different party. They were indicted under an ingenious indictment alleging that the fraud on the foreign office tended to the public mischief and the endangerment of peaceful relations between England and Russia. While the author admits that their conviction was probably justified under the English law of conspiracy, he criticises the method adopted, calling especial attention to the doctrine laid down that it was a question for the court and not for the jury, whether such conduct did tend to the public mischief, and that it was not an issue of fact upon which evidence could be given.

The author finds a clear analogy in the common law relating to libel. Under the early common law there came to be a rule that the judges decided whether in a criminal case a publication was or was not a libel. This was finally overthrown by a statute which purported to be declaratory of the common law.

The author argues from this, that this must be regarded as a fundamental principle of criminal law, and that it is a serious public matter to allow a judge to withdraw such questions from the jury.

"The people of this country, as legislators, have always reserved to themselves, as juries, the right of impressing their view — the popular view — on their verdicts. The common law of this country expresses the politics of the people as well as their morals. Indeed, morals include politics. In short, the jury is a political power.

"There are, perhaps, other objections to allowing the judge to withdraw from the jury the question whether given acts tend to public mischief or not.

"It is obvious that if a judge may decide this question entirely 'off his own bat' there is no need at all for *any* positive criminal law. For crime is wrong-doing from the public point of view (as distinguished from the private). It is impossible to conceive any of the familiar offences in this country which an average respectable and educated man would not declare of evil example and a public mischief. The inquiry would then be purely moral — expressly and nominally so, instead of as now implicitly and only ultimately so. There may be something to be said for this system, but it is not our system. The common law means the morals of the people at any given time; the judges interpret it, not because they are lawyers, but because they are members of the people, born and bred among them, and therefore sharing the mind of the people. Hence they are as well fitted as any one else to pronounce on new cases or new offences — *i.e.* not covered by precedents — when they arise. But a difficulty has always been felt about new offences, as in the present case."

The author insists that the Court should limit itself to merely expressing his opinion to the jury of the tendency of the acts or publications alleged.

CRIMINAL LAW (Procedure). "Commissions in Criminal Cases," by K. S. Venketramier, *Criminal Law Journal of India* (V. ii, p. 216).

CRIMINAL LAW (see Practice, Procedure).

DIVORCE. A paper read before the Nebraska State Bar Association by George Elliott Howard on "The Problem of Uniform Divorce Law in the United States" is printed in the January *American Lawyer* (V. xiv, p. 15). He submits that the theory that the increase in divorce in this country is due to lack of uniformity of legislation is greatly exaggerated by popular opinion. In Europe the divorce rate is rising while the marriage rate is falling. The same is doubtless true in the United States, though there are few statistics available. The author believes that "a de-

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tailed study of American legislation would produce the conviction that, faulty as are our divorce laws, our marriage laws are far worse; while our apathy, our carelessness, and levity touching the safe-guards of the matrimonial institution are well nigh incredible." He concedes that "the influence of legislation in curing social disease is very restricted. Apparently if there is to be salvation it must come through the vitalizing regenerative power of a more efficient moral, physical, and social training of the young. The fundamental causes of divorce lie far beyond the reach of the statute maker." "Still the legislator has an important, though relatively narrow function to perform. He can create a legal environment favorable to reform. Clear, certain, and simple laws which cannot be evaded, constitute such an environment." He finds no public sentiment favoring a uniform code for the entire matrimonial and divorce law, and thinks it inexpedient to strive for a uniform list of statutory causes of divorce. He thinks it best to confine the movement to an effort to procure the adoption of a model statute designed to prevent clandestine, collusive, or hasty divorce. He favors uniform state legislation rather than an attempt by constitutional amendment to enact a federal law.

DOMESTIC RELATIONS. In the January *Law Quarterly Review* (V. xxii, p. 64) Alfred Fellows urges the necessity of "Changes in the Law of Husband and Wife"—He treats of a number of anomalies resulting from the statutes changing common law, which put the wife and her property wholly in the power of the husband. He says that the pendulum has swung too far the other way in England, and that the whole subject wants revising to be put on a basis consistent with common law principles.

EQUITY (Injunctions). James Wallace Bryan discusses in the January *American Law Review* (V. xl, p. 42) "Injunctions Against Strikes." He points out that though a strike may be illegal or criminal, still from its nature it cannot be enjoined. In general, so long as the combination pursues legitimate objects with lawful means, it is subject to no interference by any court of law or equity. A combination, however, becomes unlawful when it adopts a wrongful purpose, or when it seeks a lawful end by illegal means. In either contingency its acts in furtherance of that purpose may be enjoined when a proper case arises, and this applies to labor unions as well as to other combinations.

EQUITY. (Specific Performance) "Specific Performance by Injunction" by Clarence D. Ashley in the February *Columbia Law Review* (V. vi, p. 82) is summarized by the author as follows:

"A court of equity in exercising its jurisdiction over contracts, does so because a court of law can give only money damages for a breach, which, in many instances would be inadequate. In such cases, the promisee desires the specific thing which is promised to him, and unless he receives that, he does not derive the benefit he was entitled to expect. When money damages will not be adequate, equity ought to grant its relief if the circumstances are such that it can effectively act. Equity gives its relief then, when justice requires that the promisee should receive performance, and the contract is of such a character that this can be reasonably brought about by the court. If, however, equity cannot bring about a full performance of the contract, it cannot satisfactorily or justly intervene by compelling a part performance only. Unless the intervention brings about directly a complete performance, great injustice is likely to result. Equity should not interfere at all, unless it can by a proper method bring about the performance that is sought. If it cannot do that, it should refrain, from intervening, and leave the parties to the common law."

He finds that the principles he states have become confused through the surprising decision of Lumley *v.* Wagner, in which the court enjoined an actor from performing for others in breach of his contract with the plaintiff, though it did not appear that the plaintiff was prepared to perform on his part. In spite of the court's disclaimers, it was attempted to do indirectly what it admitted it could not do directly. The author suggests that in these cases the injunction might be made conditional upon performance by the plaintiff. He also criticises some decisions which refused the injunction in cases where the actor is of an inferior grade. Since no distinction founded on value is made in bills for specific perform-

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ance of contracts relating to land, none should be made in this instance.

EQUITY (see Wills).

HISTORY. An address before the Indiana State Bar Association by Arthur W. Brady entitled "Some Phases of Historical Jurisprudence" is published in the January *American Lawyer* (V. xiv, p. 3).

"The history of the law is so closely interwoven with the law in its actually existing state that no lawyer who has mastered the elements of his profession could be entirely ignorant of that history, even if he would.

"Its great value in such training is due to two chief considerations. One is that no doctrine or principle of the common law and no statutory enactment can be said to be mastered unless traced, as near as may be, to its origin, the needs of society which led to its creation examined, the characteristics of the people to which it was adapted considered, and its growth and development scrutinized. Unless this be done, a rule of law is learned, not understood, and, if any unusual combination of circumstances be presented, is as likely to be misapplied as to be applied correctly. An instance in point is instructive:

"Another consideration, demonstrating the importance of the study of historical jurisprudence, is found in the force with which that study impresses on our minds the truth of what may be termed the law of the uniformity of human action. This law is as distinct and immutable as any other of the laws of nature, but its existence is often overlooked, or at least disregarded. It declares human characteristics to be such that, under like circumstances and conditions, the tendency of human action is the same. A proper conception of this principle is essential to a broad and thorough knowledge and understanding of the law. It helps to lighten dark places and make rough paths smooth. It aids the development of that faculty most valuable — nay, absolutely essential — to a lawyer of appraising precedents at their true value without disregarding their almost unconscious modification by the ever-changing current of human affairs, and thus of determining correctly from the decisions of yesterday what the decisions of to-morrow will be. This principle demonstrates, also, that no living system of law is changeless, but, on the contrary, that even without statutory enactment it is modified from generation to generation, so as to conform more nearly to the ideals of advancing civilization."

The author gives interesting illustrations of his thesis.

HISTORY. In the January *Law Quarterly Review* (V. xxii, p. 73) Sir Frederick Pollock concludes his valuable "Notes on Maine's Ancient Law." These are to be part of a new edition of this famous work, soon to be published.

HISTORY (Constitutional Law). Gordon E. Sherman writes in the February *Yale Law Journal* (V. xv, p. 172) about "Early Suggestions of the Modern Written Constitution." The earliest analogy which he describes is the scheme of government by which the revolutionists of Athens in the spring of B. C. 411 sought to place the government under the limitations of a written plan, whose purposes, from a constitutional standpoint, are those of the limited constitution of to-day.

The entire incident, including the subsequent return to democracy, the constitution of the fathers, illustrates with the utmost clearness the distinction at which Greek public thought had manifestly arrived in the employment of the term "constitution" in the abstract and in the concrete; this is, in fact, the same distinction with which we are so familiar to-day when we apply the term "constitution" to such a form of government as that of Great Britain on the one hand, and our own upon the other. It is nothing less than the distinction between the immediate presence, as in England, of sovereignty in legislation and administration, and government through a representation, in the United States, acting under written limitations — in other words the modern written constitution.

He finds two similar analogies in English history, first, in the provisions of Oxford, which sought to limit the power of the crown. Four centuries later he finds similar suggestions in the days of the English commonwealth.

HISTORY (Property). In the January *American Law Review* (V. xl, p. 9) Frederick C. Bryan writes of the "Origin of English Land Tenures." He discusses the history of the influence which led to the establishment of the feudal system of land-holding in England, and

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concludes that the Roman influence coming chiefly through the Church was responsible for much more of this system than the earlier Germanic influence. "Feudalism," he says, "was a necessary and intermediate stage between Germanic independence and Roman absolutism."

INTERNATIONAL LAW (Arbitration). In the January *American Law Review* (V. xl, p. 1) Dr. Hannis Taylor writes interestingly of "The Growth of Hague Ideals." He recalls the growth of sentiment toward international arbitration which resulted in the Hague convention, and regrets that the United States alone of all the powers has in its subsequent conduct been hostile to carrying out the policies there recommended.

He quotes largely from the report of the Committee of the American Bar Association on this subject, which we printed in our September number.

In conclusion he says:

"If experience should prove that such a delegation of power to the president is dangerous, it could be easily revoked, while no great harm would be likely to arise from submissions to arbitration made by the president in the meantime in the light of day, after full deliberation upon the part of his constitutional advisers. Far greater harm is likely to result from a narrow and technical construction of the treaty-making power which will place it in an exceptional position in conflict with that occupied by the other great states of the world. The civilized nations are, by a common and almost involuntary impulse, now moving with a firm and steady tread towards the attainment of certain ideals to which the Permanent Court of the Hague is as a nucleus of light. So far from obstructing the march, this republic should place itself in the lead. It can afford to do no less."

INTERNATIONAL LAW (Enforcement). "Is International Law a Part of the Law of England" is the title of an interesting article by J. Westlake, K. C., in the January *Law Quarterly Review* (V. xxii, p. 4). The discussion is suggested by a recent case in which a petition of right was filed seeking the performance by the Crown as successor to the South African Republic, of an obligation alleged to have rested on that republic for the repayment of the value of gold commandeered by it shortly before the commencement of the late war. The court said of the proposition, which is the title of the article, that "any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must show either that the particular proposition put forward has been recognized and acted upon by our own country, so that it is of such a nature and has been so widely and generally accepted that it can hardly be supposed that any civilized state would repudiate it."

In the United Kingdom as a rule a treaty has no effect on private rights. It must be followed by an act of parliament, but in the United States a treaty is itself a part of the law of the land. But it has been held that a subsequent act of Congress repeals such a treaty, so that in fact the faith of treaties is treated in the same way in the two countries. But apart from treaties, there are cases of private rights involving international law, as well as rights which the state itself can sue for. Such are diplomatic immunities, and rights held by the states for the benefit of its subjects. Assuming that the national obligation exists in the case in question, it seems reasonable that British subjects seeking the fulfilment of that obligation by petition of right, should not be worse off than aliens having a state to undertake their case. But the answer in the principal case was that the annexation, which was alleged as the foundation of the right, was an act of state, and acts of state cannot be inquired into either by judicial or quasi judicial proceedings. This does not decide whether international law is a part of the law of England, but merely sets up a rule by which the law of the land is excluded from having a voice with regard to certain matters described as acts of state. International law may also be brought before the courts by private persons in questions of prize. The author summarizes his conclusions as follows:

"The English courts must enforce rights given by international law as well as those given by the law of the land in its narrower sense, so far as they fall within their jurisdiction in respect of parties or places, subject to the rules that the king cannot divest or modify

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private rights by treaty (with the possible exception of treaties of peace or treaties equivalent to those of peace), and that the courts cannot question acts of state (or, in the present state of the authorities, draw consequences from them against the Crown).

" The international law meant is that which at the time exists between states, without prejudice to the right and duty of the courts to assist in developing its acknowledged principles in the same manner in which they assist in developing the principles of the common law."

JURISPRUDENCE. George H. Smith contributes to the January *American Law Review* (V. xl, p. 58) an analysis " Of the Nature of Rights and of the Principles of Right or Jurisprudence." He concludes his article as follows:

" For the law — whether regarded as the Doctrine of Rights or of Actions — is in its essential nature a theory, and truly defined, a theory of right or justice. Nor if it be regarded as a science, can it be otherwise conceived; for there can be no science of accidental and heterogeneous things. Hence, reverting to our original definition, the necessity of the distinction between *positive* and *instituted* law, and the corresponding distinctions between *law* and *quasi law*, between *actions* and rights, between just and unjust actions, and between *actionable* and *non-actionable*, and *real* and *quasi* rights. Without this method, in the present condition of the law, even a tolerable mastery of it is impracticable; nor is it possible otherwise to reconcile the apparently hopeless antinomy presented by the co-existence in the law of its rational, with its accidental and arbitrary elements. But with it, this antinomy — with the solution of which jurists and philosophers have been struggling from the beginning of history — disappears; and thus the law may be treated as a science, and its principles, and their general applications, expounded in the scientific form, and made cognoscible to the student; and thus the otherwise insurmountable obstacles now existing to an intelligent study of the law may be removed. For under the view now so generally prevailing, that the law consists only of judicial precedents and statutes, it is demonstrable, not only that the very entrance to the law is barred to the student, but that the knowledge of the most learned lawyer, will, when compared with the ever growing mass, be found, at the end of each year, to be proportionately less. Let us then, as students, recognize the great truth, received by tradition from the elders, that the law, or at least the substantive law, " is nothing else but reason," and as practitioners, let us (with Ashurst, J., in Pasley *v.* Freeman, 3 T. R. 62), " have so great a veneration for the law as to suppose that nothing can be law which is not founded in common sense or common honesty." Or if, with reluctance, we sometimes find something called law so established for the time being that we cannot disregard it, let us, emulating Galileo, still (at least to ourselves) assert the right, and regard the false principle only as *quasi* law; to which preforce we may be compelled, for the time being, to give in our adhesion, but which, we may confidently hope, time will, sooner or later, rectify. Thus, and in no other way, may we remove the reproach to the profession, with which the judicious Burke — in one of the passages cited in the title to this essay — felt himself constrained to qualify his magnificent but just eulogium on our art."

JURISPRUDENCE (Constitutional Law). Hon. Hannis Taylor, in the February *North American Review* (V. 182, p. 204) writes of the " Elasticity of Written Constitutions." The views he expresses are in accord with those in his article on " Legitimate Functions of Judge-made Law " in our October number.

LANDLORD AND TENANT. " Bengal Tenancy Act " by Sarat Chandra Banerjie, *Calcutta Law Journal*, (V. i, pp. 79 n, 91 n, and V. ii, pp. 1 n, 11 n).

LEGISLATION. " Digests of Governors' Messages, 1905, being Bulletin 101 of the New York State Library," edited by Robert H. Whitten, *New York State Education Department*, Albany, 1906.

LEGISLATION. In the February *Columbia Law Review* (V. vi, p. 102), Alfred C. Cox criticises our " Over-production of Law." He collects startling statistics as to the annual volume of statutes and reports and makes unfavorable comparison with that of the United Kingdom. He finds no excuse for our much larger proportional volume of new law.

" Our complex system of government may, of course, account for a part of our amazing

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fecundity in law making, as compared with every other civilized country on the globe, but not for all. Candor must compel the admission that there is something radically wrong with a system which produces such lamentable results. It has gone on without a protest because public opinion has not been sufficiently directed to the subject. A spirit of paternalism has been encouraged which looks to the legislature as the panacea for all our ills. We have yet to learn that there are some inconveniences, annoyances, and even faults which cannot be remedied by law."

For remedy, he urges some care in the selection of legislators, less frequent sessions, and longer term for executive officers, who would thereby become more familiar with effects of over-legislation and would more freely veto the excess.

"The remedies thus far suggested, even if all were in operation, would be but tentative and temporary. The real remedy lies much deeper and can only be found in an aroused and enlightened public opinion. When once the people begin to think on this subject, when they appreciate how intolerable the present system is becoming, they will find the remedy and insist upon its being enforced. They will elect only men of high character and education to represent them, and will keep them in office so long as they represent them honestly and faithfully. They will insist that the laws be drafted, not by mere tyros, but by skilled experts; that no special legislation be tolerated; that few acts shall be passed making radical changes in the municipal law, and that no measure which has worked well in the past shall be amended unless the amendment be demanded by clearly expressed public opinion. The people must insist that the watchwords for every legislative session be honesty, frugality, simplicity. We can, if we will, demand and secure a government, economical without being penurious, progressive without being empirical, and enlightened without being visionary."

LEGISLATION (Practice). "The Law Annual, 1906," edited by R. Geoffrey Ellis and Max A. Robertson, William Green and Sons, London, 1906. A convenient reference manual of English practice and of statutes frequently referred to.

LITERATURE. From an entertaining and instructive essay by Ex-President Grover Cleveland in the *Youth's Companion* (V. lxxx, p. 63), entitled "The Country Lawyer in National Affairs," we quote the following:

"The struggle for a livelihood from the practice of law in the country, and the almost endless number of practical things which the country lawyer must learn in contests involving every social and business question, prepare him, as not other conditions can, to deal intelligently and usefully with the various and widely separated questions met with in the public service. . . . I believe that, in the absence of too many labor-saving devices, in his profession, and with more dependence upon hard work, the country practitioner, as distinguished from his city brother, develops greater self-reliance and homespun industry, and greater tenacity of wholesome, clearly wrought out convictions — all of which are exceedingly important traits when carried into public life.

"I am also of the opinion that the study of individual ways and means, which the moderate income of the country lawyer makes necessary, and a familiarity with the simple, inexpensive manner of living prevalent in rural communities, tend to foster ideas of frugality and economy which, although too frequently left at home when public instead of private expenditures are under consideration, ought to be inexorably insisted upon as indispensable to a satisfactory discharge of official duty.

"It may not be amiss to intimate also in this connection that the close personal intimacy and neighborliness of rural life and a consequent sensitiveness to the interests of those with whom they dwell, more easily persuade lawyers in the country that they should be willing on patriotic grounds to devote time and effort to official work."

LITERATURE. "Bits of Quaintness from the 'Doctrine of Libels,'" by L. C. Howard, *Law Notes* (V. ix, p. 212).

LITERATURE (see Criminal Law).

MUNICIPAL CORPORATIONS. "Municipal Benefit and Pension Funds," by Glenda Burke Slaymaker, *Central Law Journal* (V. 62, p. 85).

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MUNICIPAL CORPORATIONS. "Municipal Ordinances and Contracts for the Removal and Disposition of Garbage," by Eugene McQuillin, *Central Law Journal* (V. 62, p. 64).

PERSONS. "Some Topics on the Law of Adoption," by P. R. Ganapathi Tyer, *Madras Law Journal* (V. xv, p. 307).

PRACTICE. "Examinations before Trial to Frame Pleadings," by Raymond D. Thurber, *Bench and Bar* (V. iv, p. 11).

PRACTICE (England). The recent criticism of the expense of bankruptcy and winding up proceedings in England, which has often led to abandonment of the courts for private assignments, in such cases, is discussed by Howard W. Elphinstone under the title of "The Law Society on Officialism" in the January *Law Quarterly Review* (V. xxii, p. 27).

PRACTICE (Grand Jury). In the February *Yale Law Journal* (V. xv, p. 178), George Lawyer endeavors to answer in the affirmative the question "Should the Grand Jury System be Abolished?" This was a paper delivered in January before the New York State Bar Association. The author first traces the origin of the grand jury and shows that it "emanated from fear of royal influence and was designed to stand as a barrier protecting the accused from the baseless and malicious charges of the accuser."

"Criminal proceedings were then merely private affairs." He then contends that since the reason for this has passed the system should be done away with. He further calls attention to positive objections to the system, first, the fact that it is secret and *ex parte* is inconsistent with the spirit of our English system. Then at the trial before the petit jury, the fact that a man has been held by another jury as a matter of practice always has a greater influence than a mere decision by an examining magistrate, and often practically destroys the presumption of innocence. Another objection to the grand jury is the fact that the threat of presenting a case to it is often used as an instrument of extortion. The author also objects to the grand jury even when an indictment is refused because it is not as good as an acquittal and often leaves a suspicion of guilt on a man which he would prefer to have had removed. The large expense of the system is therefore unnecessary. He can see no objection to a system of prosecution by information, permitting the court at its discretion, when needed, to summon a grand jury in cases where it might seem necessary, such as matters of great public concern. The care of the committing magistrate will be increased by his greater responsibility. Experience of several of the States has shown that the abolition of the grand jury is entirely practical.

PRACTICE (India). "Specific Relief," by Satish Chandra Banerjee, *Calcutta Law Journal*, (V. ii, pp. 23 n, 39 n, 53 n, 71 n, 80 n, 95 n, 103 n.)

PRACTICE (see Legislation).

PROCEDURE. "Legal Procedure in Lunacy," by W. McCallin, *Medico-Legal Journal* (V. xxiii, p. 407).

PROCEDURE. "The Law of Bail," by Herman Cohen, *Bombay Law Reporter* (V. viii, p. 9).

PROCEDURE (Criminal Law, Torts). N. G. Pilcher, in the December *Commonwealth Law Review* (V. iii, 64), urges legislation to "Extend the Remedies for Personal Insult in English Law." He shows that in foreign codes, in the Indian penal code, which, although constructed purely by English lawyers, shows distinct foreign traces due to the influence of native susceptibilities, there are much broader and more effective remedies.

PROCEDURE (see Criminal Law).

PROPERTY. "The Torrens System," by William H. Worth, *Virginia Law Register* (V. xi, p. 707).

PROPERTY (Adverse Possession). In the February *Harvard Law Review* (V. xix, p. 267), George P. Costigan, Jr., traces the history of "The Law Relating to the Conveyance of Lands by One Whose Lands are in the Adverse Possession of Another."

"Prior to the Pretended Title Act, there could be no conveyance at common law of lands in the adverse possession of another, except where the true owner either (1) entered and made a feoffment on the land with livery in fact, or (2) in the case of abatement, intrusion, and disseisin, made a feoffment with livery in law before the death of the abator, intruder, or disseisor, or, before the expiration of a year and a day after feoffment by such a one, and thereafter during his life his feoffee

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either actually, or by making continual claim, entered; and no conveyance operating under the Statute of Uses could be effective unless the covenanter or bargainor had possession, or the foeffee to uses got seisin.

"This statute ended all question as to the right of a disseisee to convey. Whatever may have been true before the statute, no one after it could convey during another's adverse possession so as to affect that other. The Pretended Title Act is often spoken of as an affirmance of the common law, but it certainly went farther than the earlier law. By the earlier law, a disseisor did not have to be in possession a year before making a conveyance, but after this statute, he had to do so. By the earlier law, a disseisee did not have to wait a year after he re-entered before conveying, yet by a literal construction of this statute he was required to do just that, though a more liberal construction was advocated.

"Under the Pretended Title Act, therefore, a conveyance was void if either the grantor was out of possession at the time, or the grantor, though in possession at the time, had not been in possession himself or by his ancestor, grantor, etc., for one year prior to the conveyance.

"The Pretended Title Act, if not wholly repealed, has been robbed in England of most of its efficacy. In 1845, the Statute 8 and 9 Vict., c. 106, sec. 6, made rights of entry other than those for condition broken alienable by deed; and while the Statute 32 Hen. VIII may still forbid the sale of wholly fictitious titles, and render void the deed of one knowingly taking a wholly fictitious title, the Statute 8 and 9 Vict. makes valid every conveyance by a rightful owner who still has a right of entry, even if his lands are at the time of the conveyance in the adverse possession of another. In the United States, the distinction between disseisin and the other forms of adverse possession, known to the old law, has become obsolete.

"On the question of the right of the real owner of land to convey it while another is in its adverse possession, the states are divided.

"In closing, some explanation should be offered of the fact that in a number of our states the old doctrine in some form still survives. Indeed, it receives vigorous support in one of our newest states. Perhaps the best explanation is that given for the Tennessee statutes. Of them it has been said: 'It was no fear of nobles or great men or their influence with courts and juries that produced these Tennessee statutes . . . but it was the hostility of public sentiment to the "land sharks" who were speculating in litigation over defective titles, and particularly to lawyers lending themselves to this speculation for profit, which provoked statutes seeking to enlarge the English acts just because they did not reach the evil sought to be suppressed.' Whatever the reason, the old doctrine retains, and for some time will retain in several states, considerable vitality."

PROPERTY (see History).

PUBLIC POLICY. "The Reign of Law," by Joseph W. Folk, an address before the Kentucky State Bar Association, published in our July number is printed in the January *American Lawyer* (V. xiv, p. 12).

TORTS. "How Far Insanity Avails as an Answer in Actions of Tort," by Silas Alward, *Canadian Law Times* (V. xxvi, p. 1).

TORTS (Combinations). In the December *Commonwealth Law Review* (V. iii, p. 59), an article entitled "A Defect in our Commercial Law and Federal Responsibilities," by J. H. Ferguson, urges legislation to restrict trade combinations.

TRADEMARKS. "The Union Label," by G. T. Meillon, *Commonwealth Law Review* (V. iii, p. 70).

WILLS (Equitable Conversion). In the February *Harvard Law Review* (V. xix, p. 233), Professor C. C. Langdell publishes another of his series of articles on "Equitable Conversion." He deals with the statement often made by judges that the equitable conversion of money into land has the effect of vesting the equitable ownership of the land in him in whose favor the conversion is made, and similarly with respect to the equitable conversion of land into money. From the fact that when a contract is entered into for the purchase and sale of land, and the purchaser dies pending the contract, it has always been held that the heir or devisee is entitled to enforce the contract against the seller for his own benefit, it has been supposed to follow that the land passes in equity from the seller to the

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purchaser the moment when the contract is made. The burden of proving this rests upon those who assert it. They sometimes rely on the supposed doctrine that equity considers as done whatever is agreed to be done. The author shows that there is no such doctrine, though there is a similar one that whatever is agreed to be done, equity considers as done at the time when it is agreed to be done, but this furnishes no warrant for saying that a title is passed in equity.

The author submits that upon principle a contract for the purchase and sale of land has no other effect in equity than it has at law unless and until it is broken by the seller's failure to convey the land according to his agreement, and unless the purchaser dies before any such breach, though in the latter event the purchaser's right under the contract will be devolved in equity upon his heir or devisee, as before stated. The contract has no effect in equity upon the seller's right to receive the purchase money over and above the effect of the same contract at law.

"If a person covenants that he will lay out a given sum of money in the purchase of land, and will settle the land in such manner as is stated in the covenant, or if a trust be created for the same purpose, it is certain that no land will pass in equity to any of the persons in whose favor the settlement is to be made until the land is actually purchased pursuant to the covenant or trust, for until then it is wholly uncertain what land will be settled.

"The reader will see, therefore, that, when money is covenanted or directed to be laid out in land and the land to be settled, it is when the money is thus laid out, and not till then, that any of the persons in whose favor the covenant is made, or the direction given, first become, by virtue of such covenant or direction, owners of land in equity in any other than a purely fictitious sense, even assuming that the money may, by a fiction, properly be termed land in equity before it is actually laid out in land.

"When a covenant or trust, instead of being to lay out money in the purchase of land, and to settle the land, is to sell land and make some disposition of the proceeds of the sale, it is equally clear that none of those in whose favor such proceeds are to be disposed of can possibly acquire the ownership, either at law or in equity, of any specific money until the land is actually sold, as, until then, there will be no identification of any money."

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NOTES OF THE MOST IMPORTANT RECENT CASES COMPILED BY THE EDITORS OF THE NATIONAL REPORTER SYSTEM AND ANNOTATED BY SPECIALISTS IN THE SEVERAL SUBJECTS

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

BANKRUPTCY. (Life Insurance Policies.) **U. S. D. C., N. Y.** — One phase of a question which seems to be giving the Federal Courts some little trouble is quite extensively treated in Van Kirk *v.* Vermont Slate Co., 140 Federal Reporter, 38. The court there holds that the right of a bankrupt to a life insurance policy having a cash surrender value provided for in the contract, on payment of such value to the trustee as provided in Bankruptcy Act, July 1, 1898, c. 541, § 70a (U. S. Comp. St. 1901, p. 3451), is not affected by his death after adjudication, but passes to his legal representatives, nor is such right lost by the failure of the bankrupt or such representatives to make a tender of the surrender value until the expiration of thirty days after such value has been ascertained and stated to the trustee by the company. It is also said that a *bona fide* assignee of life insurance policies, pledged more than four months before the bankruptcy of the pledgor, is entitled to hold the same against the trustee in bankruptcy and on application to the court to have their value determined pursuant to the section of the Bankruptcy Act quoted. This provision of the act, however, is said to apply only to policies which by their provisions give the bankrupt the right to surrender the same and receive a fixed or ascertainable sum therefor, so that policies giving no such contract right pass to the trustee as assets of the estate as of the date of adjudication free from any right or claim of the bankrupt.

BANKRUPTCY. (Receivers — Power to Act Outside of District.) **U. S. D. C., Wis.** — A question which the presiding judge regards as one of interest to the profession and of great importance in the administration of the bankrupt act is raised in the case of *In re* Benedict, 140 Federal Reporter, 55. Bankr. Act, c. 41, § 2 (U. S. Comp. St. 1901, p. 3421), which defines courts of bankruptcy and their jurisdiction within their respective territorial limits is construed as containing nothing which authorizes such a court to confer upon a receiver appointed thereunder but who is not vested with title to the bankrupt's property, the power to exercise his official functions in respect to such property in any other district, so that under the general rule governing courts of equity and their receivers appointed in creditors' suits, such receiver has no authority to act officially outside of the district of his appointment. It is, however, said that in view of full equity powers conferred on courts of bankruptcy by the chapter mentioned, such courts may, so far as necessary to enforce the act, employ the procedure, writs, and remedies known to equity jurisprudence, so that where in involuntary proceedings a receiver has been appointed, a District Court of another district in which property of the alleged bankrupt is situated has power to appoint an ancillary receiver to aid the court of original jurisdiction in preserving such property pending the selection of a trustee.

An analysis of the grounds of Judge Quarles' opinion is (a) A receiver in whom the title to assets has not passed, has no authority to do any official act outside the jurisdiction of the court appointing him; (b) Jurisdiction is not expressly provided for in the Bankruptcy Court, (c) Ancillary proceedings were early adopted by the Federal Courts as appropriate and indispensable, (d) By reason of the inherent incidents of the situation, ancillary jurisdiction and proceedings must exist, and therefore they do exist.

The inherent weakness of the decision is its failure to meet such doubts as were suggested by Mr. Justice Harlan in 1899 in considering this same question in connection with an ancillary receivership in railways. Justice Harlan denied that there was any inherent ancillary jurisdiction in the United States Circuit Courts in any equity proceedings.

Mercantile Trust Company vs. Kanawha R. Co. 39 Fed. 337.

Since that decision there has been a well-recognized difference in the views of the Circuit judges on this question. The latest consideration of the

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subject expressly left the question open for further consideration.

Platt vs. Philadelphia, etc. Co. 54 Fed. 569.

See article "Ancillary Receivership in Bankruptcy" in 18 Harvard Law Review 519.

Lee M. Friedman.

Aside from the significance of the principal question determined in this case, the opinion of Judge Quarles is interesting in assuming that the granting of equity powers to the district courts of the United States, sitting in bankruptcy matters, justifies them in employing the procedure, writs, and remedies known to equity jurisprudence in order to exercise that jurisdiction. While the rule is well established that courts may adopt rules of procedure, provided they be reasonable and not in conflict with statutory regulations, the continued exercise by legislatures of the power of regulating procedure has led to the popular notion, occasionally shared by members of the profession, that the courts are dependent upon the legislature for machinery wherewith to perform their functions. It has been contended, but unsuccessfully, that where the Constitution conferred jurisdiction of a particular class of actions triable by jury, the jurisdiction so conferred could not be exercised because the Legislature had made no provision for the impannelling of a jury in that court. (In re Attorney General, 40 Neb. 402). That case and the present enforce the rule that where jurisdiction exists, the court, in the absence of legislation, may devise its own processes and forms of procedure, in order that the jurisdiction may be exercised. (See also, the Epsilon, Fed. Cas. No. 4506). Indeed, the writer is of the opinion that on principle the distribution of the functions of government by American Constitutions into three departments, should have been held to prohibit the legislature from regulating judicial procedure as much as it prohibits the courts from prescribing rules for the conduct of legislative proceedings. The enormous weight of precedent, which has practically settled the rule to the contrary, is the result of a failure to distinguish between the powers of Parliament and our state legislatures.

CARRIERS. (Baggage.) **Mich.** — In Withey *v.* Pere Marquette Railroad Company, 104 Northwestern Reporter, 773, it appears very clear that the court has arrived at a correct conclusion in its ruling on the first point. The supreme court of Michigan there declares that a father paying full fare for himself and traveling with an infant child of such tender years that by custom no fare is demanded for its carriage, may recover upon the contract of carriage for loss of or injury to articles bought and used for the child, which articles are a part of the father's baggage. The defendant contended that because no fare was paid for the infant, the defendant was a gratuitous bailee as to the infant, and the transportation as baggage of articles intended solely for its use was a mere incident to that gratuity. This argument, however, is satisfactorily disposed of by the suggestion that even if the child was carried free, nevertheless its clothing was the property of the father, and was in the trunks of the father carried as his baggage, so that the railroad company which agreed to transport the baggage safely, was liable to the father for the loss of the child's apparel.

A question as to which there is more opportunity for difference of opinion is as to the husband's right to recover in the action of contract for articles of jewelry, etc., belonging to his wife, and given to her by third persons. This is decided in the affirmative, on the ground that the contract to carry plaintiff and his wife and their common baggage was a contract with the plaintiff.

CONFLICT OF LAWS. (See Taxation.)

CONSTITUTIONAL LAW. (Equal Protection of the Laws.) **Mont.** — State *v.* Cudahy Packing Company, 82 Pacific Reporter, 833, follows very much in the footsteps of Connolly and Dee *v.* Union Sewer Pipe Company, 184 U. S. 540, 22 Sup. Ct. 431, and holds invalid the Montana Anti-Trust statute enacted pursuant to the requirement of the constitution. Montana Penal Code, § 321, prohibits combinations for the purpose of fixing the price or regulating the production of any article of commerce. One of the following sections declares that the provisions of the chapter shall not apply to any arrangement, agreement or combination between laborers made with the object of lessening the number of hours of labor or increasing wages, nor to persons engaged in agriculture or horticulture with the view of enhancing the price of their products. This rather awkwardly worded statute is first construed to mean that the prohibition shall not apply to any arrangement, agreement, or combination made by persons engaged in horticulture or agriculture with a view of enhancing the price of their products, and it is held not only that this exception denies the equal protection of the laws to persons not within the exception and that the section containing the exemption is so intimately related with the other sections that the former cannot be eliminated from the act, but the whole is invalid because of the unjust discrimination effected by the exemption.

CONTRACTS. (Public Policy — Physicians.) **Wash.** — Despite the policy of the law to discourage litigation and its abhorrence of multiplicity of suits, it would seem that courts and law-

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yers might well rejoice if there were more actions involving situations like that presented in Deaton *v.* Lawson, 82 Pacific Reporter, 879. It there appeared that a contract for the rendition of medical services for plaintiff declared that it was made by and between the officers of a certain medical institution, and the physician in charge as party of the first part, and plaintiff as party of the second part. The contract was signed by plaintiff, and with the name of the medical institute written by its manager and owner. The manager and owner, who conducted all the negotiations with plaintiff, was not a physician, the only physician connected with the institution being one who was employed by the month. To throw some light on the precise nature of the transaction, it might be well to state that the manager of the institution first negotiated with plaintiff, and agreed to cure him within three months for the sum of $85. When the plaintiff came to pay the $85, he exhibited a considerable amount in addition thereto, on sight of which the manager immediately represented that he could give plaintiff a different treatment which would effect a permanent cure within six weeks, but would cost more. These representations resulted in a contract by which plaintiff turned over $469 in cash. In an action to recover this money, it is held that the contract was against public policy and void as an agreement on defendant's part to render professional services as a physician, in violation of the laws of the state, and that the contract could not be construed as a contract made on behalf of the physician employed by defendant.

CRIMINAL LAW. (Disorderly House — Usury.) N. J. — The Supreme Court of New Jersey declares that those who maintain a place where usurious rates of interest are taken, and where the statutes prohibiting usurious interest are habitually violated, are indictable for keeping a disorderly house. It had formerly been held in that state (State *v.* Lovell, 39 N. J. Law, 463), that a place where persons gather together to do acts which by law are made crimes or misdemeanors is a disorderly house. The statutes of New Jersey provide that the taking of interest at a greater rate than six per cent shall be unlawful, and declare that the penalty for violation of this statute shall be that in suits to enforce contracts in which a higher rate of interest is reserved no interest whatever shall be recoverable. Under these provisions, the court declares that the taking of usurious interest is a violation of the positive law of the state, and that to maintain a place for such habitual violation or a place where agreements for such habitual violation may be made is a misdemeanor. The holding is sustained by two cases cited by the court, where convictions for the offense of keeping a disorderly house were sustained under facts somewhat similar. The first is that of McClean *v.* State, 49 N. J. 471, 9 Atl. 681, where the defendant carried on the business of bookmaking in a box or booth on the grounds of an association managing a race track, and Harring *v.* State, 51 N. J. Law 386, 17 Atl. 1079, where the accused kept a room commonly resorted to for the purpose of betting upon horse-racing, in violation of the statute prohibiting gaming. State *v.* Dimant, 62 Atlantic Reporter, 286.

CRIMINAL LAW. (Homicide — Binding Instructions — Degree of Crime.) Penn. — The Supreme Court of Pennsylvania in Commonwealth *v.* Fellows, 61 Atlantic Reporter, 922, declares that an instruction in a homicide case that the court does not deem it necessary to define murder in the second degree or manslaughter for the reason that there are no elements of manslaughter or second degree murder in the case, but that defendant is either guilty of murder in the first degree or not guilty at all, is reversible error because interfering with the statutory right of the jury on a conviction of murder to determine the degree of the crime. It is stated that under the statute (Pub. Laws, 382), providing that if the jury shall find the person guilty of murder they shall ascertain in their verdict whether it be murder of the first or second degree, the court never has a right under any circumstances to determine the degree of the crime if one has been committed. Mitchell, C. J., dissenting, points out the fact that in Shaffner *v.* Commonwealth, 72 Pa. 60, the judge charged the jury that if the prisoner was guilty there could be no difficulty in ascertaining the degree since the death having been caused by poison, the crime must have been murder in the first degree if the poison was purposely administered, so that if the accused was guilty, the crime was murder in the first degree, and it was the duty of the jury to say so. In McMeen *v.* Commonwealth, 114 Pa. 300, 9 Atl. 878, the court charged that if the jury found that defendant sent poison to his wife with the intent to take her life it was murder in the first degree, and the jury should say so in their verdict. In both these cases the charge was held not erroneous, and the chief justice submits that there is no practical distinction between these charges and the instruction in the present case.

CRIMINAL LAW. (Indictment.) Ind. — In Terrell *v.* State, 75 Northeastern Reporter, 884,

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the supreme court of Indiana upholds in all its technical strictness the rule that an indictment must state the time of the commission of the offense, so as to show that it took place prior to the finding of the indictment. An indictment found September 12, 1903, charged that defendant on July 12, 1803, did then and there unlawfully and feloniously kill and murder W. by shooting him, etc. This mistake in the allegation of the date is held to vitiate the indictment. The ruling could not well have been otherwise in view of the prior holdings to the same effect, in Murphy *v.* State, 106 Indiana, 96; 5 Northeastern, 767; and State *v.* Sammons, 95 Indiana, 22. It was contended by the state that the statute providing that no indictment shall be set aside or quashed for omitting to state the time at which the offense was committed in any case in which time is not the essence of the offense, nor for stating the time imperfectly, unless time is of the essence of the offense, operated to cure the error, but it is held that this rule has no application where the date of the offense is alleged to be subsequent to the date of the indictment.

CRIMINAL LAW. (Rape. — Consent.) **Mo.** — Two questions, both novel, at least in Missouri, are determined by the Supreme Court of that state in State *v.* Welch, 89 Southwestern Reporter, 945. It is held in this case that a man having sexual intercourse with a woman while she is asleep is guilty of rape. This seems to be in accordance with the established rule wherever similar facts have been presented, although the court appears not to have been able to discover many American cases supporting it. Three English cases, Regina *v.* Young, 14 Cox C. C. 114, Regina *v.* Mayer, 12 Cox C. C. 311, Rex *v.* Lock, 24 L. T. (N. S.) 661, are cited as supporting the doctrine, as well as the analogous cases of Commonwealth *v.* Burke, 105 Mass. 376. Payne *v.* State, 40 Tex. Crim. Rep. 202, 49 S. W. 604, is also cited as directly supporting the holding. Upon the other point involved in the case there seems to be more difference in opinion among the authorities. The evidence in the case under consideration was hardly sufficient to show the amount of resistance or attempted resistance which would be expected from a chaste and unwilling woman awakened during the progress of the act of unlawful and forcible copulation, and from this arose defendant's contention that he was not guilty because prosecutrix consented to the act upon awakening. After considering the cases of Smith *v.* State, 12 Ohio State, 466, Regina *v.* Hallett, 9 Car. & P. 748, and State *v.* Cunningham, 100 Mo. 382, 12 S. W. 376, the court concludes that the rule is that consent by the woman after the assault but before penetration prevents the act from being criminal, but that consent after the crime has been completed by penetration is not available as a defense.

INSOLVENCY. (Right of state to Preference.) **Md.** — A case illustrating the departure in this country from the rule in England according to debts due the government, a prerogative right to priority is State *v.* Williams, 61 Atlantic Reporter, 297. The court determines in that case that the state has no right to preference over other creditors of an insolvent corporation where it has a simple contract claim and no steps to enforce it are taken until after the appointment of a receiver for the corporation. It is pointed out that the decision that the common law was adopted by the third article of the Bill of Rights of Maryland so far as it is not inconsistent with that instrument and the nature of our political institutions, settled the point that the state had a right at common law to have its debt first paid out of the property of its debtor remaining in his hands with no lien standing in the way. It is said, however, that the right does not exist here with all the incidents to the royal prerogative right in England. We do not here have the writ of protection nor of the extent in chief or in aid. The priority of the state is a rule only in the distribution of the property of a debtor requiring the debt due to the state to be first paid where the individual creditor has no antecedent lien overreaching it. Even in England it is said where the right is enforced by the process in the writ of extent in chief or in aid, it is necessary, in order to make it available, that the proceeding be resorted to before other vested rights to the property sought, to be subjected to the claim are acquired. So it is declared that where property has passed from the hands of the debtor, and into the custody of an officer of the court, the state is entitled to no priority.

INSURANCE. (Accident Policy — Construction — Death by inhaling Gas.) **Ill.** — In Travelers' Insurance Company *v.* Ayers, 75 Northeastern Reporter, 506, the Illinois Supreme Court construes a provision in an accident policy, which is sufficiently different in its phraseology from those which formed the basis of a number of prior cases to justify comment. Several Illinois cases, notably Healey *v.* Mutual Accident Ass'n, 133 Ill. 556, 25 N. E. 52; Travelers' Ins. Co. *v.* Dunlap, 160 Ill. 642, 43 N. E. 765; Metropolitan Accident Ass'n *v.* Froiland, 161 Ill. 30, 43 N. E. 766, and Fidelity & Casualty Co. *v.* Waterman, 161, Ill. 632, 44 N. E. 283, have followed the case of Paul *v.* Travelers'

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Ins. Co., 112 N. Y. 472, 20 N. E. 347, wherein it is held that a clause in an accident insurance policy, exempting the company from liability where the insured met his death from inhaling gas, did not excuse payment where death was due to gas breathed into the lungs in an unconscious and involuntary manner. The policy in the present case provided that the insurance should not cover death resulting wholly or partly, directly or indirectly, from any gas or vapor. This alteration in language is regarded by the court as not sufficient to withdraw the policy from the operation of the rule laid down in the cases cited, and it is held that the company is not exempted from liability for death caused by the accidental inhalation of gas.

In construing the exceptions in an insurance policy, there are two familiar rules. One is that in case of ambiguity, a policy of insurance, being composed by the underwriter, is to be construed in favor of the promisee; and the other is, that in order to achieve the general purpose of the contract, any policy of insurance, and especially an accident policy, is to be understood, in the absence of clear words to the contrary, to cover all losses that are unintentional. It follows that it is comparatively easy to exclude losses when the promisee intended to bring to pass the effect, and that it is difficult to exclude losses when the promisee did not intend to bring to pass the effect but simply to bring to pass the cause, and that it is still more difficult to exclude losses when the promisee did not intend to bring to pass either cause or effect.

In Paul vs. Travelers' Ins. Co., 112 N. Y. 472 (1889), the life unintentionally and unconsciously inhaled illuminating gas while he was asleep; and, under an accident policy which provided that it should not extend "to any death or liability which may have been caused . . . by hernia, bodily infirmities, . . . nor by the taking of poison, contact with poisonous substance, or inhaling of gas, or by any surgical operation, or medical treatment," it was held that the death in question was not insured against, because, as Gray, J., said in the opinion of the court: "In expressing its intention not to be liable for death from inhaling of gas, the company can only be understood to mean a voluntary and intelligent act by the insured, and not an involuntary and unconscious act. Read in that sense and in the light of the context, these words must be interpreted as having reference to medical or surgical treatments, . . . or to a suicidal purpose. . . . . To inhale gas requires an act of volition on the person's part before the danger is incurred." Against this doctrine a vigorous protest was made in Richardson & Travelers' Ins. Co., 46 Fed. 843 (C. C., N. D., Ill., 1891); but the doctrine has prevailed.

In Menneiley vs. Employers' Liability Co., 148 N. Y. 596 (1896), there was death by asphyxiation in substantially the circumstances of the Paul case; and, under an accident policy which provided that it did not insure "against death or disablements arising from anything accidentally taken, administered, or inhaled, contact of poisonous substances, inhaling gas, or any surgical operation or exhaustion resulting thereon," it was held that there could be no recovery, notwithstanding the new phrase, "anything accidentally taken, administered, or inhaled," or, as Martin, J., in the court, said: "The manifest purpose of the provision is to exempt the insurer from liability where the insured has voluntarily and consciously, but accidentally, taken or inhaled, or something has been voluntarily administered. . . . That is made more apparent by the portion of the provision which relates to something 'administered,' as it cannot be reasonably construed as referring to a thing involuntarily and unconsciously administered." In other words, even the clauses as to anything inhaled "accidentally" does not relieve the underwriter unless the life — though not choosing the effect — chose the cause. This is also the doctrine of Fidelity and Casualty Co. vs. Waterman, 161 Ill., 632 (1896), and Fidelity and Casualty Co. vs. Lowenstein, 36 C. C. A. 29 (Eight Circuit, 1899).

It should be noticed that in the policies quoted the word used was "inhaled" and that there was a context, which, to say the least, failed to fasten upon that word the meaning demanded by the underwriter. This new Illinois case of Travelers' Ins. Co. vs. Ayers, goes further. Here the circumstances of death were the same as in the other cases stated; but the policy had different language, for it excepted death "resulting wholly or partly, directly or indirectly, . . . from any gas or vapor"; but it was held that even this language, — which avoids the word "inhaling," does not protect the underwriter. It is to be regretted that the court, though informed of the distinction, did not explain the reasons for extending the doctrine to this language. If the decision is to be upheld, the reason is to be found, it would seem, not in ambiguity of the clause taken by itself, but rather in a theory that, although this one clause is unambiguous, something more emphatic is requisite in order to overthrow the accident policy's general purpose of insuring against accidents.

Eugene Wambaugh.

INSURANCE. (Beneficial Associations. — Increase of Rates.) Mo. Ct. App. — Three cases involving the same question, neither of which has as yet reached the court of last resort, present for decision the question of the validity of the changes recently made by several well-known mutual benefit associations in their rates of assessment. The cases are Pearson *v.* Knight Templars' & Masons' Life Indemnity Ins. Co., Wright *v.* Knights of Maccabees, and Mock *v.* Supreme Council of the Royal Arcanum. The opinion of the Missouri Court of Appeals in the first mentioned case is reported in 89 Southwestern Reporter, 555. The

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other cases, both of which are decisions of New York trial courts, are as yet unreported, the decision in the Mock case being without opinion and by Justice Gaynor recently advanced to the Supreme Court. The cases are united on the proposition that though a mutual benefit certificate is issued pursuant to an application in which the assured agrees to abide by the constitution and regulations of the association as they are at the time of the application or may thereafter be constitutionally changed, yet the association has no authority to materially increase the assessments without the consent of the assured. The Missouri case cites a long list of holdings to the effect that a contract of insurance made with a beneficial association can not be materially modified or changed without the express consent of the insured. (Grand Lodge of the A. O. U. W. of Mo. *v.* Slater, 44 Mo. App. 445; Sackberger *v.* Grand Lodge I. O. T. L., 73 Mo. App. loc. cit. 42; Smith *v.* Supreme Lodge K. of P., 83 Mo. App. 512; Morton *v.* Supreme Council, 100 Mo. App. 76, 73 S. W. 259), and a still longer list which declares that a stipulation to be governed by future changes in constitution and by-laws does not authorize a reduction of the amount of the certificate (Hysinger *v.* Supreme Lodge, 42 Mo. App. (St. L.) 635; Knights Templar, etc. *v.* Jarman, 104 Fed. 638, 44 C. C. A. 93; Supreme Council *v.* Getz, 112 Fed. 119, 50 C. C. A. 153; Pokrefky *v.* Association, 121 Mich. 456, 80 N. W. 240; Becker *v.* Benefit Society, 144 Pa. 232, 22 Atl. 699; Insurance Co. *v.* Connor, 17 Pa. 136; Hale *v.* Ins. Co. (Pa.) 31 Atl. 1066; Becker *v.* Mutual Benefit Ins. Co., 48 Mich. 610, 12 N. W. 874; Weiler *v.* Equitable Union (Sup.) 36 N. Y. Supp. 734; Langan *v.* Legion of Honor (Sup.) 70 N. Y. Supp. 663; Newhall *v.* Legion of Honor (Mass.) 63 N.E. 1; Wist *v.* Grand Lodge A. O. U. W., 22 Or. 271, 29 Pac. 610; Gaut *v.* Legion of Honor (Tenn. Sup.) 64 S. E. 1070; Strauss *v.* Mutual Reserve Fund, 128 N. C. 465, 39 S. E. 55; Bragaw *v.* Knights of Honor (N. C.) 38 S. E. 905). Based upon this general doctrine that the contract may not be materially modified and the holdings that a scaling of the amount of benefits is a material modification, is the court's conclusion that an increase in the amount of assessments is an equally material modification which is not permissible unless the member consents.

INTOXICATING LIQUORS. (Patent Medicines.) N. Dak. — A sale of a medicine containing intoxicating liquor is held in State *v.* Williams, 104 Northwestern Reporter, 546, not to be necessarily a violation of the prohibitory liquor law. North Dakota Laws 1890, c. 108, p. 305, as amended by Rev. Codes 1899, § 7281, declares that the provisions of the section relating to pharmacists shall not be construed to interfere in any manner with nor to prevent shop keepers from dealing in or selling commonly used medicines and poisons if such medicines and poisons are put up by a regular pharmacist, nor from dealing in or selling patent or proprietary medicines. Under this section it is held that it is a question for the jury whether a sale of an alleged medicine containing intoxicating liquor was made in good faith for medicine or whether the liquids were sold as intoxicating liquors as a beverage and the fact that the sale was not made by a registered pharmacist does not necessarily prove that the preparation sold was for use as a beverage.

LICENSES (see Property).

MASTER AND SERVANT. (Wrongful Dismissal — Question for Jury.) Eng. — In the case of Clouston and Co. (Limited) *v.* Corry, V. xxii, T. L. R. 107, the plaintiff was dismissed by his employers for the reason that he had been arrested for drunkenness and the use of bad language in public. He thereupon brought an action for wrongful dismissal, and the defendants justified the dismissal of the plaintiff on the ground that he had been arrested on a charge of drunkenness and disorderly conduct and fined therefor. At the trial of the action, the following question was left to the jury, *viz.* — Was the defendant justified in dismissing the plaintiff for his conduct? The jury found that the dismissal was not justified, and their verdict was allowed to be entered for the plaintiff, and the defendants appealed.

It is said by the Judicial Committee of the Privy Council that this was a case in which, in an action brought to recover damages for alleged wrongful dismissal from service, a defence of justification was set up, and that allegations of misconduct, drunkenness, and the use of foul language in public, resulting in a conviction, were made supported by strong evidence that was admitted by the plaintiff to be true, and that in a case like this the tribunal to try all issues of fact was a jury, and that the sufficiency of the justification depended upon the extent of misconduct, but that there was no fixed rule of law defining the degree of misconduct which would justify a dismissal. There might of course be such misconduct in a servant that would not justify a determination of the contract of service by one of the parties against the wish of the other. When an alleged misconduct consisted of drunkenness, there must necessarily be difficulty in determining the extent or conditions of intoxication which

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would establish a justification for dismissal, and the question whether the misconduct that was proved established the right to dismiss, must depend upon facts and was a question of fact. That being so, the question could only be tried by a jury. In cases, however, where a trial must take place in that manner, the judge had important duties to fulfil. He could say whether there was any evidence to submit to the jury in support of a defence of justified dismissal, and if no such evidence had in his opinion been given he should not submit any issue in respect of these allegations. The judge also might direct guide and assist a jury. Thus he might direct them by informing them of the nature of the acts that in law would justify dismissal; he might guide them by calling their attention to the facts material to the determination of the issues raised, and he might assist them in a manner and to an extent that could not be defined.

There had been judges who had exercised the power of addressing a jury in terms of apparent impartiality, and yet of placing before them views which seldom failed to secure the verdict that was desired by the judge. In the case of "Horton *v.* McMurtry" (5 H. & N. 667), Sir Frederick Pollock pointed out that it was for the jury to decide whether there was a proper ground of dismissal, but whenever it was a matter of law, his opinion was that the ground of dismissal in that case was good. The Court of Appeal held further that the trial judge was correct in submitting that issue of fact to the jury.

The case now reported was sent back for a new trial on another ground.

MUNICIPAL CORPORATIONS. (License Tax — Telephones.) Wis. — An interesting case, involving the licensing power of municipal corporations, is that of Wisconsin Telephone Company against the City of Milwaukee, 104 Northwestern Reporter, 1009. The statutes of Wisconsin (Rev. St. 1898, § 1778) grant to telephone companies the right to construct and operate lines on the public highways. Under this statute it is held that a city authorized by its charter to control and regulate streets and to prevent the incumbering thereof, has no authority to exact a license from a telephone company, constructing and maintaining lines in the streets of the city, but is only authorized to impose on the company conditions within the power expressly granted by the charter and its general police power. Hence an ordinance imposing a license tax upon a telephone company, providing that the revenues derived from the license should become a part of the general city fund and containing nothing to indicate that the license was for supervision, the aggregate amount sought to be collected being greatly in excess of the expense of supervision, was a revenue measure and void.

NEGLIGENCE. (Telegraphs — Mental Anguish.) N. C. — The North Carolina Supreme Court already committed to the doctrine first announced in Texas that there may be a recovery for mental anguish caused by failure to properly transmit and deliver a telegram, makes further application of the principle in Dayvis *v.* Western Union Telegraph Co., 51 Southeastern Reporter, 898. Inasmuch as the general principle had been previously settled in this state by a number of cases cited by the court in its opinion, to wit: Young *v.* Telegraph Co., 107 N. C. 370, 11 S. E. 1044; Sherrill *v.* Telegraph Co., 109 N. C. 527, 14 S. E. 94; Kennon *v.* Telegraph Co., 123 N. C. 232, 35 S. E. 468, the chief interest arises from the precise nature of the message which was delayed. In fact, the difference of opinion among the members of the court grows from the question whether the delay of such a message could cause mental anguish.

Plaintiff's wife missed a certain train on which her husband expected her to arrive, and sent a message to him stating that she had missed the train and would arrive on the next day. She informed the operator that she and her two children, who were ill, had missed their train and that her husband was to meet her, and would be worried unless he got the message. The husband testified that he knew that the wife had only money enough to make the trip without delay, and that he suffered great distress and mental anguish by reason of uncertainty as to the whereabouts of his family. These facts, the Court decided to be sufficient to sustain a claim for mental anguish on the part of the husband, and to show that the telegraph company had notice that if the message was not delivered and the husband was thereby left in ignorance of the condition and of the whereabouts of his wife and children, it might result in actionable suffering and mental anguish

The dissenting opinion of Brown, J., is based on the contention that failure to receive the message could not have resulted in mental anguish, and draws a distinction between anguish and mere anxiety, intimating that no recovery can be had for the latter.

PERSONS. (Slaves — Legitimacy.) Ala. — An unfortunate but apparently unavoidable determination as to the legitimacy of children born of slave parents prior to the war is contained in

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Johnson *v.* Shepherd, 39 Southern Reporter, 223. It appears that slaves cohabited and had a child before the war. The mother died before the war. The father then commenced to cohabit with another slave, which was continued until after the close of the war, resulting in the birth of another child. This latter child claimed property as heir of the first one, who was by blood his half-brother. It is held, however, citing Melinda *v.* Gardner, 24 Ala. 719, and Smith *v.* State, 9 Ala. 966, that the first child was illegitimate, so that the second child, though rendered legitimate by continued cohabitation of his parents after they were able to contract marriage, could not inherit from his half-brother.

PROPERTY. (Licenses — Revocation.) **Mass.** — Under the Massachusetts statute, authorizing the board of health of a city to issue licenses for the use of buildings as stables, it is held that such a license, when issued, is not a contract between the licensee and its grantor, and does not confer on the former any vested right of property, so that its revocation, if legal, does not deprive him of any constitutional privilege. Lowell *v.* Archambault, 75 Northeastern Reporter, 65. It is also said that though the statute contains no provision for the recall of a license, once granted, it is nevertheless the purpose of the statute that the license shall specify the extent of the right conferred by setting forth the conditions under which the building may be constructed and used, and that the right to erect and use the stable is subject to the reasonable regulations of the board of health. Where a license was granted by a board of health, permitting the erection of a building for a stable, which license contained no limit of time for its exercise, and was not subject to any existing regulations prescribed by the board, it was held, in spite of the foregoing determinations, that the license could not be revoked by the board on the objection of citizens living in the vicinity of the building, and this, even though the license might have been improvidently issued.

RAILROADS. (Power of Commission.) **N. C.** — A case of great local interest and which may well be of some importance in the construction of other similar statutes, is that of North Carolina Corporation Commission *v.* Atlantic Coast Line Railroad Company, 51 Southeastern Reporter, 793, known as the "Track Scales Case." North Carolina Laws 1899, p. 291, c. 164, creates the North Carolina Corporation Commission, and declares that it shall have such general control and supervision of all railroad . . . companies or corporations engaged in the carrying of freight or passengers . . . necessary to carry into effect the provisions of the act. Section 2 empowers the commission to make just and reasonable rules and regulations for the handling of freight and baggage at stations, and to require depot accommodations commensurate with the business and revenue. Under this statute, it is maintained that the corporation commission has authority to require a railroad company to install track scales at points where the business is of sufficient volume to justify it. Railroad Company *v.* Minnesota, 193 U. S. 63; 24 Sup. Ct. 396, is cited to the effect that a railroad company may be required to establish a new depot wherever necessary, and it is argued that the installation of track scales is a matter equally within the control of the state through its legislative power delegated to the corporation commission.

It is well established that the state may through a commission regulate all matters in the conduct of a railroad which are connected with its obligations to the public. As one of the most obvious of these duties is to furnish adequate facilities, it is plain that an order of the commission in relation to the provision of conveniences for handling business will be upheld by the courts, unless the requisitions of the commission seem to them to be outrageous. In the present case, however, it seems clear that it is reasonable to demand that the railroad shall install track scales at certain places when the business is of sufficient volume to justify it. **B. W.**

SALES. (Conditional Sales — Record.) **Mo. Ct. App.** — The Missouri statutes relative to the recording of contracts of conditional sales, and providing that when any goods or chattels are pretended to have been loaned to any person with whom possession shall remain for five years, the loan shall be taken as to all creditors of the person in possession, to be void, are construed in Gilbert Book Co. *v.* Sheridan, 89 Southwestern Reporter, 555. The statute concerning conditional sales provides that they shall be void as to all subsequent purchasers in good faith and creditors, unless evidenced by a writing executed and recorded as in case of mortgages. The words "good faith" in this statute are, it is held, confined to the case of a subsequent purchaser, and do not apply to a subsequent chattel mortgagee of the holder of the property under an alleged conditional sale, so that the mortgagee was not precluded from asserting title by notice of the claim of the conditional seller. This statute is further interpreted as applying to transfers of personal property between the original parties *in praesenti* and as hav-

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ing no application to a contract for the future sale of property delivered as a loan to be subsequently paid for by charging the price against credits. The statute relative to loans is held to have no application to a mere temporary loan or bailment of property for the accommodation of the bailee. This holding arose from a transaction by which a company, engaged in publishing law-books, arranged with an attorney to prepare a text-book, and for use in the work of preparation, furnished to the attorney a couple of sets of reports and a digest, under a contract which designated the transaction a loan and provided that the books loaned were to become the attorney's property on the completion of the work, and were to be paid for by deducting their price from the royalties to which he would then be entitled. This, it was held, was a mere loan or bailment of the books and not a conditional sale thereof, and hence, though the contract was not recorded, the publishing company was entitled to the books as against the mortgagee of the attorney.

TAXATION. (**Jurisdiction — Equitable Conversion.**) **Penn.** — The Supreme Court of Pennsylvania has determined that land located outside the state, which has, by the process of equitable conversion, been transformed into cash to satisfy the pecuniary legacies, is subject to the collateral inheritance tax. *In re* Vanuxem's Estate, 61 Atlantic Reporter, 876. The testator gave to his executors power to sell any of his real estate, if necessary, for the purposes of the estate, of administration, distribution or otherwise. It became necessary to sell the real estate to pay the pecuniary legacies, and land in other states was converted into personality and the proceeds brought into the courts of Pennsylvania for distribution to collaterals. It is held that under this state of facts, it was proper to assess the inheritance tax against the land situated in other states, since inasmuch as the proceeds of the lands must come into the courts of Pennsylvania for distribution, the tax would finally fall upon the legacies themselves, rather than upon the lands appraised by the assessor in order to determine the amount of the tax.

Mitchell, C. J., dissented, chiefly on the ground that the will did not work an equitable conversion.

TORTS. (**False Imprisonment.**) **Me.** — In Rush *v.* Buckley, 61 Atlantic Reporter, 774, a person who had been arrested for violation of a municipal ordinance and committed to jail for failure to pay a fine for such violation sued the judge of the municipal court who issued the warrants, the officer who served them and the person who made the complaints, for false imprisonment, upon the ground that the ordinance had never gone into effect and was void because it had never been published as required by law. The decisions as to the liability respectively of the person who made the original complaints and of the officer who served the warrants are founded upon fairly well-settled principles of law, and are to the effect that, where a person does no more than prefer a complaint to a magistrate in a matter over which the latter has general jurisdiction, he is not liable in trespass for false imprisonment for the acts done under the warrant issued by the magistrate, even though the magistrate has no jurisdiction over the particular complaint. Such liability only arises if the complainant undertakes to direct or aid in the service of a bad warrant, or interposes and influences the officer to execute such warrant. The officer, of course, is held to be protected if there is no defect or want of jurisdiction apparent on the face of the writ or warrant under which he acted. As to the liability of the judge who issued the warrants and before whom the plaintiff was tried and convicted, there seems to be more question. It is, says the court, a well-established rule that judges of courts of superior jurisdiction are not liable in civil actions for their judicial acts, even where such acts are in excess of their jurisdiction. Whether this immunity from civil liability is equally applicable to a judge of an inferior court or to a magistrate of limited jurisdiction, is a question about which the authorities are not in entire accord. The court concludes that the tendency of recent decisions is towards the holding, that where a judge of an inferior court or magistrate is invested by law with jurisdiction over the general subject-matter of an alleged offense, that is, has the power to hear and determine cases of the general class to which the proceeding in question belongs, and decides, although erroneously, that he has jurisdiction over the particular offense of which complaint is made to him, or that the facts charged in the complaint constitute an offense and acts accordingly in entire good faith, such erroneous decision is a judicial one for which he is not liable in damages.

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THE LIGHTER SIDE

THE GENESIS OF THE GREEN BAG

By Stanley E. Bowdle

VOLUMES have been written to tell how the copper pigeon developed his crop, and when the fantail acquired his fan, and why, in the evolutionary process, Nature saw fit to equip the Orinoco monkey with Kansas legislative whiskers. Whole chapters in books on the development of manners and customs have been devoted to the origin of the gown and mortar board, and the growth and subsidence of hoop and skirts and the like; but I have been unable to turn up a volume or find a paragraph telling the when, how, or why the lawyer adopted the green bag.

Be it, therefore, known that I am the first in this field of legal antiquities, searching among the debris of wigs and gowns and parchments for the history of this venerable institution, the bag.

My sub-consciousness has been charged with this inquiry for several years, and now and then I strike some data. A few years ago, while wandering through the great archæological department of the Mexican National Museum, at Mexico City, my attention was arrested by an immense Aztec's tablet, excavated from the ruins of the Temple to the Sun.

The scene depicted was evidently an Aztec gabfest of some kind, and the catalogue sustained the impression. It was a trial, evidently, before the General Term of the Imperial Aztec Court. The miserable litigants were there, and both lawyers, as usual, were trying to speak in concert. One carried in his hand a bag. Victory seemed to have crowned his efforts! I had traced the bag to Aztec days! "Ah," said my Mexican legal friend, "not so fast; that bag is more probably the client's purse."

Since that incident I have not been able to pick up the clew to the bag. I am bewildered amid the mists of antiquity. But I shall continue to watch the reports of the learned excavators at Nippur and Karnac, for the bag assuredly has a pompeian history.

The explanation of the gown and the mortar board throws some light on the bag. Scientists explain them in about this way: Priests were at the start repositories of all learning. But it came to pass in the evolution of things that men of means were taken into the mysteries of learning, just as pork packers now occasionally become aristocrats or LL.D.'s if they have the price.

These men of means, not being priests, naturally wanted something, other than their conversation, to demonstrate that they were learned — careful thought was too arduous an advertisement. They wanted some badge, some sign. This led to peculiarities of dress. It led to gowns and wigs and caps and robes. These things at once suggest to the vulgar public that the wearer enjoys a kind of "apostolic succession," as an eminent writer puts it, and that he should be approached with something of the manner that Moses approached the burning bush.

In short, the gowns and hoods and mortar boards are a cheap and highly effective advertisement, and are calculated to produce far more awe-inspiring results than display of the intellectual goods for which they, as an advertisement, stand. At least, this is the explanation given by scientists heavily decorated with titles; and I gratefully accept it and bow my acknowledgments.

This explanation, I am sure, will also account for the bag. It, without doubt, was regarded as an honorific decoration, telling the lay and vulgar beholder that he who carried it was in the direct line of that august intellectual succession founded by Moses, Draco, Cicero, and other stars in the firmament of mind.

My own sensations bear out this explanation, when, at my legal outset, I deliberately adopted the green bag as an aid to my otherwise unprofessional *tout ensemble*. It was with sentiments of deep gratitude that I adorned my person with the bag — gratitude to the fathers of our venerable profession for having thoughtfully provided this dignified help to feeble legal life.

Its beneficent effect was instantaneous. Oh, intoxication! In the great pharmacy of thy delights thou hast none like this — to be observed; to be looked at. No practice, yet

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those across the car seemed to watch me adjust my glasses and prepare to read the evening paper — it was the bag! I strode along with firmer stride — a sensational step, and my very friends, who at times seemed careless of my presence or approach, now nodded pleasant greeting — it was the bag! To the conductor, who heretofore had asked my fare with nudge and grunt, now seemed to ask almost with reverence — it was the bag!

I was now a lawyer, and as visibly important as a policeman. With that bag beneath my arm I felt like an honorary vice-president at a continuous Republican rally. I strode about majestically, diffusing dignity. Ye spirits of the illustrious legal dead, accept my thanks for this badge so generously provided for briefless legal youth, when no business comes to bring publicity, and when no one seems to know or care for you, when your thrice pronounced name leaves no impression, when no one looks to say, " Ah, there he is; his speech acquitted Smith."

But the bag is passing, just as private seals and wigs and Bible-kissing on taking the oath have passed. The age looks for utility and comfort. Seals were troublesome; wigs red-hot, and Bible-kissing, like other kissing, unsanitary. They had to go. But the bags' decline is slow, for it has a measure of utility.

It may still serve to suggest to the public merger documents, pompous instruments, being carried home for midnight work, while actually the repository of lunch or laundry or wife's stockings being returned for exchange. But even the public is getting more sensible and men's faces are generally too busily buried in the evening police news to look up and admiringly regard the " Hon. Tweedledee, who just knocked out the Smith bill," or to contemplate the visible judicial dignity of " Judge Tweedledum, who declared unconstitutional the eight-hour law for bakers." So bags don't count as formerly. How much can you show up in a pinch? — not what you wear — is the great question of this advanced age.

But we are bidding the bag a sorrowful adieu, for it has helped us much, and it is the last impressive vestige of that polite humbuggery for which our profession has been accorded an eternal franchise. — *The Law Book News.*

Perley's Opinion and Price. — Chief justice Ira Perley, after his retirement from the Bench, opened an office in Concord, N. H. He was a man of the strictest integrity, and his indignation would be aroused whenever he scented a fraud. One day a man called upon him for advice and set forth the facts which showed that he had craftily worked a net around another, the circumstances of which he seemed to delight in. After he had finished, he asked the judge what his opinion was. The judge jumped up, and, with great emphasis, said: " What is my opinion? My opinion is that you are an infernal scoundrel. Five dollars."

Witness would Begin Again. — The following incident will be appreciated by lovers of the absurd, especially in the legal profession.

Many years ago, during a trial by jury in the town of Enosburg, Vt., a witness was being questioned by one of the lawyers, and as he became very much mixed in his replies, he hesitated for some time, appearing to be at his wits' ends.

Suddenly he exclaimed: " Scratch out all I have said, and I'll begin again."

How Judge Peters Collected. — Some years ago a claim was placed in the hands of the late Judge Peters of Bangor, Me., against a man who was never known to pay his bills.

The usual notice to call and settle to avoid costs, etc., was sent out, and the man called and said he would pay the account the next Saturday night, when he was paid off.

The judge said: " Now, don't say you will pay Saturday night unless you mean to; just take a few more days and be sure. Say you will pay next Wednesday."

" All right," said the man, " if I live until next Wednesday I will pay that bill."

Wednesday came, but no man appeared to settle the bill, whereupon the judge wrote out a notice of the death of the man and put it in the daily paper. The next day the bill was settled. — *Boston Herald.*

TINEA TORQUET

[Note: Whether the following is another gentle roast at your most obedient, he refuses to consider, but it sounds well and deserves immortality and so we will not be sensitive. Ed.]

If the lego literary worm (tinea), that earns a precarious living grubbing among local law

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journals popularly known as by-reports, were permitted to turn upon those who furnish his weekly pabulum he might say, "You editors of by-reports, how do you regard your reporting? As ephemeral merely? Intended to meet the onset of the printer's devil? Or as eternal? A record of local judicial achievement intended to inform the mind of the leader of the county Bar as to what was said and done when he, the said leader, was a proud office boy and eyed you suspiciously when you called with that little bill for legal advertising?"

If the editor's answer to the above interrogatory is "eternal," then the worm might add, "Penurious ink-smith! How often to save the cost of a stick of type do you cut out the number and term of the case reported, depriving us of any clue to the identity thereof. Would you conceal the fact that Doe *v.* Roe, so learnedly decided by Titius, J., is the selfsame Doe *v.* Roe, ignominiously overruled *per. cur.* in the Supreme Court?

"Or if perchance, the language of Titius, J., is obscure and it becomes important for the brief-maker to know the facts of the case, nowadays ignored by the reporter, or to look at the pleadings, how can this be done without the number and term? *Melius est petere fontes* does not apply to the prothonotary's records without the docket number. When a case is clipped from an esteemed contemporary without credit, pray give the *venue*, *Surplusagium non nocet.* Perhaps the reader unskilled in local politics may not know that Titius is judge in Cappadocia County.

"But by all means, oh frugal consumer of blue pencils, let us have the judgment of the court as well as the opinion. Tell us whether the rule is discharged, the injunction granted, or the citation allowed. We legal artists are not concerned about the oyster; we will take it for granted that the luscious bivalve was duly disposed of, but we do wish to know about the shell and which poor devil of a litigant got the larger piece."

If, however, the editor's answer to the interrogatory of the worm is, "My work is purely ephemeral, a little diversion interjected between the sheriff's advertisements and the testamentary notices." Then the worm might say, "It is then because of a perverted sense of humor that some of you draw from the dust bins and republish ancient cases some obsolete, others long ago reversed or affirmed? A merry jest! The conscientious young practitioner carries home the advance sheets and with a good cigar settles down to post himself upon the very latest law. He starts! Is it a bad dream? Here is something he never heard of. Hastily turning over the pages he finds that the case is upon the construction of a tax act repealed long before he was admitted to the Bar."

"But if the joke is good would it not be still better if Shelley's case were reprinted or the judgment *in re* disputed parentage rendered by Solomon, C. J.?"

These and other things a worm (tinea), might say did his burrowing afford leisure to speak his mind. But *tractent fabrila fabre.* Perhaps his occupation, the interpretation of the incomprehensible, would prove less absorbing if the opinions of the court were snatched by the reporter from the hands of the tipstaff and elucidated by the editor while still on their way from the typewriter of Titius, J., to the town job printing office.

LIBEROSUS.

Testimonials. — The enterprising publishers of the GREEN BAG recently sent out some advertising material including a rich collection of testimonials from subscribers. An unknown humorist who received one was good enough to suggest the following appropriate additions which seem too good to keep.

Philippines

The GREEN BAG and me get along very well together. — *T. S. Aguinaldo, Esq.*

The Moros sit under the trees and enjoy it. They like the pictures. — *Leonard Wood*, U. S. A.

Canada

The man who doesn't read the GREEN BAG will never know what he has missed.

Porto Rico

The Bag part of it is well adapted to our climate — *Degetau.*

Guam

We have a back number here; and now we would permit no other to be used. It works like a charm. — *C. Annibal.*

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East Boston

I never see a copy without wondering why it is published. — *Noah Smith, Real Estate and Cut Rate Tickets.*

Port Arthur

A man was so absorbed reading the GREEN BAG that when a shell took his head off it didn't make any difference. Good, also, in nervous complaints. — *Kuropatkin.*

Boston

Subscribe to the GREEN BAG, and you at least know where your money has gone. — *T. W. Lawson.*

The GREEN BAG and my "Winning of the West" are the best products of the century. No decent man neglects them. — *T. Roosevelt.*

A county attorney who is one of our readers, sends us the following complaint forwarded to him by a local justice of the peace. He thinks that the GREEN BAG is the only forum that has jurisdiction in such matters.

"In the Name and by Authority of the State of Texas: Before the undersigned authority personally appeared G. L. Barry, who, being duly sworn, states upon oath, that one Tom Pitts in the county of Montague and state of Texas, heretofore, on the 17th day of November A.D. 1904, did unlawfully take, steal, and carry away one Pointer dog, name 'Bill,' white with liver colored spots, had at time stolen, raw places on each of his back legs, on out side, has knot on one of his back legs just above ankle joint, and against the peace and dignity of the state.

Geo. L. Barry, *Affiant.*

Sworn to and subscribed before me, this 19th day of November A.D., 1904.

J. T. Stallings,
Justice of the Peace, Precint No. 4
Montague County, Texas."

Jury Duty. — The judge had his patience sorely tried by lawyers who wished to talk, and by men who tried to evade jury service. Between hypothetical questions and excuses it seemed as if they never would get to the actual trial of the case. So when the puzzled little German who had been accepted by both sides jumped up, the judge was exasperated.

"Shudge!" cried the German.

"What is it?" demanded the judge.

"I tink I like to go home to my wife," said the German.

"You can't," retorted the judge. "Sit down."

"But, shudge," persisted the German, "I don't tink I make a good shuror."

"You're the best in the box," said the judge. "Sit down."

"What box?" said the German.

"Jury box," said the judge.

"Oh, I thought it vas a bad box that peoples gets in somedimes."

"No," said the judge, "the bad box is the prisoners' box."

"But, shudge," persisted the little German, "I don't speak good English."

"You don't have to speak any at all," said the judge. "Sit down."

The little German pointed at the lawyers to make his last desperate plea.

"Shudge," he said, "I can't make noddings of what these fellars say."

It was the judge's chance to get even for many annoyances.

"Neither can anyone else," he said. "Sit down."

With a sigh the little German sat down.

Patience. — Edwin James was one of the most brilliant English lawyers of his day, but he was always in financial difficulties. At one time he lived in some West End chambers, the landlord of which could never obtain rent. At last he had recourse to an expedient which he hoped would arouse his tenant to a sense of his obligations. He asked him if he would be kind enough to advise him on a little legal matter in which he was concerned, and on James acquiescing, drew up a statement specifying his own grievance against the learned counsel and asked him to state what he considered the best course for a landlord to take under such conditions.

The paper was returned to the landlord the next morning with the following sentence subjoined.

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" In my opinion, this is a case which admits of only one remedy — patience." — *Baltimore Daily Record.*

" When I first came to Kansas and found that the state had no grand jury system, I thought surely I was beyond the limits of civilization," said Col. Bill Hackney, the other day. " I immediately became a reformer and started an agitation for a law creating grand juries. I was sent to the legislature two or three terms and at each session tried to get a grand jury law through, but failed. Then I went to the Senate for a couple of terms, and kept up my fight, but failed. Then as a member of the ' third house ' for a couple of terms, I threw my influence in favor of the grand jury bill every time it showed up. Finally, after seventeen years of ceaseless toil, I was amply rewarded. A grand jury law was passed. I went home happy. I had helped do something to protect the rights of the people. In order to see how the thing worked, the people of my own county, where the agitation had been the fiercest, had a grand jury called, and I was the first man indicted. I was accused of betting on an election."

Getting Even with a Lawyer. — A New Hampshire lawyer was defending a railroad in a suit brought to recover damages for physical injuries to the plaintiff. The latter was on the stand, and the lawyer was questioning him in a manner calculated to disconcert and " rattle." The witness stood it for a while, but finally broke out with:

" Sir, I shall have to refuse to answer your questions unless you put them in a different manner. This is a positive injury to my nervous system, which at best is in a shattered condition. I am troubled, owing to my injury, with sclerosis of the spinal cord, and at this moment I can see you double, when the Lord knows it is enough to upset a man to see you once." — *Boston Herald.*

Claiming His Own. — A Kansas City lawyer, says the *Times* of that city, while in St. Louis the other day, dropped in on a friend who is a judge, and found him holding court. A prisoner, with a well-known criminal past, was being tried for the hold-up of a Dutch grocery man. In the robbery the Dutchman had grappled with one of the two robbers and had wrested his pistol from him. The robbers escaped, but the storekeeper retained the revolver, and it was offered in evidence at the trial. The prisoner managed to " fake up " a pretty fair alibi, and, although the Dutch man positively identified him as the smaller of the two robbers, he was acquitted. After the jury had delivered its verdict the young man approached the Bench and said:

" Judge, can I have my gun now? "

" What's that? " said the judge sternly.

The young man thereupon, realizing his mistake, ran out of the court room. The jurors, who had not dispersed, were mad, and the judge, who had never been much in sympathy with the alibi, was madder still.

" Can't we get him back here and convict him? " asked the foreman.

" No," replied the judge in disgust, " he's been acquitted, but I hope he robs the home of every one of you."

Not There. — *Lawyer.* — " You say you left home on the 10th? "

Witness. — " Yes, sir."

Lawyer. — " And came back on the 25th? "

Witness. — " Yes, sir."

Lawyer (severely). — " What were you doing in the interim? "

Witness. — " Never was in such a place."

Instructions. — A young lawyer was requested to prepare an instruction with respect to evidence offered under a plea of contributory negligence. The result was so ingeniously, delightfully, shockingly original, that one of our subscribers wants to share it with the others.

Instruction to the Jury No. 3

The court instructs the jury that one's ignorance and want of knowledge of that which he ought to know is no excuse for that which the law presumes he in common with men of ordinary intelligence does know. It is not actual knowledge that is necessary before plaintiff is guilty of contributory negligence, but what he is presumed to know.

The Judge's First Client. — Judge James J. Banks, the well-known Denver lawyer, is a native of the south. It was in Birmingham, Ala., that he hung out his first shingle. For

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a long while Judge Banks sat in his office and wondered what a law client looked like. He would read and study to pass the long hours away. Every time he heard footsteps in the hall he would straighten up, assume an air of knowledge, and wait, only to be disappointed. One day an old negro woman entered his office.

"Is yo' de lawyah man?" she asked. Judge Banks immediately was all attention. This surely was a client. He answered in the affirmative.

"Well, sah," said the old woman, "Ah wants ter ax yo' device. Now, yo' see, Ah owes rent on ma house. Ah kain't pay hit, en de lan'lord say he gwine put me out nex' week ef Ah doan' fotch 'round the cash. What's Ah gwine ter do, Mistah lawyah man?"

Judge Banks gave himself over to deep study for a moment. Then he told the old woman that, with due process of law, the landlord could be compelled to give her a month's notice. The first client was delighted.

"Well, now, young man," she said, "Ah's mighty much erbliged ter you. Yo' suhtinly es smaht. Good mohnin'!"

"Hold on," came from the young lawyer. "Haven't you forgotten something?"

"How's dat?" asked the old negress. "Did Ah done drapped somethin'?"

"No," said Judge Banks, "but my fee is five dollars. You must pay me for that advice."

The old negress hesitated. Then she took hold of the doorknob.

"Mistah," she said. "Ah doan' want yo' ole device. Keep hit. Dat rent ain't but foah dollahs." And out she went. — *Denver Post.*

A Jury of the Vicinage. — Dr. Charles H. Parkhurst of New York city said recently, in discussing some phases of corruption in that city: "I declare, when I see some of the deceit that exists about one, I can almost sympathize with the jury in the Jerome Ess case. You have heard of that case? No? Well, Jerome Ess, a Western man, was noted for his mendacity. It was impossible to believe him, impossible to trust him. He got, finally, in the toils of the law, and at his trial he pleaded guilty. He did well to plead guilty, for the case against him was strong and irrefutable. Nevertheless, the jury in its verdict declared him innocent. The judge was thunderstruck. 'Innocent: Innocent: But the man himself pleads guilty:' 'We know it, your honor,' said the foreman of the jury; 'but he's such a liar that we can't believe him.'" — *Exchange.*

Too Clever. — "When Chief Justice Chase, a man of great abilities and marked characteristics, was presiding in one of the country courts of Vermont, an appeal case from a justice's court came up before him so small and contemptible in its origin that he ordered it stricken from the docket. The case was where a turkey had trespassed upon the garden of a neighbor and got shot for its depredations. The owner brought suit to recover damages, and, failing before the justice, had appealed the case. Judge Chase was angry, and when he ordered the case from the docket said:

"'The lawyer who consented to appeal this case ought to be thrown from the window of the courtroom. Why didn't he have the case referred to some of the honest neighbors for settlement?'

"'Because, your honor,' retorted the attorney, getting hot under the collar, 'it was our intention not to let honest people have anything to do with it.'

"True, this was a neat retort, but it cost the lawyer just an even $50 for contempt of court."

Webster's Brandy. — Mr. Webster's fondness for brandy gave one of his important clients a very bad twenty-four hours. He was called to Philadelphia to defend the Goodyear rubber patents and the head of the firm met him at the station. When they had entered the carriage, he at once turned to Mr. Webster and referred to one feature of the evidence to be presented in the trial the following day.

"I speak of it, Mr. Webster," he said, "as it has a peculiarly important bearing on the case, and I thought you might not have understood its significance."

Mr. Webster, who was looking dreamily out of the carriage window, was recalled to a con-

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sciousness of his client's presence. He yawned, and, settling back against the cushions, remarked:

" I've always hoped I might some day come to Philadelphia, because I've been told that there is no place in the United States where they serve finer brandy. When I came away from Boston I said to some of my friends, ' Boys, I'm going to find out about that Philadelphia brandy, and if I find that it really is the best, I shall have made a useful trip.' "

Several times Mr. Goodyear tried to draw his distinguished attorney's attention to the particular point at issue, but he never seemed to take the slightest interest in it. The brandy of Philadelphia was apparently the only topic which interested him, and he always recurred to it.

Mr. Goodyear left him somewhat brusquely at his hotel. When he returned to his office his story was anything but inspiring. " We've got a man who is supposed to be the greatest lawyer in the United States, and the only subject in which he takes any interest is Philadelphia brandy! "

That night, though, Mr. Webster worked in his room until after two o'clock, occasionally walking the floor and marshaling his case into battle array. His plea the next day was one of his most impressive utterances in its power and logic, and the case, involving hundreds of thousands of dollars, was given to the Goodyears. — *Harper's Weekly.*

Scarlett's Art. — It is not necessary that a lawyer should be eloquent to win verdicts, but he must have the tact which turns an apparent defeat to his own advantage. One of the most successful of verdict winners was Sir James Scarlett. His skill in turning a failure into a success was wonderful.

In a breach of promise case the defendant, Scarlett's client, was alleged to have been cajoled into an engagement by the plaintiff's mother. She was a witness in behalf of her daughter, and completely baffled Scarlett, who cross-examined her. But in his argument he exhibited his tact by this happy stroke of advocacy.

" You saw, gentlemen of the jury, that I was but a child in her hands. What *must my client have been?* "

Discharged. — A man came into the police court the other day carrying a friend on his back. " What's the matter? " asked the judge. The man answered, " Judge, this man is a friend of mine, and his name is Gunn. Now, Gunn is loaded. I know that it's against the law to carry a loaded gun on the streets, so I brought him in here." The judge said: " Gunn, you are discharged." And the next day the report was in the papers. — *Mount Morris Index.*

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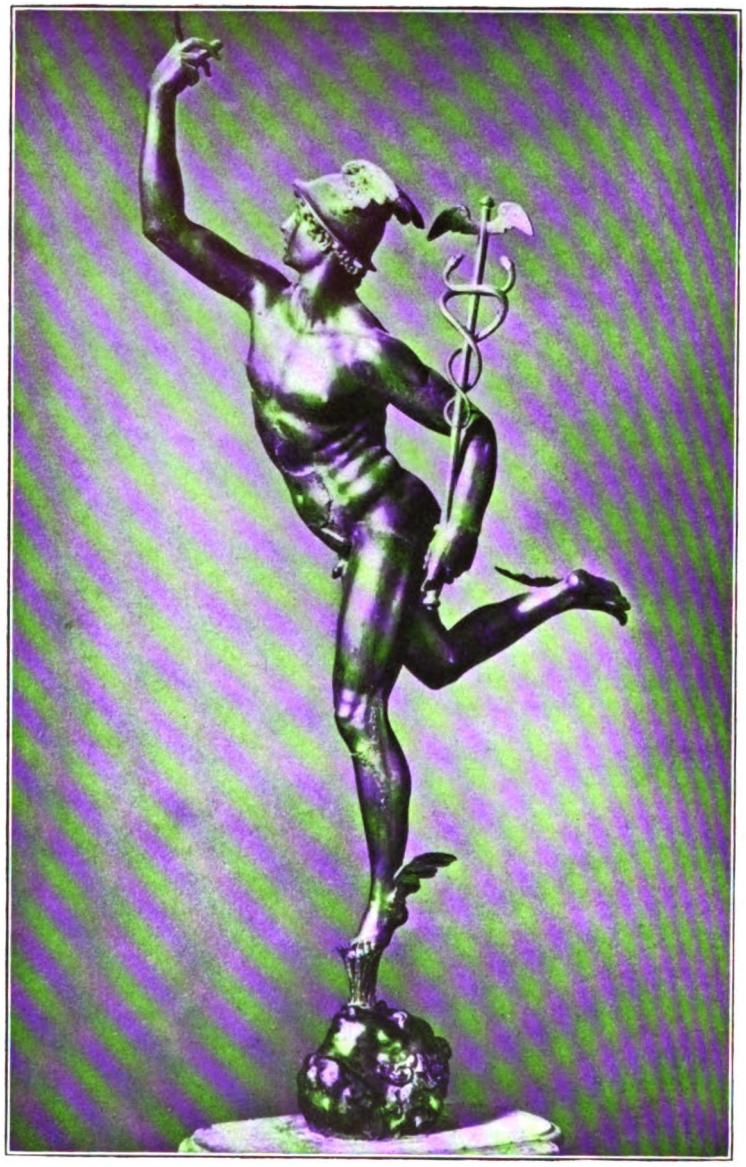

HERMES

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The Green Bag

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EMPLOYERS' LIABILITY AS AN INDUSTRIAL PROBLEM

Roger S. Warner

THERE is at least one field in which the elasticity of the common law and even perhaps of what may be called the common law idea, has proved no match for the strain put upon it by the development of modern life, — a field in which all Europe, including Great Britain, has struck at the roots of a fundamental doctrine both of the civil and of the common law, but in which the United States remains virtually at a standstill. This is the field of what is with us still, Employers' Liability for Damages. In Europe compulsory insurance or universal compensation has taken its place.

The last century, almost within its latter half, has seen the supplanting of hand-driven tools by power-driven machinery and, as a direct consequence, of small independent workers by large systems of centralized labor accompanied by changes in the social fabric that to our ancestors would have been incredible. It is safe to say that no other system of law has been required in a comparatively short time to meet so radical a change in the conditions which it was designed to serve.

The discovery of steam as a driving power and its immediate application to almost every kind of industrial activity brought large numbers of persons together under one roof for the purpose of combining their efforts toward the one end of manufacture. Before, these persons had worked singly or in twos or threes at their benches, or in their shops, or at their water-driven mills. Their occupations were not perilous and what dangers there were were obvious to the most unthinking. Each man, if he depended upon his neighbor for assistance, depended upon him to do a plain job. The weaver employed a man or two, the blacksmith had a helper, and the shoemaker an apprentice. Division of labor as we know it, there was none. The vital inter-dependence of workmen that we find in a modern factory or railway system was undreamt of. Accidents were infrequent, and when they occurred were generally so obviously the result of a man's own carelessness that to bring an action for damages against the employer was far from being a common occurrence. Men worked with their own familiar tools, beside their own familiar friends, whose capacities were well known. Within the most simple limitations, no man was forced to rely for his safety upon the skill of another.

But times changed. Where girls once spun their flax and wove their linen in their houses, they now began to gather in factories and learned to guide power-driven machinery. The shoemakers left their lasts and flocked to the machines, where, instead of being the sole master of his tools, each man found himself at work upon a delicate, rapidly driven, and not by any means infallible mechanism for the successful operation of which he must depend upon machinists and his employer's conscientious care. The guard and driver of the coach were transferred to the steam railroad to take charge of what among all trades is the most complicated and hazardous.

To realize the full extent and suddenness of this change in conditions one has only to compare the decisions in the last volume of his state reports with that published in 1825.

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In 1825, the law of contributory negligence was ill understood and in a chaotic shape. It was not until 1837, indeed, that the courts were called upon to determine the liability of an employer for the conduct of one of his workmen toward another. Then it was that Lord Abinger decided in the case of Priestly *v.* Fowler (3 Meeson & Welsby 1) that the butcher boy's helper injured by the negligence of the butcher boy had no remedy against their common employer, and thus fixed the place of the fellow servant doctrine in the common law.

It is unfortunate that the facts of the case should have been such as to suggest reasoning as if the word "servant" meant simply "domestic"; it is probably this circumstance which we have to thank for a doctrine founded upon so strained a legal fiction. Lord Esher, some years later, commented upon the case in this fashion: "I think it may be suggested that the law as to non-liability of masters with regard to fellow servants arose principally from the ingenuity of Lord Abinger in suggesting analogies in the case of Priestly *v.* Fowler." These analogies are worth quoting. "If," he says, "the owner of the carriage is therefore responsible for the sufficiency of his carriage to his servant, he is responsible for the negligence of his coach-maker, or his harness-maker, or his coachman. The footman, therefore, who rides behind the carriage may have an action against his master for a defect in the carriage owing to the negligence of the coach maker, or for a defect in the harness arising from negligence of the harness-maker for drunkenness, negligence or want of skill in the coachman; nor is there any reason why the principle should not, if applicable in this class of cases, extend to many others. The master, for example, would be liable for the negligence of the chambermaid for putting him into a damp bed; for that of the upholsterer for sending in a crazy bedstead whereby he was made to fall down while asleep and injure himself; for the negligence of the cook in not properly cleaning the copper vessels used in the kitchen; of the butcher in supplying the family with meat of a quality injurious to the health; of a builder for a defect in the foundation of the house, whereby it fell and injured both the master and the servant by the ruins. . . . . The servant is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself, and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master."

This lets us into Lord Abinger's state of mind. It must be remembered that at this time the doctrine of *respondeat superior* was well established as a part of the law of tort, and that if the butcher's boy had injured the fishmonger's helper within the scope of his employment, the butcher would surely have had to pay. But to permit house servants to sue their employer for injuries received below stairs seemed to Lord Abinger so preposterous that he generalized broadly and freely. The modern factory system was not of his world and it is perhaps unfair to allow the case of Priestly *v.* Fowler to dim the luster of his reputation for economic foresight. The fact remains, however, that at the very beginning of the era of the machine and the factory the law was laid down without reservation upon instances drawn from domestic service.

And yet after all is said, it is difficult upon any principle that would find favor in the common law, to differentiate between the house servant and the factory hand. It was to be expected that the rule should be applied to every case where the status of master and servant was found. The fact is that the case was decided upon economic grounds; upon instances exceptional rather than typical; it is, perhaps, the misfortune of his posterity that Priestly was a butcher boy and not a factory hand. Since that day the fellow servant rule has been a controlling principle of the common law; it may almost be said in

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view of the change in industrial conditions, that since that day it has been out of place in our *corpus juris*.

In the light of pure reason the doctrine does not bear the closest scrutiny. Why, if the butcher is liable to the fishmonger's boy, should he not be liable to his butcher boy's helper? Because, in the eye of the law, the butcher boy's helper assumed the risk. But this is begging the question. There is no assumption of the risk *qua* risk; if there were, the helper could not recover against his fellow servant, the butcher's boy. The risk is assumed only as to the master, which merely means that the law implies a provision in the contract of hiring that the risk shall be assumed. In other words, it is all one whether we say that he could not recover because he assumed the risk or that he assumed the risk because he could not recover. Chief Justice Shaw of Massachusetts in Farwell *v.* Fitchburg R. R. 4 Met. 49 (1842), the leading and almost the first case upon the fellow servant doctrine in this country said, in following Priestly *v.* Fowler, "To say that the master shall be responsible because the damage is caused by his agents is assuming the very point which remains to be proved." It seems to be equally true that to say that the master shall not be responsible because the damage was caused by his agents is assuming the very point which remains to be proved.

The Home Office in 1894 submitted a memorandum to the Royal Commission on Labor in the following significant terms. "The doctrine (the fellow servant rule) is an exception to the general rule; is modern judge-made law; implies a contract founded on a legal fiction not in accordance with fact; has been pushed to extreme length by the judges forcing and straining the meaning of the term 'common employment' and in practice leads to gross anomalies and injustice. . . . The law . . . . is an unfair law, operating oppressively against workmen as a class."

It is to modify this fellow servant rule that employers' liability statutes have chiefly been designed. Almost all American jurisdictions, for instance, protect trainmen by including in the class of superintendents for whose negligence the employer is liable those who are in charge of trains, switches, or signals. General employers' liability acts have for their leading feature the extension of this class of vice-principals.

Of course, conditions are not to-day what they might have been if such statutes had not been passed. But wherever it remains, the rule is anomalous or nearly so on logical grounds, pointed at by the injured workman as a chief source of his difficulties, and criticized with vigor by economists and lawyers wherever the opportunity offers.

The maxim of *volenti non fit injuria*, like all maxims, is a trifle vague. If we mean by "voluntary assumption of risk" that assumption which is the result of an implied contract to take whatever may come in the course of employment and is voluntary merely in the sense that the servant might have refused employment if he had chosen, there appears to be no valid reason why the risk of injury from a fellow servant's carelessness should not be one of the risks thus assumed. But as we have seen, this is *fiat* assumption; to recite the rule explains nothing. If, on the other hand, we take the maxim to call for a voluntary assumption of some risk that is more or less well known to be inevitably attendant upon the work to be done, we cut out substantially all the dangers directly traceable to another's negligence and treat as assumed only risks arising out of contact with inanimate things. It may be that such an assumption is scarcely distinguishable from contributory negligence. At all events for our purposes, the distinction, if one exists, is academic.

The notion that obvious risks of all sorts are assumed and that contributory negligence is always a bar to relief sits easily in minds trained upon the common law. But machinery and the factory systems have brought with them demands not to be satis-

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fied by assertion of common law dogma. The most obvious of these demands arise from what the French economists have called the *risque professionel*. Casual observation of the course of any industry is enough to convince one that there is a certain, computable risk of accident in that industry varying only as the material conditions vary under which the industry is carried on. This risk is incident to and inherent in the industry.

The courts, in accounting for the fellow servant rule and the rule of assumption of risk, generally used to observe that where there is extra risk, there is extra compensation, that public policy requires as high a degree of care as possible, and that these rules put a premium upon increased caution, and that the servant is in a better position than his master to observe dangers and guard against them. These are the grounds taken by Chief Justice Shaw in the Farwell case and are hinted at in Priestly *v.* Fowler. But as to the accuracy of the first two statements, there is no longer any illusion. It is certainly no longer true, if it ever was, except in trades of extraordinary hazard, that wages are regulated to compensate for the risk.

As to the second ground, that of supposed public policy, Field J. in Chicago & Milwaukee R. R. *v.* Roes 112 U. S. 377, 383, remarked "We have never known parties more willing to subject themselves to dangers of life or limb, because, if losing the one or suffering in the other, damages could be recovered by their representatives or themselves for the loss or injury."

It is upon the third ground that doctrine must rest, and it is upon this ground that it has been placed by the more recent decisions, namely, that the servant has at least as good an opportunity as the master to guard against accidents. Except for permanent safety devices, which are for the master to supply, the statement is undoubtedly true. But is it a reason? Is it not also true that the risk of most accidents is obvious merely in the sense that we all know that powder factories blow up every now and then, and that if a man works long enough at a circular saw the chances are that he will lose a hand? Is it not true that risks of this sort are voluntarily assumed, not because there is an interval after the danger becomes imminent in which to withdraw, but because by not going into that particular trade, that particular risk could be avoided?

To persons accustomed to dispose of questions of employers' liability upon common law principles, without going minutely into the train of causation, the statistics in regard to the causes of industrial accidents are startling. John M. Macklin, Esq., of the Labor Commission of New York state, made an elaborate and most valuable study of the condition of employers' liability both at home and abroad, and in 1899 embodied it in a commissioner's report of which I have made frequent use. He quotes the Bulletin of the International Congress of Accidents to the effect that 70 per cent of the 48,400 industrial accidents occurring in Austria in the five years, 1890–94, were caused by unforeseen contingencies, by which is meant conditions not traceable to the fault of the person injured or of his employer, and that in 1896 that percentage rose to 76 per cent, while in 1887 but 51.8 had been thus caused in Austria against 53.13 per cent in Germany. With improvements in methods and increased requirements of safeguards, the percentage of such accidents tends to increase, as these figures for Austria clearly indicate. It is probable that in Germany to-day something like 80 per cent of all industrial accidents are due to unforeseen contingencies — or to what is the same thing — the *risque professionel*.

These unforeseen contingencies are probably most often of a kind which, though under the classification adopted by continental observers are not traceable to the injured man's negligence, would nevertheless fall within the category of assumed risks under our law. They are the results of saw-

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ing warped boards, of the rapid feeding of machines, of the repeating of stamping dies and cutters, of belts slipping from loose to tight pulleys, and generally of the thousand and one causes which go to make modern methods more hazardous for the workman than those of his great-grandfather's time.

It appears, in short, that the Moloch of industrial activity demands a sacrifice of human life and limb, constant, as the actuaries tables show, and inevitable so long as human contrivances and human understanding are fallible. It is obvious that for losses such as these some one must pay. In the first instance, it is the workman himself. In the long run, however, there is an economic loss that is charged upon the community — and this to the accompaniment of individual hardship of a peculiarly distressing nature. Observing this, European governments with scarcely an exception, have devised schemes by which the loss falls upon the consumer of the commodity, the manufacture of which has demanded the sacrifice. In the United States, while fire, deterioration of plant, and financial loss are insured against, and the insurance, whatever form it may take, is charged to the cost of production, no account is taken of the deterioration of the human machine.

It is only a blind worshipper of common law doctrine who sees no problem here or who finds it solved by the law as it stands to-day. It is not a question to be determined by the stern justice of a Mosaic retribution; it is an economic problem — a problem that has stirred an entire continent of states and caused probably more sweeping legislation and radical revision of economic policy than any problem of modern times — not even excluding our own drastic surgery in dealing with the question of slavery.

But before taking up in detail this European legislation and its operation, let us consider further the conditions as they are with us. The application of our personal injury laws has developed a brood of abuses which in a community less easy going than ours would have been strangled almost at birth. Some of these abuses, while common to all phases of that enormous docket of litigation that is piling up ahead of us in all our courts, are peculiarly obnoxious in the field of employers' liability.

Take for instance that insidious practice of fomenting litigation by the employment of "runners." There was a notorious case not long ago in one of our larger cities, where the day after a street car collision, thirty-four suits were brought from one office in favor of passengers. Drug stores and bar rooms are subsidized; it is carefully noised abroad that so and so is good for twenty-five dollars if a safe case is sent him. This sort of thing bears peculiarly hard upon the workman; for, while his case has rarely much merit, the employer or his insurance company will almost always pay something less than the cost of trial to settle the matter. There is almost always enough prospect of a small settlement to tempt the unscrupulous to work up a claim which shall net something for the counsel if little for the client. But putting the claim in the hands of a lawyer means inevitably the sacrifice of the claimant's job.

A case in most of our large cities must wait at least two years before it reaches a jury. The cost of a trial is large and since this must come out of the lawyer's pocket unless a verdict is won, he makes the cases that he wins pay for those that he loses. A handsome verdict is pared down, by counsel's and doctor's commissions and the cost of trial, to such an extent that a plaintiff would generally fare better if he had taken the bedside settlement offered by the claim agent of the insurance company — one who is in a position to apply literally the principle of *bis dat qui cito dat* very much to his own advantage. Many an uninsured employer would pay comparatively liberally if he did not know that his money instead of going to his injured workman, must pass across the itching palm of counsel.

The practice, now so general, of insuring

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in employers' liability insurance companies tends to make the relations of employer and employee no more easy. It becomes the business of the insurance company to make the settlement and to make it cheaply; and naturally enough the first object of the successful adjuster is to get a release before a lawyer can catch the claimant. The bedside settlement is generally the cheapest. Moreover, it is the insurance company that insists upon the dismissal of any man who brings suit; the moral obligation which an employer would naturally recognize to employ a man hurt in his service, is thus at the outset thrown by the board.

These conditions are familiar enough to every lawyer and need only to be alluded to to be recognized.

A quarter of a century has passed since insurance of working men by employers was made compulsory in Germany. Since then a most complicated system of insurance, not by single employers, but by whole trades, has been evolved. The schedules of graded payments are brought to an almost inconceivably minute exactness. The machinery for carrying out the detail occupies an enormous force of clerks in an important government department. Belgium, France, Austria, Norway, Spain, and in short, almost all continental countries have adopted systems based upon the same theory and worked out in much the same way. For us, however, the idea in this form smacks perhaps too much of paternalism, besides being open to insurmountable constitutional objections.

In England, however, where the problems were, like ours, those of an industrial community living under the common law, the continental result was reached, but by a different process.

In 1880 the first employers' liability act was passed. The most important provision of this law was the extension of the class of vice principals, but the relief appears to have been slight and unsatisfactory. What remained of the old doctrine and the unimpaired vigor of the rule as to assumption of risk became more in evidence as the use of safety appliances became more general and the number of accidents traceable to the employers negligence fewer; so that, after an unsuccessful attempt by Mr. Asquith, in 1893, to do away with the "common employment" rule and the implied contract of assumption of risk, the time became ripe for the introduction of Mr. Chamberlain's Workmen's Compensation Act, destined not only to wipe away the doctrines of common employment and *volenti non fit injuria*, but also the law of contributory negligence. The gist of the law was to provide unfailing and universal compensation for workingmen's injuries.

So radical and apparently socialistic a movement was sure to meet with vigorous opposition. Mr. Asquith's bill had failed, not because of the efforts of defenders of the fellow servant doctrine, but on account of a section inserted by the House of Lords, permitting a workman to "contract himself out" of his rights of action against his employer. For thirteen years, the common employment doctrine has been virtually without support in England. The Chamberlain Act, therefore, met opposition not from the orthodoxy of the Inns of Court, but from manufacturers and mine owners, who argued that any system which increased the cost of production must result in the death of industries protected by no natural or artificial monopoly. The step did appear to involve serious loss to employers, since it could not be disputed that the cost of production was to be increased. But the Chamberlain Act passed in 1897, has been in operation for nearly nine years, and British industries appear still to be in a flourishing condition. So far as I am aware, no attempt has been made to restrict the operation of the Compensation Act since its passage. On the other hand, its scope has several times been extended to trades not originally included.

The Compensation Act now applies to nearly all industries and to nearly all injuries

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received in the course of employment, excluding only those "attributable to the serious and wilful misconduct of the workman himself." It is further required that the accident shall have disabled the workman from earning full wages for two weeks. The compensation paid is based upon the disability and, in case of death, by the degree to which the dead man's family were dependent upon him for its support. The maximum lump sum payable is three years' wages, not to aggregate, however, more than £ 300. If for two weeks after the injury the workman continues to be unable to earn full wages, compensation begins and continues as long as necessary, the amount payable not to exceed half pay and the compensation plus wages earned during disability not to exceed full wages. It must be remembered, in looking at these figures, that wages in Europe are considerably lower than in America; under an American Act, therefore, the rates of compensation in dollars and cents would properly be larger. Disputes as to liability for, or amount of, compensation are referred to arbitrators chosen by the parties or the county court judges.

The remedy afforded by the measure is alternative to the Employers' Liability Act and to the common law; in theory it does not supersede either. In fact, however, the returns for 1904, the latest available, show that there were 3,625 cases which came to the attention of the courts under the Compensation Act and 598 under the Employers' Liability Act, the latter probably representing nearly the total number of actions for damages as distinguished from claims for compensation. The cases which came before the courts do not include those settled by agreement, and, to quote the official report "as in previous years, the great majority of claims were settled by agreement and only a small percentage were made the subject of formal arbitration. Even in cases of death, in which large sums would generally be payable and which would therefore be the most likely to be disputed, not more than 25 per cent (of the total deaths due to industrial accident) came in any way before the courts, and this figure includes a good many cases finally settled out of court and others in which the only question was the apportionment of the compensation among defendants." The total number of such deaths was 2,065 in 1904, of which but 524 came before the county courts and of which but 12 were brought under the Employers' Liability Act. These figures show pretty clearly the estimation in which the Compensation Act is held by the British workman.

The reasons which prompt the workmen to ask compensation rather than damages are not far to seek. The British artisan appears to have realized that the amount of which he is sure under the Compensation Act and which goes into his pocket is about as large as that which he has a chance of getting from an English jury after paying expenses; that in an action for damages it begins to come in practically at once; and that if he is fit for work he comes back to his job.

To us in America, the experience of Great Britain must be intensely suggestive. It is true, perhaps, that before the Compensation Act was passed, the amount of employers' liability litigation may not have been as large in Great Britain as it is with us. This goes to show not that a Compensation Act could not be devised to meet our needs, but rather that our needs are greater. The Committee appointed by Governor Bates of Massachusetts in 1903 to consider among others, the problems of employers' liability makes the statement that "It has been estimated that of this large volume of personal injury cases (which engages almost the entire time of many sessions of courts and demands from time to time the appointment of new judges) those particularly relating to employees constitute from one eighth to one seventh." The abuses which have grown up in the practice of accident law are

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undoubtedly much greater here than in Great Britain where tradition has maintained high professional standards.

Governor Bates' Commission of 1903 was headed by Dr. Carroll D. Wright, perhaps the foremost American authority upon labor problems. The other members were manufacturers, economists, and business men. They reported a bill shaped upon the British act. But it was killed in the committee of the legislature to which it was referred, apparently upon the ground that Massachusetts could not afford to give aid and comfort to foreign competition by increasing the cost of production of commodities manufactured within her borders. How far this reasoning was justified, it is difficult to say. It is to be feared that the benefits afforded to employees were not sufficiently insisted upon; and it is difficult to believe that the same considerations which applied in 1897 to the industries of free trade in England, would not apply equally to those of Massachusetts, or to forget that the same arguments were made in regard to the Massachusetts Employers' Liability Act in 1887 that are to-day applied to the Compensation Act. But the real answer to the objection is that conditions are becoming intolerable and that we are fast coming to a time where all industrial communities must recognize the propriety, from a practical as well as an economic standpoint, of putting the burden of industrial waste upon the consumer.

Although it seems improbable that there is reason to fear a radical change in cost of production resulting from the introduction of a Compensation Law, yet in a country of diversified conditions, where industrial characteristics and the cost of production in so far as they have settled themselves at all have done so only after violent oscillations between a state of under production and a state of over production, one hesitates to pray for any legislation that might through mere apprehension add a disturbing factor to so precarious an industrial equilibrium.

It does not appear that it is the function of the Federal government to effect general legislation along the lines of a Compensation Act; and we can hardly hope for a simultaneous adoption of the same remedy by all of the states. The objection of handicapping competing manufacturers, however, cannot apply to an act affecting public service corporations only; because the price obtained by the owners of a public franchise for their commodity is fixed, like the price of the product of any other monopoly, by the limit which the people will pay or by legislative enactment but not to a great degree by competition. Of course the only method of affecting that most important branch of the public service, the interstate carrying trade, is to reach it from Washington by Federal Statute. State laws would then be confined to street railways, illuminating plants, water works, and perhaps public labor generally — industries purely local in character.

It is scarcely to be expected that the problems which we have been discussing can be left to work out their own solution without legislation. They are industrial problems created not by natural and economic conditions alone, but by an artificial regulation of these conditions. It may be that our methods and difficulties differ so far from those of the British that we cannot profit by their example; it may be that there are more effective solutions. But these are the questions to be determined — let us have all the light that discussion can give us.

Boston, Mass., March, 1906.

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THE ABUSE OF PERSONAL INJURY LITIGATION

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MR. LIGHTNER.

A KNOWLEDGE of the fact that personal injury litigation, and especially that arising from the relation of master and servant, has increased rapidly during the past few years, and that there are evils connected therewith, is not confined to the legal profession. At the same time, only the lawyer, who is actively engaged in the trial of this class of cases, is adequately impressed with the evils of the situation. They go beyond what is popularly supposed to be the case. I suggest the following:

1. The debauching of public morals;

2. The lowering of the standard of the legal profession; and,

3. The burdening of the public with the support of an increasing number of persons who have become incapacitated from earning a livelihood.

Words from me cannot express the extent of the above evils. I merely illustrate them as follows:

1. Of course, perjury is daily committed in the courts in all classes of cases, but the frequency with which this is done, and apparently with the approval, if not upon the suggestion, of members of the bar and of others who, at least, should know better, is almost appalling. The Supreme Court of this State, some few years ago, applied the principle that a promise to repair defective or dangerous machinery, on the part of the master, would relieve the servant from the rule of assumption of risk. It follows that if a servant is injured upon machinery, with the dangers of which he was fully informed, he can nevertheless succeed in his action (or, what is substantially the same thing, require that the case be submitted to the jury for decision) if he has any evidence that his superior had promised to have the machine made safe. After this rule became familiar to the profession, one or more of the lawyers, having a large business for plaintiffs in this class of cases, added, in substantially all of the declarations thereafter filed by them, the necessary averments to come within the above rule, viz: that the master had promised to repair; and, as far as I have followed the matter, testimony in support of these averments was produced upon the trial of the cases. Now, it is possible that a master may in some cases have promised a servant to repair a defective machine and neglected to do it, but it is apparent that such instances, in well organized factories, would be extremely rare; and that this should occur, in substantially every case brought by certain attorneys after the importance of the fact became understood, is worthy of note. What must the large number of people, who are interested in each personal injury case, think when they learn that the plaintiff, by successfully setting up what they know to be untrue, has recovered a substantial amount of money?

2. A high standard for our profession is a matter in which not only lawyers, but also the public at large are interested. The practice of unfairly soliciting business is, to say the least, more prevalent in this class of cases than in any other. We all know that. But only the lawyer, who is brought in contact with the matter, can understand the extent to which the abrogation of the rules of common law against champerty and maintenance has affected some members of the profession. There have come to my attention cases wherein attorneys have begun an action in the name

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of an injured man, without any acquaintance with, or authority from, the injured party, and the latter (being ignorant of our legal procedure, as well as of our language) has later been persuaded that the court had appointed the attorney in question to secure justice for the injured person. When the younger members of the profession, who begin with little, if any business, see that apparent success is attained by such methods, can we be surprised that many of them yield to the temptation to follow in these courses?

3. But the public is, perhaps, even more interested in the results to the injured employees. Under our present system of laws, unless the master is in some respect at fault, the servant, who may be totally incapacitated by injuries received while in the performance of his work (perhaps, with no fault of his own), is left as a charge upon public or private charity. The question has frequently arisen in my mind, where have all of the injured employees of our growing factories gone to? What are they now doing? Surely the public at large is interested in seeing that these people are provided with sufficient means to continue an existence, without being a burden upon the public.

A remedy for the evils, which are here merely suggested, is a matter much to be desired. I am satisfied that both employer and employee would welcome a solution of the matter, upon any basis which would be reasonably fair to their respective interests. Although, doubtless, the remedy must be applied by the legislature, yet it is only to the legal profession that we can look for advice upon, and the framing of, provisions which will meet the situation. We should appreciate the fact that something is going to be done, and it rests with the legal profession to see to it that satisfactory legislation is enacted.

On the one hand, laws which increase the measure of liability of the master, or which lessen that liability, will not solve the problem; they will do but little more than aggravate the situation. To illustrate: our legislature not long since prohibited the employment of children under sixteen years of age in factories, etc. The Supreme Court construed this statute so that the master, practically, becomes liable for every injury received by an employee under sixteen years of age. The fact that the boy, or his parents, represented him to be over sixteen years of age at the time of his employment does not alter the situation. The consequence of this legislation is that any reasonably prudent employer will refuse to employ, and will discharge if already employed, any boy or girl who from appearance might possibly not be sixteen years of age. Although the child labor laws are much to be commended, yet the fact that a boy, perhaps over sixteen years of age, cannot find employment is, in many cases, a serious evil, both for the boy himself and, also, for those to whose support he should be learning to contribute.

In many cases, employers have established some system of insurance for their employees, which is intended to provide means of support for those who become injured in service and, undoubtedly, these and similar associations have accomplished much good. At the same time, these provisions apply only to a small minority of workmen and, also, they do not furnish a remedy to the evils I have above suggested. They leave the employee open to pursue his remedies under the law against the master, and I doubt very much whether they lessen litigation as much as is generally supposed.

As far as I am informed, the Workmen's Compensation Act of 1897, adopted by the English Parliament, is the only legislation, in countries governed by the English common law, which attempts to substitute, for the common law theory of the master's liability, a system of compensation to the workmen, irrespective of the cause of his injuries. It seems to me that legislation

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along the lines of this Act should be acceptable, if not welcome, to both employer and employee. I say acceptable to the employer, because it would tend to avoid litigation; would provide some support for an employee injured in the master's work; and would, also, limit within reasonable bounds the amount that the employer would be called upon to pay in any given case. I say acceptable to the employee, because he would, as a rule, receive what was his due at the time that he most needed it, that is, immediately after he had received his injuries; he would be assured against becoming a charge upon charity, in the event of total or partial incapacity; and, also, what to my mind is of chief consideration, he would in most, if not all, cases realize, from the provision made by such a statute, fully as much as he obtains under present principles, even when successful at the close of prolonged litigation. I say this last advisedly, because, although the compensation provided in the English Act is, in general, less than one-half of the amount that the law would allow to the injured employee, if successful under our present rules, yet, as far as my experience goes, it is a very unusual case in which a successful plaintiff in personal injury litigation realizes as much as one-half of the amount of his judgment.

In considering the provisions of the English Act (which I assume are understood by anyone who may be interested to read what I have written), the following have occurred to me as possible criticisms, viz:

First. Under such a statute which secures to an employee (except in the exceedingly unusual cases where he can be charged with reckless personal negligence) a stipend from his employer without his being required to work for it, will the employee be less careful in protecting himself from injuries and will he unreasonably aggravate injuries that he may receive?

Although the courts have frequently answered these propositions in the negative, and it would seem to me that no man would injure himself or aggravate his injuries upon the assurance that he would receive one-half of his wages and not be required to work, yet I find that employers of labor do not agree to this, and in some cases have expressed to me the opinion that such evils would result to a larger extent than is generally supposed.

However, even if this latter opinion were true, it seems to me that any such evils are only the same, and are no greater in degree, than are met by insurance companies. At the present day, as is well known, all kinds of policies are issued, providing for indemnity against accident. The master must be in a better position to protect himself against unwarranted claims than is an insurance company, between which and the injured there are no personal relations.

Second. How far would such an act tend to lessen litigation in master and servant cases?

I was surprised, upon a cursory examination of the English reports, and especially the reports of the Queen's Bench Division, to find that apparently the higher courts in England were called upon to pass upon more master and servant cases since the Act took effect than prior thereto. This would not seem to promise a lessening of litigation, which is one of the things to be desired by a change in our present laws. At the same time, a further consideration of the cases indicates that there has been a material lessening of the class of litigation with which the evils above referred to are attended, and that, perhaps, such litigation has been largely eliminated. The cases since the Act took effect are, almost without exception, actions which call for a construction of different provisions of the statute; in other words, they call for decisions upon questions of law. When the Workmen's Compensation Act of 1897 has been fully construed by the courts, I believe that even this class of litigation will largely disappear. The act is, in this respect,

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similar to the statute of frauds. I think it will be agreed that the statute of frauds is desirable and has lessened litigation, but when one looks through the reports and sees the quantity of cases construing the statute of frauds, he might be inclined to question this statement.

In conclusion, I would say that, in my judgment, matters will not stay as they now are. Legislation will be adopted, modifying the present situation. The most efficient remedy for the present evils is, in my judgment, something along the lines of the English Act above referred to.

DETROIT, MICHIGAN, March, 1906.

MR. NEWCOMB.

IN the development of a question so infiltrated with human elements, it is indeed difficult to separate the legal and professional aspects from the social and economic aspects. When abuses and evils exist, inquiry must be directed to their cause, and the cause removed in order to effect a cure, and the treatment that strikes at the root is in the end more wholesome and effective.

For the most part the legal and professional abuses of personal injury litigation find their origin imbedded in the social and industrial relations of man to man. If the corporation and the individual could always find a common ground, if the weight and value of personal injuries could always be clearly determined and justly compromised, there would be no wrongs to remedy. But with the disagreements of men and resultant abuse of power, come the legal and professional problems, out of which grow evil conduct and wrongdoing, that justly merit the condemnation of every lawyer and every layman, who has at heart a sacred regard for the nobility of the law and the sincerity of its professions.

There is, however, too much tendency to view this question from a single angle, in fact, too much aggressive attack and eager condemnation from one side of the trial table. When corporations train men to take advantage of ignorant cripples and helpless widows; when their claim agents are sent into subsidized hospitals to secure, by the smooth trickery and polite artifice of the gold brick gentry, cheap bedside settlements, or signed statements of the injured claimant, even while the odor of the anæsthetic is still upon him; when these signed statements are twisted and distorted by the skillful wording of the artistic adjuster, so that the ignorant and helpless sufferer who signs his name sweeps his rights away almost as effectually as though it were his release; when he is bluffed and bullied, and threatened with the loss of his job, and every argument made and deceit practiced to secure the settlement of his claim for a mere fraction of its just value; when his witnesses are sought out and bartered with in order to render dangerous testimony harmless; when his doctors are approached with offers, and promises of liberal payment for medical services rendered, with the obvious intent to minimize the injuries; when every scheme is resorted to, to starve him into a settlement; when witnesses are threatened with discharge if, on the one hand, they refuse a statement of facts to the company, and upon the other hand, if they give one to the injured man; when testimony is altered or suppressed entirely, and witnesses mysteriously disappear; when all these wrongdoings — and others even more to be condemned — can happen and do happen, then it comes with poor grace to claim that all fairness and virtue and honesty dwell in the glass palace of the corporation, and all the trickery and deceit in the shack of the individual.

A fair analysis of the present abuses of tort litigation strips the problem of many of the false notions popularly regarded as causes, when they are in fact the surface effects of causes that lie beneath. Many of

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the evils find their origin long before the threshold of the court-house is reached. Ambulance runners, damage lawyers, prepared testimony, coached witnesses, fat fee experts, padded and inflated injuries, jury tampering, and similar abuses are mere results, not causes, and the removal of these results, if at all possible, would not operate to effect a cure.

The parent cause of existing evils is due primarily to selfishness; that brand of selfishness that naturally follows from the elimination of personal relationship. Half a century ago the abuses so prevalent to-day were probably never heard of. They have developed in proportion to the complexity of commercial and industrial life. When the shop was small and the workmen few the kindly relation of the employer to his men was strengthened by close personal contact. If the men were injured, financial aid and sympathy were extended, regardless of the legal questions involved. There was a moral duty always, and that moral duty was always felt and recognized, even in the absence of legal duty. In such a soil, fertile with the warmth and glow of wholesome fellowship, damage suits can never thrive.

But as the shop grew and the gulf between the employer and the employee formed and widened, tort litigation increased. With the growth of corporate power, came the cold-blooded rule of gain, born of corporate greed. With the adoption of modern mechanical devices came increased hazard and danger to life and limb; likewise increased expense for safeguards. As the individual was supplanted and absorbed by the machine, his identity became lost, and he was and now is regarded as a part of the machine. He no longer has a name, he goes by a number and carries a brass check. If he becomes crippled he is cast out upon the human scrap pile, and another takes his place. If his life is crushed out, "Gather him up, dig a hole, and shove him under."

To-day serious and fatal accidents are of such frequent occurrence that they excite little concern except to those who must bear the loss. It is no longer the humane element that determines the purchase and use of safeguards, rather is it the commercial element. Every railroad center and every mining and manufacturing community can cite many instances where the cost of safeguards has been weighed against the cost of life and limb, and crowded hospitals and funerals and litigation have followed, as a natural result.

It is to the cause of this changed condition — this revolution of the moral code — that we must look for the cause of the present day abuses of personal injury litigation.

Conveniently, we may consider all injury cases under two classifications: injuries to employees and injuries to the public. Relative to the first class, we may safely estimate that about ninety per cent of the corporations doing business to-day in this country are insured in the various Employers' Liability Companies. This does not include railroads, traction lines, and large trusts that maintain claim departments of their own. These liability companies are designed to indemnify the employer from any loss or damage he may sustain by reason of injuries to his employees. As a matter of fact, they assume entire charge of accidents arising in the plants of their assured. They secure their business by the sharpest manœuvering and keenest competition. Rates are cut again and again, until it would seem that one serious accident would easily wipe out a year's premium. Now and then a wild-cat company enters the field, and with an utter disregard for live-and-let-live rates demoralizes what little conservatism has been developed in the business. In order that a risk may be made to pay, the injured employees must bear the burden. Accidents must be settled cheap or the policy cancelled. Generally, the employer is deaf to the appeal of his men. The corporation has paid for

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insurance, and it expects protection. To a varying degree it is unconcerned with the number or the seriousness of accidents. The cost of insurance is measured against the cost of safeguards. If it costs less to buy insurance than it does to provide safety appliances and a safe place to work, then economy is the best policy. The corporation, therefore, having proofed itself against loss, has but a passing interest in the methods employed or the amounts paid to dispose of accidents arising in its business. Having sold its legal obligations to the lowest bidder, it is disposed to regard its moral obligations as having been also transferred, and so, if the employer interests himself at all, it is to join with the insurance company to settle with his employees upon the lowest possible basis. The employer knows that cheap settlements mean cheap insurance, and insurance is an item of expense, that with the majority of corporations, is ever too burdensome, and never too cheap.

When, therefore, the personal element and friendly relationship that had formerly existed between master and servant has been eliminated, and when the business of liability companies is secured by the cut-throat methods of almost ruinous competition, the injured employee may have no hope for fair play or a square deal. The claim agent of an insurance company cannot approach an injured man on settlement, with any proper conception of reasonable justice. This very situation operates to shape and mould the policy of every claim department. It may therefore be regarded as one of the causes that naturally leads to evils in tort litigation. The difficulty may be traced by natural and easy stages back to the parent cause — corporate greed — and with it abuse of power, evidenced by the advantage taken of the ignorant and the helpless. There is only one rule that to-day fits all cases and all classes, and that is to hammer the claim down to the lowest possible figure. Is it any wonder, therefore, that dissatisfaction and bitterness is occasioned, and litigation often results, and with it large verdicts and liberal fees. "The corporations are primarily responsible for it. Because, with a few honorable exceptions, they treat every claim for damages, no matter how just, as an iniquitous attempt at robbery, and if they cannot bully the claimant into settling for a small sum, they fight it out with every means in their power. In short, they insist upon swindling this class of creditors out of their just dues."[1]

Personal injury litigation arising from injuries to the public, or to those other than employees, allows, to some extent, the elimination of insurance abuses. Nevertheless, the record of settlements made in liability cases by railroads and trusts and other large corporations that maintain claim departments of their own, demonstrates, with few praiseworthy exceptions, that the policy of these corporations is universally one of cheap settlement, or no settlement, regardless of the merit of the claim.

On the one side may be found organization that comes with wealth, and intimidation that comes with power; on the other side, helplessness, ignorance, and fear. Then comes the product of organization, the modern claim adjuster, whose sole purpose is to secure a settlement for a small sum. He has been trained in all the subtlety and chicanery of the trade. To his mind the case is invariably one of no liability, but if liability undeniably exists, he cunningly and craftily juggles the injury. He is smooth of tongue and polite of manner when it best serves his purpose to be so. He cares nothing for values. He is after results at the lowest possible cost. Upon these results his remuneration, even his job, depends. That a man has been crippled for life, that a widow has been left penniless with small children, and the legal claim against the company clear, is irrelevant and immaterial. He has been

[1] Editorial, *Saturday Evening Post*, Oct. 14, 1905.

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taught to talk and think in two figures, occasionally three; against this tool of corporate greed is pitted some poor unfortunate, and, too often, ignorant claimant, who knows nothing of injury or of law. It is like killing chicks with a cannon. This is the really pitiful spectacle that forms the background for many of the abuses that to-day may be vividly depicted in injury cases. Truly, no injured man is fit to pass judgment upon the merit and value of his own claim, and no more is he fit to cope with the "smooth gentleman of guile" than with the engine that struck him. It is an unfair, unequal contest, and in the majority of cases can only result one way.

If corporations would pay in settlement of damage claims amounts that would fairly approximate their just value, the tendency would be to settle rather than to litigate, and those corporations that are known to meet the issue squarely, with a purpose to honorably weigh the facts and determine the rights of the parties, and to consider fairly the question of injury, seldom have any difficulty in securing a just result. But when every lawyer knows of settlements that ought to fix the brand of shame upon the corporations in whose name they were made; when every doctor has personal knowledge of cases in his own practice where injured men — ofttimes permanently crippled — have ignorantly signed away their rights for a mere pittance; when the attachées of every hospital in the land have seen and know of the trickery and deceit that is perpetrated in effecting cheap bedside settlements, can it be said by any rule of ethics that counteracting influences shall be open to censure, when they seek to prevent these methods from being carried on unmolested. It is indeed pitiful that any interference should ever be interposed to prevent a corporation from securing ironclad releases upon its own terms, when those terms are grossly unfair and undeniably unjust, and can only merit the condemnation of all right thinking men!

This, then, is the situation that properly calls for remedial action. It cannot be denied that any plan that seeks to work out exact justice between the corporation and the individual will be welcomed by the individual.

It would mean a proportionate increase in cost for every injury, and that would mean more reasonable care to prevent injury. Many of the improvements and methods to-day employed to reduce the hazard of railroading, and to minimize the dangers of mines, factories, and furnaces, are due, not to the love that corporations have for human life and limb, but because of heavy judgments and expensive litigations.

Large verdicts for personal injuries are not unrighteous and iniquitous, as corporation attorneys would have us believe. On the contrary, they are the most effective stimulants to the production of reasonable care and the adoption of better safeguards. Heavy verdicts mean improved rolling stock, safer roadbeds, and more careful inspection. They are the forerunners of blocked frogs, covered cogwheels, and guarded machinery. They produce new rules and regulations, better material for scaffolding, and a little more care in their construction. Touch the "rocks" of the corporation and instantly abundant streams of care and prudence burst forth. The city of Cleveland recently sustained an unusually heavy judgment for injuries arising from a defective sidewalk; within a few weeks over two thousand defects had been reported into the street department by the police force, and active measures taken for their repair. Had the city won, it is obvious that no such public missionary work would have resulted. So, a substantial verdict for the plaintiff is a lesson learned, that operates, not alone to benefit the present community, but generations yet to come.

To a considerable extent the present abuses in tort litigation can be removed by the enactment of a just and fair Workmen's Compensation Act, but corporations are not

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ready to lend their support to so radical and expensive a measure, until other legislation has intervened. When the States, by proper enactment, abolish the barbarous defense of "assumed risk," a doctrine that bars recovery for the master's negligence, even though the servant is free from fault; when the "fellow servant" defense is either eliminated or restricted within sane and logical bounds, then the corporations will discover that the cost of injuries is an item that must be reckoned with, and then, and not until then will they favor Workmen's Compensation.

CLEVELAND, O., March, 1906.

MR. WEST.

IN Chicago, two years usually elapse before a personal injury case can be brought to trial. On the theory that "delay is always good for the defense," defendants' counsel discourage either the settlement or speedy trial of personal injury claims. The plaintiff needs money, especially if incapacitated for work; he or his witnesses may die; they may remove to other jurisdictions; they will forget and lose interest in the case. Plaintiff's attorney is usually not as well equipped as is the defending counsel, for the prosecution of appeals through the Appellate and Supreme Courts, nor is his client as able to bear the expense, which is often most burdensome. It often happens that after the statute of limitations has run, the plaintiff discovers he has sued the wrong defendant. The declaration may state a cause of action, but the proofs develop a different but equally good cause of action, on which there can be no recovery because it is too late to amend. If, through inexperience, an immaterial fact, not susceptible of proof has been alleged in plaintiff's declaration with particularity, thereby becoming material, it must be proved as alleged or there will be a variance.

The defendant fears the passion and prejudice of juries. Although delay is a defence often utilized in the State Courts, the defendant prefers an earlier trial in the Federal Courts, where written instructions are not reeled off in a monotone, but where the judges orally sum up cases, review the facts, and instruct as to the law. He also believes that in the Federal Courts the judges, on account of their life tenure of office, are less susceptible to outside influences, and the jurors are of a higher grade of intelligence. But what will remedy the abuses in the State Courts, of which both plaintiff and defendant complain?

In the trial of a personal injury case it seems that all disputed questions are treated as questions of fact to be determined by the jury. All information or instruction as to what previously has been decided in similar cases, is rigidly excluded from the jury, which is left without guidance as to the facts, and with little understanding as to the law, each case being treated as if, in all respects, it were the first of its kind. The jury decides and the court enters judgment that the certain course of conduct of the defendant, or plan of construction, or method of doing work, under which a person has sustained an injury, does or does not, as the case may be, entitle the injured party to damages. This decision often furnishes no rule for the guidance of other defendants in similar cases. If the employer, desiring to adopt means of self protection and to comply with the law, makes changes to conform to the apparent requirements of that decision, entailing considerable expense and inconvenience and acting possibly against his own judgment, he is no better off than before. After the change is made another person suffers an injury. The matter is submitted to another jury. This jury is not permitted to be informed of the previous jury's decision. It may decide differently from the previous jury on the same or similar facts. There is no reason why most of the leading principles of negligence should not by this time be as clearly defined and as easily ascertainable

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as are those of the law merchant. If such were the case a vast amount of personal injury litigation would never reach the courts because parties could readily determine for themselves that their best interests would be consulted by an amicable settlement out of court. Therefore, if the laws relating to negligence were codified, it is believed that parties would be enabled to understand more thoroughly their reciprocal rights and duties. Employers would take better precautionary measures for the protection of employees. Moreover, young and careless attorneys would be enabled to advise more accurately.

If the statute of limitations were modified so that in certain cases a new action might be brought, even after the expiration of two years from the date of the injury, there might be less frequent miscarriages of justice.

If the state judges were appointed or elected for longer terms; if causes were not passed or continued, except for good reasons; if masters were required to furnish information enabling their servants to know whom to sue for injuries, received in the line of their employment; if the criminal laws for the punishment of perjury were more practical so that more convictions could be secured; if the instructions, when in writing, were limited to a reasonable number; better, still, if judges could instruct orally; if expert medical testimony were provided by the court rather than by the parties; if the physical surroundings in the court room were more comfortable and sanitary; if there were calendars of personal injury cases only, so that jurors would become educated in personal injury litigation (such calendars are now made of case actions against the City of Chicago); if it were possible to regulate by statute the recovery, based on the extent of the injury and the amount of the injured person's earnings for a stated period prior to the injury, thus eliminating from these suits a certain speculative character; if one stubborn or corrupt juror could not cause a disagreement or an unjust verdict; if judges would refuse to excuse from jury service high grade business and professional men, — it is believed more just verdicts would result.

Under present conditions after the presentation of all the evidence and before the retirement of the jury, or when a jury is waived before the judge's finding has been noted down, the plaintiff may take a nonsuit. This often works a great injustice to the defendant.

If trial judges always had courage enough to direct verdicts in proper cases; if trial and Appellate Courts had more extensive powers for reviewing verdicts on questions of fact, — the inducement to parties to try for a capital prize in the jury lottery would disappear. This would diminish the number of suits. It would give more speedy trials. It would remove from the employer some of the temptation to litigate an undoubtedly just claim.

Finally, if the legal and moral requirements for admission to the bar were more rigid, suits without merit would be fewer, findings would be more equitable and clients would receive fairer treatment. But it is easy to criticise. It is difficult to remedy.

CHICAGO, ILL., March, 1906.

MR. WERNER.

I HAVE accepted your invitation to contribute to a symposium on the above subject with the understanding that the methods of eradicating the abuses in this field of litigation from a legal and professional, rather than from an economic and social standpoint, were to be considered. I therefore will not attempt to discuss, in what I may have here to say, such remedial legislation as has been attempted by way of "Fellow Servant," "Employer's Liability," or "Workmen's Compensation" Acts.

Before we attempt to suggest remedies for abuses, we ought in all fairness to be sure

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that abuses exist, and to be able to state clearly what they are. That compensation or pecuniary assistance should be desired by and provided for workmen or those dependent upon them, where disability or death results from personal injury sustained whilst engaged in gaining a livelihood, is natural and proper. That it should be provided for in such a way that the recipients may feel that they are legally entitled to it, and that it be not given in a way calculated to undermine the honesty or self-respect of the injured, is certainly of primary importance. As the policy of our laws should be to build up self-respecting, honest, and prudent workmen, so the chief abuse must be found in the resort to methods which tend to rob the injured, and their sympathizing witnesses, generally fellow-workmen, of these virtues. Now what is it in our present methods which has this tendency?

A professional experience of over a quarter of a century, spent chiefly in the defense of personal injury cases, warrants me in saying that there is scarce a case of injury sustained by a workman out of which a skillful and unscrupulous lawyer cannot frame a theory and distort testimony, which will take his case to a jury; and second, that, on the other hand, in the very large majority of such cases, a perfectly candid, uncolored statement of all the pertinent facts would demonstrate to any fair-minded and competent lawyer absolute non-liability on the part of the employer. Of course I refer to jurisdictions where the Remedial Acts above mentioned are not in force.

I was asked recently for a report as to the results obtained in cases of this nature which I had tried for a certain Employers' Liability Insurance Company. I found, omitting the cases which I had settled as a matter of sound business policy, that out of ninety-two cases actually tried in the courts for this one company, eighty-five had been decided in favor of the employer and seven in favor of the injured workman (or his dependents); and that of these, twenty-five had been taken to appellate courts before final adjudication was had, in which nineteen met reversals and six affirmances. These cases were of the most miscellaneous kind, injuries in mines, in factories, in the construction and demolition of buildings, in connection with passenger elevators, electrical appliances, etc., and in jurisdictions where the abuses referred to are probably not less rife than in other jurisdictions. Such an experience warrants me in concluding that in the vast majority at least of the *suits* instituted to recover damages for personal injuries, there is no legal liability, and that the time of litigants, witnesses, courts, and juries is wasted, to say nothing of the costs and expense incident to such litigation, and of hope deferred that sickeneth the heart. I do not lose sight, in speaking of the non-liability for damages in this class of law cases, of the many meritorious claims for damages on account of injuries, which are settled without litigation. I am speaking, as I have been asked to speak, of personal injury *litigation*.

Is there then any method by which the unmeritorious cases can be weeded out without the loss of time and expense of litigation, with the attendant corruption of claimants, witnesses, and others interested in the successful maintenance of such law suits? The vast majority of these cases are prosecuted by plaintiffs suing as paupers, by lawyers employed on a contingent fee basis. A worse combination to the end of securing justice can hardly be imagined. The claimant has nothing to lose and everything to gain. His self-respect is gone when he is forced to sign an affidavit representing himself as a friendless pauper. The lawyer's very livelihood is dependent on his making a case out of a class of cases notoriously barren of fruitful results. What should a court do upon an application in such a case for leave to sue as a poor person? I answer: If, upon examination, a *prima facie* case be disclosed, the application

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should be granted, upon condition, however, that the prosecution of the case in favor of this ward of the court should be confided to a reputable and experienced lawyer, to be appointed by the Court, who may thereafter dismiss, settle, or contest, as his judgment may dictate as best for plaintiff, his fee to be fixed by the Court, and taxed as part of the costs in the case, to be paid by the defendant in the event that final judgment be had for the plaintiff, otherwise to be paid by the county just as are the other costs incurred by the plaintiff. As a rule the real interests of the claimant will be far better protected in this way than as now in the hands too often of the ignorant, inexperienced, and grossly selfish practitioner, who in the vast majority of cases has been an entire stranger to the claimant until he proposed the unholy partnership.

Suggestions as to a restriction or modification of the right of trial by jury in these cases have been made. Space forbids my entering upon any enlargement on this point. The impulse in the ordinary juror to relieve the suffering and needy at the expense of a presumably rich corporation protected by a supposedly richer insurance company, is almost too great for human nature, as exhibited in the jury box, to resist. In the large majority if not in all cases the judge is much more capable in every respect of solving disputed questions of fact, or of mixed law and fact, than the jurors ordinarily obtainable.

So, too, a restriction or modification of the right of appeal has been suggested. A diligent reader of the West National Reporter System, having this class of cases especially in view, is amazed at the constantly increasing number of these cases decided by our courts of last resort throughout the country, and at the comparatively few which decide any question either new or important in this branch of litigation. The fact is that most of these cases are defended by parties whose early attempts at fair adjustment have been repelled, and who have a very natural distrust of the results obtained by jury trial by reason of the abuses which they know exist, and which we are here discussing. Supplied with ample means for defense, they determine to defend to the bitter end, often from a high sense of what is due to themselves and to society in resisting injustice. The result is that almost every adverse judgment is appealed from. In the course of the trial, with an appeal in view, all manner of questions are raised, having but remote connection with the real merits of the case and ultimate rights of the parties; instructions, having any purpose but to instruct, are drawn and requested; and often the summary brief on motion for new trial presents but little resemblance to the elaborate one submitted in the higher courts. Space forbids more on this point.

With the corrections of the abuses to be obtained by legislation, permit me to add one word. Attempts at the definition of rights, or the abolition of common-law defenses, by statute, are often unfair on principle, and lead to new floods of litigation. The statutes have to be construed and then amended and then reconstrued and again amended, and so on, as long as the intellect of man and human language are imperfect. Compulsory insurance grants relief certain and expeditious, and places the burden where it rightly belongs and ultimately must rest — on society at large. We, in this country, seem hardly prepared to follow our European neighbors on this lead. I have heretofore, however, suggested a plan of accident insurance which, if generally adopted, I believe would give the employer all the protection he now gets from his Employers' Liability Insurance policy, and provide protection for the employee, and do more towards the removal of the abuses of personal injury litigation than all the other methods heretofore suggested, and this consists simply in the extension of the principles underlying the ordinary Railway Vol-

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untary Relief Associations to all employers of labor, and the substitution of a responsible insurance company for the Relief Department of the employer's organization. The result of substituting a co-insurance accident policy for an Employers' Liability policy is that both parties, the employee as well as the employer, receives protection, and their interests are harmonious instead of as now, under the ordinary Employers' Liability policy, antagonistic. As this proposal will be entirely new to many of your readers, and as insurance companies will be bound to provide such policies as soon as there is sufficient demand therefor, I shall use the remainder of my alloted space to explain more fully the nature and effect of this proposed insurance policy.

This is an ordinary accident insurance policy of the present up-to-date form, issued by a regular insurance company, which embodies a contract between employer and employee, whereby the employee, in consideration of a partial payment by his employer of the premium for such policy, agrees, in the event that he elect to receive benefits provided for in the policy on account of accidental injury, to release his employer from any and all liability on account thereof if occasioned by the negligence of his employer.

The position of the insurance company issuing such policy would be precisely that occupied by the benefit associations in the similar contracts, which have come before the courts of this country on numerous occasions, in cases between railroad corporations and employees, wherein such contracts have been uniformly upheld. The Baltimore & Ohio Employees' Relief Association, the Burlington Voluntary Relief Department, the Philadelphia & Reading Railroad Relief Association, the Pennsylvania Railroad Volunteer Relief Department, and the Plant System Relief and Hospital Department, are instances of such benefit associations.

The courts have uniformly pronounced these associations of the highest order of benefit societies, and have pointed out that the contract simply offers the employee the opportunity to make his choice between the *sure benefits* of the association and the *chances of litigation;* and they have held, not only that such contracts were not against public policy, but on the contrary in harmony with the soundest public policy, inasmuch as the benefits payable to the injured employee are available for his relief without reference to the question of negligence of the master, thus including benefits in cases of accident, pure and simple, of injury by negligence of fellow-servants, and even by the employee's own contributory negligence, thus covering a wide field in which there is no legal liability on the part of the employer, extending even to all cases of accidental injury to the employee during the term of his employment, whether or not happening whilst actually engaged in work for the employer, or whilst going to or from work, at home, or wheresoever. The cost of this policy to the employer would in all probability not greatly exceed the premium he now pays for inadequate liability insurance.

It has even been decided that it is not within the power of a legislature to take away the right of parties to enter into such a contract, and I beg to quote the following from a decision by Judge Ricks, of the U.S. District Court of Ohio, who says, in Shaver *v.* Penn. Co., 71 Fed. Rep. 934:

"The sole question is whether, under the admitted facts already stated, this contract is valid. There are decisions of the Supreme Courts of the States of Iowa, Maryland, Pennsylvania, and of State Courts in Ohio, and of Circuit Courts of the United States in Ohio, holding such contracts legal and binding. Under this plan employees of railroads are afforded protection by species of insurance. This sort of protection is not available to them in ordinary insurance companies, except at such high cost as to make it substantially unobtainable. Members sick or injured are entitled to benefits regardless of what causes their temporary disabilities. They will thus receive bene-

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fits in cases where no claim against the railroad company should be made. They could receive benefits, also, in cases where the injury was the result of their own contributory negligence, or of that of fellow-servants in the same department of service, in both of which cases, as a rule, no right of action would arise against their employer. Now if the employees desire to enjoy the benefits of such contracts they should have the right to make them. They are capable of deciding themselves whether they want to contract for such protection. It is not within the powers of a legislature to assume that this class of men need paternal legislation, and that, therefore, they will protect them by depriving them of the power to contract as other men may."

Though the question discussed has usually arisen in actions between railroad companies and their employees, of course the same rule would obtain as between any private employer of labor and one of his employees. Indeed, it was involved in such a case wherein the Lake Superior Iron Co. attempted the organization of a relief department similar to that of railway companies (63 Mich. 690). It is readily apparent that for the ordinary employer of labor the organization of such a department of his business is impracticable, and the history of some of the relief departments formed by railway companies has shown the danger of attempting to merge the functions of insurance company with those of a railroad.

ST. LOUIS, MO., March, 1906.

MR. TAYLOR.

AS long as machinery is used, personal injuries will occur. The increase in the number of accidents has been commensurate with the more general use of machinery. Laborers are not more careless now than formerly, but the likelihood of injury has become greater. We may, therefore, look upon the problem of liability for personal injuries as one which cannot be disposed of absolutely, but which must be handled in the manner which, in the long run, will reduce the number of injuries and accord redress in meritorious cases only.

That great injustice now exists in the legal administration of this class of cases is beyond dispute. The hope of securing large contingent fees has lured into this field of practice not only attorneys with limited business, but also many lawyers of great ability and skill. Many cases which are wholly without merit, are started with the expectation that the defendant will settle for at least the amount which it would cost him to try the case, — a species of blackmail. The inclination of judges to shift responsibility and to place the solution of cases in the hands of juries, whose prejudices are well understood, has done much to encourage this class of litigation.

In defense, counsel have resorted to most subtle refinements of the law in respect of assumption of the risk, fellow-servants, safe places, rules, and kindred points, and in individual instances such differentiations have been successful; but such legal distinctions have been met by variation of the facts so as to take the cases out of the rule and thus no permanent security has been obtained.

The result has been that employers have been compelled to resort to insurance as the only method by which they can safely conduct their business. Thus, an additional fixed expense has been placed upon them. From the standpoint of the courts this has made no difference, however, for the insurance companies have simply taken the place of the employers. The number of cases has not been decreased; indeed, this course has had rather the opposite effect, because juries are inclined to be especially liberal as against insurance companies.

Such is practically the present condition of this class of litigation in this country. The courts are over-burdened. The trial

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of meritorious cases of this nature is greatly delayed; and the disposition of general legal matters is seriously hampered.

Under the present conditions existing in the courts I see but little prospect of relief. The proverbial generosity of juries with the money and property of other people will constantly encourage litigants to fit the facts to the decisions. Improvement of the situation, through the medium of the courts themselves, is scarcely to be expected. It seems to me, therefore, that the only refuge lies in the enactment of statutes which will tend to decrease the number of injuries and to prevent the bringing of purely speculative cases.

The following suggestions occur to me:

1. Laws prohibiting or restricting the employment of children should be adopted and enforced. In this State the minimum age of children who may be employed in factories is fixed at fourteen years. I presume the statutes of other States are similar. The age limit might be raised with propriety. We may reasonably assume that persons of greater age would display greater discretion and judgment in the handling of machinery and that thus the number of injuries would be substantially decreased. I believe that such a law, strictly enforced, would also have a very beneficial effect from the standpoints of education and the general welfare.

2. The enforcement of statutes requiring careful provision for the safety of employees, and requiring employees to take proper precautions for the safety of themselves and their co-employees would also have a beneficial tendency. A great many personal injuries are caused through what amounts to criminal carelessness and reckless disregard for the safety of their fellow-servants. Strict accountability for such carelessness would cause employees to be more thoughtful.

3. Strict laws against champerty and maintenance, if properly enforced, would be very beneficial. It is urged that such laws would prevent poor persons, who have been injured, from obtaining redress; in other words, that unless the person injured is able to make a contract for payment for services and disbursements on a contingent basis, he will be unable to have his day in court. I do not believe that this position is true in fact. It not infrequently occurs that meritorious cases of this class are presented in Court by our best and busiest lawyers, who take them either out of charitable considerations or from the fact that the result is reasonably certain and reasonable compensation is assured. In most instances, friends of the injured person will see that his legal rights are protected. Deserving cases will always receive proper attention without the necessity of sharing contracts whereby the attorney becomes personally interested in the result of the litigation.

4. Statutes should be passed requiring early notice of claims of this kind. Such statutes are in existence as to claims against municipalities, and by shortening the time of the statute of limitations, a similar result has been obtained as to other employers. Still, by reason of frequent changes of employees and inability to ascertain the true condition of machinery at the time of the accident, failure to give speedy notice of injuries frequently leads to injustice. If a claim is meritorious, no harm will be done by making a requirement which will permit early investigation.

5. I believe that the present jury system is responsible for much of the present injustice in this class of cases. Whatever we may think of the merits or demerits of this system, it is doubtless here to stay, and all that can possibly be done is to modify it in some respects. Practically speaking, leaving a case to a jury for decision upon the facts simply leaves the question as to the amount of the verdict. The fact of injury seems to render the testimony of the plaintiff and his witnesses conclusively true. Again, practically speaking, our juries are not composed of men who represent the average intelligence of the community. Men

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of affairs avoid jury duty. Educational requirements have thus far been merely a farce in actual practice.

In the matter of taking private property for public use, the constitutional provisions of the several states usually require that the jurors shall be freeholders. Thus, a higher grade of jurors is usually obtained. But in negligence cases, which by reason of their number have become much more important, no such requirement exists. Defendants are at the mercy of the caprice, prejudice, and vicarious generosity of comparatively low-grade men. I believe that a property qualification would materially improve the character of our juries, and by getting the judgment of men who own property themselves and appreciate its value, results more akin to justice would be obtained.

6. The European legislation on this subject strikes me very favorably. It is perhaps doubtful whether such enactments could be obtained in this country. I have not given the question of their constitutionality any consideration. But the present tendency of legislation on this subject requires that some steps be taken to limit the extent of liability.

As the result of the recent Federal decision affirming the validity of the Minnesota statute relative to fellow-servants, we may anticipate that similar enactments will be made in many other of the states.

The decisions that employees do not assume the risk of violation by the master of state laws for the safety of employees, even though the danger is obvious, have a similar tendency, viz: to render the master an insurer of the safety of his servant.

At the same time, other statutes have been enacted under which there is less opportunity for speculation on the question of damages. In many of the states there exists a fixed limit of liability in case of death. Under the laws of Michigan for many years there has been no liability in case of instantaneous death as the result of injury, except for such damages as shall be deemed fair and just, with reference to the pecuniary injury resulting from such death, to those persons who may be entitled to such damages when recovered. As in many instances no one is so dependent on the deceased as to suffer pecuniary injury by his death, no recovery can be had. Until recently, however, if the injured person lived any appreciable length of time, the cause of action survived, and the administrator could recover all of the damages which accrued to the injured party himself. By the statute of 1905 this right of action has been taken from the administrator, whether death as the result of the injury is instantaneous or not. Thus, in all cases where death results from the injury, the elements of pain and suffering are eliminated.

All such laws have a tendency to reduce the opportunity for speculation on the question of damages.

Now if the tendency is to enact laws which practically render the employer an insurer, why should not the measure of liability upon the insurance be fixed also? Why determine the fact of liability and leave the measure of damages open?

In all kinds of insurance a limit of liability is fixed. If this were not so insurance companies could not exist. Why, then, should manufacturing companies be compelled to assume the liability of insurers without limitation as to damages? The logic of such enactments is apparent.

It may be argued that the real extent of injury necessarily varies, that the loss of a limb, for instance, would be more injurious to one than to another. But it may be assumed that a fair amount would be fixed by the law and individual cases would have to give way to the general average. Statutes fixing liability in case of death result in the same inequality, but they have been sustained.

Perhaps a measure of damages might be agreed upon by actual contract, but this would be impracticable in the case of large

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employers of labor. It would be preferable to have a law fixing the measure of damages, with reference to which the parties would be deemed to contract.

I fully appreciate that legislation of the kind above suggested can be obtained only with the greatest difficulty. I realize that bills of this kind would meet the determined opposition of labor organizations. Possibly such legislation is impossible at present. But I have an abiding faith that the time will come when employees will realize that their interests are identical with those of their employers. It is not to the interest of injured employees, who have meritorious cases, that dishonest cases should prevail or that excessive damages should be allowed so as to cripple employers and to discourage investment in manufacturing enterprises.

DETROIT, MICH., March, 1906.

MR. BRYANT.

IS there too much litigation in the Courts of Maryland? If yea, what is the cause, and what the remedy? If there is not, then with the cause and remedy we need not bother ourselves, in this State. Of course in the very nature of things Baltimore City, with its six hundred thousand inhabitants, would be looked to in a great measure for an answer to the several inquiries.

In this city we have three courts with concurrent jurisdiction, where our jury trials are held. From data gathered we find that on the second Monday in January, 1906, the Superior Court had on the trial calendar 977 cases, 508 of which were damage cases and 469 commercial cases. The Court of Common Pleas had 436 cases, 355 of which were damage cases and 81 commercial cases. The Baltimore City Court had 1157 cases, 930 of which were damage cases and 227 were commercial cases.

Thus we see in the Superior Court the litigation was about evenly divided. In the Court of Common Pleas there are about four damage cases for one commercial case, but the docket in that Court is small in comparison with the other two. In the Baltimore City Court there are a little more than four damage cases to one commercial case.

Thus it appears, that in January, 1906, our three Courts began the January term with 1793 damage cases and 777 commercial cases. For the year 1905 the Superior Court was in session 292 days and this time was about equally divided in the trial of damage and commercial cases.

The Court of Common Pleas was in session 211 days and about one fourth of this time was occupied in the trial of commercial cases and all of the commercial cases were called for trial and either tried or continued; the other three fourths of the time was taken up in the trial of damage cases.

The Baltimore City Court was in session 293 days, 98 days of which was consumed in the trial of commercial cases, the whole commercial docket having been called for trial or continuance, and the balance of the time was consumed in the trial of damage cases.

This data discloses the fact that in the year of 1905 in two of our three courts all of the commercial cases therein had an opportunity to be heard and disposed of, and in the other, the Superior Court, the first of this year 1906 finds its docket with the cases about equally divided; hence it cannot be accurately claimed that damage litigation in Baltimore city in the year of 1905 crowded out other kinds of cases. In the other courts of Maryland, outside of Baltimore city, I cannot get any specific data, but I am informed that at each term the dockets are practically gone through with, and the court adjourns before the next succeeding term begins, and there is no overcrowding of the dockets by what is known as damage cases as distinguished from other causes of litigation.

I presume that damage litigation is on the increase, and I believe this can be proven by an examination of the records of our

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courts in Maryland, and I rather expect that commercial litigation is not making the same progress, and I think the cause is rather apparent. The possibility for accidents, with the dangerous agencies in use in this progressive hour, is getting greater all the time, and the individual's bump of caution is not increasing in the same proportion, hence the result, more accidents, more injuries, more supposed wrongs to be redressed and more damage suits; while on the other hand a general uniformity in our commercial laws, a simplified code of pleading, calling for speedy judgments, and a persistent mode of dunning, backed up by organized collection agencies, have in my opinion all tended to reduce what is termed commercial litigation. Then again, we must remember that the law upon matters commercial can be settled in a given case and be of binding effect in a commercial case of like character, while on the other hand we are told that negligence is relative, and that its presence or absence depends upon the facts of each case, and no general rule applicable to all cases can be laid down, so it seems to me until the world changes or we have some positive enactments damage litigation will flourish. It is true that there seems to be in the air a sentiment at this time against damage suits, and you may take any individual who is outspoken in this direction, but let him meet with and have an accident, whether with a car, an automobile, a bicycle, or a fly-wheel, then *his* case is the *real thing*, unlike all other damage cases, and his whole nature is changed and he wants redress for his supposed wrongs. The courts are open to him and in he goes if a settlement is not affected. Now ought the courts to be open to him or should they be closed? That is the question I take it. Well who is to determine the question? Should his lawyer do it? Suppose his lawyer is a good one, conscientious and wants to act fairly and justly in the matter to his client, will not an illustration give us some light? The following case occurred in Maryland, within the last 18 months. A child is injured; the father brings suit for his son's injuries; case tried and allowed to go to the jury; jury disagrees; case tried again before another judge and jury; case allowed to go to the jury; jury renders verdict for plaintiff covering injuries. Appeal taken, appellant court says case should never have been submitted to the jury at all, and judgment reversed without awarding a new trial. Now who is responsible for the boy's injuries, the time consumed in the three hearings of the case, and the costs of the proceedings? Two different trial judges said plaintiff had made out *prima facie* case, appellate court said no. The question is, who is to blame? Can it be said that the plaintiff's attorney should never have brought the suit? Two different judges said his client had a case, but in the end it turned out that he had none, and this by the court of last resort. If a case is tried and won to a finish and fairly won, who can say that it should never have been instituted? We will not get an answer until our jurisprudence is changed. Then it is the cases that are lost to the plaintiff, which should never have been instituted, and unnecessarily brought about the crowded condition of our dockets, and consumed the time of our courts and left in many instances its trail of unpaid costs. The bar is charged as being responsible for this class of cases, but in my opinion in many instances wrongfully charged. I again refer to the above illustration. If a lawyer tells his client he has a case when the lawyer believes he has not, and institutes proceedings with the hope of compromise, or for the purposes of vexation or any other purpose, then the attorney is to be censured, because he has polluted his high office, and such an attorney is a marked man, and will soon seek his proper level among the shysters of the profession. I hope this discussion will tell us what treatment we can serve up to this class of individuals. It occurs to me if you can get rid of the shysters at the bar

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you will have gone a long way in solving the problem under discussion. Damage litigation you will have with you always, shyster damage litigation you can eliminate by putting him out of business, and in my opinion the Bar can help you in this direction as well as the legislature. It has been intimated that a fake suit is often settled to save expense; if so, then the defendant acknowledges he thinks more of his dollars than he does of his principles, and if he does he then helps the fakir to do business rather than to put him out of business. Take a railroad company who has suits piled up against it, almost without number, and it claims, and perhaps justly, that lots of them should never have been brought, then had the company not better try these cases and win them, than to settle them, and thereby get a fresh supply of the same kind, because while trying these fake suits the company will be standing for principle and putting the fakir out of business, and putting off the day when meritorious claimants will convert their claims into judgments? I take it that all will agree that a meritorious claim will always have a standing in court and because it happens to sound in tort is no reason why it should be looked upon with suspicion. I believe in our jury system, but I also believe that it can be improved upon, and if we can get the court and bar to join hands in this direction, and have some concerted action, *much* might be accomplished. If the conscientious, fair-minded, and substantial individual could be made to serve on our juries, then the wheat could be soon separated from the chaff, and another step in the right direction would be taken. It must not be forgotten, however, as we go along seeking remedies for supposed evils, to do justice to all. The great mass of damage suits is directed against the corporations, because corporations own the place where and the things which usually are involved in this character of litigation, and in attempting to protect the *corporate* body let us not forget the *human* body and its rights. In Maryland I believe that all either want at this stage of the game is an upright judiciary, which, thank God, we have, an honest jury, and a fair fight, with no favors to either plaintiff or defendant. Other states may have a different condition of affairs which call for redress, and may I suggest that the conserted action of the Bench and Bar with reference to shysters and acts looking to the *personale* of the jury box will bring assistance where assistance is most needed. In Maryland many of the damage suits are defended, not by actual defendants, but by the insurance companies who have issued certificates of protection.

On April 1, 1902, an act went into force in this state which had for its purpose the creation and maintenance of a coöperative insurance fund, in the hands and under the supervision of the state insurance commissioner, for the benefit of employees in certain lines of employment.

The act provides that any corporation, partnership, association, individual, or individuals engaged in the business of operating any coal or clay mine, quarry, steam or street railroad in this state and any incorporated town, city, or county in the state, engaged in the work of constructing any sewer, excavation, or other physical structures, or the contractors for the same, shall be liable in law to any employee, engaged in the above-named occupations, or in case of death to his wife, her husband, if the deceased be a married woman, or to his or her parent or children, in accordance with "Lord Campbell's Act," for damages flowing from an injury to said employee or from the death of such employee, when such death or injury is caused by the negligence of the employer or by the negligence of any servant or employee of such employer, and if it appears that such injury or death was caused by the joint negligence of such employer, his servants, or employees on the one hand, and the negligence of the injured or deceased on the other, then the employer

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shall be liable for one half of the damages sustained by such injury or death. But liability of the employer, town, city, etc., ceases under the provisions of the act, if said employer, town, city, etc., shall pay certain annual sums into the hands of the State Insurance Commissioner in monthly installments; coal and clay mining employers pay $1.80 for each person employed, steam railroads pay the annual sum of $3 for each employee residing in this state; street railway or trolley road the annual sum of 60 cents for each employee. Town, city, county, etc., to pay such sum for each employee as the insurance commissioner shall adjudge necessary to insure each employee, in the sum of $1000, in event of death, considering the occupation of trade risk involved, and this amount may be deducted from wages of the employees to the extent of one half. Those liable under this act cannot take advantage of it unless they on the first Monday of each month make a report under oath to the insurance commissioner, stating the number of persons employed, and pay the monthly installments; and it is unlawful to make any contract waiving or avoiding this act.

The insurance commissioner is to be custodian of the fund, so raised, and in case of death of employee insured under the act, to pay to his representatives or administrator the sum of $1000.

The insurance commissioner is to make annual report to governor of the state, and shall have plenary power to determine all disputed cases which may arise in the administration and to regulate the rates or premiums, in order to preserve the fund and pay the death claims. His compensation is one per cent of the receipts of said fund.

If a party, subject to provisions of this act, shall consider that he, they, or it are making better provisions on the whole for the workman employed, either by way of payments in case of death, injury, sickness, or old age, or all combined, and are contributing more in such manner than he, they, or it would be obliged to do under this act, then said party may upon application to the insurance commissioner be absolutely released and exonerated from all liability under this act. The insurance commissioner has power to act in this respect and to give a release, which shall be recognized in our courts. From information obtained I understand that three corporations in this state took the benefit of the Act, and when one of them was sued the act was pleaded in bar of the plaintiff's right to recover, and upon demurrer filed to this plea the court of original jurisdiction held the act unconstitutional and void in the following words:

"The act provided for the payment of the death benefit in two classes of cases in which there was previously no right of action, viz: where the death resulted from the negligence of a fellow servant, and where the deceased had by his own negligence directly contributed to his death. But for the handling and disbursement of this entire fund "plenary power" was lodged in the hands of the insurance commissioner, thus investing him with judicial or quasi judicial powers, and that without any provision for a trial by a jury or any right of appeal from his conclusions. Had the act stopped here it might well have been argued that inasmuch as it provided for a fund for the benefit of certain widows and orphans, who would otherwise be remediless, it was within the power of the legislature to place the administration of that fund in the hands of such officials as it might see fit. But the act did not stop with the provisions already referred to but also embraced cases where the death had been caused by the negligence of the employer, cases where there would be a clear right of action in the courts under the existing law. It also enacted that the employers who made the payments provided in the act, should, by such payments, be exempted from further liability.

The effect of the act was, therefore, not only to vest in the insurance commissioner

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powers and functions essentially judicial in their character, but to take away from citizens a legal right which they had heretofore enjoyed and which could be enforced by them in the courts and also to deny to them the right to have their cases heard before a jury.

It is only necessary to clearly understand the provisions of this act to see that they are in direct conflict with several of the provisions of the Constitution of the state. Thus Art. 5, of the Declaration of Rights, assures to the people the right of a trial by jury. Knee *v.* City Pass. Ry. 87 Md. 624, Art. 19 gives to every one for injury done to him in his person or property, a remedy by the course of the law of the land. Yet both of these guarantees are completely ignored by the act in question. Without prolonging the matter, it is so clearly evident that the act in question is framed in total disregard of the provisions of the Constitution that the act must be declared void, and the demurrer sustained."

From this decision no appeal was taken, although the act is still in force and the codifier of our laws has not put it in the Code recently published, doubtless because of the opinion just mentioned. Thus it may be said that both parties to the litigation here are satisfied with things as they now stand, and in my opinion, it will require considerable discussion before a radical change is made in our civil procedure.

BALTIMORE, MD., March, 1906.

MR. QUACKENBUSH

THE remedies for the abuses of personal injury litigation are publicity and prosecution. If the public be educated concerning the extent to which the truth is almost universally disregarded daily in the courts in personal injury cases, it will not be long before an aroused public will demand protection from this growing menace to property. So common has perjury become that jurors are inclined almost to applaud a clever lie well told. The judges are coming to look with indifference upon this crime. If they were not, there would be at least one witness committed for perjury every day by every judge engaged in the trial of such cases. In private conversation, the prevalence of perjury is denounced by the judges, but it is only in the most flagrant case that a judge will, upon his own motion, issue a warrant for perjury in his own court. He will hesitate even to grant an application by one of the parties. Now this condition of things is not the fault of the judges so much as it is the fault of the public generally. If the judges felt that the public expected them to be keen to protect the courts from imposition, they would act without hesitation. The judicial branch of government reflects the prevailing public opinion, perhaps unconsciously, but, nevertheless, as surely as any other. And the same proposition holds true concerning prosecuting officers. Their principal concern seems to be with the prosecution of crimes against property and those involving personal violence. The crimes of perjury, subornation of perjury, champerty, and maintenance seem to be disregarded. The writer remembers only three convictions for perjury during the last fifteen years in the largest county outside of New York City in the state of New York.

If, as has been said, all the powers of government have for their ultimate purpose the getting of twelve honest men in the jury box, how important it is that the twelve honest men shall have some assurance that they will not be made to waste their time listening to rank perjury in case after case.

It would seem as if the oath of a witness has lost all religious sanction except in rare instances. It is necessary, therefore, that the positive law should be vigorously enforced if the courts are again to be places where men fear to falsify.

Until recently, the public has been un-

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aware of the prostitution of the courts because the defendant who has escaped a verdict based upon perjured testimony has not felt any duty resting upon him to prosecute. He is glad to avoid further litigation. The defeated defendant knows that he will be charged with a purpose to get even, if he complain, assuming that the verdict has not ruined him. The defendant, shocked at the outrageous lying against him, the jury which brings in an immediate verdict for defendant, and the bystanders all expect to hear the judge indignantly command the sheriff to take the perjurer to prison, but instead he blandly calls the next case.

And so the evil might continue to grow were it not for the tendency of the times to bring about co-operation. The business of insuring employers against liability for the negligence of their servants is of recent development. But it has opened the eyes of many persons to the frauds and dangers of personal injury litigation. By taking the defense out of the hands of the individual defendant, it has made his case the concern of every one insured in the same company because, after all, the company is only the instrument for averaging the losses among the policy-holders. It has also given to the defense an impersonal character and the courage of numbers. It has resulted in a collection of accurate statistics. It has been the means of the organization of an Alliance against Accident Fraud.

The Alliance against Accident Fraud is made up of the leading employers' liability insurance companies, the accident companies, the steam and the electric railway companies, the transportation and public service corporations, and, generally, contractors and business men of all kinds whose property may be the subject of attack through accident litigation. It is continental in its scope. Its purpose is publicity and prosecution for the crooks, including professional litigants, "fakirs," false witnesses, shyster lawyers, tricky doctors, ambulance-chasers, and runners, and the encouragement of fair dealing and honest and prompt adjustment of the losses of honest claimants.

For the interchange of information concerning the practices of the "sharks" local bureaus are established in the large centers. A card index is kept of all claims made against members giving the names of the lawyer and the doctor in each case as well as the claimant's, together with any useful information obtained.

There are pending against the street railway companies, represented by the writer, over twelve thousand personal injury actions. The trial of these cases occupies about a quarter of the time of all the courts in New York City.

Allowing for sympathy for the plaintiff and prejudice against a railway corporation, which necessarily influences many verdicts which are not warranted by the truth, it is significant that only a little more than one half of the cases tried result in a verdict against the defendant. This shows the extent to which groundless suits are brought. And yet until the organization of the Alliance against Accident Fraud there was no means of preventing the unsuccessful plaintiffs from trying to sell their injuries to any other of the numerous subjects of their attacks. Now, they will be instantly spotted and, if caught, they will be prosecuted by an impersonal, dispassionate organization. Further than this, every person having to do with the crooked case will be given the publicity which he deserves and which the protection of the public demands.

The movement is in its infancy but it has already produced great results. It follows therefore that the best existing remedy for the evils under consideration is to be found in such an alliance.

NEW YORK, N. Y., March, 1906.

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MR. DUANE

I UNDERSTAND it to be the object of this symposium to draw out suggestions as to the correction of abuses in personal injury litigation, and the reduction of the large sums now being paid by defendants to the degree that they are paid unjustly. A considerable experience during the past twelve years in defending such cases, and to a much less extent in representing plaintiffs, has led me to form certain conclusions which I will state *seriatim*.

1. The surest safeguard against having to pay an unjust verdict, or an excessive verdict where the plaintiff is entitled to recover, is to make a thorough preparation of the defendant's case. In addition to obtaining signed statements in advance from all of the witnesses to the occurrence, the history of the injured party should be investigated not only since the accident but for a considerable time previous thereto. This investigation should include the character and amount of his work, his daily habits during the time that he alleges illness or in capacity, and, in a general way, all facts which will furnish material for a successful cross-examination of the plaintiff and his witnesses, both by involving them in contradictions and by surrounding plaintiff with such an aroma of deceit, fraud, or pretense as will neutralize, if not destroy, the sympathy which all juries feel instinctively for a man who asks for something as contrasted with a man who withholds it.

2. No personal injury case should ever be allowed to go to trial by defendant unless there is a reasonable chance of securing a favorable verdict; or, when indefensible, that a jury will give a lower verdict than plaintiff is willing to accept in settlement. It is most undesirable for defendants of this class that too many cases should be tried, for the number of large and showy verdicts will thereby be increased. One large verdict advertised in the newspapers will encourage innumerable litigants either to insist on trial or to hold out for extravagant settlements. Hence a liberal system of settlement in advance of trial is of universal benefit.

3. In that large class of cases where defendant's liability is undisputed I have found it efficacious to offer no evidence and to confine myself entirely to a discussion of the plaintiff's evidence as qualified and cut down by cross-examination. This method tends to destroy all antagonism on the part of the jury, and in this jurisdiction entitles the defendant to the last speech. I have found that in scarcely ten per cent of the cases so tried have the jury rendered an excessive verdict.

4. In defending cases which turn on medical questions, I am strongly opposed to calling medical witnesses for the defense except where absolutely necessary. A contest between rival experts employing obscure and lengthy medical terms tends to aggravate the apparent seriousness of a case, with a corresponding increase in the verdict rendered. In my judgment a more efficacious way is to depend largely upon the cross-examination of the plaintiff's physicians and experts, assisted by the prompting of a competent medical man. If the defendant's physician has examined the plaintiffs in the presence of his own doctor, the latter when called can often be made to admit on cross-examination the favorable facts elicited when the plaintiff was thus examined. In the trial of very serious cases, I have found that the policy of having three or four eminent specialists seated near me has a most subduing effect upon the testimony of plaintiff's physicians, who in such a presence dare not jeopardize their reputations by untrue or exaggerated medical statements, believing that if they do so, these specialists will follow them to the stand and destroy their testimony.

5. As a means of preventing perjury I strongly advocate the policy of arresting,

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after trial, all plaintiffs and witnesses who are clearly guilty of it. Prosecutions for conspiracy to defraud are also most valuable — especially in their effect upon a certain class of foreigners — and when well advertised in the newspapers I have known such prosecutions to have the effect of greatly reducing the number of fraudulent claims subsequently made.

6. It is my belief that open perjury is comparatively rare as compared with an intelligent exaggeration of crucial facts. I have known of cases where attorneys have instructed their clients as to what they needed to prove in order to create a case, and then sent them out to procure witnesses who could be trained to twist the real facts of an occurrence into the shape desired. The most effective remedy for offenses of this class is professional ostracism of attorneys guilty of them and proceedings for disbarment in cases where clear proof can be obtained. The disbarment of a notorious legal character of this class, which occurred in Philadelphia several years since, had a most salutary effect in this regard.

7. The total amount of unjust verdicts rendered in this class of litigation can be greatly reduced through urging upon the courts the pursuit of a liberal policy in holding plaintiffs to a strict measure of proof at the trial, in charging strongly in favor of defendants in clear cases, in assuming a large measure of responsibility in entering nonsuits or otherwise terminating unjust cases by deciding them on propositions of law rather than of fact, and in setting aside or cutting down unreasonable verdicts when rendered. The recent tendency of our courts to withhold from the jury issues and testimony which involve a clear violation of mathematical or mechanial laws is an illustration of a tendency in the right direction. Another illustration is the growing disposition to rule out medical and other evidence of what is "barely possible" as contrasted with what is "reasonably probable."

8. It would be a great aid toward reforming abuses in personal injury litigation if a better class of jurors could be empanelled to try these cases. A jury composed of men of the professional class might not be desirable, but on the other hand justice would be greatly forwarded if more jurors could be drawn from the class of men who are in active business for themselves as small traders or otherwise. The unprincipled political rounder rewarded by appointment to jury service through the influence of a petty boss, the ignorant laborer, and the prejudiced mechanic should all be excluded. It is my belief that if jurors are intelligently selected, the jury system is an admirable method of determining personal injury as well as all other cases. In Philadelphia there exists a fairly satisfactory method of obtaining a good jury, and both my observation and experience have confirmed my belief in the general efficacy of the jury system when properly conducted. In at least eighty per cent of the personal injury cases in which I have been engaged I have personally agreed with the verdicts rendered, and I have rarely seen a jury fail to find a verdict for the defendant in this class of litigation where the evidence clearly demanded it. If the average quality of our juries could be still further improved, as above suggested, the erroneous results reached in many of the remaining twenty per cent of trials could probably be eliminated.

PHILADELPHIA, PA., March, 1906.

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PERSONAL INJURY ACTIONS AND WORKMEN'S COMPENSATION IN ENGLAND

By R. Newton Crane

BEFORE considering the various statutes which have been passed in England to regulate the relations between master and servant and the liability of the former, and of tort feasors generally, for negligence which has resulted in personal injuries, it should be stated that actions for personal injuries are of comparatively minor importance in the English courts, whether considered from the point of view of their number or the amount of the damage awarded by the verdicts of juries. Exact figures are not obtainable in either country, but it is safe to say that the English courts are not troubled with half so many of this class of actions as are docketed in the American courts, and that the amounts awarded in damages by English juries are not a tenth of those obtained from American juries.

There are several reasons for this. There are, for example, fewer railway and street accidents in England. The railways have no level crossings, their lines are securely fenced in, and their yards are inaccessible to the public. In the larger municipalities the power of the police in regulating the traffic is unlimited and is cheerfully acquiesced in by the drivers of all sorts of vehicles and by pedestrians. But the most important circumstance in considering this matter is the fact that speculative actions, the taking up of damage cases on contingent fees, is practically unknown in the English courts. A solicitor, however willing he might be to give his services to a client in the hope of contingent reward, and even to advance the very considerable expenses attendant upon the litigation, would think seriously before paying down in cash from $200 to $500 to brief counsel to appear in court to conduct the action, and before making himself liable for a further like expenditure for "refreshers," and other out-of-pockets incident to the trial of the case in the court of first instance and on appeal.

There is still another reason why actions for damages for negligence do. not realize large amounts in England, and that is the construction which has been placed upon Lord Campbell's Act. This Act, passed in 1846, extended the liability for injury, where death had not ensued, to actions where death was caused by "the wrongful act, neglect, or default" of the defendant. It was provided that such actions should be for the benefit of the wife, husband, parent, and child of the person whose death was so caused, and in every such action the jury might give such damages as they thought proportioned to the resulting injury to the parties respectively for whose benefit the action was brought; and the jury was further authorized by their verdict to award the amount to which each of the parties respectively was entitled. Thus where a husband and father is killed and damages are awarded against the defendant through whose negligence death resulted, the jury may say what amount of such damages is to be paid to the widow and what amount is to be paid to the child or children respectively, and how in the case of the children the award may be invested or held for their benefit. Early in the history of the litigation which ensued in consequence of the Act, it was decided that actual pecuniary damage must have resulted from the death, and that the jury cannot give damages for mental sufferings, or loss of society, or for affliction, or as a solatium for injured feelings. It will be readily appreciated what effect this law and the construction placed upon it has had upon the limitation of the volume of personal injury actions, and what influence these principles has had upon subsequent legislation relating to the liability for damages for

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negligence, and upon the legislative enactments requiring masters to compensate their servants for injuries and for accidents in the course of their employment.

The master's common law liability has been very clearly stated by Mr. A. H. Ruegg, K.C., the leading authority and counsel of the English Bar, upon actions for damage for personal injuries as follows: "The master is responsible to his workman for the consequences of personal injury caused by his personal negligence if judgment can be obtained against him during his lifetime, but he is not responsible to the relatives or personal representatives of a deceased workman. He is absolved from responsibility for the negligence of those to whom he delegates the duty of management and control of his business, and for the negligence of fellow workmen of the workman injured. He can be freed from responsibility by showing that the injured workman took the risk of his breach of duty, or by showing that the injured workman was himself guilty of contributory negligence."

Scores of statutes have been enacted within the past century and a half tending to modify the common law as thus stated, and to remove the restriction which it imposed upon those injured by negligence, and with a view, particularly, to benefit workmen. The first in importance was Lord Campbell's Act which has already been referred to, and which gave to the relations and personal representatives of a deceased person who had been killed or who had died from injuries, the same right against the tort feasor of the master which the workman might have had if he had survived. The next most important act was the Employers' Liability Act. This came into operation on January 1st, 1891, and by it the common law doctrine of "common employment" and the theory of "fellow workmen" were swept away. Thence forward the master has been responsible where injury is caused to a workman (*i*) by reason of any defect in the condition of the ways, works, machinery, or plant, "but only if such defect arose, or had not been discovered or remedied, owing to his negligence or to that of the person to whom he had entrusted the duty of seeing that they are in proper condition;" (*ii*) where the negligence is that of his workman to whom he has entrusted powers of superintendence or control; (*iii*) when the injury is caused by the act or omission of any person in his employment done in obedience to his rules or by-laws, or the particular instructions of any person delegated by him with authority, and (*iv*) when the negligence is that of any person in the service of the employer who has charge of the signals, the locomotive, or the train upon a railway.

While the workman and his relatives were thus greatly benefited, the act restricted the amount of damages or compensation which he or they might recover if recourse was had to the Act. The compensation recoverable, the statute says "shall not exceed such sum as may be equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade employed during those years in the like employment and in the district in which the workman is employed at the time of the injury." The act further provides that no compensation shall be recoverable unless notice of the injury was given within six weeks and the action was brought within twelve months. The action may be brought in the County Court where a speedier and less expensive trial is supposed to be obtained.

Following this legislation came the Workmen's Compensation Act of 1897. This introduced an entirely new feature into the relations of master and workmen. The common law and all previous statutes were based upon the theory of contract. The new act made the master, by statute, an insurer of the lives and safety of his employees, and imposed upon him a liability in this respect independent of any breach of duty on his part or on the part of his servants. The act, however, was not general but ap-

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plied only to employment in or about railways, factories, mines, quarries, or engineering works, and in or about any building which exceeds thirty feet in height and is either being constructed or repaired by means of a scaffolding or being demolished, or on which machinery is used for the purpose of construction, repair, or demolition. In 1900, the benefits of the Act were extended to workmen engaged in agriculture.

The Workmen's Compensation Act fixes the liability of the employer as follows: (*i*) if the injury results in death and the workman leaves dependents, that is, persons who would be entitled to sue under Lord Campbell's Act, wholly dependent upon his earnings at the time of his death, a sum of three years' wages, calculated upon his earnings for the years next preceding his injury; (*ii*) if the dependents are only partly dependent, such sum reasonable and proportionate to the injury, not exceeding three years' wages, as may be agreed upon or settled by arbitration; (*iii*) where the injury results in death and there are no dependents, the reasonable expenses of medical attendance and burial, not exceeding ten pounds; (*iv*) where there is a total or partial incapacity a weekly payment during incapacity not exceeding fifty per cent of his weekly average wages and not exceeding one pound weekly. In fixing the amount, regard must be paid to the workman's power of earning wages after the injury, and to any payments already made to him in respect thereof by his employer. Naturally if the injury is attributed to the workman's own serious and wilful misconduct no compensation is allowed to him. Notice must be given promptly of the injury and proceedings must be taken within six months. If the injured workman recovers his capacity his compensation ceases. The employer may contract himself out of the act if the Registrar of Friendly Societies, after taking steps to ascertain the views of the employer and the workman, certifies that any scheme of compensation or insurance for the workmen, voluntarily arranged between them and their employer, is not less favorable to the workmen than the provisions of the act.

Such, in general, are the provisions of the English Workmen's Compensation Act. It involves an entirely new principle in its attempts to adjust the relations between workmen and their employers, and to determine the responsibility of the latter for injury happening to them in the course of their employment. In the early part of the nineteenth century it was the theory of the law, stating it generally, that the workman himself should be responsible for his own safety, and that he could not obtain compensation therefor from his employer, except where the latter had been personally negligent. The new act not only reverses this theory but makes the employer an insurer of the safety of his employees. It establishes the novel proposition in political economy that the pecuniary result arising from loss of life or personal injury, incident to the carrying on of an industrial enterprise, should be regarded as part of the expense of production, which the employer primarily must pay, but which ultimately must be paid by the consumer in the enhanced price of the article produced.

This principle of insurance of the lives and safety of the workmen came from Germany, where it has been in operation since 1848. It was adopted here in England in 1897, in France, Italy, and Denmark in 1898, in Switzerland in 1899, in Spain in 1900, in Holland in 1901, and in Belgium in 1903.

The questions naturally arise: How has the Act worked practically? and How is it regarded by those most affected by its operations? It was at first regarded as a socialistic measure, and opposed on that account. But it is now generally regarded with favor by all classes. Probably those most benefited at the outset were the lawyers, for few acts of recent times have been the source of as much litigation. This arose from the variety of constructions placed upon the unusual and novel terms employed in several of the sec-

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tions, such particularly as "undertaker" (meaning thereby "employer"), "factory," "engineering works," "scaffolding," and what standard should be applied in measuring "30 feet in height," and what was meant by "on, in, or about." County Court judges over-ruled arbitrators, the Appeal Court over-ruled the County Courts, and the House of Lords over-ruled the Appeal Court. However, many of the difficulties have been smoothed away, and doubtless the Act will be further amended in the future. A Commission appointed by the Home Secretary recently, after carefully considering the question, issued a report recommending that the law be altered so that in future a workman who receives compensation under the Act shall not be allowed any other remedy (at present he has, in addition, his right at common law and under the Workmen's Compensation Act, but can recover only once), that the scale of compensation to infants and apprentices shall be increased, that protection shall be extended to the workman whilst engaged in his master's work off his premises as well as on them, that the limitation of the height of the building and the existence of scaffolding shall be repealed, and that the term "dependent" shall include brothers and sisters.

Any attempt to repeal the law, or limit its scope, would be indignantly resented by the workmen, and the employers would probably also object, as they are covered by insurance at a comparatively cheap rate, while the insurance companies find a new and profitable field of business.

LONDON, ENG., February, 1906.

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THE BELGIAN LAW OF 1903[1]

By G. de Leval

BEFORE the new legislation went into effect, accidents to workmen were governed by the general principles of law, and especially by Articles 1382, and following, of the *Code Civil*, which say:

"Every human act causing injury to another obliges him to whose fault the harm is due to make compensation." (Art. 1382.)

"Every one is liable for injury he has caused, not only by his act, but also by his negligence or lack of due care." (Art. 1383.)

"One is liable not only for injury caused by his own act, but for any resulting from the acts of persons over whom he should exercise control, or from things he has under his care." (Art. 1384.)

According to the principles of the *Code Civil* one injured at work who sought compensation through the law from his employer had first to prove that his employer was at fault. To render him liable for a tort whether committed intentionally or through negligence, there must have been a breach of duty with injury resulting therefrom. The employer escaped all liability by proving that he had not failed in his legal duty, or, following Article 1147 of the *Code Civil*, that he had been prevented from performing it by an accident.

Some writers applied the rules of contract to accidents to workmen, since there was a contract between employer and employee for the hiring of labor. This contract imposes on the employer the duty of furnishing good appliances; there is liability, therefore, if an accident happens as a result of the use of poor ones. To escape under this theory the employer should prove he furnished good appliances and that he has not been at fault. The actual decisions of the courts did not follow this second theory, but kept to the application of Article 1382, with all its consequences. Since it was often extremely difficult, if not impossible, for the employee to furnish the required proof of his employer's fault, it had long seemed necessary to govern accidents to workmen by special legislation, in order to give a certain and just remedy to sufferers. The Belgian law makers aimed at this result when enacting the law of Dec. 24, 1903.

The basic principle of this new legislation is compulsory compensation, the amount of which is fixed by law, for all accidents to workmen in certain enterprises; and, as the Minister of Industry and Labor, M. Francotte, points out in a circular addressed to the governors "the compensation includes a pecuniary indemnity, representing a part of the wages as well as the expenses incurred the first six months after the accident for medical attendance and medicines.

"The compensation is owed to the sufferer and, in case of death, to certain classes of parties interested. It is as a rule granted in the form of a life annuity, if there is permanent disability; and in the form of a life or temporary annuity when the accident is fatal."

Heads of establishments are individually liable for this compensation. They may get rid of the liability by transferring it completely to an insurance organization recognized by the state. It suffices either to join a mutual insurance association formed by employers and approved by the government, or to deal with an approved insurance company charging a fixed premium. The state's approval is given to insurance organizations only after the furnishing of security, upon which the indemnities allowed are a first charge. This security for the first year must be 300,000 francs; for subsequent years it must equal one and one-half times the amount of the indemnities accruing the year before and paid or owed

[1] Translated by William C. Gray, Fall River, Mass.

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by the organization. In no case is it to be less than 300,000 or more than 1,500,000 francs. By merely joining such an organization or insuring in such a company employers are relieved of all obligations to their workmen and the liability at once passes to the insurer.

This law of Dec. 24, 1903, deals with compensation for accidents to workmen *in certain industries only, happening in the course of and as a result of the execution of the contract of employment*, governed by the law of March 10, 1900. An accident happening in the course of the employment is presumed, until the contrary is proved, to have occurred as a result of it. (Article 1.)

In article 2 are enumerated the private or public industries subjected to the new law. They are as follows:

Deep and surface mines and quarries; coke kilns, factories making coal compounds; furnaces and shops for the preparation of ores and quarry products.

Blast furnaces, steel works, shops making and fashioning iron and other metals; foundries.

The making of machinery and metal products; iron mills; shops making hardware, locks, stoves; the working of metals, manufacture of bolts, nails, screws, chains, wire, cables, weapons, knives, and other metal utensils or objects.

Mirror and window glass factories, glass-blowing establishments, crystal works, goblet works; the manufacture of pottery products.

The manufacture of chemical products, gas and its by-products, explosives, matches, oils, tapers, soaps, paints and varnishes, rubber, paper.

Tanneries and currying shops.

Flour mills; breweries; malt works; distilleries; the manufacture of charged waters; sugar manufacture.

Mason work, carpenter work, painting and other branches of the building industry; chimney cleaning; grading, well-digging, paving, roadmaking, and other branches of civil engineering.

Forest industries.

Transportation by land of passengers and goods; inland navigation; towing from path, and by boats; dredging; storing, packings loading and unloading goods.

Businesses which require the use of steam, air, gas, or electric power of a pressure or voltage beyond a limit to be fixed by royal decree.

And, generally, businesses using (for more than temporary purposes) machinery run by other than animal or human power.

Then the *industrial* enterprises not included in the above categories, but which employ habitually *five workmen* at least. And *agricultural* enterprises employing habitually at least *three workmen*. Likewise *mercantile establishments*, with at least *three* employees.

Lastly, enterprises not covered expressly by the law but the dangerous character of which shall have been recognized by royal decree, on the advice of the commission on accidents to workmen.

Heads of businesses covered by Article 2 are *compulsorily* subjected to the provisions of the new law. Others, for example those employing ordinarily only *two workmen* in an agricultural enterprise, or *four* in an industrial one, and some in businesses not subjected to the new law, may submit to its provisions, although they are not obliged to do so. Such submission will benefit them in a way which we shall examine.

Under the former system, it was often difficult for the workman to establish the justice of his claim, but, once the court had recognized the liability of the master, the workman got full compensation for all the injury suffered. The new law relieves the workman of this onerous burden of proof by decreeing that he shall in all cases be compensated when an accident happens in the corse of the eumployment. All he will have to do, therefore, will be to prove his injury, and by the very fact the master (or

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the mutual organization or insurance company with which he is connected) will be compelled to give compensation. But the law here makes a compromise: The compensation to which the injured person will be entitled will not be complete as formerly, and its amount will not be left to the independent judgment of the courts. In the first place, none is due when inability to work has lasted less than one week. But Article 4 decrees that when the accident has resulted in a temporary total inability to work lasting more than a week, the injured person shall be entitled, from the day following the accident, to a daily indemnity equal to fifty per cent of his average daily wage.

If temporary disability is, or becomes, partial, the compensation shall be fifty per cent of the difference between the pay of the injured man before the accident and what he can earn before complete recovery. If the disability is, or becomes, permanent, an annual allowance of fifty per cent, determined according to the degree of the disability, as just explained, will take the place of the temporary indemnity, beginning from the day when, either by agreement of the parties or a final judgment, it shall be decided that the disability is of a permanent character.

The indemnity is thus fixed by the law itself. The employer must, according to the new law, not only give compensation for the injury, but he is also liable for the expenses for medical attendance and medicines caused by the accident and incurred during the first six months. The injured man may choose his doctor and druggist unless the employer has established such a service at his own expense and has so notified his workmen. When the workman has the choice of doctor and druggist, the master is liable for the expense only to the extent of the sum fixed by a schedule established by royal decree. Examination of these different schedules would require too much space for the scope of this article.

The new law does not cover injury caused *intentionally* by the employer. In such cases the general rules of civil liability are to be applied. Moreover, the injured man, or his representatives, retains the right to seek compensation according to the ordinary law from anybody responsible for an accident, except the master or his foremen and workmen. In order to prevent attempts by employers to escape the application of the law by means of agreements that it shall not govern, Article 23 enacts that any agreement contrary to its provisions is absolutely null and void.

As this new law went into effect only on July 1, 1905, it would be premature to criticise it now, and we must wait, in order to form a judgment as to its results, until the courts have had to deal with the questions to which it must inevitably give rise. It is on the whole well received, especially by the working classes.

BRUSSELS, BELGIUM, February, 1906.

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WORKMEN'S COMPENSATION IN ITALY

By Henry Burnham Boone

ON the 17th of March, 1898, the following law was decreed by Umberto I, King of Italy, with the approval of the Senate and House of Deputies for the protection of the life and health of workmen.

1. The workmen contemplated by the act are the following:

a. All those employed in mining or excavations, in the construction of buildings, in enterprises for the production of gas or electricity, in telephone companies, in industries where explosive material is manufactured or treated, in arsenals and shipyards.

b. Workmen employed in the construction or working of railroads, or in the service of transportation by rivers, lakes, and canals, in tramways or any variety of mechanical traction, those employed on the construction or repair of ports, canals, embankments, bridges, tunnels, or streets — provided that the number of workmen in one of the above named enterprises is superior to five.

c. Workmen employed in labor in which machinery is used whatever be its motive power, provided that there are more than five workmen, and the workman does not himself give the motion to the machine he uses.

2. A workman is one who performs labor for another outside his proper house for wages, he who superintends the labor of others provided that his wages do not exceed seven lire a day and the apprentice, paid or unpaid.

All workmen under the above definition and performing labor of the sorts contemplated by this act must be insured against injury to life, limb, and health, by their proper employer and at his expense. No agreement between employer and employed to avoid the insurance or lessen the indemnity decreed by the State is valid.

Such insurance must be effected by the head of an industry or his agent within ten days after the establishment of such industry. Returns must be made by the heads of industries during the first ten days of each month to the Prefect of the Province giving the number of operatives during the past month and their daily compensation, and the number of days' work performed by each individual.

Companies in which insurance may be affected:

1. The National Insurance Company of Italy. This is a government institution founded many years ago to insure workmen employed in the service of the State on railways, roads, and public buildings, etc.

2. Certain other specified companies under control and inspection of the national government.

Indemnity paid to injured workmen:

a. Injuries capable of a cure in five days or less have no indemnity.

b. In case of permanent absolute injury the indemnity is equal to five years' salary and not less than three thousand lire.

c. In case of injury, permanent but partial, indemnity is made equal to five times the amount of probable annual loss of salary.

d. In case of temporary but absolute injury the indemnity is half the daily wage lost and begins to accrue after the fifth day of injury.

e. In case of temporary partial injury the indemnity is half the daily loss of wages caused by the reduction on account of injury, and accrues after the fifth day.

f. In case of death the indemnity is five years' salary and is paid to the heirs or legal representatives of the dead, following the laws of descent of the Legge Civile. This sum must be paid in three months after death or injury.

The head of the industry must sustain the expense of medical care given the injured at the time of injury.

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The decision as to the extent and gravity of the injury is provided for by a series of royal acts but — two years after the accident the workman or the insurance company may demand a review of the decision if the state of health of the injured man shows that there was made an error of judgment — or if there are new developments in his case caused by the old injury.

Controversies respecting the indemnity take place before that tribunal appointed by law. Up to any controversy involving forty dollars — two hundred lire — or less there is no appeal from the trial court.

The following industries are not governed by this act:

1. The government of Italy which has its own system of indemnity for personal injuries of its servants.

2. Those who having industrial plants and engaged in industrial undertakings contemplated by this act, have founded, or will found at their own expense, buildings recognized by royal decree, which provide in a permanent manner for a body of workmen exceeding five hundred and further assign an indemnity to injured workmen not less than that fixed by law, and have already deposited as security with the State such guarantee as may be fixed by the minister of agriculture.

Those heads of industries who fail to insure their laborers within the legal time or do not renew such insurance at the proper time or employ more laborers than their list shows, are punished with a tax of five lire a day for every workman employed for the number of days during which they were uninsured, and in case of accident to one of their workmen must pay the indemnity guaranteed by law, and an equal amount to the government.

Notwithstanding the insurance affected under this law there still remains the criminal responsibility with the head of an industry for injuries suffered by his workmen, and this criminal responsibility still remains with him if the sentence of the court declares that the responsibility for the accident lies with him to whom the owner or head has intrusted the care of his business.

The head of an industry must give notice at least two days after an accident to the police under penalty of a heavy fine.

At present the law on the subject is very well settled by decisions of previous years of the Court of Cassation, but these decisions would not throw any valuable light on the matter for American lawyers, as they deal chiefly with the legal meaning of certain words of the act. The lawyers tell me that there is now very little litigation upon questions of personal injury litigation, while before the passage of this law the courts were largely occupied with suits of that sort.

FLORENCE, ITALY, February, 1906.

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EMPLOYERS' LIABILITY IN FRANCE

By B. H. Conner.

THE French law of negligence is neither so highly developed in theory nor so frequently invoked in practice as is the corresponding branch of the law in the United States. The Code provides generally that every act or omission on the part of one individual which causes injury to another gives rise to a cause of action.[1] This liability is extended to include liability for injuries by dependents, minor children, pupils and apprentices, servants and animals.[2] The above provisions constitute what may be described as the fundamental law of negligence. In considering them it should be borne in mind that they are not affected by previous law, either of precedent or organic law, and that they are subject to modification at any time by legislative authority, having, themselves, the force of mere legislative enactments.

The four sections cited above, with the addition of one other (Art. 1386) which makes the owner of a building liable for injuries resulting from faulty construction or the lack of proper care, comprise the whole and only chapter of the Code dealing with the subject of Torts. Their vagueness is characteristic and suggestive of the vast and terrible power exercised by the judges who construe and apply these laws, without either constitutional limitation or the binding force of previous decisions.

The resulting uncertainty may be noted as one of the reasons for the comparatively limited amount of litigation in this field during the last century. The small damages awarded, the difficulty of proving, under the French rules of Evidence, a case where the liability is not clearly apparent, the distribution of the functions of the lawyer among several classes of men, each of which is restricted to a particular kind of work, such as notarial work, pleading, etc., the fondness of the Latin mind for generalization and the corresponding dislike for "technicalities" are also important factors in the discouragement of a science which has reached such an admirable degree of perfection in the United States. While the French lawyer, as a rule, is fond of analytical study, it must yet be apparent that under these conditions the beauties of the doctrines of *res ipsa loquitur*, of "contributory" and "comparative" negligence and the "fellow servant rule," do not afford him the same keen pleasure which his brethren of the American Bar derive from their study.

But the most important reason of all is found in the antiquated rules which surround the members of the French Bar in their professional relations to their clients. The workman, as such, in France, is entitled to "assistance judiciare," which means that his counsel, appointed by the court, is obliged to plead his cause and is forbidden to accept any compensation for his services, no matter how successful he may be. The same rule applies to other persons who are in need of "judicial" assistance. In ordinary cases, however, the counsel may accept a fee but may not stipulate for or demand it, and may not sue for its recovery. It is no reflection upon the high-minded and conscientious zeal of the *Avocats* to say that such a system is not calculated to, and does not, conduce to the same progress which is observable in a system which knows not to muzzle the ox that treads out the corn.

In 1898 a statute was passed with special reference to the question of the liability of a master towards employees injured in his service. This law has been modified by various subsequent statutes, the last important one of which was the law of March 31, 1905. The first paragraph of this law

[1] Code Civil. Arts. 1382, 1383.

[2] Code Civil. Arts. 1384, 1385.

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explains its purpose and scope. It is translated as follows: —

"ART. 1. Accidents resulting from work or during the progress of same to workmen or employees engaged in boat-building, factories, manufactures, yards, the business of loading and unloading, public warehouses, mines, quarries, and, in short, in every kind of work, in whole or in part, in which are made or handled explosive substances, or in which is used any machine moved by power other than that of man or animals, gives the right to an indemnity at the expense of the employer, provided that the interruption of work has continued for *more than four days*."

It should be noted that the above provisions do not apply to the employees of agriculturists, excepting those who are injured by "machinery moved by power other than that of man or animals."

The second paragraph of this article (Art. 1) contains the following remarkable provision, which remotely suggests the "fellow servant rule."

"Workmen who ordinarily work alone may not be brought under the present law by the accidental collaboration of one or several of their fellows." The interpretation and application of this subtle proviso the writer begs to leave to the wisdom of a future generation.

The most important provisions of the law under discussion are as follows:

"ART. 2. Workmen and employees designated in the preceding article may not recover for accidents of which they are the victims in their work by any other provisions than those of the present law.

"Those whose annual salary exceeds 2,400 francs shall benefit by these provisions only to the extent of that amount. For the surplus they shall have the right to only one fourth of the annuity (rente) stated in Art. 3, in the absence of special agreement increasing the proportional amount."

"ART. 3. In the cases mentioned in the foregoing paragraph the workman or employee has the right: —

"For absolute and permanent disability, to an annuity equal to two thirds of his annual salary.

"For partial and permanent disability, to an annuity equal to half the reduction which the accident has occasioned to his annual salary.

"For temporary disability, if the said disability has lasted more than four days, to a daily indemnity without distinction between working-days and Sundays and legal holidays, equal to half the salary earned at the time of the accident, unless the income was *variable;* in the latter case the daily indemnity shall be equal to one half the average earnings on working-days during the month preceding the accident."

The families of workmen dying as the result of injuries may receive indemnities. The surviving consort is entitled to an annuity equal to 20 per cent of the annual salary of the victim. Art. 3, a.

As to children the rule appears to be as follows: Orphans as to one parent only may receive not more than 40 per cent of the annual salary of the victim; orphans as to both parents, not more than 60 per cent. Art. 3, b.

Relatives of a workman dying as the result of an accident in his work and leaving no wife or legitimate children him surviving may recover not more than 30 per cent of the annual salary of the victim, payable in fixed proportions, to the ascendants for life, to descendants until they respectively attain the age of 16 years. Art. 3, c.

These annuities are payable quarterly: they may not be assigned or seized. Relatives residing in a foreign country may not recover, except by treaty guaranteeing to French citizens equivalent rights in the country in which they reside. Art. 3, c.

The employer must pay for medical treatment and funeral expenses, the latter not to exceed 100 francs. Art. 4.

From the foregoing it will be seen that the effort of the Legislature has been to provide pensions for employees injured in

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their work or for the families of those killed therein. The result is to divide victims of accidents and injuries into two classes, viz: employees and non-employees, to give the former a right of action based, not upon the idea of negligence, but upon their status, and to deprive this class of their former right of action on the statutory ground of negligence, where it existed, under the Code. The law as it stands is the target for a fusillade of criticism from the French press, directed not less against the decisions construing it than against the text of the law itself. But it is a long step in the right direction and, with the modifications which may safely be predicted in the near future, will do much to define and perfect the substantive law and to better the condition of the French workingman in the important matter of compensation for personal injuries. The chief objections which are urged against the new law are:

1. Its discrimination against employees engaged in agriculture.

2. Its tendency, by providing larger pensions in the cases of married men who are the victims of accidents than those of unmarried men, to favor bachelor applicants in the eyes of prospective employers; and,

3. Its failure to provide compensation for injuries, however severe, which do not affect the earning capacity.

There is, of course, the further objection, from the point of view of the employer, that his business is subjected to a burden which, in some kinds of commerce, may prove onerous. But the result will be, it would seem, to ultimately adjust the scale of wages to meet the increased risk. As a practical matter this problem is very generally met by insuring the employees against injuries for which the employer is liable, the insurance companies taking over the employer's liability. The expense of these policies of insurance also must obviously be borne, eventually, by the workmen. For injuries for which the employer is not liable the workman may have protection by a Bureau of Insurance under the supervision and guaranty of the State, the details of the organization and management of which do not admit of treatment within the limits of this article.[1]

PARIS, FRANCE, February, 1906.

[1] See law, July 11, 1863.

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The Green Bag

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Communications in regard to the contents of the Magazine should be addressed to the Editor,
S. R. WRIGHTINGTON, 31 State Street, Boston, Mass.

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

The conservatism of the common law is a common place, and the difficulty of awakening the great good-natured public to the reform of abuses arising from existing legislation, or the lack of it, is equally familiar. When economic and other problems particularly affect the practice of the legal profession it is equally difficult to persuade lawyers as a body to consider them, and but for occasional addresses at Bar associations, the attendance at which, unfortunately, is often not fully representative, these subjects are left to those who lack the practical conception which comes from constant contact with them in their concrete form. Believing that there is need of widespread professional discussion of the aspects of one of these modern problems which is of peculiar interest to lawyers, we have endeavored in this issue to collect information and opinions from practical trial lawyers based on their experience, as to the best methods of remedying the abuses of personal injury litigation which have become so notorious that it seemed not inappropriate to symbolize the subject by a picture of Hermes, the runner and god of liars.

Amid many evil practices, exist genuine injuries for which any just jurisprudence must afford compensation. To separate the wheat from the chaff requires the knowledge and experience of the practising lawyer, and on him must devolve the duty of finding methods of eradicating the abuses and of testing the sufficiency of propositions for removing conditions of which these abuses are the outgrowth. It has been thought by many that if the cases involving employer's liability were segregated, and the evils peculiar to that form of action remedied, the profession could easily evolve methods of reforming the abuses remaining in the other forms of personal injury actions. The former problem is more complex and should properly be considered with reference to the experiences of other countries. For this purpose we publish a series of articles by experts, upon the English and Continental systems. The English act is of great importance, since it has been tried under social and legal conditions approximating our own. The accounts of the French and Belgian methods which we publish are interesting illustrations of methods of civil lawyers, but owing to constitutional and other obstacles may not be applicable here. The abuses of process seem to be a problem peculiarly American, of recent development, and one to the remedy of which but little thought has been heretofore directed. It is to the consideration of both of these problems that it is desired to direct the reader's attention.

Mr. Roger S. Warner, whose article on workman's compensation opens this issue and affords a basis for the considerations presented in the symposium which follows, is one of the younger members of the Boston Bar. In his early experience in practice he was concerned with the trial of personal injury cases on behalf of a liability insurance company and became much interested in the subject of workman's compensation which was proposed as a remedy for existing ills by a legislative commission of Massachusetts then investigating the subject. He is now a member of the firm of Warner, Warner and Stackpole of Boston.

The contributors to the symposium on the abuse of personal injury litigation are all trial lawyers in active practice who are chiefly engaged in litigation of this sort. Mr. Quackenbush is counsel for the operating department of the New York Street Railway lines. Mr. Duane is asisstant council for the Philadelphia Traction Co. and Mr. West

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has been City Attorney of Chicago. The others have acted chiefly for plaintiffs or for liability insurance companies. We endeavored to obtain the assistance of practitioners in all the leading industrial centers of the country including in our list both defendants' lawyers and plaintiffs' lawyers. Unfortunately pressure of other business has prevented many who promised to write from giving us the benefit of their experience, but we are fortunate in being able to publish eight contributions from practical men who are brought in constant contact with the problem they discuss. While most of these are chiefly from the defendant's standpoint, owing to the fact that most of the plaintiff's lawyers whose names were recommended to us declined to discuss the subject, the plaintiff's side is well presented in several of the contributions.

Of the suggestions made the following seem most important. Restriction of the liberties now freely indulged in by unscrupulous attorneys are recommended by Messrs. Taylor, Bryant, and Duane. Mr. Werner even suggests the appointment of attorneys by the court to try cases for poor plaintiffs. Better juries are recommended by Messrs. West, Taylor, Bryant, and Quackenbush. Bolder judges are called for by Mr. Werner and by Mr. Quackenbush. Limitation of the amount of damages is recommended by Mr. Taylor. Restriction of appeals is recommended by Mr. Werner. Mr. West believes in a codification of the law of negligence while Mr. Lightner approves of a workman's compensation act.

It is to be noted that most of these contributors hesitate to express themselves about a workman's compensation act, and confine themselves to questions of practice. Mr. Bryant, however, calls attention to the failure of the Maryland act and to the possible unconstitutionality of such legislation. It is believed, however, that the decision in regard to the Maryland act was due to peculiarly inapt provisions, and that an effective statute can be prepared within the limits of legislative power which will accomplish all that has been claimed regarding the English act. We especially commend to your attention the subject of voluntary agreements described by Mr. Werner.

Trial lawyers concerned with personal injury litigation will be especially interested in the numerous practical suggestions contained in the contributions by Messrs. Quackenbush and Duane. Messrs. Bryant and Quackenbush advocate trying more cases, but Mr. Duane advises trying only cases that can be surely won.

With reference to our foreign contributions we need only say that Mr. Crane who has been a frequent contributor to the GREEN BAG in the past, is an American lawyer now practicing in London. M. De Leval is counsel to the United States Consulate General of Brussels. Mr. Conner is associated in practice with Sir Thomas Barclay, Paris, and Mr. Boone of Charlottesville, Virginia, has been a resident of Italy for several years. Both of the latter have previously contributed to our pages. We regret that a discussion of the German system of industrial insurance by Justice Muller, which was promised for this issue, did not arrive in time to be included. We hope to be able to publish this in a later number.

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CURRENT LEGAL LITERATURE

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

ADMINISTRATIVE LAW. In the March *Harvard Law Review* (V. xix, p. 335) Edmund M. Parker in an article entitled "State and Official Liability" criticises a chapter in Mr. Dicey's "Law of the Constitution" in which the author discusses English administrative law as compared with that of continental countries. He criticises especially Mr. Dicey's statements to the effect that the scheme of administrative law is opposed to all English ideas. While this is true in a sense it is not true in the sense which the author intended to imply, namely, that such a scheme of administrative law is not recognized by the law of England.

"It would seem, therefore, that, if true of France, it is also true of England, that the extent of the rights, privileges, or prerogatives of the government as against the private citizen is to be determined on principles different from the considerations which fix the legal rights and duties of one citizen towards another; and it is also true of England, as well as of France, that an individual in his dealings with the state does not stand on anything like the same footing that he does in dealing with his neighbors, and one must conclude that if this notion is alien to the conceptions of modern Englishmen, it can be only because of their lack of familiarity with the law of their own country."

The second idea upon which French administrative law rests is that of the separation of the departments of government. While this may seem strange to an Englishman it is a vital part of American constitutional law. The author especially criticises Mr. Dicey's statement that in France the ordinary tribunals have, speaking generally, no concern with any matter of administrative law.

"It must be remembered that among other things which administrative law includes are the civil rights and liabilities of private individuals in their dealings with the state and with officials as representatives of the state; and as in France a fairly large part of those dealings falls within the jurisdiction of the ordinary courts, and is governed in many cases by no special and peculiar rules, it seems to me that attention should be called to this feature of the French law, in correction of Mr. Dicey's general statement."

He also shows Mr. Dicey is in error in stating that "under the French system no servant of the government who without any malicious or corrupt motives executes the orders of his superiors can be made civilly responsible for his conduct.

"This brings us to the matter which is perhaps of most importance in forming any judgment regarding the administrative law and administrative tribunals of France, and the entire omission of any reference to which from Mr. Dicey's chapter seems to me its greatest defect.

"That matter is this, that as a complement of the exemption from suit enjoyed by government officials in France on account of acts, even negligent and improper ones, within the limits of their functions, the state itself in many cases is held to be liable and may be sued by the private citizen who claims to have been injured by such negligence, or improper act, of the government official. No comparison between the law of England and the administrative law of France can be considered as fair, which directs attention solely to the exemption from suit enjoyed by certain government officials in France, an exemption which similar officials do not enjoy in England, and fails to mention the right of the citizen in France to sue the state for the act of that official, a privilege which the private citizen does not enjoy either in England or in this country.

"There are many other instances of a liability imposed on the state in France, not by statute but by the 'case law' of the Council of State, in cases where, by the law of England and of the United States, no such remedy would be given the person injured. Among

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these may be mentioned the liability of the state to make good injuries received by vessels, owing to neglect of harbor authorities to mark properly the dangers to navigation, and the liability to indemnify the owners of vessels injured by collision with the government vessels through the negligence of the officers of the latter."

Although Mr. Dicey in the note to his second edition has virtually retracted most of the statements above criticized he is urged to correct the erroneous impressions that might be received from the text in future editions.

ADMIRALTY. "Constitutionality of State Statutes Conferring Liens of Shipping" is discussed by William B. Gillmore, in the February *New Jersey Law Journal* (V. xxix, p. 37).

"Perhaps it is not too much to say that no single point has caused more litigation in the admiralty courts than the question whether, under certain circumstances, a maritime lien exists as distinguished from a mere right of action *in personam*. Liens have, from the beginning, been recognized for the wages of seamen of all kinds, with the exception of the master of a vessel; in favor of materialmen who have furnished repairs or supplies on the credit of the vessel for which they were furnished; in favor of the owner whose vessel had been injured in collision with another through the negligence of the latter; in favor of the seamen through whose meritorious services property has been saved rom loss or destruction on the seas, and in favor of persons of a number of other classes which need not be specified for the purpose of this article."

"The statutes creating liens of a maritime nature which the states have from time to time undertaken to enact, may be divided into the following classes: (1) Those providing for liens in favor of persons furnishing supplies, material, or repairs, for shipping or furnishing materials and labor for building vessels. (2) Those creating liens for wages due to persons employed on shipping. (3) Those conferring liens in favor of persons injured, or in favor of the estates of persons killed through negligence of the owners of vessels, or persons in charge of them. (4) Those giving liens for damages to property injured by collision, as the Iowa statute. (5) Those providing for attachments of the vessel against which a claim is asserted, the attachment not being technically a process *in rem*, but a remedy subsidiary to the action in which is it used."

An admiralty suit *in rem* is always based on a maritime lien or on a right of possession of a whole or a part of the *res*. No implied lien exists for materials or repairs furnished to a vessel in her home port, since they are presumed to be made on the personal liability of the owner. State statutes, however, have conferred such liens. The author summarizes his views regarding these as follows:

"To conclude, we may deduce the following propositions of law from the decisions of the federal courts, and of the few state courts which have considered the subject which is the topic of this article.

"(a) The courts of the states have no jurisdiction over matters of 'admiralty jurisdiction,' cognizance of such causes being given by the United States Constitution to the federal courts exclusively, the word 'admiralty' being used herein in the technical sense as fixed by legal writers and maritime courts.

"(b) The exclusive jurisdiction of admiralty causes given to the Federal judiciary does not exclude state courts from exercising a concurrent common law remedy; and in this proposition the word 'admiralty' is also used in the technical sense.

"(c) If the common law gives a concurrent remedy in a maritime matter the State courts may exercise it, even if a State statute authorizes an attachment of the defendant's property, provided such attachment is a subsidiary remedy to a common lawsuit and does not take the form of an admiralty proceeding *in rem*.

"(d) State statutes, although unconstitutional in giving a proceeding *in rem* to enforce a statutory lien on shipping, will be enforced in the federal courts if their subject matter is a maritime contract; *aliter*, if the subject is not maritime, as, for instance, a contract for building a ship.

"(e) The New Jersey statute, as its procedure is indistinguishable from an admiralty proceeding *in rem*, is unconstitutional, except in so far as it gives a lien for labor and materials used in building a ship, and provides a method of enforcing that lien.

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"(f) It is an open question whether a state has constitutional power in any way to legislate for liens on 'foreign' shipping, the word 'foreign' being used in contradistinction to the word 'domestic,' as the latter word has already been defined in this article.

"(g) For torts on or by shipping on navigable waters the state may give liens if the right of action arose within state boundaries, and such liens will be enforced by proceedings *in rem* in the federal admiralty courts.

"(h) For torts resulting in death, the states may impose liens on shipping, and may provide for their enforcement by attachments subsidiary to a common law action. The weight of authority also maintains the view that such a lien will be enforced by a proceeding *in rem* in the federal court where the vessel may be found; and in this suit the lien given by the state of the vessel's home port will be enforced."

BIOGRAPHY (Lincoln). In the *Century* for March (V. lxxi, No. 5) Mr. Frederick Trevor Hill continues his article on Lincoln as a lawyer. To his training and experience as a lawyer under the conditions which existed in the early days in Illinois are due many of his most able qualities as a statesman. Mr. Hill makes an earnest protest against considering Lincoln as a teller of silly stories, a buffoon and raconteur. Lincoln never told a story, says a contemporary, for the story's sake or to raise a laugh. There is an interesting description of life on the circuit in the early days, and the experiences of the trial lawyer.

Lincoln was the only lawyer to ride the entire circuit, which covered an area of over one hundred square miles, and was a warm personal friend and favorite of Judge David Davis, who knew and appreciated his abilities.

"It was Judge Davis and a handful of men who had learned to know and appreciate Lincoln *as a lawyer* — a small group of his fellow-practitioners on the Eighth Circuit: Davis, the judge; Swett, the advocate; and Logan, the leader of the bar, but especially Davis — who forced Lincoln upon the Chicago Convention in 1860, and thus gave him to the nation."

"Lincoln's growth of mind and character was most happily fostered by the free life of the circuit, where he was in close touch with a vigorous, independent, unartificial people drawn from every part and class of the country and all representatively American. Theirs was the force which really molded the man at the formative period of his career, and the most important individual influence on his future may be fairly ascribed to the judge before whom he practised and with whom he virtually lived for ten successive years."

Lincoln's ability was of slow growth and it was his fellow-lawyers who first evidenced the discovery of his ability and effectiveness by retaining him to try cases for them.

Between 1849 and 1860 he probably tried more cases than any other man on the circuit.

"It is impossible to overestimate the value of these active professional years on Lincoln's subsequent career. They brought him into close contact and collision with able lawyers of every caliber, with men of force and strong character, men whose business it was to reason, persuade, cajole, and intimidate others to their way of thinking, and who employed every device from legitimate argument to brutal terrorizing to accomplish their ends.

Long before he was called to Washington, his daily life in the courts had familiarized him with the roarers and bulldozers of the profession, with the sly and tricky gentry who work by indirection, with the untrustworthy, treacherous, and unscrupulous practitioner, with the broadminded advocate and the narrow, bigoted partisan."

BIOGRAPHY (Lincoln). "Lincoln, the Lawyer," by Hon. Jesse J. Dunn, *Oklahama Law Journal* (V. iv, p. 249).

BOOKS. "Subject Index of Law Additions" to the New York State Library from Jan. 1, 1894, to Dec. 31, 1903. New York State Education Department, Albany, 1905.

BOOKS. In the March *Yale Law Journal* (V. xv, p. 221) Albert S. Bolles discusses the question, "How Should Our Law Books be Written?" He divides American legal treatises into state books and books on the common law of all the states. The former serve a useful purpose and are complete in themselves. The author of the latter class has a more difficult task. If he aims to produce a work essentially exhaustive, he traverses the field of comparative jurisprudence. The

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principal defect of many of the modern law books falling within this class is they do not regard the subject from this point of view, are incomplete, and consequently do not possess the same authority as the older books in their day.

With the rapid increase of decisions, recent writers, with a few exceptions, despairing of attaining similar completeness, have contented themselves with presenting, as they supposed, the more important principles fortified with some references, without much or any thought of the question how the principles were regarded in different jurisdictions. The comparative method has not been observed, and so the worth of their productions, measured by those of earlier authors, has steadily declined in usefulness and authority. Their books are often but little more than a digest of a particular subject, with a better arrangement of the principles, but without the merit even of the completeness of a digest."

"Many of our modern books abound in these imperfections. Consequently there is danger in using them as authorities for new rules in states where none exist. There is no certainty that the rule found in one of them is the last rule, or is maintained by the larger number of states, for the author does not usually profess to have used the exhaustive, comparative method, but only professes that the principles stated are sustained by his citations.

"Does any one doubt the successful employment of the comparative method? Perfection is not expected, but with the excellent digests, both state and national, now existing, it is practicable to collect and compare all the cases dealing with the same matter and the different rules embedded in them."

"To those who are thus in quest of knowledge a law writer who is properly qualified for his task should be a welcome helper. He ought to know more about his subject, which he has especially studied, than any judge or lawyer, and therefore can rightfully and modestly claim to be the teacher of all others. And if he has not thus mastered it, and acquired a much better understanding of it than others, he ought not to add another book of the old-fashioned kind to the overburdened literature now existing." He also suggests that the author should present statutes as well as common law rules.

"Of late, another kind of book is appearing, in which completeness of citation is the author's goal. Such works are supposed to be especially valuable to the brief-maker as a quarry, to which he can go and find ore. Many of the citations massed bear indirectly on the principle, yet by the method are rightfully included. Doubtless these works have a real use, but are still wanting in the comparative idea, the sifting of cases, putting them under their proper classifications and evolving from them the better rules. They may serve as authorities for the rules stated; they are still lacking in the higher critical elements."

CARRIERS. Joseph H. Beale, Jr., contributes to the March *Yale Law Journal* (V. xv, p. 270) an analysis of the cases relating to "The Beginning of Liability of a Carrier of Goods."

"A carrier of goods is a bailee of the goods for the purpose of carriage; and his responsibility as carrier cannot begin until he has become a bailee. And since possession of the bailee is the gist of the bailment, the carrier's responsibility does not begin until the moment when he assumes possession."

"The simplest form of such assumption of possession is the actual taking of goods into the hands of an authorized agent of the carrier for carriage. Where this happens, the carrier's responsibility begins from the moment the carrier's agent takes the goods."

"One who delivers goods to a person purporting to act for a carrier must see to it that the person is actually authorized by the carrier to accept goods on his behalf; the shipper takes the risk of the authority of the person with whom he chooses to deal."

"It is, however, sufficient to deliver the goods to a servant of the carrier who is usually employed in receiving and forwarding goods for the carrier; a shipper has a right to assume that such a person has ample authority to deal with him in this matter."

"It sometimes becomes important to determine at what moment goods delivered to the carrier by tackling or other mechanical device pass into the possession of the carrier."

"The determining fact in such a case is the control of the machinery."

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It is not sufficient delivery to merely place goods where a carrier may conveniently get them unless he has consented to receive them there. Consent may be established by custom. Where the owner of the goods goes along with them and retains custody of them the carrier is not considered in possession, but where he goes merely for greater security of the goods the carrier is responsible on assuming possession. A carrier in England is responsible for small articles of personal baggage taken with him by a passenger, but he is not an insurer, and the degree of care is materially lessened by the fact that the passenger is in actual control. In this country the carrier has never been held liable.

"The carrier's liability begins at once on the receipt of goods for transportation, though the goods have not yet been placed in the carrier's vehicle for transportation and even though no bill of lading has been issued for them, and the freight has not been prepaid."

"Since a bailment is required before the carrier of goods becomes responsible as such, it must be clear that without such bailment one cannot be a carrier of goods. It sometimes happens that a bill of lading is issued by the servant of a carrier without a delivery to the carrier of the goods named in the bill. Such issue of a bill of lading does not make the carrier responsible as a carrier for the goods described in the bill. In some jurisdictions it has, to be sure, been held that if a bill of lading was issued by the proper agent of the carrier and was indorsed for value to a *bona fide* purchaser, the carrier could not as against him dispute the receipt of the goods; and where a carrier issued two bills of lading for the same goods, and the two bills came into the hands of two holders for value and without notice, it was held that the carrier could not dispute the receipt of two lots of goods. But this is based on the doctrine of estoppel; the carrier is not responsible as such on real facts, but in this particular case the real facts cannot be shown."

CHATTEL MORTGAGES (see Mortgages).

CONSTITUTIONAL LAW. "The Law of the Constitution in Relation to the Election of President," by J. Hampton Dougherty, *American Lawyer* (V. xiv, p. 68).

CONSTITUTIONAL LAW. "Is There an Unwritten Constitution of the United States?" by Henry M. Dowling, *Central Law Journal* (V. lxii, p. 144).

CONSTITUTIONAL LAW (Commerce). The interpretation of the commerce clause which forbids a state to tax or prohibit the introduction of goods from other states so long as they remain in the original package is criticised by William Trickett, in the March *Columbia Law Review* (V. vi, p. 161), in an article entitled, "The Original Package Ineptitude." This doctrine arises from a decision of Chief Justice Marshall, who drew the line at the time when the goods became incorporated and mixed up with the mass of property in the state. The author says this is manifestly no test. While it might be intelligible with reference to some articles it would not be with reference to others, for machines can always be identified until taken apart. The reason for the prohibition of taxation is that a right to tax would practically mean a right to prohibit importation. From the doctrine that an importer loses his right if he breaks the original package it follows that he must establish an unbusinesslike package or lose his right to sell at retail, and unless he has the right to sell at retail the right to import is practically worthless. The author asks why should the right to import and sell depend on the size or form of the package. In a recent decision it was suggested that where there was no original package there was no right to import, and then lays down the new principle, "that not every original package can be sold by the importer despite the state's prohibition, but only original packages of a certain size." The size is not determined by naming its cubical dimensions, or the material which encloses the bulk, but is defined in part by history, and in part by intention. The package, we are informed, must be in the "form in which from time immemorial, foreign goods have been brought into the country." But these cigarettes were not foreign goods. Foreign goods are of infinite variety, and they do not all come in the same kind of packages. Silks do not come in casks, nor potatoes in pasteboard boxes. New kinds of goods are from time to time brought into the country. Suppose a kind of package has been used twenty-five years past only. Will it be deemed to have been used from time immemorial? Cigar-

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ettes have not existed from time immemorial. But why attempt to put a judicial straight-jacket upon business? Why is the merchant not allowed to use whatever kind of package convenience, economy, or even caprice suggests? Why put the business of the country under the yoke of a petty abstraction? If a merchant chooses to a use little package, why deprive him of the right to make a sale which he would have had had it been a big package?

Another test, however, is intimated. It is suggested that the use of some packages is *bona fide*, and that of others *mala fide*. The size must be that of "packages in which *bona fide* transactions are carried on between the manufacturer and the wholesale dealer residing in different states." This means, apparently, that if a man wants to enjoy the constitutional right of importing into a state and of selling therein an article of which it unconstitutionally prohibits the introduction and sale, and he adopts such packages as will make this right fruitful, he *ipso facto* forfeits that right. The court practically says to him, you have a right to import and sell in the original package.

"Has not the time arrived to abandon the judge-made canon, that the immunity of an import from state control depends upon its remaining in the form in which it first appeared within the state, and in the ownership of the importer; or, retaining that, to concede the right of the importer to import for retail, and in packages designedly adapted, without breach, to purchase by consumers?"

CONSTITUTIONAL LAW (Railroad Rates). Andrew Alexander Bruce contributes to the *Central Law Journal* (V. lxii, p. 199) a thoughtful article on "Railroad Commissions, State and Federal."

His views of pending legislation are summarized in the following paragraph:

"From the considerations suggested it seems clear that all the national congress, and, under the majority of the local constitutions, all a state legislature can do in the matter of creating and empowering a railroad commission, is to create a board which shall be investigatory, advisory, and administrative in its nature, or a subordinate railroad court which shall possess the functions of a court alone."

In conclusion he says:

"If railroad and other similar commissions there must be, and there is a strong argument for them, is there anything to be gained in the long run by twisting the constitutions, state and national, beyond all recognition? Is it not time to realize that conditions have radically changed since the adoption of these instruments both in the states and in the nation; that the Constitution of the United States was adopted and ratified in an age when there were no railroads, no great combinations of either capital or labor, and no foreign possessions; that in many of the states the constitutions of an agricultural era are being sought to be made over and construed to meet the needs of a manufacturing community? Is there not a demand for constitutional amendments rather than for constitutional misconstructions? Does not each new distortion, each new surrender of basic principle and of irresistible logic, pave the way for still further surrender, make the law less and less certain, and encourage that class of lawyers, now only too common, whose main business seems to be to teach their clients how to violate the basic principles of society and human kinship and by the weapons of delay and obstruction to hinder if not prevent all progress and all reform?"

CONSTITUTIONAL LAW (Railroad Rates). "Railway Rate Legislation," by Hon. J. B. Foraker, Speech in Senate of United States, Washington, D. C., 1906.

CONSTITUTIONAL LAW (Railroad Rates). "A Practical Plan for Railroad Rate Regulation," by Charles J. Traxler. An address delivered before the Commercial Club, Minneapolis, Minn., 1906.

CONTRACTS. "Are Notes or Other Unexecuted Obligations given to a Railroad Company to Induce the Location of Stations at a given Point Void as against Public Policy?" by M. C. Garber, *Central Law Journal* (V. lxii, p. 164).

CONTRACTS (Sales). "Combinations of Contracts Relating to the Sales of Personal Property," by Edward S. Rappallo, *American Lawyer* (V. xiv, p. 52).

CORPORATIONS (History, Theory). With the purpose of analyzing the essentials of the trust problem Robert L. Raymond con-

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tributes to the March *Harvard Law Review* (V. xix, p. 350) a discussion of "The Genesis of the Corporation," in which he reaches conclusions in accord with the article by W. Jethro Brown, on the "Personality of the Corporation and the State," published in the *Law Quarterly Review* after this article was written. Mr. Brown's article is reviewed in our December number. He calls attention to the fact that "the germ of the corporate idea lies merely in a mode of thought, in thinking of several as a group or as one. He contends that this mental process is familiar and inevitable and that the basis of all groups is the same. If a group acts together with sufficient regularity or frequency we begin to think of them and speak of them as something distinct from the individual components. Thus without the aid of artificial creation or authority from a sovereign power partnerships and corporations exist from the very nature of human activities.

"The corporation, though representing perhaps the most advanced attainment of the group idea, is only one manifestation of a development which has gone on in every country under the sun having a claim to be called civilized. Obviously, and this cannot be too strongly insisted upon, it was not the invention of any one man or one people."

The corporation in its essentials is not peculiar to any country or any people. The author then traces the history of the origin of corporations from which he sums up as follows:

"From the temporal development we get, by reason of the association of individuals in the same locality plus an active interest therein, especially in trade matters, a unit interest which demands and receives franchises and privileges which belong to the associated persons in a way not provided for by any of the existing theories of ownership. We get the fact of a oneness which has a place in business and law without the conscious recognition of its existence. The process was vague; it was not marked off by distinct steps. The oneness of the burgesses was there all the time, as it is in every group, but many years had to elapse and many unconsidered acts to be done before it emerged from the mist as something definite and real. Meanwhile the group idea was developing in ecclesiastical life. For wholly different reasons religious groups were formed.

"From the ecclesiastical development we get organizations of individuals formed for different purposes and by voluntary association, which have a continuous existence and which are recognized as units."

These facts called for a new legal theory and resulted in the conception of an ideal person having legal rights and duties borrowed directly from the early English theory as to church ownership.

"The corporation, then, grew by nature. It was the product of a natural evolution. During all the period with which our discussion has concerned itself there was no rule that the corporation must have some definite and authoritative commencement. There was no rule that the corporation must be erected, set up, made by act of the sovereign power. By the middle of the fifteenth century, however, it was settled as a matter of positive law that the corporation must be created by the sovereign power. This rule arose simply from considerations of political expediency. It was recognized that boroughs, organized communities, might be dangerous. It would not do for the sovereign power to have them exist too freely. This reason also applied to the gilds which were likely to become aggressive. Here too was a good source of revenue. The privilege of being a borough or the right to form gilds would be bought. The rule of law was based, like other rules of law, on public safety and convenience.

"A corporation which in business affairs can do practically anything and everything that can be done by an individual and can do it anywhere and everywhere is a long distance from the true corporation which was brought into existence by absolute necessity, which was recognized simply because the progress of events demanded its recognition, which was the result of natural growth, of logical evolution. The modern corporation is the product of arbitrary legislation struck off at a given time. It does not represent the natural growth of the corporate idea, but rather is a distorted application of that idea. Serving as a buffer between questionable acts and their natural consequences, it has been used to bring about a state of affairs in the commer-

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cial world which rests on neither a just nor a sound basis. If existing conditions are to be improved, it must be by intelligent amendment of our corporation laws. An exact standard by which to measure proposed legislation is not to he hoped for; but in a clear understanding of what a corporation really is we may find both guidance and authority for action."

DIGEST. Digest of the United States Reports (V. 1 to 186 inclusive). Table of cases, table of citations of all non-federal cases cited by the Supreme Court. 3 vols. By Walter Maline Rose, Bancroft–Whitney Co., San Francisco, 1903.

The profession welcomes a comprehensive digest of the Supreme Court decisions in place of the antiquated and ill arranged works previously used. These volumes classify decisions intelligently and conveniently and, as far as the reviewer has been able to discover, accurately and completely.

DIPLOMACY. "Spanish-American Diplomatic Relations Preceding the War of 1898," by Horace Edgar Flack, *Johns Hopkins Press*, Baltimore, 1906.

EQUITY. Pomeroy's "Equity Jurisprudence" by John Norton Pomeroy, Jr. Third Edition in four volumes supplemented by a treatise on equitable remedies in two volumes, price $36.00, Bancroft-Whitney Company, San Francisco, 1905. The new edition of this important work consists of the old text and notes with the addition of a new series of notes giving the new citations well arranged in alphabetical order with reference to the state jurisdictions and identified by brief references to the distinguishing facts of each in most instances. These notes also contain discussions of many subjects which were omitted or inadequately treated in the earlier editions, such as "spendthrift trusts" and "the following of mingled trust funds." These notes are excellently done and in an entirely new work would properly come in the text. The notes include valuable references to authorities not often cited such as notes of the *Harvard Law Review*. The last two volumes treating of Equitable Remedies are entirely new. They are an expansion of the text of the fourth volume, which in the original edition treated very briefly such important subjects as injunctions and receivers, the cases on which have multiplied tremendously since the original work was completed. The point of view of the author is still that of an annotator of his father's text. The work, however, is careful, and though somewhat less ambitious in style than the work of the father will perhaps prove fully as useful to the practitioner. The edition is a great improvement on the earlier ones which seems sufficient praise.

EQUITY (See **Property, Equitable Conversion**).

EXECUTORS. In the March *Michigan Law Review* (V. iv, p. 349) under the title "An Inroad upon Fiduciary Integrity," Edson R. Sunderland discusses the question whether an administrator or executor should be permitted to show that he cannot collect a debt due from himself. He thinks that the situation clearly falls within the general principle "that no person shall be permitted to occupy a position of trust and confidence, who at the same time is clearly subject to influences hostile to a faithful performance of his trust." As a fact, however, there is hopeless conflict among the cases upon this question. In some decisions it has been stated that insolvency on the part of the administrator would relieve the sureties on his official bond.

"Three states, Nebraska, Michigan, and Kentucky, are thus seen to have adopted the qualified rule of liability, within the last four years. The only reason, independent of statute, suggested in any case which advocates that view, is the hardship upon the sureties. This does not seem a sufficient justification for relaxing the safeguards which the law deems so essential for the preservation of the trust relation. The principles of equity prescribe, in the interests of an enlightened public policy, that no person, who occupies a position of trust and confidence, shall be permitted at the same time to sustain such personal relations to the subject matter of the trust, that self-interest can become a direct competitor with the most scrupulous fidelity. Any departure from this wholesome principle is too likely to open the door to fraud."

HISTORY. "The Chancellors of the Nineteenth Century Considered as Law Reformers," by E. K. Blyth, *Canadian Law Review* (V. v, p. 96).

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HISTORY (Bar of Paris). E. S. Cox-Sinclair writes in the February *Law Magazine and Review* (V. xxxi, p. 171) of "The Bar in France."

"There are two great fundamental distinctions between the constitution of the Bar of England and the constitution of the Bar in France, one a matter of corporate entity and the other a matter of internal government. The Bar of England is one entire body, in practice distributed to some extent into parts or local entities. The Bar in France consists of many distinct local orders, each in theory separate, but each in practice having with the others a singularly close association, and each having in its code of customs a system almost identical with that of its compeers. Again, the Bar of England has as its authority of domestic discipline a group of Four Inns of Court, having no corporate connection with each other, no direct system of representative government, and no direct association with the actual practice of the profession. Each Bar in France, on the other hand, is, regarding its system of inner control, self-contained; its officers are selected by the members of the order, and it is both one of the governing criteria of the selection, and also one of the results of that selection, that the status of the official should be a status in the active pursuit of the profession. It may be added, that both in England and in France the advocate is free from state control, and the authority of the court of justice over his conduct is limited to the expression of an opinion regarding his attitude, or the course pursued by him, in a particular case.

"Now, these differences of constitution and of discipline, if one excludes from consideration the influence of racial characteristics, and of those incidents which are called accidents, which as frequently intervene in the development of a constitution as in the evolution of a species, are the direct result of several historic facts."

The author then traces the history of the development of the Bar of Paris down to the Revolution.

HISTORY (Juries). An interesting account of the trial of "Sir Nicholas Throckmorton" by G. Glover Alexander is published in the February *Law Magazine and Review* (V. xxxi, p. 184) as an instalment of his series of articles on "The Province of the Judge and of the Jury." He finds evidence that the defendant was appealing to the jury to take upon themselves the decisions of those points of law which the judges had so obviously misconstrued against him. The article also contains a beginning of an account of Lilburn's trial.

INTERNATIONAL LAW. "Growth of Neutral Rights and Duties," by Edwin Maxey, *American Lawyer* (V. xiv, p. 55).

INTERNATIONAL LAW. A treatise by L. Oppenheim, LL.D., lecturer on public international law at the London School of Economics and Political Science, etc. 2 Vols. Price $12.00 net. Longmans, Green, and Co., London, 1906. The first volume of this work which appeared last year dealt with subjects classified under the general title of "Peace." This second volume is entitled "War and Neutrality," but also includes a section devoted to "Settlement of State Differences." The author carefully discusses the rules of international law in the light of the specific applications and extensions made in the recent great wars in Africa and the East and treats of some subjects not usually included in such a treatise. The text is clear and well arranged and the conclusions seem to the reviewer to be sound. The book will be of value to all who desire a comprehensive knowledge of the principles of international law.

INTERNATIONAL LAW. Thomas Batty publishes in the February *Law Magazine and Review* (V. xxxi, p. 160) what he describes as "Forty Propositions in the Law of Neutrality." This is a collection of forty rules which it is impossible to summarize here.

INTERNATIONAL LAW (Consular Courts, China). In the March *Michigan Law Review* (V. iv, p. 339) Gustavus Ohlinger describes "Extra-Territorial Jurisdiction in China." He explains that the Chinese have long been accustomed to the presence in their midst of foreign populations governed by laws peculiar to themselves and, perchance, owing allegiance to a foreign sovereignty. This custom first arose with reference to Arabian traders and has been continued into modern times. It was only in criminal matters that the government reserved to

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itself jurisdiction, and this was seldom exercised except in serious cases. These were cases punishable capitally.

The author then relates the history of the special treaties with modern nations, especially with the United States, in which suits against the Chinese were to be tried by the native magistrate, the plaintiff's consul only attending to watch proceedings, suits against foreigners being tried by representatives of the foreign nationality. We have provided for consular courts in certain foreign jurisdictions including China with rights of appeal to federal courts of the United States. As a matter of practice Chinese officials have seldom attended proceedings before the foreign tribunals, but many foreign representatives have so acted at hearings before the native magistrates as to practically usurp their jurisdiction, and this the author regards as one of the gravest abuses connected with foreign intercourse in China. "Extra-territoriality," he says, "is at best an unsatisfactory makeshift." It involves a multiplicity of suits, confusion of laws, and calls forth national prejudices.

JURISPRUDENCE. "The Province of Quebec and the French Civil Code," by Edonard-Fabre Surveyer, *La Revue Legale* (V. xii, p. 12).

JURISPRUDENCE (History). "A Historical Sketch of the Growth of Mohammedan Jurisprudence," by Abdur Rahim, *Calcutta Law Journal* (V. iii, p. 19n).

LITERATURE. "Recollections of a Country Lawyer," by Sol L. Long. Courier Printing Co., Winfield, Kansas.

MANUALS. "The Elements of Business Law," by Ernest W. Huffcut. Price $1.00. Ginn and Co., Boston, 1906. A teacher's manual for laymen.

MINING. "The Mines Act of Ontario," by J. M. Clark, *Canada Law Journal* (V. xlii, p. 89).

MORTGAGES. "Clog on the Equity of Redemption," by Edmund G. Kaye, *Canadian Law Times* (V. xxvi, p. 88).

MORTGAGES. "Sub-Mortgages," by P. Duraiswamy Aiyanzar, *Bombay Law Reporter* (V. viii, p. 42).

MORTGAGES (Chattel). "The Effect of Foreign Chattel Mortgages upon the Rights of Subsequent Purchasers and Creditors" is discussed by Marion Griffin in the March *Michigan Law Review* (V. iv, p. 358). By weight of authority a chattel mortgage is a transfer of the property itself as security for the debt and creates more than a mere lien. The true principle governing the validity of chattel mortgages is that the law of the place of contract governs as to the nature, validity, construction, and effect of the contract. Some courts make a distinction however, and hold that priorities in attachments are determined by the law of the forum.

"Nor can it be successfully contended that because the registration laws of a state have no extra territorial force, the priority of a chattel mortgage conferred by registration is not entitled to enforcement in other states. Strictly speaking, priority is not conferred by registration. As we have already seen, it is conferred by the contract itself, the statutes concerning registration being designed merely to protect that priority by supplying a constructive notice which shall take the place of actual notice whenever the latter may be wanting. Priority is only the legal term for the superiority of a prior title or lien. Before equity worked out the doctrine of innocent purchase, the first contract invariably gave a superior title. The doctrine of innocent purchase formed an exception to the general rule, and to prevent its too wide operation, laws were enacted requiring registration and making that equivalent to actual notice. But priority is no more conferred by registration than by actual notice. It existed before them, and though liable now to be lost for want of one or the other, it has its origin in the mortgage itself.

"The majority of decisions are for the most part based on the true principle, that the registration laws of their own states do not apply to a mortgage on property which at the time of the execution of the mortgage was within the jurisdiction of another state, but that comity will give to such mortgage, if properly executed and recorded there, the same effect that it has by the law of that state, notwithstanding its execution or registration might have been invalid under the laws of their own state."

He admits, however, that this priority of the contract made in another state is recognized by comity and not *stricti juris*.

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Tried by another test he reaches the same result. The situs of personalty is at the domicile of the owner and a contract with reference thereto if valid by the law of the domicile is valid everywhere.

The author then recites various exceptions to the rule (a) where chattel mortgages are executed and recorded in a foreign state at the time when the property is within the jurisdiction of the state in which suit is afterwards brought, where they contravene some express law or settled public policy of the state. A debt has its situs at the domicile of the debtor, and an assignment of it is governed by law. A contract made with an order to immediate transfer of the property to another state is to be construed by the laws of that state. A transfer of property by operation of laws is governed by the law of the situs.

"The general rule is founded on the correct principle that the mortgage with all its incidents should be governed by the *lex loci contractus*. That rule protects the mortgagee. It does not defraud creditors whose claims existed before the mortgage — they have not been as diligent as the mortgagee in obtaining security; nor subsequent creditors, because their claims are inferior. Nor does it work any greater hardship upon innocent purchasers than in any other circumstances under which they have constructive but not actual notice.

"The position of the Michigan, Pennsylvania, and Tennessee courts is indefensible, except upon the ground that the doctrine of comity, imposes no obligation."

MUNICIPAL CORPORATIONS. "Municipal Problems in Mediæval Switzerland," by John Martin Vincent, *The Johns Hopkins Press*, Baltimore, 1905.

NEGLIGENCE (Landlord and Tenant). "Liability of Lessor of Railroad for Lessee's Negligence Resulting in Injury to Latter's Employee," by Cyrus J. Wood, *Central Law Journal* (V. lxii, p. 181).

PERSONS (Infancy, Contracts). Cases relating to "What Contracts of Employment are Binding upon Infants" are collected by C. B. Labatt in the March *Canada Law Journal* (V. xlii, p. 129).

PERSONS (Names). G. S. Arnold contributes to the March *Yale Law Journal* (V. xv, p. 227) an article entitled "Personal Names." He traces first the history in England of the gradual appearance of surnames owing partly to an early requirement for the record of births, marriages, and deaths. In time middle names became customary, but the law has always regarded these as unimportant. Apart from statutes any person may at will change his name, but in this country many states have legislated upon the subject.

"A brief examination of these statutes, however, will show that, even in the instance where it is forbidden to engage in trade under a fictitious or assumed name the common law has really not been abrogated, and that these statutes have a very different effect from the cognate legislation in some of the European states."

"A comparison of the results of these laws shows this distinction — in France and Germany the usurpation of a name renders one liable in action either to the state or to the individual, in England and the United States, generally speaking, this is not true. Moreover it is evident that in the former countries a name is regarded as, in itself, and without considering it as an adjunct to trade, a property right. In the latter this is not true. No man has a property right in his name *per se*."

"Aside from the question of direct pecuniary interest, however, which in most cases the policy of our laws protects, and consequently aside from the question of fraud — for fraud is the basis of the right of complaint — there is no remedy against a person who adopts the name of another. Abstractly, this seems unjust, for there can be a no more valuable patrimony than a good name; it is, though outside the pale of commerce, one of the most prized attributes of man. The arbitrary adoption of a person's name may cause him boundless annoyance, confusion, and humiliation."

"While it cannot be denied, however, that the refusal of the courts to recognize the rights of a name as such and their natural and consistent hesitation in pronouncing the name property until its pecuniary value can be shown, result occasionally in great hardships, instances of such results are surprisingly rare. Theoretically incomplete, the law of names shows how most satisfactorily

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the common law and equity expand to meet all practical needs."

POOR LAWS (England). "The Consolidation and Amendment of the Poor Law Statutes" is advocated by Lewis Sinclair in the February *Law Magazine and Review* (V. xxxi, p. 147). This again calls attention to abuses of the English statutes which have resulted in a great increase in pauperism due, the author thinks, to a multiplicity of authorities, a multiplicity of acts, orders, and legal decisions, an obsolete law of settlement, and wasteful administration.

PRACTICE (Imprisonment for Debt). In the February *Law Magazine and Review* (V. xxxi, p. 129) Charles M. Atkinson produces startling evidence to show a great increase in imprisonment for debt in modern England, under what we call poor debtor process, which the author regards as due to a failure to administer the law in the spirit in which it was framed. Personal service not being required the debtor frequently has no notice of the proceeding. It has not been required that his means of payment shall be strictly proved. The result is an expansion of small local credits and the support of large numbers of working men by the public.

PRACTICE. "Execution of Decrees Against Holders of Impartible Estates," *Madras Law Journal* (V. xvi, p. 1).

PROCEDURE. "The Plea of Set-Off," by Satya Chandra Mukerji, *Allahabad Law Journal* (V. iii, p. 1).

PROPERTY. "Alien and Corporate Ownership of Land in Texas," by Hon. M. H. Gossett, *American Lawyer* (V. xiv, p. 66).

PROPERTY. "Intermediate Landholders and the Madras Rent Recovery Act," by P. R. Ganapathy Aiyar, *Madras Law Journal* (V. xv, p. 375).

PROPERTY. "The Rule against Perpetuities," by John Chipman Gray, second edition in one volume. Boston, Little, Brown & Company, 1906, pp. xlvii, 664.

If we may judge by the way the first edition of this work has been received, the second edition will be welcomed by the Bench and Bar of both England and America. The ideal set for attainment in the original execution of this work and the manner in which that ideal has been fulfilled, has made the first edition during twenty years a constantly increasing book of authority both here and in England. It has been in constant use not alone as a means of finding authorities, but as guide to principles. Indeed the admirer of Professor Gray's work observes with the greatest satisfaction and pleasure that in two recent English cases — *In re* the Trustees of Hollis Hospital [1899], 2 Ch. Div. 540, 552, and *In re* Ashforth's Trusts, 21 Times Law Reports 329, 331 (1905) — eminent English Chancery judges have expressly adopted Professor Gray's views on controverted points as against the positions taken by English authors whose opinions Engish lawyers and judges have always held in great respect. In the first of these cases Professor Gray's opinion was expressly preferred to that of Mr. Challis, and in the second to that of Mr. Joshua Williams.

The important additions to this work consist of a further word on whether determinable fees can exist since the Statute of *Quia Emptores* (§31 *et seq.* and Appendix E, §§774, 788); an Essay on Future Interests in Personal Property contained in Appendix F, §§789–856 (supplementary to §§71–97); the Meaning of Perpetuity as an attempted restraint on the barring of an estate tail, §§141a–141f; an interesting answer in Appendix G, §§857–893, to the effort of the New Hampshire court to get round the doctrine of Leake *v.* Robinson (supplementary to §§373–374); two other appendixes on Gifts to Indefinite Persons for non-Charitable Purposes, and Conversion and the Rule against Perpetuities. Chapter IV on Postponement of Enjoyment and the Rule against Perpetuities (§§118a–121j) has been entirely rewritten.

The most interesting of the new problems dealt with appears in §121b. There the learned author puts the case of an immediate vested bequest to the grandchildren of A,[1] a living person, to be paid to them at twenty-five. He supposes that there is one grandchild *in esse* not yet four years old. He says "Here the number of the class may not be determined till too remote a period, the Rule

[1] The actual language used by the learned author is "testator" instead of "A," but the case actually discussed would require the limitations to be either to the great-grandchildren of the testator or to the grandchildren of "A," the living person at the testator's death.

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against Perpetuities will be violated, and the gift to a class which may be so constituted will be bad; there is, then, no reason for sustaining the direction to postpone in the interest of increasing the class, and the provision is inoperative." This at first sounds as if it were in direct contravention to the principle announced in §629 that "every provision in a will or settlement is to be construed as if the Rule did not exist, and then to the provision so construed the Rule is to be remorselessly applied." A reference, however, to §442a seems to indicate that the result approved in §121b is reached not alone because to let the class increase would make the gift void for remoteness, but because the gift to the members of the class born at the testator's death and those born afterwards, compose two distinct groups which are separated by the express language of the testator. Hence the too remote gift to afterborn members of the class is rejected, leaving the gift to the other group, which is valid, to stand. This express separation of the two groups of the class is apparently to be found in the words "to be paid at twenty-five." If, however, the gift to the afterborn members of the class were in the same way contained in the words "who reach twenty-five" in such limitations as to the "grandchildren of the testator who reach twenty-five" the learned author admits that there could be no separation of the gifts. (§§205a, 373–374.) It seems a fair criticism of that portion of §121b here specifically referred to, to say that the learned author has not expressed the reasoning upon which the result is based as happily as usual. Nor has he at any place explained why the class of grandchildren is separable by the express language of the testator any more in the case where the gift to afterborn members of the class arises by virtue of the rule for the determination of classes founded upon the words "to be paid at twenty-five" and where it arises by virtue of the rule for the determination of classes from the words "who reach twenty-five." — ALBERT M. KALES.

PROPERTY (Equitable Conversion). Prof. C. C. Langdell contributes to the March *Harvard Law Review* (V. xix, p. 321) the seventh and last of his series of articles upon "Equitable Conversion." This treats of the duration of an indirect equitable conversion showing that it is the same as that "of the contract, trust, or duty which brings it into existence, or more strictly it is the same as that of the right which such contract, trust, or duty creates to have an actual conversion made, for a contract may be conditioned on future performance while the right exists at once." There is little doubt when an indirect equitable conversion begins, but the time when it ends is much less certain. In case of a contract for the purchase and sale of land the equitable conversion in favor of each party to the contract will come to an end whenever the contract comes to an end. It will end in favor of either party by a total breach of the contract being made or by his losing the right to enforce the specific performance of it. A conversion created by a covenant trust or duty to purchase and settle land is seldom put an end to in either of these ways, but may be ended otherwise than by performance of the covenant, trust, or duty, as for example by a complete exhaustion of the gifts which are to be made of the land purchased.

"The conclusion, therefore, is that every equitable conversion caused by a covenant, trust, or duty to lay out money in the purchase of land, and to settle the land, will necessarily come to an end as soon as there ceases to be any person who is entitled to have the money laid out in the purchase of land, and to have the land conveyed to him for an estate for life or in tail in possession.

"The equitable conversion caused by a covenant, trust, or duty to lay out money in the purchase of land and to settle limited interests in the land, will also come to an end whenever any person shall acquire an absolute ownership of the money, though such limited interests covenanted or directed to be settled in the land to be purchased be not exhausted; and such absolute ownership of the money may now be acquired by any person, of full age and *sui juris*, who is entitled to an estate tail in possession in the land to be purchased, and to have the same purchased immediately."

"There is, however, one class of cases in which it is agreed by all that there will cease to be any equitable conversion, though the

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actual conversion covenanted or directed to be made has not been made, and though there has been no election not to have it made, namely, where the absolute owner of money which has been converted in equity into land has the money in his own hands, — in which case the money is said to be *at home;* and it seems not to be material whether he has possession of the money in his own right or as executor only."

PROPERTY (See Mortgages, Mining).

PUBLIC POLICY. "Blackmail and Extortion," by James W. Osborne, *Bench and Bar* (V. iv, p. 50).

RAILROADS (See Constitutional Law).

SALES (See Contracts).

TORTS (Injunction). An interesting commentary on the recent report of the English commission appointed in 1903, after the famous Taff Vale case, to inquire into trade disputes is published serially in the *Law Times* beginning March 3, 1906 (V. cxx, p. 390) under the title of "Trade Disputes and Combinations."

TORTS (See Negligence).

TRUSTS (Free Church Case). In the March *Columbia Law Review* (V. vi, p. 137) Judge Francis C. Lowell discusses "The Free Church of Scotland Case" from an American point of view. The decision he states was rested upon two grounds.

"*First*, that the United Free Church had departed from the doctrine of the Free Kirk, in that it no longer adhered to the dogma of establishment, the dogma that a state ought to maintain a particular form of religion. *Second*, that the United Free Church had abandoned the dogma of predestination, which was an essential part of the doctrine of the Free Kirk."

To an American lawyer the question concerns the construction of a charitable trust. He contends that the disposition of gifts by will must depend upon the language of the several wills. Yet the House of Lords construed wills by the hundred without reference to any of them. The reports of the decision omit "*First*, to state the precise question involved in the two cases; *Second*, to recognize that the donors were many, and that the intention of one might be quite different from that of another; *Third*, to set out the language used in the several gifts; and *Fourth*, the failure in the first case to state if there was a general deed or declaration of trust. These omissions are hard to understand. Some of them, but not all, may be set down to differences between Scotch and American law."

In America he says the court would construe the terms of a charitable gift in the light of surrounding circumstances and Scotch ecclesiastical history would be deemed such a circumstance and no more. The Lords, however, quoted from the writings of certain preachers of the faith to ascertain its dogmas although these opinions have never been formally adopted as symbols of the faith. The American court would have attached more importance to the form of organization of the members of a church and would have regarded a gift to the church as a gift to the body whose views were to be determined by a majority. He believes that the difference in point of view may depend in part upon the different ecclesiastical history of the two countries. But upon the evidence even if the House of Lords were required unaided by a denominational tribunal or ecclesiastical decisions, to determine if there had been an abandonment of essential dogmas of the faith, the question, it seems, should have been answered in the negative.

"We find, then, that the Free Church case is hard to understand. *First*, from the omission in the report of a statement of the precise controversy. *Second*, from the failure of the Lords to seek the intentions of the individual donors of the fund in question. *Third*, from the assumption that continued identity of doctrine, apart from express requirement, is essential to a Christian church. *Fourth*, from the disregard of the ecclesiastical judgment of the Free Church upon the dogmatic questions involved. *Fifth*, from the failure to recognize that modification of doctrine was expressly permitted by the Barrier Act, and union with another religious body by the Model Trust Deed. *Sixth*, from an exaggeration of the importance of the principle of establishment, and from an erroneous conception of Calvinism not entertained by American Calvinists."

WILLS. In the March *Columbia Law Review* (V. vi, p. 175) George H. Yeamans discusses the curious antiquated rules regarding "Definite and Indefinite Failure of Issue."

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The question arises from an interpretation of all limitations of estates where the first taker "dies without issue" whereby it was held that this meant a failure of issue at any indefinite time in the future and not at the time of the death of the first taker. The author says, "the bare statement of what the question was shows that it ought never to have been entertained." The simple meaning of the clause referred to the author believes refers to the time of the death of the first taker," and yet the courts took the matter seriously and by imputing a strained and unnatural meaning to the words used, converted the simple language of every day life into a cemetery for the interment of testamentary intentions." This arose from the application of the rule against perpetuities to limitations so interpreted. Many states have adopted statutes enforcing the simpler interpretation, but not all. The author believes that the time is not far distant "when all this learning about definite and indefinite failure of issue will be considered as much of a curiosity," to many minds as much of a puzzle, as the now exploded rule in Shelley's case.

"The law is a great and noble profession; but one danger both to the Bar and the Bench is a tendency to too much refinement, too much of what is called technicality. Technical reasoning is nearly always intensely logical, if the premises be accepted as sound; but the difficulty is, that the premises are often based upon fossilized rules that have ceased to have the breath of life in them, because the reason of the rules has ceased to exist. In forensic reasoning and in judicial decisions it is often well to examine the ancient foundations of the law. But it is also indispensable that the latest growths, the latest fruits, the latest flowers that promise fruit, should be examined carefully. It is always wholesome that the judicial pruning-hook should be applied, not only to the dead limbs of the law, but also to cutting asunder the old, diseased or fossilized roots that no longer furnish any nutriment to modern legal reasoning."

WILLS. "On Restricting Wills," by Geo. Martin Rae, *Canadian Law Times*, (V. xxvi, p. 81).

WILLS (See Property Equitable Conversion).

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NOTES OF THE MOST IMPORTANT RECENT CASES COMPILED BY THE EDITORS OF THE NATIONAL REPORTER SYSTEM AND ANNOTATED BY SPECIALISTS IN THE SEVERAL SUBJECTS

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

ADMINISTRATIVE LAW. (Post Office — Fraud Order.) U. S. C. C. for E. D. of Mo. — An exceedingly interesting case relating to the right and authority of the officials of the Post Office Department to deny the use of the mails when, in their judgment, the statutes relating to such use are being violated, is that of People's United States Bank *v.* Gilson, 140 Federal Reporter, 1. It is there declared that the use of the postal service of the United States is not a matter of right, but of privilege, limited by the statutes declaring certain classes of matter to be non-mailable, and that it is competent for the Post Office Department to determine *ex parte* that a concern is using the mails in conducting a scheme to defraud and to base an order excluding it from such use upon that *ex parte* determination. A hearing in such cases is held not to be necessary, so that if one is granted, it is an act of grace, and the concern affected may properly be required to assume the burden of proof and to show affirmatively that its business is legitimate and honest. The statutes regulating the subject (Rev. St. §§ 3929, 4041, as amended by Act Sept. 19, 1890, c. 908, § 2, and Act March 2, 1895, c. 191, § 4, U. S. Comp. St. 1901, pp. 2686, 2749) give the postmaster-general power upon evidence satisfactory to him that any person or company is engaged in conducting any scheme to defraud through the mails to direct the postmaster not to deliver registered letters nor pay money orders to such person or company, and are said to authorize the postmaster-general to find that a concern is using the mails in conducting a scheme to defraud and to issue a fraud order on the evidence of agents and inspectors of the department, and which is more important still, it is held that such a finding cannot be reviewed by the courts in so far as it involves questions of fact, unless a plain error of law is shown.

The statutes relating to the Postal Service (Rev. Stat. §3929 and 4041) authorize the Postmaster-General, upon evidence satisfactory to him that any person is conducting any scheme or device for obtaining money through the mails by false pretenses or promises, to instruct postmasters to return mail matter directed to such person, and to forbid the payment of money orders.

The suggestion contained in the opinion that under these statutes there is no right to a hearing, has little significance in view of the statement that the officer acquired jurisdiction over the bank both by notice and appearance, which clearly implies that hearing is a jurisdictional requirement. This latter view is supported not only by the analogous cases of revocation of licenses and removal from office for cause, but also by the practice of the Post-Office Department, which was followed in the present case, and by the express provision of the Act of March 3, 1901, ch. 851, §1.

Should a fraud order be issued without any evidence to support it, the court will restrain its enforcement, but on the trial of the suit for an injunction the Post-Office Department may still show the fraudulent character of the scheme. (187 U. S. 94.)

The kind and weight of evidence, however, will be conclusively determined by the Postmaster-General, and it seems, therefore, that the person opposing the order may be required to rebut the ex parte findings of the department.

In the cases reported in 187 U. S. 94 and 136 Fed. 1001 the court was of opinion that the facts as presented by the bill showed that the business was not covered by the terms of the statute and therefore made a prima facie case for judicial interference, while in the present case the scheme described in the bill of complaint appeared to the court as not free from suspicion, and the prayer for an injunction was therefore denied.

The doctrine of the Supreme Court regarding judicial control of the action of the postal authorities will be found laid down in Bates & Guild Co. v. Payne, 194 U. S. 106, to the effect "that where the decision of questions of fact is committed by Congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even on mixed questions of law and fact, or of law alone, his action will carry with it a strong

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presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing."

In other words the Supreme Court does not recognize an absolute right to have the independent judgment of a court upon questions of law or fact decided by administrative authorities, but asserts the judicial power to review administrative determinations in case of clear error or of abuse of authority. **E. F.**

ADMIRALTY. (Wrongful Death — Measure of Damages.) U. S. D. C. for S. D. of N. Y.— Two or three points of some importance are contained in the decision in the Saginaw and the Hamilton, 139 Fed. Rep. 906. It is there held that in enforcing in a court of admiralty a right of action for wrongful death in a collision on the high seas, which right of action is given by the statute of the state to which the vessels belonged, the measure of damages is governed by the law of such state. It is also determined that the first officer of a vessel sunk in a collision is not chargeable with negligence because of her improper navigation where he acted in all that he did under the orders of the master, and that the fact that such vessel as well as the other was in fault for the collision does not affect such officer or members of the crew so as to preclude the recovery of full damages for their deaths from the fund paid in by the other vessel in proceedings for the limitation of liability. Probably the most novel holding in the case is that to the effect that the mortality tables, prepared for life insurance purposes, afford little aid in determining the expectancy of life in actions to recover damages for wrongful death, and that this is especially true where the deceased is a colored person. This latter holding is based upon two grounds, the first of which was expressed in the William Branfoot, 48 Fed. 914, where Judge Simonton said, with respect to mortality tables: "I have no confidence in and less respect for these tables, made up by insurance agents, in which, of course, large allowance must be made for heavy commissions, expenses, and profit." The conclusion that such tables are especially inaccurate as applied to the colored race is reached by consideration of the mortality tables abstracted from the census of 1880, which tables show that there is a very noticeable difference between the expectancy of life of a white and a colored person, especially during early maturity, the average white person at the age of thirty, for instance, having an expectancy of about three and one-half years more than a colored person of the same age.

The decision that the damages are governed by the law of the flag where the cause of action arose on the high seas is in accord with principle and authority.

And the slight value of mortality tables as evidence of the durability of human life in case of the colored race agrees with the known facts as to their high death rate as compared with the white race, a recognized fact in the sections where the colored population is most numerous.

R. M. H.

CARRIERS. (Passengers.) Ky. — A decision of great interest to carriers, particularly railroads, is delivered by the Kentucky Court of Appeals, in Illinois Central Railroad Company *v.* Allen, 89 Southwestern Reporter, 150. The duty of a carrier of passengers is held to be to attend to the comfort and safety of all of its passengers alike, but not to furnish especial attention to any one in particular, unless under exceptional circumstances, such as sickness en route, though if a carrier voluntarily accepts a helpless passenger without an attendant, it thereby assumes the additional care commensurate with his needs. In view of this duty, it is held that where a blind man seventy-seven years of age frequently took short trips involving no change of cars, or, on taking a trip involving a change of cars, was assisted by chance acquaintances or the employees in charge of the train, the carrier was justified in refusing to sell him a ticket unless he secured an attendant. The case is not entirely without precedent; indeed, the court quotes to some extent from Illinois Central Railroad Company *v.* Smith, 37 Southern 643, where the Supreme Court of Mississippi says that primarily the affliction of blindness unfits a person from safe traveling by railway, if unaccompanied, so that when a blind person applies to purchase a ticket, the ticket may be refused, unless the agent knows of his personal knowledge that the applicant for the ticket is competent to travel alone.

CONSTITUTIONAL LAW. (Due Process of Law.) R. I. — Two related points of considerable local interest are determined in Gunn *v.* Union Railroad Company, 62 Atlantic Reporter, 118. The scope of the decision is necessarily somewhat limited by the fact that the point of chief importance is determined expressly with reference to conditions in Rhode Island. The provisions of the Federal Constitution prohibiting a state from depriving any person of life, liberty, or property without due process of law, or denying to any person within its jurisdiction the equal protection

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of the law, are held not to require a trial by jury in suits at common law in a state court. This point, as the court pointed out, had been previously settled by the decision in Maxwell *v.* Dow, 176 U.S. 581, 26 Sup. Ct. 448. The point specifically in issue in the present case was whether a statute recently adopted in Rhode Island, authorizing the supreme court to direct judgment without any further trial by jury, is constitutional. In determining this matter the court traces the history of jurisprudence in Rhode Island, pointing out that by the charter of Rhode Island the validity of its laws was made dependent upon their not being contrary, but as near as might be agreeable, to the laws of England, regard being had to the nature and constitution of the place and the people. Public Laws, 1636–1705, provided for a second jury trial as of course, and this remained the law of the colony and of the state till 1878. From 1732 to 1844 a third trial could be had as of course on a writ of review, and from such third jury trial prior to the Revolution an appeal to the king in council might be had, on which appeal judgments and verdicts were reversed without remanding for a new trial. Constitution adopted in 1843 provided that the right of trial by jury should remain inviolate. And in view of these historical facts, the court holds that the legislature was authorized to give the supreme court power to direct judgment without any further jury trial.

CONSTITUTIONAL LAW. (Flag Law.) Neb. — In Halter *v.* State, 105 Northwestern Reporter, 298, the supreme court of Nebraska takes issue with the courts of both Illinois and New York in their recent decisions in Ruhstrat *v.* People, 57 N. E. 41, and People ex rel. McPike *v.* Van De Carr, 70 N. E. 965, that the statutes prohibiting the use of the national flag for advertising purposes are unconstitutional. The decision of the New York court, to be sure, is not quite so broad as that of the Illinois court, but the Nebraska court finds fault even with that decision. Various contentions of the defendants are considered, and it is maintained that the claim that the act deprived citizens of the right of exercising a privilege, impliedly, if not expressly, granted by the Federal Constitution, was unfounded. "The right to advertise whisky, beer, tobacco, and other articles of merchandise by the use of the national flag is," says the court, "not the subject of an express constitutional grant, and it can be said to be impliedly granted only in the sense that, like an infinite number of other acts, it is not prohibited. If the fact that an act or course of action is not prohibited by the Federal Constitution gives a citizen of the United States a right which the state is powerless to abridge or restrict, the sphere of state legislation is more circumscribed than has been generally supposed, and our Criminal Code is largely waste paper." The decision in the Illinois case that the statute is an infringement upon the personal liberty guaranteed by the state and federal constitutions is met with the argument that as patriotism has always been regarded as the highest civic virtue, and as contempt for an emblem begets a like state of mind toward that for which it stands, the statute is grounded upon sound practical considerations, and is within the police power. In the New York case the act was held not to be wholly void, but to be so only to the extent that it applied to articles manufactured and in existence when the act went into effect. It is asserted that this is not always an objection to the constitutionality of a statute, and it is pointed out that when the act against taking fish with a seine went into effect, there were many seines manufactured and in existence which were rendered practically valueless, and the same may be said of swivel guns. The prohibitory liquor laws necessarily rendered nearly valueless a large amount of property which was used in connection with the manufacture and sale of such liquors in the states which enacted such laws. This, however, was not regarded by the supreme court as a fatal objection to the statute. This same holding answers the objection that the act could not constitutionally interfere with the use of the trade-mark of the defendant company, which trade-mark was composed in part of a representation of the flag. To this claim the court replies that a trade-mark is property only, and consequently comes within the scope of the argument as to property rights.

CONSTITUTIONAL LAW. (Taxation.) N. C. — A new North Carolina statute intended to equitably distribute the burden of maintaining public highways, is held constitutional in State *v.* Holloman, 52 Southeastern Reporter, 408. S. C. Laws 1905, p. 292, c. 259, requires persons desiring to use the highways of certain towns for heavy hauling to procure a license on payment of $15 per wagon, and makes it a crime to use roads for heavy hauling without such license. The funds derived from the licenses are to be placed to the credit of the board of supervisors and to be used as other funds of the township. This act is held a valid exercise of the power of the legislature to prescribe by what methods the roads shall be used, worked, and kept in repair. The system provided by the statute is, the court says, an approximation to the just rule of taxation for roads in proportion to the benefit received.

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CONSTITUTIONAL LAW. (Veteran's Preference.) Ia. — The Iowa statute providing for preference of honorably discharged soldiers and sailors of the Civil War, residents of the state, in appointment, employment, and promotion in public service over others of equal qualification is upheld in Shaw *v.* City Council of Marshalltown, 104 Northwestern Reporter, 1121. The statute was attacked as violative of the fourteenth amendment of the Federal Constitution. This contention receives but brief treatment at the hands of the court, it being merely said that the amendment did not add to the privileges and immunities of a citizen, but simply furnished an additional guaranty for the protection of such as he already had, and even then protects only privileges and immunities which are those of citizens of the United States, as distinguished from the citizens of a state. The argument that the law was in contravention of Iowa Const., art. 1, § 6, declaring that the General Assembly shall not grant to any citizen or class of citizens privileges or immunities not equally belonging to all, is given more attention. The gist of the decision on this point seems to be that the right to hold office is not one of the fundamental privileges or immunities to which the Constitution referred. It is also held that the statute is not class legislation within the accepted meaning of the term, inasmuch as it imposes no special obligations or burdens on those who are excluded from its benefits, and as privileges may be granted to particular individuals without reserve when by so doing the rights of others are not interfered with.

CONTEMPT. (Assault on Judge.) N. C. — Ex Parte McCown, 51 Southeastern Reporter, 957, contains a very satisfactory and compendious discussion of the nature and elements of contempts, chiefly those arising from misconduct directed toward the presiding officer of the court. The case arose on a petition for habeas corpus and contains a preliminary decision to the effect that in such a proceeding to determine the legality of petitioner's confinement for contempt the only question presented for consideration is the jurisdiction or power of the judge to proceed as he did, inasmuch as the writ of habeas corpus cannot be made to perform the office of a writ of error or of an appeal. The petitioner in this case was punished for contempt, because after the court had been adjourned by the judge to meet again at his call, and after he had retired to his living apartments, petitioner went there and complained to the judge in an angry manner for not having imposed a more severe sentence in a certain case, and finally committed an assault upon the judge. This it is held constituted a contempt within the definition thereof as contained in North Carolina Code. Most of the leading cases touching upon the subject are reviewed, that of Commonwealth *v.* Dandridge, 2 Va. Cas. 408, being especially mentioned. The argument in that case that as the judge is necessarily placed in a situation in which he comes in conflict with the jealousies and resentment of those upon whose interests he has to act, it is even more necessary to protect his person than to protect that of a suitor, lawyer, a witness, or a juror, is quoted with express approval.

CRIMINAL LAW. (Evidence.) Mass. — Two points of considerable value are determined in Commonwealth *v.* Tucker, 76 Northeastern Reporter, 127. It was a prosecution for murder, and it was shown that certain officers armed with a search warrant went to the door of the house where defendant resided and stated to his mother that they had a warrant to search for an article named therein, and offered to let her examine the warrant, which she declined to do, and invited the officers to make the search they desired, during which broken pieces of a knife were found in the defendant's coat pocket. These pieces of knife are held to be admissible in evidence, the search having been made under the invitation and not under the warrant, so that the finding and taking of the articles did not constitute an abuse of legal process. The fact that the finding and taking of the articles did constitute an individual trespass on the part of the officers as against the defendant does not have the effect of rendering the articles inadmissible against him. Some question also arose as to whether writing found near the body of deceased was that of defendant. It was shown to have been the duty of accused as salesman to make out a memorandum of each sale, signed with his name or initials, and transmit the same to the shipping clerk. Slips of this nature to which defendant's surname was attached, and which were handed by him to the shipping clerk, were held to be sufficiently shown to contain his handwriting to make them admissible as standards of comparison of handwriting, though there was no direct evidence that any one had seen him write the slips.

JUDGMENT. (Merger.) N. C. — Eller *v.* Carolina and Western Railway Company, 52 Southeastern Reporter, 305, is interesting as a case necessitating a reversion to the foundation principles of the law of torts.

A valise containing a wedding trousseau was injured by the railway company in transit. The bride to be, who was the owner of the valise, sued

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the railroad company for delay in the delivery of the valise and also for damage to the property. The suit was settled and plaintiff received a sum of money in satisfaction of the damages. Afterwards plaintiff commenced another action for mental anguish caused by the injury to the clothing. This action, it was held, was not maintainable, it being the opinion of the court that plaintiff should have collected in the first action all that she was entitled to recover, and not having done so, was precluded from afterward claiming any further damages.

In its search for authorities the court goes back to Fetter *v.* Beal, 1 Salk. 11, where plaintiff recovered damages for an assault and battery by which his skull was broken and afterwards, upon the falling out of a piece of his skull, brought an action for additional damages. The right to recover additional damages was denied, Lord Holt saying that the injury which was the foundation of the action was the battery, and the greatness or consequence of that was only an aggravation of damages, so that whatever damage might probably have ensued should have been given in evidence in the first action. This principle is regarded as governing the case at hand and the plaintiff's right to recover is held to have been merged in the former recovery. In the language of the court, "She could carve out as large a slice as the law allowed but she could cut but once."

LICENSES. (Transient Merchants.) Ia. — Iowa Code, § 700, giving cities and towns power to define by ordinance who shall be considered transient merchants, is construed in State ex rel. Town of Sigourney *v.* Nelson, 105 N. W. Rep. 327, as only giving the town authority to determine what merchants shall be considered as transient and not as empowering it to declare persons to be merchants who, by universal acceptance in the business world, are not such. Consequently, it is held that one employed as a traveling salesman, who received a stated salary and expenses, displayed samples and solicited orders from consumers, which he sent to his employers, who shipped the goods to the purchasers, was not a merchant within a city ordinance, requiring a transient merchant to take out a license. "Such person," says the court, "is merely a medium through which a merchant communicates with his customers; what is accomplished being no more than if the merchant had made use of the mails or telephone to solicit orders and of an express or transfer company to make deliveries."

LICENSES **(see Torts, Injunctions).**

MARRIAGE. (Common-Law Marriage.) Tenn. —Under the decision in Smith *v.* North Memphis Savings Bank, 89 Southwestern Reporter, 392, there can be no common-law marriage in Tennessee. The court holds that the common law, as a distinctive system of laws, was never adopted in its entirety, nor was it in force in Tennessee, but only such part thereof was in force there as was a part of the law of North Carolina when the territory of Tennessee was ceded by that state to the federal government. It naturally follows that the statutory provisions of Tennessee, requiring parties proposing to marry to first procure a license and make their contract in the presence of certain officers or a minister of the gospel, are mandatory, and preclude recognition of the validity of a common-law marriage. This decision is not fraught with quite such serious consequences in the instant case as might be expected, since a supplemental decision declares that where plaintiff and deceased had lived together and recognized each other as husband and wife for more than twenty-five years, deceased, if living, would be estopped from asserting that they had not been legally married, and hence in a proceeding by plaintiff to enforce her marital rights as widow against his estate, it would be presumed, as against his administrator, that they were legally married.

MUNICIPAL CORPORATION. (Ultra Vires — Municipal Trading.) Eng. —Attorney-General *v.* Lord Mayor of Manchester in the Chancery Division was a case of great interest to municipal corporations that carry on undertakings of a character until lately more usually carried on by private corporations or individuals. The action was brought by the attorney-general on the relation of one Thomas Watson trading as Sutton & Company against the Corporation of Manchester. The facts showed that the relator was a large ratepayer in the defendant's city, and that he carried on business as a carrier and forwarding agent in Manchester and its neighborhood, and the defendants were the owners, as the local authority for the city of Manchester, of a large system of tramway or street-car lines operated on the trolley system, within and beyond the city, which they had constructed or which had been acquired by or leased by them under various acts of Parliament and provisional orders. It also appeared that the corporation intended to put in operation a large and comprehensive scheme of parcels delivery and collection, or in other words, to do the work of a local express company, in connection with their tramways. As part of this scheme they proposed to accept "cash on delivery" parcels, parcels to be delivered by special messengers at

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special rates, and " to insure " parcels. It further appeared that they intended to act as agents for railway companies and other carriers, to collect and deliver parcels outside the radius of their tramway lines, between places having no connection with their trams, and that they had spent several thousand pounds in plant, carts, and horses, and had engaged numerous agents and servants with a view to carrying on their proposed business, which was in effect that of a common carrier. It further appeared that all the expenditure that had been incurred or was about to be incurred had been, or was to be defrayed, out of money borrowed under sect. 20 of the Tramways Act, 1870, that is to say, upon the credit of the city funds or the city rate, or by the general expenditures of the funds of the city upon the venture. The plaintiff claimed a declaration, that the defendants were not authorized to convey, collect, or deliver for reward any goods or parcels otherwise than by the tramways comprised in their tramway undertaking, or to accept any parcels or goods for such conveyance, collection, or delivery, or to act as general carriers or as parcels delivery, general forwarding, or railway agents; that it was unlawful for the defendants to expend any part of the city funds or the receipts of their tramway undertaking, or any city rate, for any of the purposes aforesaid; that it was unlawful for the defendants to use any building, plants, or servants belonging to their tramway undertaking otherwise than for the working and using of their tramways, or to convey or deliver goods or parcels except by their tramways. The plaintiffs also claimed the injunctions restraining the defendants from doing any of the acts in respect of which a declaration was claimed. In giving judgment for the plaintiffs the judge said that it was common knowledge that municipalities were frequently authorized to acquire works of a public nature within their boundaries with a view to working them at a profit, and that his duty was confined to construing the acts by which the legislature had conferred that power, and that he knew nothing that would authorize him to apply principles of construction to an act giving power to a municipality to carry on some trading operations, differing from those applicable to an Act giving similar powers to any other corporate body. He was of opinion that the various acts and provisional orders enabled the corporation to run carriages and take tolls on all the tramways mentioned therein and to use such tramways for the purpose of carrying passengers and of conveying and delivering animals, goods, minerals, and parcels; and he also was of the opinion that there was nothing ultra vires in their delivering by cart or otherwise at the consignee's house or to any other place authorized by him, including the station of a railway company, such goods as they had brought on their tram lines. He could therefore see no objection to such of the expenditure complained of as arose out of their undertaking the business of a common carrier by the working of their tramways; but the corporation were not empowered to act as carriers generally without reference to their tramways. To collect and deliver parcels for the tramway was fairly incidental to the tramway undertaking, but to collect and deliver parcels outside the radius of the trams, and without any connection with the trams, was not incidental to the tram business, but distinct from it. His lordship also held that the corporation could only act as agents for the railway companies in respect of tram-borne goods, and not as general agents. His declaration therefore would be that the defendants were not entitled to expend any part of the city fund, or the receipts of their tramway undertaking, or the proceeds of any city rate or other money of the city, to establish or carry on the business of carriers, except in connection with their tramway undertaking and in respect of articles carried along the tramways belonging to or leased by the corporation or on which they had power to use carriages. He granted an injunction.

PROPERTY. (Fraudulent Conveyances.) Ill. — A wife is within the protection of the statute against fraudulent conveyances, so that a voluntary conveyance of property made with the specific intent to defraud a future wife of her marital rights is void to the same extent as if it was intended to defraud future creditors, although the grantor has not at the time of the conveyance selected any particular person as his wife, but makes the conveyance with the general intention to defraud any person whom he might marry of her marital rights. Higgins *v.* Higgins, 76 North-eastern Reporter, 86. Such a conveyance is regarded as practically identical with a conveyance by a person who contemplates contracting a debt and who disposes of his property with intent to defeat the claims of future creditors. Under such circumstances it has formerly been held that the fraudulent intent need not necessarily be directed against any particular person. The similarity between the two fraudulent conveyances also gives rise to the further holding that inasmuch as the conveyance in fraud of the wife's marital rights was purely voluntary it was not necessary that the grantee should participate in the fraudulent intent of the grantor in order that the conveyance might be set aside

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TELEGRAPHS. (Discrimination.) Ind. — A holding which seems to be the logical consequence of the previously settled law on the question is contained in Western Union Telegraph Company *v.* State ex rel. Hammond Elevator Co., 76 Northeastern Reporter, 100. The cases cited in the opinion: N. Y. & Chicago, etc., Exchange *v.* Chicago Board of Trade, 127 Ill. 153, 19 N. E. 855, 11 Am. St. Rep. 107, 2 L. R. A. 411; Inter-Ocean Pub. Co. *v.* Associated Press, 184 Ill. 450, 56 N. E. 822, 48 L. R. A. 574, 75 Am. St. Rep. 184; Friedman *v.* Gold & Stock Telegraph Co., 32 Hun, 4; Nebraska Telephone Co. *v.* State ex rel., 55 Neb. 627, 76 N. W. 171, 45 L. R. A. 113; State *v.* Citizens' Telephone Co., 61 S. C. 83, 39 S. E. 257, 55 L. R. A. 139, 85 Am. St. Rep. 870; Smith *v.* Gold & Stock Telegraph Co., 42 Hun, 454, hold that a telegraph company must furnish its service without discrimination. So the Indiana court is in line with the authorities when it holds that where a telegraph company in the exercise of its charter rights and in connection with its other business has been engaged in buying continuous quotations of prices of products from a board of trade and selling the same at a fixed price to such persons as desire them for such length of time as to make such quotations necessary to the successful conduct of business in such products, the quotations and the system of supplying them have become impressed with a public interest, so that so long as the company continues in such business, it must supply those desiring the quotations on equal terms. The right to compel the company to supply quotations is not, however, unlimited, for it is held that the requirement of a board of trade that every applicant for its continuous market quotations shall, as a condition precedent, obligate himself not to use them for conducting a bucket shop, is a reasonable regulation which will be enforced by the courts, so that in view of the fact that the telegraph company had agreed that it would not deliver the market quotations unless the applicant for them agreed not to use them for the purpose of conducting a bucket shop, the court would not compel the company to deliver the quotations to an applicant who refused to make such an agreement.

TORTS. (Fraud — Negligence.) N. Y. — What the court denominates "an unusual state of affairs" is presented by the case of Kuelling *v.* Roderick Lean Manufacturing Company, 75 Northeastern Reporter, 1098. Plaintiff, who was a farmer, purchased a road roller having a tongue to which was attached a team of horses when the roller was used. When plaintiff attempted to use the roller, the tongue broke, throwing plaintiff from the seat, which was attached to the rear end of the tongue, causing the horses to run away and draw the roller, which weighed some 700 pounds, over plaintiff, damaging him somewhat. Plaintiff sued the manufacturer of the roller, alleging that he had knowingly constructed the tongue of crossgrained wood with a knothole in it, and had plugged up the knothole with putty and covered it with paint, so as to prevent a person purchasing the machine from observing the defect. Under these circumstances it is held that neither the manufacturer of a machine, nor one to whom he has sold it can sell the machine as sound and safe, knowing any fact as to a concealed defect therein, when the consequence of such defect would naturally be an injury to the person using the machine, so it is held that plaintiff is entitled to recover from the manufacturer in an action for fraud and deceit. The case, says the court, does not involve the law of negligence, but is controlled by considerations resting upon the law applicable to fraudulent and willful concealment.

The courts seem well agreed that if the manufacturer sells an article known by him to be dangerously defective, without warning the buyer, he is liable to any third person who may be rightfully using it for an injury occasioned by such defect. Langridge v. Levy, 2 M. & W. 519; Lewis v. Terry, 111 Cal. 39; State v. Fox, 79 Md. 514; Huset v. Case Threshing-Machine Co., 120 Fed. Rep. 865. Kuelling v. Mfg. Co., 183 N. Y. 78, supra. If the manufacturer negligently puts such an article on the market, he is liable for a defect injuring a third person provided the article is imminently dangerous. Thomas v. Winchester, 6 N. Y. 397; Peters v. Jackson, 50 W. Va. 644. What is imminently dangerous, it is difficult to say. One court indicates that to fall within the category the article must be intended to preserve or destroy life. Huset v. Case &c., Co., supra. But one case included a step-ladder. Schubert v. Clark Co., 49 Minn. 331. Another excluded a threshing-machine. Heizer v. Kingsland Co., 110 Mo. 605. Another excluded a side-saddle. Bragdon v. Perkins-Campbell Co., 87 Fed. Rep. 109. E. W. H.

TORTS. (Injunctions — Ticket Speculators.) N. Y. — A decision of considerable importance to the interests involved which, as far as the writer knows, involves a question not hitherto determined by any court in this country is decided in the case of Collister *v.* Hayman, 76 Northeastern Reporter, 20. The plaintiff alleged that his sole occupation was buying theatre tickets for the pur-

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pose of resale, and prayed for an injunction restraining defendants who were proprietors of the theatre from interfering with his business by posting signs stating that tickets sold on the sidewalk would be refused at the door and by employing private detectives to state to prospective purchasers from plaintiff that tickets so purchased would not be recognized by the management of the theatre. Plaintiff was denied relief. A "theatre ticket," says the court, is a license issued by the proprietor, pursuant to the contract, as convenient evidence of the right of the holder to admission at the date named, subject to his observation of any reasonable conditions appearing on the face thereof, and is revocable for a violation of such conditions. The tickets in question contained a clause providing that if sold by the purchaser at the sidewalk they would be refused at the door, and this provision is held to be valid and to become a part of the contract evidenced by the ticket and to remain a part thereof as long as the ticket exists, so that it is binding upon all subsequent holders with notice. It is pointed out that the owner of the theatre is under no obligation to permit a patron to enter the place upon any terms other than those which the owner may dictate. It is within the owner's power to charge what he chooses for admission without regard to the reasonableness of the rates, to limit the number that may be admitted, to refuse to sell tickets at all, and collect the price of admission at the door, to provide that no one under twenty-one years of age shall be admitted, or that men only or women only shall be admitted, or to make any other regulation which he may see fit. If the public dislikes such regulations, its only remedy is to refuse to buy the tickets. So it is held that the proprietor is fully within his rights in making the tickets subject to the condition that they shall not be sold on the sidewalk.

WITNESSES. (Privileged Communications between Husband and Wife.) Ia. — The Iowa statute, providing that neither husband nor wife can be examined as a witness as to any communication made by one to the other while married, receives judicial construction in Sexton *v.* Sexton, 105 N. W. Rep. 314. It would seem, as indeed the court frankly admits, that the statute was sufficiently broad in its terms to be conclusive against the right to call either husband or wife to speak as a witness respecting communications had by them, no matter what the character thereof, or the occasion or purpose. The court, however, recurs to the familiar principal that the real purpose and intent of the legislature is the thing which is to be enforced by the courts, and after a brief examination of the common-law origin of the rule, making communications between husband and wife privileged, arrives at the conclusion that whether common law or statutory, the rule is founded upon public policy and that it is only intended that confidences inherent in the marital relation or incident thereto should be protected. In this view the privilege embraces only the knowledge which the husband or wife obtains from the other, which, but for the marriage relation and confidences growing out of it, would not have been communicated or which is of such a nature or character as that to repeat the same would tend to unduly embarass or disturb the parties in their marital relations. As so construed, the statute is held not to prohibit the wife from testifying in an action by her for the alienation of her husband's affections as to statements and declarations by the husband addressed to her, showing former affection and the subsequent loss thereof. "Affection between husband and wife," says the court, "is the rule, and the law presumes it to exist. Indeed it is published to the world with the fact of marriage, and accordingly in no sense can it be a matter of marital confidence and as such subject to be violated by the one testifying to the acts, physical or verbal, commonly understood to be declaratory thereof and in proof of the fact."

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CORRESPONDENCE

IMPRISONMENT OF CORPORATIONS

CHICAGO, ILL., March, 1906.

TO THE EDITOR OF THE GREEN BAG: —

In view of recent decisions one may consider the legal proposition fairly well settled that a corporation can commit a crime. However much the strict logician may invey against the argument that a thing without soul, hands, or mouth may be guilty of criminal intent and criminal action the fact is before us that this contention has prevailed in the highest court of the land. To take advantage of false logic and authoritative mistake is one of the high functions of the opportunist. Therefore the suggestion should not come amiss that this illogical construction, placed on the corporate status, should be carried to its illogically logical conclusion whereby it may become a weapon in the hands of those whom it was designed to undo. To relieve the really guilty law-breakers, the corporate officers, the trend of late rulings has been to place all the blame on the inanimate, betrayed corporation. The reason is plain: the corporation can pay, as a fine, a small per cent of its unlawful spoils, whereas the individual malefactor, if convicted, must needs suffer the degradation of wearing stripes. Let us say, in deference to the reputations of our judiciary, that capital commands the keenest gray matter and the keenest gray matter produces the argument which gives birth to the law.

This letter is not a brief on behalf of any client. It is not written for the convincement of any court. It is intended merely as a suggestion as to how justice may be bred from injustice. No authorities will be cited or decisions construed. The layman may assume that the conclusions herein contained are based on good law. The lawyer will know that in the present state of corporate law all things are possible and that the theory here advanced is as near in accord with the trend of judicial reasoning as any other theory which may be evolved.

The first postulate is: A corporation may commit a crime.

The second postulate is: A corporation may be punished for a criminal offense.

The third postulate is: A corporation may be punished by a fine.

A fourth common error (certainly not a logical conclusion from the three preceding postulates) is: A corporation cannot be imprisoned.

The prisons of the United States should voice the unanimous interrogatory: "Why?"

A man with a shaven head, wearing clothes that are a brand of shame, could argue thus: "I took $1000 that did not belong to me. The state has taken away my liberty, my earning power, and my material ambitions for a period of five years. This corporation took $500,000 a year that did not belong to it. Its officers have been held guiltless. They are free on the streets to-day. The corporation has been adjudged guilty. What right has that guilty corporation to its liberty, its earning power, and its material ambitions, while I am confined and denied all three?"

The snug man of finance would say: "What are you going to do about it?"

The convict would answer: "If I were on the Bench ruling on cases as the law is to-day, without a single statutory change, I would instruct a jury to bring in a verdict against the guilty corporation exactly as if that corporation were what it claims to be — a person."

The questioner would continue: "How would you execute the sentence?"

The convict would answer: "I would commit the corporation to jail. If the corporation does not consist of the men who own and manage it — there is only one other consistency which it can have. It is not a thing of air or it could not commit a crime. It must be a material something. It must be composed of its capital stock and all its assets, tangible and intangible. The state has deprived me, a human being, who committed a crime, of liberty, earning power, and material ambitions. It could not touch my soul. So it confined my erring flesh, inanimate without my soul, yet containing the soul.

"To do justice to one and all, the state should confine the assets, inanimate but con-

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taining the miscalled soulless being's soul. For the period of punishment not a dollar of the corporate cash should be circulated; not a bond should bear interest, not a share of stock pay a dividend, not a single franchise should be operative, not a wheel of machinery should be turned."

The snug man roused to a financial sentiment would expostulate: "Think of the infinite harm you would do, think of the thousands out of employment, think of the money lying idle."

The convict would reply: "I am out of employment, my family is deprived of my support — because I committed a crime. If I had employed ten thousand men and been convicted of crime I should have been sent to jail just the same. You say, 'think of the money lying idle.' I say, 'think of the thousands of *men* idle (to all intent of the community) in prisons to-day. Are their misapplied lives a greater loss to the public than the loss of misapplied dollars? Can the government to-day prevent a corporation from spending $50,000,000 in Europe or Asia if it chooses? Is not that money lost to our people?"

The snug man might answer rather stupidly: "What do you think would be the result of such a theory of yours being put into practice?"

The convict would answer: "I am not omniscient but I can foretell one certain result. The directors and managers of corporations would be forced to obey the laws we have to-day, which are amply sufficient to prevent wrongdoing. Nowadays wrong is done, why? Because the dividends must be produced. If they are not, new officers will be chosen. The director is forced to disobey the law. Why? Because his competitor does, because *his* competitor does, and so on around the circle.

"Suppose one corporation should be imprisoned for five years. Then what a wail would go up from the 'widow-and-orphan' stockholders for their imprisoned money! There would come a demand for conservative, lawful management of corporations from every stockholder in the country and the day of reckless defiance of law and order would be past.

"Let me add," the convict would conclude, "that all public franchises would be forfeited on imprisonment of the corporation. Of course even at present a public official loses his office when imprisoned for crime. I think under my little theory that the public service corporation would be the most carefully and beneficently administered of all."

This is a brief letter on a subject of breadth inestimable. To forestall the hasty critic it should be stated in conclusion that not all the arguments for or against the convict's proposition have been discussed herein.

DONALD R. RICHBERG.

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THE LIGHTER SIDE

ECHOES FROM THE BAGGAGE ROOM

By D. W. Locke, in the *Ohio Law Bulletin*

A few days ago I hurried to the Pennsylvania railway station in the city of Bucyrus, Ohio, to catch train No. 9 going west. It was a cold dreary day, a drizzling rain adding to the discomfort of the weather. Arriving at the depot I found No. 9 marked late, on the time board, and also found the waiting room and most of the depot in the hands of a gang of painters. Looking for some place of warmth I entered the baggage room, where I found a roaring fire in a big old-fashioned coal stove, and gathered around it, quite a crowd, who like myself were waiting for the belated train.

I saw at once that they were enjoying themselves, and joining them I found that a couple of attorneys were relating personal experiences and short anecdotes of their legal brethren, much to the amusement of their listeners.

I drew up a box and secured a seat in the circle just as one of them began the following:

" You know that I have been court reporter for about twenty years, and if one half the funny things that I have heard had been preserved they would make, I think, a very readable book. For instance, not so very long ago, Bob Cary was trying a case of assault and battery. The complainant had been pretty badly beaten up by her husband, and the constable, when he went to arrest the man at the family home, near Sycamore, Ohio, found the wife still bleeding from the wounds inflicted by her assailant. Cary was very anxious that the witness should testify as to the condition in which he found the woman, and after several preliminary questions leading up to the climax, he leaned back in his chair, and said: ' You may now tell the court in what state you found the woman.' The constable was an Irishman, and promptly came the answer: ' In the state of Ohio, sor.' "

After the laugh had subsided, the other attorney said:

" That was surely a surprise to Bob, but I'll bet he was not more surprised than General Finley was some time ago. You know there is one thing that the General would rather do than anything else, and that is, make a speech at a picnic, and he never misses such an opportunity and, to do the General justice, he always makes a good speech. Well, on the occasion I refer to, the General was engaged in the trial of a case here in Bucyrus, and a witness was an old gentleman by the name of Trimble, popularly known as Uncle Billy Trimble. His evidence had not been very palatable to the General and on cross-examination Finley was trying if possible to confuse the old man, and to thus break the force of his testimony. The General, to do this, raised a question of the exact time of the happening of some event; to this the witness replied that he ' was not exactly certain as to the date.' Seizing this bit of uncertainty as a chance to gain his point, the General began to worry the old man about this date. Uncle Billy was always a very sedate, solemn sort of an old chap, and was very slow in speech. The General said:

" ' Now, Uncle Billy, let me help you to remember this date. Do you remember the pioneer picnic at McCammeron grove that year? ' ' Well, I think I do remember there was a picnic there that year.' ' Why, Uncle Billy, weren't you there? ' ' Well, I don't just exactly remember whether I was there or not.' ' Now, Uncle Billy, let me refresh your memory; don't you remember that I was there and made a speech at that picnic? ' Very slowly and deliberately Uncle Billy replied: ' Well, now since you speak about it, I do remember that picnic and that you were there and *tried* to make a speech.' The old gentleman was promptly excused. without any further seeking after the exact date.

" The General was not as quick at getting out of the ' hole ' in which the unexpected turn made by the old man put him, as was a lawyer named Tyler who was defending a prisoner once in our court, charged with the shooting of the marshal of Crestline. Tyler had a desperate case, and he left no means untried to break down the evidence against his man. It might be well to say, in passing, that in his day Tyler was one of the best criminal lawyers in Northwestern Ohio. A

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witness from Crestline, an old German by the name of Schneider, had in his broken language given a very damaging bit of testimony. Tyler sought to confuse the old gentleman, and started in to make him ridiculous. He glared at the witness for a moment and then shouted at him: 'What's your name?' Meekly came the answer, 'Schneider.' 'Oh, your name vas Schneider,' mimicking the broken German of the old man. 'Well, Schneider, don't you vant to buy a dog?' 'Vy, no; was you for sale?" Hardly had the laugh, which the court was powerless to suppress, died away, when Tyler rejoined, 'No, I'm sold,' with such a look of whimsical innocence on his face that he turned the laugh in his favor."

"Yes," said the other, "a lawyer has to think pretty quickly sometimes, and about as good an example of the quick retort that I now think of was given in a trial before a justice, in which the attorneys engaged were two young lawyers, one of whom, being pretty well off had already purchased a very fine library of which he was exceedingly proud. The other not being blessed with a superabundance of this world's goods, had not yet been able to acquire any library to speak of. During the trial the attorney minus the library had at every conceivable opportunity emphasized the fact that the 'law of the case' was in his favor, and in his opening argument made a long effort to prove that the law was with his client. In answering the argument the other attorney said: 'What does he know about the law? What law books has he ever read? Why, he hasn't even a single text-book in his office. All the law books he has are a few annuals that he got at the auditor's office for nothing, and an old copy of "Swan's Treatise" that some kind friend gave him.' He then argued his side of the case and sat down. In reply to the opening of the answer, his opponent said: 'Yes, if it please the court, I admit that I am a poor man. I had no rich father to buy me law books and line the walls of my office with volumes of legal lore, but' — with a dramatic gesture, laying his hand upon his forehead, 'my library is here,' and seeking to produce a deeper effect, he paused, but alas, the pause was fatal, as immediately came the response, 'Yes, bound just like mine, in calf.'

"Speaking about law books reminds me of a little incident that happened in our circuit court here, Judge Beer presiding. A young lawyer was about to argue his first case in that court, and before beginning he dragged a big table out in front of the judges' bench and simply covered it with law books. After he had them all arranged to suit, the court meantime looking on in silence, he cleared his throat and began: 'May it please the court, in support of my position, I desire to cite a few authorities,' and as he turned to reach a volume and open it at the place previously marked, Judge Beer said, 'Young man, are you going to read to us from all those books?' 'Yes, sir, your Honor.' 'If you do we'll beat you sure,' was the comment of the presiding judge, and evidently heartily concurred in by the entire bench, if their confirmatory nods were any indication of their feelings. At any rate the young man was wise enough to skip the books and argue his point directly to the court.

"Speaking of Judge Beer reminds me of one that he tells on himself. You know that the judge served several terms on the common pleas bench, and afterwards was elected to the circuit court, where he was recognized as an able jurist and an affable, courteous gentleman. The judge, as the years went by, grew not only in legal wisdom but also in girth measurement, until he was, and still is, an ideal 'Shakespearian justice.' Well, recently, the judge made a visit to the home of his boyhood, Ashland, Ohio, where he called upon an old German shoemaker that he had not seen for many years. The old shop was there, as it had been when the judge was a boy, but as the judge weighs considerable over two hundred pounds, he very nearly occupied all the available space in the little cobbler shop. The old German was pegging away at a pair of cowhide boots. as the judge entered, and looking up, he gave the judge a careless greeting and kept on with his work. Finally the judge said: 'Jake, you do not seem to know me.' 'No, I don't; who vas you?' 'Why I am Tom Beer, that used to come into your shop years ago, a little barefooted boy.' 'Oh, you vas Tom Beer, vas you? Vell, vat you doin', Tom?' 'I am on the bench,' responded the judge. 'On the bench, hey? You was a shoemaker too, vas you?' 'No,

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no, I am a judge on the bench.' 'Oh, you vas one of dem crowbait judges, vas you?' 'No, no, I am a judge of the circuit court, a judge regularly elected.' 'So you vas a real judge.' Then, allowing his eye to rest contemplatively on the judge for a moment, he started another peg, but pausing with the hammer raised in the air, he remarked, 'Say, Tom, you must be a h—l of a judge,' and once more the tap tap of his sole hammer was the only noise heard in the little room as the judge silently withdrew."

During the relating of the foregoing anecdotes by the two lawyers I had noticed a rather tall gentleman who was a very much interested listener. He now said: "Did either of you gentlemen ever attend a trial down in the mountains of West Virginia?" They both replied that they had not. Thereupon he began, "I was down in that country last fall on a matter of business and wanted to see a man by the name of Bevier, whose home was, I was told, 'some place up there.' Engaging a guide, I set out in search of him, and after riding about thirty-five miles over hills and mountains I finally came to his house but, in response to our 'halloo,' his wife came to the door. My guide asked where Bevier was, when his wife said, 'He done gone ovah to the schoolhouse. Thes a trial ovah thar to-day. He tuk his gun along. Spect thar'll be doin's ovah there to-day.' I asked her what the trial was about, She said that 'ole man Rawson was tryin' to make ole man Swisher pay for a dawg that Rawson sed Swisher had stole frum him.' Well, we went on to the schoolhouse. On the way, my guide said to me that if I had a gun I should give it to him and he would lay it on the table, as it would be an insult to the court to enter the court room carrying a 'gun.' I had no 'gun,' but my guide took his and laid it on the table, where to my intense surprise I saw two stacks, pointing every way, apparently a 'gun' for every man in the house and there were in the neighborhood of fifty present.

"The testimony was all in before we got there, but it seemed that the plaintiff had testified that Swisher had coaxed the dog away from his house and kept him, much to his damage and loss. The defendant had denied the coaxing the dog from his neighbor, and, on the other hand, had testified that the dog had come to his place half starved and mangy. That out of pity he had fed him and taken care of him, as a stray dog, and that even if it was Rawson's dog, he should not have any damages against Swisher, as the dog was now well and hearty and in better condition than when it left Rawson's.

"By the time my informant had furnished me the evidence, the justice was ready with his decision, which was 'that Swisher should return the dog to Rawson and pay the costs in the case, which would be one dollar and one half.' Then there was much whispering and careful searching of pockets among the adherents of Swisher, but the entire amount the whole crowd could raise was just fifty cents. Thereupon the court ordered the constable to keep Swisher in custody, until the dollar was forthcoming. Court then adjourned; the men gathered up their 'guns' and filed out. My guide whispered to me that if the men mounted their horses and began to spur them and make them 'cavort' around that I should seek cover, as there would surely be something 'doin'.' Just outside of the door was a very large tree. The constable and his prisoner had barely crossed the threshold, when somebody said something to the constable that attracted his attention for the moment. Quick as a flash, Swisher gave a jump, and was behind that tree, and then you ought to have seen him run. The hound that was the subject of the trial could not have caught him as he went flying up the side of the hill, running zigzag to avoid any possible bullets that might come his way. A great hubbub arose, and the justice coming to the door, and seeing the crestfallen constable minus his prisoner, shouted, 'You constable, I'll hold you for the dollar costs; you'll pay me that dollar yourself.' With a nasty growl the constable whirled, and with a savage oath stuck a big 'gun' at the old justice, accompanied with the order, 'You old fool, you git in thar and shet youah mouth,' which order the J. P. promptly obeyed. There was a hasty mounting of horses, with spurs driven home, and such rearing and plunging, accompanied by confused swearing, that I also, following the old justice's example, took to cover by running behind the schoolhouse. But anxious to see what was going on, I risked peering around the corner; the factions had

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separated, and scowling at each other were drawn up across the road in two parallel lines, each man ready for action and, apparently, but waiting for the signal to begin, when an old gray-haired, long-whiskered patriarch, evidently the oldest man present, handing the reins of his horse to his neighbor, dismounted and walked out into the road, between the two lines of hostile, angry men. Tall and angular, yet as he straightened his bent form there was something of majesty about the old fellow as he raised his hand, and said:

" ' Boys, youalls know me; youalls know what I done over on Hog-Back; youalls know what I done ovah on Snake Creek; youalls know I *ain't afeard to shoot;* but, boys, youalls know that up thar on them hills the cohn crop ain't bin so very good this hyar year; youalls know that ovah in yondah fiels is some tobaccy crops that is a mighty poor yield; and you boys knows that up among these hills stands many a empty hawg pen, that was left so by the cholery that killed off so many of our shotes this spring; and now, boys, ef we'ens goes to shootin, to-day there'll be some widders up there, that when wintertime comes is goin' to be mighty hungry, and there'll be some orphans that'll be turrible cold when the snow flies, and say, boys, let's we'ens not do any shootin' to-day.'

" All the appeal of the natural orator was in the concluding sentence, and as he dropped his hand and bowed his head, in the hush that followed I walked out to where the constable was standing and said to him, ' Here is a dollar; pay up the justice and do as the old man says.' He looked at me for a brief moment, and then, seeing that I was in earnest, reached out his hand and gave me a shake that meant volumes, as he fairly shouted, ' Put her thar, stranger. I don't know whar youall come frum, but I do know that youall am squar. Have a drink on me,' and with his other hand he dived down into a side pocket and pulled out a great bottle of muriatic acid that I was perforce compelled to partake of, and would have handed it back had not the old man with a gesture unmistakable started the bottle on its rounds as a peacemaker, and it did not return until its message of good-fellowship was all told, and with a joyous shout the entire company rode over the hills to Rawson's to have it refilled."

As the speaker ceased his story the cry, " Train west " broke up our little party and we separated, each to go his several ways; but the memory of that pleasant half-hour in the old baggage room at Bucyrus still lingers with me, and will for many a day.

Philander and the Office-Boy. — Mr. Knox, at present a Senator from Pennsylvania, was formerly engaged in the practice of law in Pittsburg.

One day, says a friend, Mr. Knox was much put out to find on his arrival at his office that everything was topsyturvy and that the temperature of his rooms was much too low for comfort. Summoning his office boy, a lad but recently entered in his employ, the lawyer asked who had raised every window in the place on such a cold morning.

" Mr. Muldoon, sir," was the answer.

" Who is Mr. Muldoon? " asked the attorney.

" The janitor, sir."

" Who carried off my waste-basket? " was the next question.

" Mr. Reilly, sir."

" And who is Mr. Reilly?"

" He's the man that cleans the rooms."

Mr. Knox looked sternly at the boy and said: " See here, Richard, we call men by their first names here. We don't ' mister ' them in this office. Do you understand? "

" Yes, sir." And the boy retired.

In a few minutes he reappeared and in a shrill, piping voice announced:

" There's a gentleman that wants to see you, Philander." — *Saturday Evening Post.*

She Paid the Paint Bill. — In Brookline, a short time ago, a woman was brought into court, charged with intoxication. She was fined $10, and as she arose she said to the judge: " Well, I suppose you need this $10 to help paint your house."

" Oh, yes," said his honor; " I think you had better give me $5 more, and I guess I'll paint the blinds." The fine was promptly made $15.

Hearsay Evidence not Good. — Senator Proctor, of Vermont, who particularly likes to tell stories showing the humorous side of

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legal proceedings, relates the following with reference to an Irishman who was being examined as to his knowledge of a certain shooting affair:

" Did you," asked the presiding magistrate of the witness, " did you see the shot fired? "

" Oi did not, sir," responded the Celt, " but Oi heard it foired."

" That evidence is not satisfactory," replied the magistrate, sternly; " you may step down."

The witness left the box. No sooner had he turned his back on the judge than he gave vent to a somewhat derisive laugh. Enraged at this contempt of court, the magistrate called the Irishman back to the witness box.

" How dare you laugh in that manner in court? " demanded the judge, angrily.

" Did you see me laugh, Your Honor? " asked the Irishman.

" No, but I distinctly heard you laugh," came from the irate judge.

" Such evidence is not satisfactory," rejoined the Celt, quietly, a twinkle coming into his eye.

" Whereupon," says Senator Proctor, " every one in court laughed, including the judge." — *Boston Herald.*

Alas, Poor Lawyers! — In Florida, after the land and timber litigation between those two new and rapidly increasing classes known as " turpentiners " and " phosphaters," and the older squatter population, or " natives," there is no richer single source of fees and business to young attorneys than the easy cattle-thieving in this sparsely settled, free-range state. When the round-ups come, it is so hard not to bring in other calves besides your own for the branding.

Crimination and recrimination, therefore, between cattlemen is an every-day matter here, forming a regular item in the lawyer's forecasted revenues.

For this reason it strikes many of our profession with a sense of actual loss to read, in a late issue of a prominent Florida journal, that at the recent convention of the Cattlemen's Association, some man with an aptitude for calling a spade a spade, arose and proposed the following unique resolution:

Resolved, that we quit stealing one another's cows. To the credit of the Association — though the discomfiture of the legal profession in these parts — it is added that the resolution was adopted by an overwhelming majority, and in absolutely sound faith!

From a Rural District. — *Squire Bellows.* — What's your business?

Witness. — Actor.

Squire Bellows. — Actor! Why those fellers never tell the truth.

Witness. — My father had a worse job.

Squire Bellows. — Inherited prevarication. What did your father do?

Witness. — Lawyer.

They were not Joined by the Almighty. — One of the witnesses called in a Chicago divorce case last year was a highly respected clergyman in the Windy City. According to one of the counsel in the case, the following conversation took place between the judge and the minister. Said his Honor:

" Doctor Blank, if you were on the Bench in my stead, and were acquainted with all the circumstances of this case, would you grant this divorce? "

" Assuredly I would, your Honor," replied the clergyman, without the least hesitation.

" But," said the judge, " how do you reconcile this assertion with the injunction of Scripture, ' Whom God has joined let no man put asunder? ' "

" Your Honor," responded the minister, with convincing gravity, " I am quite satisfied that the Almighty never joined this couple." — *Harper's Weekly.*

Rats! — The disgust of a layman with legal phraseology was shown in the will of Elphonzo Youngs, filed here yesterday. Mr. Youngs was a dignified, well-to-do gentleman, best known for thirty years as a deacon in one of the largest Congregational churches in Washington. He wrote his will himself, evidently starting out to copy from some book form, which set the example in this wise:

" Being by the Grace of God in sound mind and body, and mindful of the uncertainty of human life," etc.

Then suddenly on the written page there appears a wild dash of ink and the following:

" Rats! This is too formal. All there is about it is this — at my death, I want my

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ever faithful and devoted wife, Amelia Loretta L. Youngs, to have and control everything I possess." — *New York Times.*

Obliviscence. — Just once, after he had been on the stand continuously for many hours, the great financier lost his temper, and retorted with an angry answer.

" I'm afraid you forget that you are a gentleman," observed counsel.

The rebuke struck home. The witness winced visibly. But he was not unwilling to justify himself.

" Where one is called on to forget so many things, all at once, one becomes confused, you know," he stammered. —*Life.*

No General Settlement in this Case. — Wickliffe Matthews, the San Francisco lawyer, tells the following:

A case came on for trial for the recovery of rents for the occupation of a house, which were unpaid. After the plaintiff had proved his case and rested, Michael McGrath, attorney for the defendant, in making his opening statement to the jury said: —

" The defense in this case is, that the premises are not fit for human habitation. The house is old, and in poor condition, the posts of the back porch rotted, and the west corner gone down, the front porch sunk, the dining-room floor lower on one side than on the other, the roof about to fall in, and in fact, everything about the house is old, delapidated, and settled."

The plaintiff's attorney here interrupted. " There is something about the house that has not settled."

" What's that? " said Mr. McGrath.

" Why the defendant has not settled for the rent."

And the jury so found.

The Law and the Gospel. — The following colloquy concluded a trial in Worcester County of a traveling evangelist for non-support of his wife.

" I am now in the tribunal of justice. My fate I leave in the hands of the Lord and this court."

" ' He who provides not for his own household and denies the faith is worse than an infidel,' the scripture says," said Judge Utley.

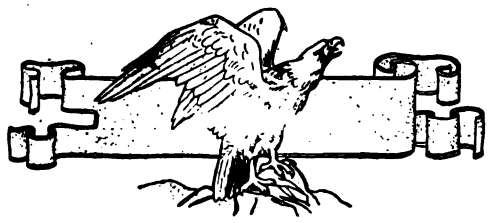
" Jesus says — " said Fenner.

" Fined $20," said Judge Utley.

Insanity. — " Can an insane person make a valid contract? "

The question, so simple, could hardly be supposed to warrant a commentative reply; yet a student in a Southern law school answered it thus:

" He can get married."



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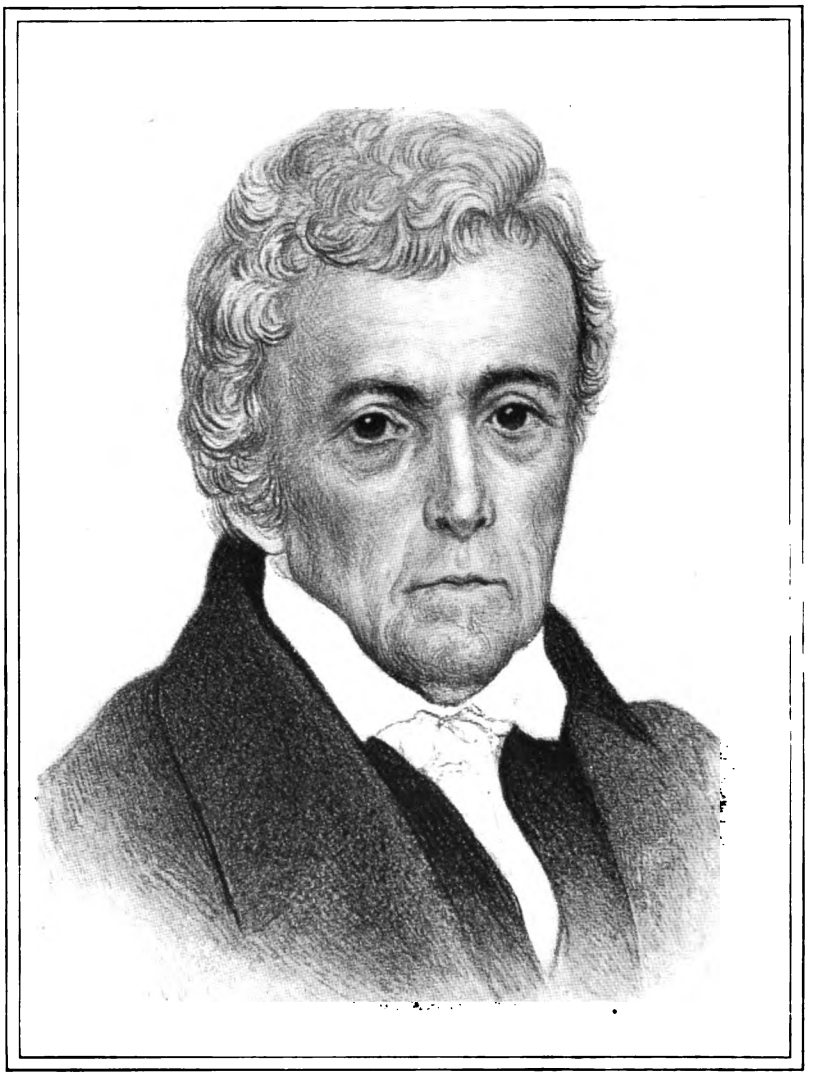

FRANÇOIS XAVIER MARTIN

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The Green Bag

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FRANÇOIS XAVIER MARTIN: HISTORIAN AND JURIST

BY PIERCE BUTLER

NEAR the close of the Revolutionary War there landed in North Carolina a penniless young Frenchman, François Xavier Martin, who was destined to become one of the most powerful personalities in the early history of two of our states. Born in Marseilles, March 17, 1762, of a good family of moderate means, he had received at least a careful and sound education before he found himself, about his seventeenth year, thrown on his own resources. He emigrated to the French colony of Martinique, engaging unsuccessfully in commerce. Going to the Carolinas in the vain hope of recovering something on a shipment of molasses that had gone astray, he was stranded in a foreign country, whose language he did not understand, without money and without friends. At first his education stood him in good stead, and he taught such as would learn French or Latin. In this way, himself acquiring English, he soon sought other means of earning his living. He thought that it might be profitable to become a printer, but he had never seen a case of type. Nothing daunted, however, he sought employment of the only printer then in the town of Newbern, where he was living. The employer took it for granted that one applying as a printer knew something of printing, and gave him a trial. Such was his adroitness and aptness that he managed to conceal his utter ignorance until he could pick up the rudiments of the craft by watching the other printers, excusing his errors by explaining that the distribution of the types in France was necessarily quite different, and his kind-hearted employer forgave the errors. In after years he used to tell with keen relish of the success achieved in learning to print without ever letting his employer discover that he had an apprentice instead of a journeyman.

In a short time, by close attention to his work and the practice of a rigid economy that was to become a lifelong habit with him, he became an expert printer, and saved up enough money to buy an outfit and set up a press of his own. Here he printed almanacs, school books, and general odd work, together with a newspaper, which he used to peddle himself in the surrounding country, and his business became profitable. But the trade was to be merely a means to an end, not the end in itself; Martin was quietly and persistently preparing himself for the bar, and here his studious habits, and the solid foundation of his education in French and Latin, helped not a little, while a cultivated and friendly gentleman, Mr. Abner Nash, encouraged the energetic and plucky young Frenchman to persevere in his studies. Yet when he was admitted to the bar, in 1789, he did not by any means give up his printing office, which continued for some years to furnish a more certain source of income than any practice that might come to him. Indeed, it was through the combination of trade and profession that he not only won reputation and fortune, but also acquired the wider and more accurate knowledge of law that was to secure greater preferment in the profession. Along with the forgotten almanacs and other "pot-boilers" that issued from his press, we find, in 1792, and the years immediately following, his first modest attempts at legal writing, a volume containing the statutes of the Parliament of England in force in North Carolina, a treatise on the powers and duties of a

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sheriff according to the law of North Carolina, and a similar treatise on executors. In connection with the first especially he made himself thoroughly familiar with the common law as well as with the statutes, and was also led into minute studies on the early history of North Carolina, upon which he began to take notes. His next legal work was a remarkable *tour de force*. He translated Pothier on Obligations, "a book for which he had a profound respect, and at this time so complete was his skill as a translator and typesetter, that in executing the work he used no manuscript, but rendered the French directly into English type in the composing-stick."[1]

Elected a member of the House of Commons in the legislature of his adopted state, he found opportunities for perfecting and extending his notes on the history of the state which he was planning. Moreover, he was commissioned by the legislature to publish the revised statutes of the state, which appeared from his press at Newbern in 1804. Thus as lawyer and printer he was doing good service, and his reputation as a peculiarly sound and able lawyer was firmly established. He had already amassed at least a competence, but the habits of frugality, practised as a necessity in the beginning, had now become second nature, and he worked as hard and spent as little as in the days of early struggle.

He was already a man well advanced in years, and had achieved no small success; but there was yet a long life and a far more distinguished career before him. President Madison appointed him judge in the territory of Mississippi, and he accepted. Little more than a year later he was transferred to the Superior Court of the territory of Orleans, March 21, 1810, and came to New Orleans. The town was then enjoying its first period of rapid growth under the stimulus of American control and expanding traffic on the river, for in the seven years since the purchase the population had more than doubled; the town of seventeen thousand inhabitants might soon with some justice call itself a city, and the territory was even then preparing to turn itself into a state. But it was as yet but a state in the making, with a more heterogeneous population than goes to the makeup of most of the commonwealths of this notoriously composite union, and above all with a system of jurisprudence yet to be made out of the many differing codes and statutes that had more or less vigor in the community that had known three different masters within a decade. Judge Martin himself gives a whimsical account of the complications of legal theory and the embarrassments of legal practice at the time of his coming: "The Fuero Viejo, Fuero Juezgo, Partidas, Recopilationes, Leyes de las Indias, Autos Accordados, and Royal Schedules remained parts of the written law of the territory when not repealed expressly or by necessary implication. Of these musty laws the copies were extremely rare; a complete collection of them was in the hands of no one, and of very many of them not a single copy existed in the province. To explain them Spanish commentators were consulted and the *corpus juris civilis* and its own commentators were resorted to; and to eke out any deficiency, the lawyers who came from France or Hispaniola read Pothier, D'Agueseau, Dumoulin, etc. Courts of justice were furnished with interpreters of the French, Spanish, and English languages; these translated the evidence and the charge of the court, when necessary, but not the arguments of the counsel. The case was often opened in the English language, and then the jurymen who did not understand the counsel were indulged with leave to withdraw from the box into the gallery. The defense, being in French, they were recalled, and the indulgence shown to them was enjoyed by their companions who were strangers to that language. All went to-

[1] Judge W. W. Howe, Introduction to edition of Martin's "History of La.," p. x.

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gether into the jury room, each contending the argument he had listened to was conclusive; and they finally agreed on a verdict in the best manner they could."[1]

Out of this babel of tongues and laws it was the task of Martin more than of any other man to construct an intelligent and intelligible jurisprudence, a task for which he was admirably fitted by his wide and varied experience and knowledge, his habits of patient, laborious study, his calm mind, sanity, and clarity of vision, wise respect for tradition and precedent, and thorough honesty of character. He began almost at once, for the first time in the province, to compile reports of the cases decided, and published them himself for many years, so that in Martin's "Reports of the Superior Court of the Territory of Orleans" (2 volumes, 1809 to 1812) and of the "Supreme Court of the State of Louisiana" (18 volumes, 1813 to 1830) the legal profession of the state at last had before it a definite and admirable body of decided cases as a basis. He prepared and published also a digest of the laws of the state, a further step in the effort to give definite form to that jurisprudence in whose actual making he was to have so large a share.

With the transformation of the territory of Orleans into the state of Louisiana the territorial judge was without a court, but not for long. Almost immediately he was appointed attorney-general for the state, and held that office until 1815, being appointed in February of that year a justice on the Supreme Bench. It was the troublous time after Jackson's great victory, when that hot-headed commander was having a fierce quarrel with the French residents of New Orleans, whom he unwarrantably suspected and harshly accused of sentiments treasonable to the United States. Louallier, one of those so suspected, published an ill-timed and very fervent defense of himself and criticism of the General. Jackson had him arrested by military force, the city being under martial law, and proposed to have him tried by a military court. Louallier retained counsel on the spot, a Mr. Morel being beside him when he was arrested, and Morel at once made application for *habeas corpus*. In Martin's own words: "Application was made to one of the members of the Supreme Court, Martin, who was being prevented (*sic*) by the imperfection of his sight to be otherwise useful, had enrolled himself in one of the companies of veterans, organized for the maintenance of order in the city."[1] But Judge Martin's imperfection of sight, which, by the way, had made him a laughing stock in a brief career as a volunteer in the Revolution thirty years before, was merely physical; he saw that this was no case for him: "Morel was . . . informed that the judge did not conceive he could interfere, especially as it was alleged the prisoner was arrested and confined for trial before a court martial, under the authority of the United States." We need not pursue the episode farther, except to add that Judge Hall, of the United States District Court, not being so clear on the rights of the military authorities, did issue the writ of *habeas corpus*, and was in consequence himself given a taste of Old Hickory's wrath.

I mention this little incident, which was for forty years a stock subject with stump speakers who upheld Hall or eulogized Jackson as the case might be, because I have no doubt it was in the mind of Judge Bullard when in his address upon the life and services of Judge Martin he devotes nearly four pages to an exposition and analysis of Martin's first opinion as a Judge of the Supreme Court of Louisiana. The circumstances of the case that called for this first opinion were that "Martial law had been proclaimed by the general in command, and by an act of the legislature passed on the 18th of December (1814) all

[1] "History of La.," edition 1882, p. 344.

[1] "History of La.," p. 394.

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judicial proceedings in civil cases were suspended until the first of May;" accordingly, when the Supreme Court met early in March, "Martial law was still in force. A motion was then made that the court should proceed to the trial of a particular case then pending." This motion being opposed on the ground of the existence of martial law, and also of the act of the legislature, Judge Martin delivered an able and carefully elaborated opinion, declaring emphatically against the assumption of a right by any man to suspend, by his mere will, the operations of the courts, but deciding that the act of the legislature was of binding force. "And here let me remark," concludes Judge Bullard, "once for all, that Judge Martin exhibited on that occasion, as well as every other, during his long judicial career, the highest degree of moral courage and firmness of purpose. Nothing could deter him from the fearless expression of his opinion, without the slightest regard to persons."[1] Martin was, indeed, quite fearless, or even careless, whose toes he trod upon in the exercise of his functions; but Judge Bullard's eulogy, read in the light of the Hall episode, makes one smile as one reflects how fortunate it was that Martin had other grounds for acting, in the case of Louallier's application for *habeas corpus*, in a way inconsistent with his own opinion upon the legality of Jackson's proclamation of a suspension of the ordinary judicial tribunals.

Beginning his service on the Supreme Court in 1815, Judge Martin was to continue on that bench, for a period of thirty-one years, its most learned and respected member at a time when, says a distinguished member of the present Bar in New Orleans, the Supreme Court of Louisiana was second to none in the Union. His decisions were admired for their soundness and for the force and terseness of their expression, points upon which he particularly prided himself. As has been indicated, these decisions and his reports really gave form to the jurisprudence of the state, cleared the way in the tangle of laws and codes that ruled in the new commonwealth. We cannot here give details, but must content ourselves with repeating that his contemporaries as well as all students of Louisiana law to the present day unite in grateful tribute to the value of his services.

The man himself was as odd a character as ever sat upon the Bench. Quick and intelligent in conversation, and fond of humor of the broadest kind, he was, says Judge Bullard, an agreeable companion. But he cared nothing for social life *per se*, nor for anything else that one can name but his work — legal and historical studies — and the accumulation of money. He was never married, and lived the squalid life of a miser. According to Gayarré, who knew him, his household consisted of his negro body servant, Tom, and two old negro slaves, man and wife, with whom he made an extraordinary compact.[1] He provided the house and his own clothing, and told the negroes: "I provide you with a home; I require of you only the small service necessary for myself; you must provide me with food, and keep my clothes in repair; after you have done this, the rest of your time is your own, and whatever you can earn is your own; you must not look to me for any further provision." Whether or not this was the actual arrangement, there is no doubt that the great judge lived a life of squalid avarice. He cared nothing for the pleasures or even the decencies of the table, ate ravenously whatever was put before him, merely to satisfy the cravings of hunger.[2] His clothes were worn till they were patched and

[1] Discourse on the Life and Character of the Hon. F. X. Martin, New Orleans, 1847, prepared and delivered at the request of New Orleans, see pp. 13–16.

[1] Fernando de Lemos, pp. 243–256.

[2] It is perhaps worth noting that one of Martin's distinguished fellows on the Bench, Judge Mathews, was a tremendous eater. He declared the turkey a very unsatisfactory fowl — "too big for one and not enough for two."

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threadbare. His room was festooned with cobwebs and encrusted with dirt. Out of a salary of five thousand dollars he did not spend as many hundred. Just and upright both in public and in private life, he was a hard man, driving hard bargains to add to the painfully accumulated fortune which he must leave when he died to relatives whom he knew but slightly or not at all. "He was so near-sighted," says Gayarré, "that, when he read or wrote, his robust and fully developed nose touched the paper and sometimes was tipped with ink. He walked along the streets of New Orleans with his eyes closed and with tottering and hesitating steps, feeling his way like a blind man, absorbed in thought, probably lost in utter darkness, or at best guiding himself only by the twilight of his imperfect vision, running one of his hands abstractedly over the side walls of the houses, mechanically and unconsciously twirling round with his index the iron catches intended to hold fast the outside shutters of windows and doors, muttering to himself half-formed sentences, and frequently ejaculating in a dolorous undertone these words: 'Poor me! poor me!'"

His sight was always weak, and the unremitting strain to which he subjected it finally brought on utter blindness, a trial which he bore with the utmost fortitude, and without allowing it to interfere with the regular and exact performance of his duties as a magistrate. But we pause for a moment to mention two of his works in the field of history. The history of North Carolina prior to the Revolution, which he had planned to carry through that period, was interrupted by his removal to Louisiana. Here he soon began collecting materials for the history of Louisiana. In 1827 he was at last able to complete this, and the "History of Louisiana," in two volumes, appeared in New Orleans in that year. Martin never thoroughly mastered the idioms of his adopted tongue, as may be apparent even in the slight quotations I have given from the work. But its chief fault is not merely in the stiffness of the language. There is little more sense of form than in the medieval chronicle; no organization of the extraordinarily rich and varied materials collected by his tireless industry gives them coherence, combining them to form a picture at once vivid and effective; few generalizations sum up for the reader the substance of a period or of an historical movement; for the most part, a purely chronological arrangement is adopted, the happenings of one year are set down in order of time, often even without grouping together to show their relation to each other or to other events; and the general effect is naturally confusion and dullness. But with all these faults, which one would think serious enough to ruin the book, Martin's "History of Louisiana" is really very valuable. Utterly incapable of, and indeed hostile to, the rather excessive floridity of style that marks the work of Gayarré, he yet surpasses Gayarré in what is after all the most important qualification of an historian, accuracy and soundness of judgment. His facts, though not gathered from such wide sources as were at the command of the later and better known historian, are very full and quite carefully sound, especially for the period with which Martin and his older contemporaries were personally familiar, so that the book is in a double sense a mine of valuable miscellaneous materials for the historian of Louisiana.

Two years after the "History of Louisiana" appeared the long contemplated "History of North Carolina," the general character of which is sufficiently indicated by what has been said of its predecessor. By this time the imperfection of his sight was so manifestly on the increase that the lonely old man began to feel more keenly his practical isolation, despite his high honors and host of devoted friends, in the foreign land where none of his own family lived. He had expressed to some of these friends his determination not to leave his money to relatives

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living in France: if they wanted his money they must come and settle in Louisiana, and give some evidence of willingness to work for themselves and of ability to care for his hard-earned fortune after it should have become theirs. Some time before 1830 he induced his nearest living relative, a brother, Paul Barthelemy Martin, to come to Louisiana.

This brother, many years his junior, was yet an old man, a childless bachelor who had himself accumulated a modest competence as a merchant in Naples and retired from business. Yet to Judge Martin, who had never seen him since childhood and could in the physical sense not really see him now, this brother seemed always a mere boy, and was called by the childish nickname, Mimi. He was fond of him and indulgent to him though perturbed by the thought of the wasting of his substance in riotous living when Mimi insisted upon some modest improvements in his mode of life, keeping a decent table, having wine with his meals, and occasionally some friend to dine with him. But for all his misgivings about the extravagant tastes of this wilful boy, he had confidence that Mimi would know how to keep his property, would be "*un autre lui-même.*"

About 1838 or 1839 Judge Martin became so blind that he could no longer read or write. His retentive memory and great stores of learning, however, enabled him still to formulate and dictate his opinions, while he could sign orders of court, licenses, and the like, if the pen were put in his hand and he was directed where to sign. His praiseworthy habit of making his opinions as concise as possible made his blindness less of a handicap, and his method of preparing opinions, if Gayarré is to be understood literally, might enable him almost to dispense with books. He was, according to all testimony, an adept in logic and in the Socratic method; in consultation with his colleagues, says Judge Bullard, he would lead on from question to question till he had entrapped the unwary answerer between the horns of a dilemma or refuted his reasoning from his own answers. When a peculiarly knotty point perplexed him, he would, says Gayarré, make a tour of the offices of certain lawyers not interested in the case at issue and in whose judgment he had confidence. To each he would, as if merely in the course of conversation, propound the question. Whichever side was taken by the man interrogated, Martin would take the other, and argue for it till he had pumped his man dry. Then with grunts of satisfaction at having, perchance, defeated this antagonist, he would grope his way to the next office, and repeat the process on another victim, perhaps with sides changed. Having thus satisfied his doubts and sharpened his wits, he would make his decision. Sometimes, when the authorities seemed to warrant either of two views, he would present to his colleagues two opinions, one for the appellant and one for the defendant, and then debate these in the same keen fashion with his colleagues till a decision was reached. And it is said that on one occasion when this had been done and the judgment of the court had been decided upon, the other judges were horrified to hear the chief justice, who had got the opinions mixed, calmly delivering the rejected one from the Bench!

However much these anecdotes may be beside the mark, Judge Martin did continue to perform his duties, and in no perfunctory manner. It is true that he once wrote an opinion partly on the paper and partly on the table, whereof the clerk could make nothing at first, but happily remembered the table, put the paper back in its original position and found the whole thing then intelligible.[1] But usually he dictated his opinions, and worked as conscientiously and withal as efficiently as any of his clearer sighted colleagues. When the new constitution of the state went into effect the

[1] La. Annual Reports, II., p. 669.

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aged chief justice was left off of the reorganized court, March 18, 1846. Though showing few of the infirmities of age — his blindness could hardly be accounted such — Judge Martin was worn out, and the enforced idleness of his retirement fretted him. He failed rapidly, and died in the same year, December 10th.

While men were still recounting anecdotes of the wisdom, uprightness, and personal idiosyncrasies of the great judge who had for thirty-one years sat on the Supreme Bench, the curious were provided with a fresh item of interest in the will, written on a single sheet of paper folded like an envelope, its brief clauses sprawled all over the sheet, in the well-known handwriting of a man known to have been stone blind at the date assigned. The will was olographic, written, signed, and dated in his own hand, and those who had sat with him on the Bench and seen him write attested the genuineness of the document when it was offered and admitted to probate. "I institute my brother, Paul Barthelemy Martin, heir to my whole estate, real and personal, and my testamentary executor and detainor of my estate. In case of his death, absence, or disability, I name my friend and colleague, Edward Simon, my testamentary executor and detainor of my estate. New Orleans, this twenty-first day of May, eighteen hundred and forty-four. F. X. MARTIN."

There was food enough for gossip in the will itself and that gossip received a fresh supply of material when, before the provisions of the will could be carried out, suit was instituted in the name of the state to declare the will null and void. There had recently gone into effect a statute (1842) imposing a tax of ten per cent upon all successions and every part thereof go to distributees domiciliated out of any territory or state of this Union. On account of Judge Martin's notorious avarice, it was believed that he had planned to evade the tax, and had really left the estate to the brother domiciled in New Orleans under a tacit if not actual agreement that the legatee would distribute portions of it to the other relatives. The state brought its suit on the grounds (1) that the will was void and of no effect because when it was alleged to have been made Martin was blind and incapable of making an olographic will, and (2) that the attempt to evade the tax established a *fidei commissum*, and constituted a fraud upon the state. The Second District Court sustained the contention of the state, whereupon appeal was had to the court over which the testator had so lately presided, and three of whose justices had attested the genuineness of the will. The case came on for trial in the June term of 1847, with a formidable array of legal talent on either side: for the state, Attorney-General Elmore, aided by Messrs. Musson and Pépin; for the appellant, the greatest of the Creole lawyers, Mazureau, aided by Messrs. Grima and Legardeur.[1] It was shown by the testimony submitted in the record, that Judge Martin was quite blind in 1844, that he could not even sign his name unless the paper were put, not under his eyes, but under his very nose, the pen dipped in the ink for him, and put in his hand, and his hand guided, to the proper place for signing. *Per contra* it could not be questioned that the writing in the will was his; and it was further shown that on several occasions since he had become blind he had been known to write legibly at least as much as a dozen or so words. It was further shown that, although he had expressed his disapproval of the ten per cent tax and his belief that it could be evaded, he had never intimated that he meant to evade it, or indicated how this could be done, merely expressing the opinion in conversation with his fellow-justices. Moreover, he had told Judge Simon a few months before his death that his nephews in France would not get his money, since they would not leave France. And P. B. Martin, in reply to interrogatories as to whether his

[1] La. Annual Reports, II, pp. 667–721.

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brother had given him any instructions as to the disposal of the estate, and whether or not he meant to transmit any part thereof to the other heirs, answered: "Mon frère ne m'a rien déclaré là dessus — mon frère m'a dit: 'Je te fais mon héritier,' et de disposer de sa fortune, que c'était à moi. Je n'ai . . . . d'autre intention que celle de disposer de ma fortune selon ma volonté. Là dessus je dis que je ne me crois pas obligé de faire dans ce moment ci un testament public. Je ferai mon testament comme je l'entendrai."

One would like to examine a little more in detail this very curious and interesting case, and to present some of the arguments, particularly from the eloquent brief of Mazureau, with its opening quotation of Hindoo apothegm applicable here: "Celui qui amasse une grande fortune, sème des procès qui germeront après sa mort." But space forbids us to notice anything more than the fact that in all their ransacking of reported cases and commentators on French and Spanish law, the counsel could find but one case somewhat resembling the present one, and could find no positive authority for the contention that a blind man who knew how to write could not make a valid olographic will. Justice Ross, who handed down the decision, ruled against the contention of the state on every point, and ordered the judgment of the lower court reversed. "The representative of the state," he concluded, "has faithfully discharged, what, under the information he had received, he conceived to be an official duty. Upon us devolves the more grateful task to determine that he was misled by that information, and that the name of *François Xavier Martin* stands unsullied by fraud."

New Orleans, La., April, 1906.

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THE MEDIEVAL INNKEEPER AND HIS RESPONSIBILITY[1]

By Joseph H. Beale, Jr.

THE innkeeper occupies in our law a peculiar and apparently anomalous position: while not technically a bailee of the goods of his guests he is held up to the strictest responsibility which any bailee is under; and while apparently a mere individual householder with no corporate or other franchise specially granted he is compelled, like the great railroad corporations, to receive and entertain strangers whether he will or no. In order that we may understand the reason for the apparently peculiar doctrine of the law regulating the rights and liabilities of innkeepers, in order that we may learn the extent of their responsibilities and understand their limitations, we must examine briefly, as has just been said, the early history of innkeeping in England; the character and nature of inns, and the functions which they performed in the social life of the English people at the time when the law of innkeepers was forming, that is, during the fourteenth and fifteenth centuries. The nature of the English inn in the Middle Ages determined the English law of innkeepers; and the principles thus established form the basis of the law of innkeepers in every place where the common law prevails.

Travel abroad was much commoner during the Middle Ages than we often realize; and the traveler returning to England might have brought home with him information about the trade of the innkeeper and suggested its establishment in his own land. But there is no reason to suppose that the English inns were not of indigenous growth; certain it is that they were noted as the cleanest, the best supplied, and the most attractive inns in the world. We must turn to the habits and needs of travel in medieval England to explain the origin, the nature, and the legal position of English inns.

There was a surprising amount of traveling in England in the Middle Ages. The roads, to be sure, were very bad, and in general were impassable for loaded wagons, and the transportation of goods from place to place was therefore almost impossible. While one portion of the country was well supplied with food, another portion not so far away might be in the throes of famine without a chance of relief so far as land transportation was concerned. Yet in spite of this the roads were sufficient for foot passengers, or for lightly loaded horses, and they were used by multitudes of people on foot or on horseback. Carriers of goods existed, but they transported their goods in packs by means of horses.

The roads were not only bad, but they were infested with outlaws and robbers of all sorts. Between the villages there were long stretches of forest, and these forests were the refuge of the outlaws who formed a considerable proportion of the population of the country. They might at any time attack travelers by day, but that was unusual. As it usually happened that travelers proceeded in companies, there was not much danger of attack so long as daylight lasted; but at night the danger was considerable.

Such being the conditions of traveling two results followed: a traveler must carry as light weight of baggage as possible, and he must secure protection at night from thieves and outlaws. He could not conveniently carry with him food for his journey, and he must, therefore, find entertainment along the road. He could not safely sleep in the open and he must, therefore, find some house which would offer him protection as well as entertainment for the night. These needs led naturally to the establishment of a course of business which should supply the

[1] From the introductory chapter of a forthcoming work on Innkeepers, announced for publication by W. J. Nagel, Boston. Copyright, 1906, by Joseph H. Beale, Jr.

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demand. At the proper place on every main road of travel houses were devoted to the business of furnishing food, drink, and safe lodging to hungry and weary travelers. Thus out of the needs of the wayfarer and as an incident of travel from place to place grew the English inn. It was established to supply the needs of the traveler along his journey, to wit, to furnish food and drink for man and beast, and rest and safety for the night.

The inn was not the only accommodation which weary travelers might find in the course of their journey. The religious houses practised hospitality, and freely received certain classes of people. The nobles and magnates habitually resorted to them for refreshment and were received both in consideration of their own bounty and as representatives of the class to which the community owed its foundation and its wealth. The very poor also were received out of mere charity, for hospitality to the poor was one of the first requirements of religion as it was understood in the Middle Ages. To the houses of the friars, therefore, rich and poor resorted for entertainment; but the great middle class, the men who were able to pay their way, were not welcome there. If they had the means to pay for accommodation and were without special claim to favor, they must go to those whose business it was to care for them. The great houses of nobles and gentry were also open to travelers who were in need of entertainments, but there, too, it was as a rule only the rich and the poor who were expected to avail themselves of the private hospitality. Any one lost or benighted would of course be received; but the lord of the manor had no desire to compete with the innkeeper, who must make his livelihood from the wayfarer.

Besides these private houses and the inn for necessary entertainment, the alehouse or tavern supplied incidental refreshment to the traveler, though primarily intended to serve another purpose. This house primarily supplied the wants of the inhabitants of the place, for there the native found rest, heat, companionship, and beer. He could stay until the stroke of curfew, and then was turned out to find his way home as best he might, quarreling and fighting by the way, using his knife freely, or falling from his horse into a convenient stream, the easy prey for enemies and for robbers. "The law would not have a tavern haunted out of season," and the night time was out of season. The difference between the inn and the tavern is therefore obvious. The one was instituted for the weary traveler, the other for the native; the one furnished food that the traveler might continue his journey, the other furnished drink for the mere pleasure of neighbors; the one was open to the traveler for protection at night, the other turned its guest out at the very moment when he most needed protection, and left him to find it, if his remaining senses permitted him to do so, in his own home. It is unnecessary, therefore, to point out the fact that a tavern is not an inn, and that the innkeeper's duties do not extend to the tavernkeeper.

Such being the course of life among wayfarers in medieval England, the inn was a natural outgrowth of the conditions. The inn, the public house of entertainment, was naturally evolved from the private house. Any householder might receive a stranger for the night, as indeed in rural communities many householders are apt to do. If in the course of time one such householder came, either through the superiority of his own accommodation or by reason of the lack of competition, to receive all persons who in that village needed accommodation he would thereby have become an innkeeper. He would have done it perhaps gradually, without any distinct change marking the transition from the private householder to the public innkeeper; nor would the accommodation he offered be different in kind from the accommodation that would be offered by the private house-

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holder furnishing occasional accommodation to a transient guest. The inn was an outgrowth of the private house, and the kind of house employed and the general conduct of life in the house would be the same in the early inn and the private house of the same period. In order to discover the nature of the accommodation afforded by the inn it will therefore be worth while to examine the plan of life in the ordinary dwelling of the time.

The English houses of the thirteenth and fourteenth centuries differed greatly, of course, in size and in elegance, but the plan of life in all houses had certain common features. Life indoors centered about the great hall, the principal part of the house, to which other parts were added as they might be required. In the hall the days were spent, so far as they were spent indoors, meals were eaten, and night having come the tables were removed and the beds were spread. The mistress, to be sure, had a small room of her own, the bower, into which she could retire at any time, and the master of the house had a separate chamber in which he slept. But the retainers, the servants, and the ordinary guests slept together in the common hall. The house of a man who was well to do might have an additional chamber for guests, and a stable was usually attached to the hall at one end. The hall was warmed and lighted by a great fire. In each chamber there was a small fireplace for heat, and light was given by a candle. The inn was undoubtedly built on this same plan, even when a building was built especially for an inn; in most cases doubtless the inn had been built for an ordinary dwelling house. The weary traveler coming to the inn at nightfall would have his supper at the great table, and his bed would then be spread in the hall itself. Heat and such light as was necessary he would have from the hall fire. If he brought a horse and paid for his keep, we are told he paid no extra charge for his bed, but the foot traveler paid a small sum for his lodging. A traveler of better estate would pay for and receive accommodation in a small chamber. There he would be served with food and his bed would be spread, and he would be charged not merely for the food and lodging, but also for his fire and his candle. Even there he would not be likely to occupy the chamber alone, or even a bed alone; the king himself on his travels was expected to have a bedfellow, and a private person would be fortunate if he had only one. Still he was traveling in luxury if he shared with two or three others a private chamber, a private bed, and a private fire. As time went on and the business of the innkeepers increased, especially in the great towns, buildings were built as inns, the number of chambers being greatly increased. In the sixteenth century we hear of inns in London which could accommodate one hundred guests. It must be clear that with so many guests the common hall would be needed for their reception and for the general table; and the guests must have all been put into special chambers for sleeping; but most of these were undoubtedly still common chambers, in which travelers were put as they happened to come, sharing not merely the chamber but the bed with strange bedfellows.

Such being the business and such the customs of innkeepers, their responsibility, which seen through modern eyes seems anomalous, is easily explained. They undertake as a business to furnish food, protection, and shelter to the wayfaring guest; having undertaken such a public business, and the public need being concerned, the innkeeper must supply his service to all; and in order to perform his undertaking he must furnish not merely sufficient food and a tight roof, but sufficient protection against the dangers of country traveling. Either to refuse shelter, to fail to provide food, or to permit robbers from outside to enter the inn would be a breach of his obligation and would render him liable to action. But this is not the limit of his obligation. If

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he puts a stranger into a common room with other strangers and bids him sleep, the innkeeper must undertake his care and protection during the night, not merely against persons outside but against strange bedfellows within the inn. It is interesting to notice how history repeats itself in this case. A much later invention, the sleeping car, brought back to modern life some of the obsolete features of the life of the Middle Ages. A number of persons, strangers to one another, were received to sleep in a common room open to persons from outside. The existence of the same conditions imposed a similar responsibility, and the proprietor of the sleeping car, like the innkeeper in the Middle Ages, was obliged to protect his guests as well as he could against danger from within or from without. The innkeeper's liability did not exist in the case of a private chamber, into which only the guest who engaged it or friends brought into it by himself were allowed to enter. If a man engaged a room and control of it, and was given the key, the protection which the innkeeper was obliged to furnish him was, therefore, merely against outsiders who might be permitted to break into the room without right. Against the inmates the guest had no right to call upon the innkeeper for protection. This is the reason of the stress laid in the old cases upon the fact that the innkeeper has given the guest the key of his room; this gift of key marked and symbolized the fact that the room was no longer in the innkeeper's disposal, that he could quarter no stranger in it, and that the guest and his friends alone could enter, and, therefore, against those who rightly entered the innkeeper undertook no responsibility.

The business of innkeeper having been carried on in this way the distinctive features of the law are easily accounted for. The principles of the innkeeper's liability once being established have continued unchanged until the present day; and the hotel keeper in the great cities of the United States derives his rights and traces his responsibilities to the host of the humble village inn of medieval England.

CAMBRIDGE, MASS., April, 1906.

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ARBITRARY SEARCHES AND SEIZURES AS APPLIED TO MODERN INDUSTRY

By Andrew Alexander Bruce.

THE fourth amendment to the Federal Constitution, which guarantees to the people of the United States the right of security in their persons, houses, papers, and effects against unreasonable searches and seizures, and which has been reënacted into the constitutions of all of the American states, is nothing more or less than a declaration of the English common law as it existed or was presumed to exist at the time of the adoption of that instrument.[1] It was the doctrine of the famous Wilkes[2] and Entick[3] cases, which were decided in England in 1763 and 1765 respectively, and which have been justly considered landmarks not only in English but in American history. In both cases damages were recovered for breaking into private houses and seizing and carrying away private papers under the pretext that the same were treasonous and libelous, and in both cases an individualistic doctrine was enunciated and the theory of the social compact set forth. "The great end for which men entered into society," said Lord Camden,[4] "was to secure their property; that right is secured sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by positive law are various. Distresses, executions, forfeitures, taxes, etc., are all of this description, wherein every man by *common consent* gives up that right for the sake of justice and the general good. By the laws of England every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without license. . . . . If he admits the fact he is bound to show by way of justification that some positive law has justified or excused him. . . . The case of searching for stolen goods crept into the law by imperceptible practice. No less a person than my Lord Coke denied its legality. . . . Observe, too, the caution with which the law proceeds in this singular case. There must be a full charge upon oath of a theft committed. The owner must swear that the goods are lodged in such a place. He must attend at the execution of the warrant to show them to the officer. . . . I wish some cases had been shown where the law forceth evidence out of the owner's custody by process." These decisions were handed down in the midst of the great struggle of the American colonists for constitutional liberty. They were welcomed and applauded perhaps more in America than in England itself. Every American statesman during the revolutionary and formative period of the nation was familiar with them and considered them as the true and ultimate expression of constitutional law. Arbitrary searches and seizures, indeed, were in a large measure the proximate cause of the American revolution. Prior to the rendering of the judgments referred to, James Otis in a fiery speech delivered in Boston in 1761 had pronounced the writs of assistance which were then being freely issued to revenue and other inferior officers as "the worst instruments of arbitrary power, the most destructive of English liberty and the fundamental principles of English law that ever were found

[1] See opinion of Lord Camden in Entick *v.* Carrington, 19 Howell's State Trials, 1029; The Case of John Wilkes, 19 Id. 981; Opinion in Boyd *v.* U. S. 116 U. S. 616.

[2] 19 Howell's State Trials, 981.

[3] 19 Howell's State Trials, 1029.

[4] See opinion in Entick *v.* Carrington, 19 Howell's State Trials, 1029; Boyd *v.* U. S., 116 U. S. 616, 6 Sup. Ct. Rep. 530.

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in an English law book," since they placed "the liberty of every man in the hands of every petty official." "Then and there," said John Adams, "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain; then and there the child Independence was born."[1] The American colonists did not bother themselves with the consideration that they were technically speaking to a large extent a people of law-breakers, and that although the searches and seizures complained against were no doubt arbitrary and without due process of law, the result was usually to bring to light violations of the law and to secure contraband goods which had been smuggled in contravention thereof. They had come into an individualistic atmosphere, the atmosphere which always prevails upon the frontier and far from the centres of government; the atmosphere which is always to be found among a people who have left the comforts and refinements of the older communities and who have faced deprivations and hardships in order that they may acquire; which is generally to be found among those who, starting without rank or position, see before them by the means of acquisition the opportunity for wealth and preferment. So too the laws were arbitrary and passed without the sanction of the governed. And the colonists therefore questioned not merely the right to search and seize but the validity of the very laws under which the searches and seizures were instituted. They were determined to vindicate their personal rights to property and to the acquisition thereof, and to prevent inquisitorial exercises of power of every kind. Their motives were personal. They were largely selfish. They emanated from a desire for personal liberty rather than from a desire for a national existence, for a comprehensive scheme of government or the welfare of the people or of the state as a whole. They were peculiarly anxious that the personal liberty which they believed to have been theirs as Englishmen should be preserved to them as American citizens, and it was for this purpose that the fourth amendment to the federal constitution was insisted upon and adopted. The amendment, however, did not prohibit all searches and seizures, merely those which were unreasonable. This was true of the English law as then formulated and was in accordance with the traditions of the past.[1] The colonists hardly denied the right to search and seize but rather the right to arbitrarily and unreasonably search and seize, and they demanded a voice in the making of the laws for the violation of which or for the enforcement of which the entries and seizures were made. They insisted upon some kind of due process of law, some inquiry, some proof of a *corpus delicti*, as it were. The clause of the Magna Charta, indeed, to which they constantly made reference, did not forbid all entries upon private premises, but merely entries by an armed force and not by the law of the land. *Nec super eum ibimus nisi per legem terrae*, the words ran. The law of the land, due process of law, had long been considered to involve a day in court, a right to be heard, and the service of the process or the seizure by a proper judicial officer.[2] Although, therefore, the exigencies which made searches and seizures necessary at all forbade the giving to the person affected the right to a personal hearing in the first place in every instance, a preliminary investigation or hearing of some kind,

[1] Works of John Adams, vol. 2, Appendix A, pp. 523–525; vol. 10, pp. 183, 233, 244, 256; Quincy's Reports, pp. 469–482; Paxton's Case, id. 51–57; Boyd *v.* U. S. 116, U. S. 616.

[1] See opinion in the case of John Wilkes, 19 Howell's State Trials, 981, and Entick *v.* Carrington, 19 id. 1029.

[2] Reeves' History of English Law, vol. 11, chap. 5; Dartmouth College *v.* Woodward, 4 Wheat. 519; Mr. Justice Johnson in Bank of Columbia *v.* Okley, 4 Wheat. 235.

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and before a judicial officer was insisted upon by the common law and by the constitutions, both state and federal. Complaints were required to be sworn to and filed, and it was only after an examination of these that the warrants could issue.[1] The constitutions, however, did not require the issuance of search warrants in all cases. They rather guaranteed the continuance of the rights which were already existing or which were presumed to exist, the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, and the right to insist that in those cases where search warrants were required by the common law the same should not be issued except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. The law as generally understood was, that an entry could only be made by a judicial officer;[2] that in all cases a warrant was necessary,[3] except where the purpose of the entry was for the arrest of a felon where the crime had been committed in the presence of the officer, or where an affray or breach of the peace was going on within the closed doors.[4] In no case could an entry be made for the purpose of arresting one thought guilty of a misdemeanor without a warrant,[5] nor even with a warrant (and even where the commission of a felony was suspected) for the purpose of obtaining evidence or information.[6] In no case could a warrant be issued except upon probable cause supported by oath or affirmation.[1] The probable cause had to be shown by affidavit based upon knowledge as to the facts therein contained. The uncertainty of probability was a conclusion to be deduced from the facts, rather than an uncertainty lying in the facts themselves.[2] The warrant could be not issued for the purpose of obtaining evidence of an intended crime, but only after lawful evidence of an offense actually committed.[3] In every case the officer was required to follow the strict letter of his warrant, and the burden was upon him to justify his acts if he departed from it.[4] Protection from the arbitrary acts of administrative officers, and for the reasonable privacy of the citizen, were the main things sought for. It is even doubted by the earlier writers whether a search warrant could be issued in the night-time.[5] It is true that warrants could be issued for the seizure of contraband articles, or to abate known nuisances.[6] They were authorized, however, only where the existence of contraband articles were known; where the articles bore the relationship to the government that stolen goods did to the individual; where, as nuisances, they were, legally speaking, not property at all, or where their introduction, without the payment of the duties prescribed, had forfeited them to the Crown, and the Crown in seizing them was merely seizing its own. Search warrants were not authorized for the purpose of prying around and of ascertaining whether contraband articles were concealed or not.[7]

[1] See opinion of Lord Camden in Entick *v.* Carrington, 19 Howell's State Trials, 1029; 4th Amend. to U. S. Const; 2 Hale, P. C. 142.

[2] 2 Hale, P. C. 150; Cooley, Const. Lim., 7th. ed., 430.

[3] Black's Const. Law, p. 501.

[4] Black's Const. Law, p. 501.

[5] McLennon *v.* Richardson, 15 Gray (Mass.) 74.

[6] Cooley, Const. Lim., 7th ed., 431.

[1] Amend. U. S. Const. Art. IV; Entick *v.* Carrington, 19 How. St. Mich., 1029.

[2] Comm. *v.* Lottery Tickets, 5 Cush. 369.

[3] Cooley, Const. Lim. 7th ed., 431.

[4] Cooley, Const. Lim. 7th ed. 434.

[5] 2 Hale, P. C. 150. But see Comm. *v.* Hinds, 145 Mass. 182, 13 N. E. 397; State *v.* Brennan's Liquors, 25 Conn. 278.

[6] Sandford *v.* Nichols, 13 Mass. 286; Henderson's Distilled Spirits, 14 Wall. 44.

[7] Tiedeman St. and Fed. Con. of Persons and Prop. § 158.

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This is an individualistic code. It is the code of the man who mistrusts centralized government, of the man who is no believer in a bureaucracy, of the man who desires to place obstacles in the way of governmental inspection and of governmental paternalism, of the man who cherishes a love of privacy. It is in line with the high garden wall so characteristic of the English home, of the Calvinistic political ideal which upheld the individual, and which even in its political collectivism refused to go beyond the local industrial center or the local church organization. It does not say that no entry by force can be made until reasonable means have been adopted to enter peaceably, but that, except in certain cases, no entry can be made at all. Side by side with the growth of this rule, but based perhaps on more altruistic ideals, is the rule that no man shall be compelled to incriminate himself.[1] The history of the rule is ably set forth by Prof. Wigmore in his monumental work on "The Law of Evidence."[2] It was never insisted upon in the common law courts until after the English revolution. A contrary practice prevailed in Massachusetts as late as the year 1685. "The privilege," to use the language of Prof. Wigmore, "creeping in thus by indirection, appears by no means to have been regarded as the constitutional landmark that our later legislation has made it. In the parliamentary remonstrances and petitions and declarations that preceded the expulsion of the Stuarts, it does not appear at all. Even by 1688, when the courts had for a decade ceased to question it, and at the revolution the fundamental victories of the past two generations' struggle were ratified by William in the Bill of Rights, this doctrine is totally lacking. Whatever it was worth to the constitution-makers of 1789, it was not worth mentioning to the constitution-menders of 1688. It is a little singular that the later body, who had themselves suffered nothing in this respect, and could herein aim merely to copy the lessons which their forefathers of a century ago had handed down as taught by their own experience, should have incorporated a principle which those forefathers themselves, fresh from that experience, had never thought to register among the fundamentals of just procedure."[1]

The tendency of to-day, however, is decidedly towards collectivism, both industrially and socially; and in accordance with this trend of movement, we have by legislative enactment authorized not merely the issuance of search warrants in numerous cases that could hardly have been contemplated by the common law, but in many instances searches and invasions of the right of privacy without the formality of any warrant at all. Searches and seizures with warrants have been authorized for the purpose of searching for gambling instruments and devices, for counterfeiting tools, for lottery tickets, for intoxicating liquors supposed to be kept for sale in violation of the law, for obscene books and papers, for dangerous explosives, for books and papers of a public character which have been taken from their proper custody, for females secreted in houses of ill fame, for children kept from their parents or guardians, for concealed weapons, for counterfeit money, and for forged bills and papers.[2] The validity of these statutes has been generally upheld. In speaking of them, the Supreme Court of Iowa has said that "no search warrant is unreasonable in the legal sense, when it is for a thing obnoxious to the law and of a person or place particularly described, and is issued on oath of probable cause."[3] And this statement is perhaps historically correct. The searching for smuggled goods would perhaps hardly have

[1] Am'ts. U. S. Const. Art. 5.

[2] Wigmore on Ev., Vol. III, chap. 78.

[1] Wigmore on Ev., Vol. III, p. 3090.

[2] Cooley, Const. Lim., 7th ed. p. 432.

[3] Santo *v.* State, 2 Ia. 165, 63 Am. Decs. 487.

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been complained of by the colonists if the same had been done by due process of law, and not arbitrarily and by others than judicial officers. It was also, perhaps, the arbitrary and unjudicial method pursued in the Wilkes and Entick cases that was complained of rather than the entry itself.[1] The contemporaneous construction of the Federal Constitution would certainly lead to this conclusion, as the right to enter and seize goods smuggled in violation of the revenue laws and to seize contraband whisky has always been insisted upon.[2] "Certain articles, while used for lawful purposes, may," says the Supreme Court of Maine,[3] "be subject of forfeiture and destruction under proper statutory provision if their use is deemed pernicious to the best interest of the community. And when such articles are attempted to be used for unlawful purposes, or in an unlawful manner, and the attempts are so concealed that ordinary diligence fails to make such discovery as to enable the law to declare the forfeiture, the statutes authorizing searches and seizures have been held legitimate." "The exercise of this power," the court, however, goes on to say, "must be properly guarded, that abuses may be prevented and that a citizen shall not be deprived of his property without having an accusation against him setting out the nature and charge thereof, and but by the judgment of his peers and the law of the land."

It will be noticed that in the cases mentioned the things sought to be seized or the practices prevented are things and practices which have shocked the moral sense of the community; they are things and practices against which the churches have fulminated, behind which there has been no great show of respectability, no leading citizens, no manufacturers' associations, no great accumulations of capital. So, too, the things and practices have come in the main within the term "nuisance."

We have, however, as before suggested, in addition to extending the scope of the search warrant, also by legislative enactment everywhere extended the exercise of inquisitorial power, and have everywhere provided for entries and inspections without warrant and without legal formality. We, too, are now proceeding against things and practices which are *mala prohibita* rather than *mala in se*, which are a violation of man's duty toward man as a fellow and a brother and of his social obligations towards him rather than against things and practices which are merely violations of private property rights or which tend to breaches of the public peace. Everywhere, for instance, our statutes provide for the inspection of factories, workshops, and mines, in order that the provisions of the law may be enforced which prohibit child labor and which require machinery to be guarded and the health and safety of the employee promoted. So, too, we have statutes providing for the inspection of passenger elevators, of fire escapes, and of buildings generally; we have statutes which provide for the inspection of milk and cream and for the sampling and examination of all kinds of food. Ever and anon also legislative commissions are appointed with the power to inspect and to examine into the affairs of private as well as of public corporations.

Are such searches and seizures or entries or inspections constitutional? Do they infringe upon the guaranty that no man shall be compelled to incriminate himself upon the right of privacy? Is privacy in all instances an inalienable right? Such statutes certainly trench upon the old theory of property rights and do serious violence to the doctrine of *laissez faire*. Are they reasonable as that term is used in the constitution? Was that term used only to cover

[1] Though Lord Camden intimated that the papers in question could in no case be seized even under a proper warrant. See opinion in cases.

[2] Henderson's Distilled Spirits, 14 Wall. 44.

[3] Gray *v.* Kimball, 42 Me. 299, 307.

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those searches and seizures and entries and examinations which were known to the common law, and should all others be deemed unreasonable?[1]

To justify these acts an insistence must be had upon an elastic construction of the constitution, and the premise must be adopted that although that instrument did not guarantee any rights or privileges which were not enjoyed at the time of its ratification it certainly did not guarantee that all uses of liberty and of property then indulged in should be perpetuated. It did not guarantee the existence for all time of the morality and the civic and social conscience then existing. The theory of Mr. Bryce must be adopted, when he said that "The American Constitution has necessarily changed as the nation has changed, has changed in the spirit with which men regard it and therefore in its own spirit."[1] An insistence must be made upon the fact that the Constitutions, state and national, merely prohibit *unreasonable* searches and seizures; that the ethics of the times have changed; that the state is becoming a protector as well as a lawgiver, a guardian as well as a policeman, and that the term "unreasonable" must be construed in this light. So, too, the premise must be conceded (and this is a premise far reaching, revolutionary in its logical results) that no man, no master, no owner of property has a natural or constitutional right to manage his business or his property as he pleases; that where human life and human health and the welfare of society as a whole, in which the individual, however humble, is an important element,[2] are concerned, the factory and the workshop, and the store and the mine are not castles, nor sacred, whether the home be or not; and that all businesses in which lives are risked or morals are affected, or social happiness and prosperity are at stake, or the welfare

[1] A statute, said the late Judge Cooley, after enumerating cases where search warrants were recognized by the common law, "which should permit the breaking and entering a man's house, and an examination of books and papers with a view to discover the evidence of crime, might possibly not be void on constitutional grounds in some other cases; but the power of the legislature to authorize a resort to this process is one which can properly be exercised only in extreme cases, and it is better oftentimes that crime should go unpunished than that the citizen should be liable to have his premises invaded, his desks broken open, his private books, letters, and papers exposed to prying curiosity, and to the misconstructions of ignorant and suspicious persons, and all this under the direction of a mere ministerial officer, who brings with him such assistants as he pleases, and who will select them more often with reference to physical strength and courage than to their sensitive regard to the rights and feelings of others. To incline against the enactment of such laws is to incline to the side of safety. In principle they are objectionable; in the mode of execution they are necessarily odious; and they tend to invite abuse and to cover the commission of crime. We think it would generally be safe for the legislature to regard all those searches and seizures 'unreasonable' which have hitherto been unknown to the law, and on that account to abstain from authorizing them, leaving parties and the public to the accustomed remedies." Cooley, Const. Lim. (7th ed.) 432.

[1] 1 Bryce, American Commonwealth, 389.

[2] "It may not be improper to suggest in this connection, that although the prosecution in this case was against the employer of labor, who apparently under the statute is the only one liable, his defense is not so much that his right to contract has been infringed upon, but that the act works a peculiar hardship to his employees, whose right to labor as long as they please is alleged to be thereby violated. The argument would certainly come with better grace and greater cogency from the latter class. But the fact that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer." See opinion in the Eighth Hour case of Holden *v.* Hardy, 169 U. S. 366, 395, 398.

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of the state as a whole is involved, are to that extent affected with a public interest and fit subjects for governmental regulation, inspection, and control, and even of governmental entry when that entry is reasonable and reasonably necessary. This is a new theory of government for the individualistic Englishman of the old school.

It is a theory which comes to be accepted later in a frontier than in a well-settled community. Pioneers are preëminently individualists. He who lives upon the frontier can do much as he pleases; he comes but little in contact with his fellowmen; it is not difficult for him to so use his own that he injures not that of another, because he rarely comes in contact with that other, and he consequently acquires the habit of doing as he pleases. He naturally rebels and chafes when collectivism and its rules and limitations are thrust upon him. This is the reason why criminal prosecutions are proportionately so numerous in our western states during the formative period of their growth. It is the theory that the duty of the citizen does not merely involve the duty to support the state, to keep the king's peace, and to refrain from acts which under the rude code of the past were deemed to involve moral turpitude, but in a large measure to be a gentleman, and to care for, protect, and diligently guard the health and welfare of others, of employees, of visitors, of customers, and of the public at large. It is a step in the direction of making the moral code of the New Testament the basis of the criminal law and of the law of the land.

There can be no doubt that the American colonist, at the time of the revolution, was an intense believer in personal rights and personal liberty. The keynote, indeed, of all English revolutions up to that time had been individualism, and this idea was carried further in America than anywhere else. Everywhere in America was to be noted a militant individualism, not merely the revulsion of a high-spirited people against the feudalism of the past and the assertion of arbitrary power by an alien parliament, or the refusal of the right of representation which that feudalism upheld. Not merely the individualism of the Calvinist, but the individualism of the frontier, of the self-supporting landed proprietor. The several states were jealous of their individual liberty and their respective citizens were equally jealous of their personal liberty. Up to and including the struggle in America the whole growth of the English revolution, in which the war in America was merely a chapter, was a story of individualism. The colonists in America were insisting upon the recognition of the same theories of constitutional government which Oliver Cromwell insisted upon in his struggle against Charles I, and to which the English people at a later period made William III subscribe. Neither the barons who met at Runnymede, nor the Roundheads who fought at Naseby, nor the Puritans who landed at Plymouth Rock, nor even the American revolutionists themselves had any broad realization of the solidarity of mankind or of the doctrine of human rights which fired Lafayette and which so dignified the earlier stages of the French revolution. They wanted liberty, but they wanted it for themselves; they wanted freedom of worship, but freedom of worship for themselves alone. The barons at Runnymede demanded the privileges granted for the freemen of England alone, and at that time seventy-five per cent of the population were in the thralls of serfdom. The Puritans of the old and the newer England were almost as merciless in their persecutions of those who did not conform to their particular religious beliefs as were the Spanish inquisitors themselves. They rarely got beyond the idea of a small religious or industrial unit. The merchant classes of Liverpool, of Bristol, of Boston, and of Newport were perhaps more active in and reaped more plentiful harvests from the African slave trade than did the inhabitants of any other cities. The growth of a broad civic

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conscience, of a generous altruism in the law of both England and America, was for a later day. This was an age when the forms of modern industry were but evolving, of the Ricardian and *laissez faire* schools of social and political thought; the era which antedated the English factory laws, an age of slavery and of bonded servants. Even half a century later those who protested against the iniquities of the English factory and mining systems were branded as anarchists and as socialists. It was an age of personal as opposed to public rights, of a personal as opposed to a public conscience.

In speaking of inspection laws Professor Freund, in his recent work on "Police Power" says, "The power of inspection is exercised as an incident to regulation for the prevention of disease, accident, and fraud. It operates almost exclusively on buildings and machinery or other apparatus, and on articles exposed for sale. The power of inspection is distinguished from the power of search; the latter is exercised to look for property which is concealed, the former to look at property which is exposed to public view if offered for sale, and in nearly all cases accessible without violation of privacy. Hence, inspection does not require affidavit, probable cause or judicial warrant. The right to inspect may be reserved as a condition in granting a license."[1] These statements, except the last (and the truth of which will of course be everywhere conceded, provided that the business is such that it can be properly licensed) are made *ex cathedra* and without the citation of authority. They are undoubtedly true where no violation of privacy is involved; that is to say, where the goods are offered for sale from the public streets or in a public market. Whether they are true generally, however, is a serious question. It is one thing to say that certain goods shall not be sold without a license, and to provide that one of the conditions of the granting of that license shall be the concession of the right of inspection. The right of inspection, too, may reasonably be conceded where the goods affected are offered for sale in a public street or in a public market. But where businesses are not licensed it is not so clear that goods offered for sale in privately owned stores or warehouses can be inspected under statutory authority merely, and it is much less clear that a factory can be entered without the consent of the proprietor for the purpose of ascertaining the conduct of the same in relation to the goods manufactured, the proper guarding of the machinery used therein, the nature of the employees, and the precautions used for their comfort and safety. A store may possibly be deemed a public place, though even this may be seriously doubted. But is a factory or a mine? Are not the factory and the mine, and perhaps the unlicensed store, as essentially private places, castles, as were the homes of the past? When manufacturing was carried on almost exclusively within the home, as was the case of the clothing industry at the time of the revolution, the right to enter without a a warrant would certainly have never been conceded, nor with a warrant, unless all the constitutional provisions as to description, oath, etc., had been complied with. This Professor Freund concedes, for in continuing the discussion he says: "The constitutional aspect of inspection is, however, different where it extends to interior arrangements of private houses or personal property kept therein in private custody. It appears that health officers often claim the right to enter private houses to inspect sanitary arrangements in some cases by express legal authority. So in Chicago the health commissioner is given the power to inspect the plumbing and other sanitary arrangements in all houses, while the power of the commissioner of buildings to enter buildings to verify the compliance with the building regulations does not extend to houses used as residences for one or two

[1] Freund Police Power, 42.

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families or for less than twenty-five persons. This power does not seem to have been affirmed or denied by judicial decision, but on principle it would seem that administrative officers cannot be vested with general powers to enter private premises at any time, except to abate actually existing public nuisances, and that every such inspection against the will of the owner should be based on judicial authority complying with the constitutional requirements with regard to searches. The English law requires in case of refusal of admission an order of a justice after reasonable notice of the person having custody of the houses to be inspected. Massachusetts likewise in such cases requires a warrant but does not provide for notice, but the English act gives a general power of entry in cases of epidemic disease."[1] Professor Freund, however, leaves unanswered, not merely the question of the factory and the workshop and the store, but of the home factory, or workshop. What, for instance, it may be asked, would be the law in the case of the home finisher, of the garment worker, of the sweatshop? For in the state of New York, at any rate, the case of *In re* Jacobs[2] has made it practically impossible to abolish the home sweatshop. Does the fact that the manufacturing is done in the home preclude the right of inspection except by search warrant, and surrounded by all the safeguards provided by the constitution in the case of search warrants, and is the unlicensed factory a private premise. Is the factory a castle as well as the home? Does it come within the concept of Lord Chatham when he eloquently remarked that, "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it, the storm may enter, but the King of England may not enter, all his force dares not cross the threshold of the ruined tenement."

[1] Freund Police Power, 42, 43.

[2] 98 N. Y. 98.

There are few, if any, adjudicated cases upon the subject. The only one which the writer has been able to discover is the Michigan case of People *v.* Dow.[1] In it the larger and fundamental question as to whether the right of inspection could be insisted upon at all was not raised. The only question presented or discussed was, "Whether the factory inspector or his deputy has the right at all reasonable times to enter at any door or entrance that is open and through which access may be gained to the machinery in any factory, that the duties of the inspector or his deputy, as set forth in the statute under which the warrant in this case is issued, may call him, or whether the factory inspector or his deputy be compelled to enter such factory through such opening or door as the proprietor or person in charge may see fit to designate."[2] "We have," the court in its opinion says, "no hesitancy in answering this question, and affirming that it is the duty of the factory inspector to observe the reasonable regulations of the proprietor. The authority conferred by this statute is extraordinary and the regard to the rights of others would suggest to the officers that the authority be exercised in such a way as to avoid collision with the owner or occupant if possible."

"The case would have been quite different if the refusal had been captious, or if the door through which the inspector had been directed would not have afforded him full access to all parts of the factory which he desired to inspect. The provisions of the law are wise and salutory and we would by no means be disposed to place such a construction on the statute as would be calculated to unnecessarily hamper officers in the discharge of their duty; but on the other hand, the power to enter upon private premises for the purpose of inspecting property is a delicate power and should be exercised with great caution. We think the

[1] 76 N. W. 89 (Mich.).

[2] See opinion in People *v.* Dow, *supra*.

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evidence in this case did not warrant a conviction."

The ruling of this case undoubtedly seriously neutralizes the value of many, if not all, inspection laws, as in most instances violations of the law can easily be concealed if only a short time for concealment is given, and especially if the officer can be directed through outlying parts of the factory before being conducted to the place which he really desires to inspect. The writer while seeking to enforce the child labor law of Illinois had repeatedly reported to him cases where children under the statutory age had been found concealed in closets and on the roofs of the factories which the inspectors had visited, and numerous cases where dangerous machinery had been removed or covered. The holding, nevertheless, is in accord with the spirit of the law. We must bear in mind that our factories and workshops are not, as a rule, licensed, and that there is therefore no condition of inspection imposed upon them as a consideration for such license. The inspections, however salutary, are, we must confess, in the main merely for the purpose of obtaining evidence. They are not to abate nuisances already known to exist. They are not to recover stolen property nor property known to be held in violation of the law, nor to prevent batteries or affrays known to be in process, nor to arrest criminals. They are rather to detect violations of the law — to spy out the land. Before, therefore, the right to inspect such unlicensed premises can be insisted on at all, and even in many instances before the right to exact a license at all, the premise must be laid down and accepted, that the businesses are businesses public in their nature and affected with a public interest; that the factory and the workshop and the store and the mine are not castles.

Personally and at the risk of being branded as a socialist, the writer believes that such a position should be taken once and for all. He believes that under our complex civilization no man can truthfully say that his business is his own and his own alone, and that the public has no concern in it. This was the position taken by the late Mr. George M. Pullman when asked by a citizens' committee in Chicago to arbitrate the controversy with his employees which led to the Debs strike. He maintained that he was competent to and had the right to manage his own affairs. And yet an investigation showed that it cost the public almost three times as much to police the property of Mr. Pullman and to protect it as was obtained from the company in taxes even in times of industrial quiet. It is too well known that the controversy resulted in what closely approximated a civil war. The most effective weapons that Mr. Pullman relied upon was his ability to compel the railroads to live up to the contracts which they had made with him for the hauling of his cars. It was because the strikers sought to compel the violation of these contracts that the Debs strike was unlawful,[1] and it was because the railroads dared not break these contracts that they in turn resisted the strikers. But if it had not been for the courts which stood ready to enforce these contracts, if it had not been for the strong right arms and bayonets of the public which are behind the mandates of the courts, and without which the mandates of the courts would be nullities, these contracts would have had no effect. No man in America can say that he is independent of the law, or independent of the courts, and that the public has no concern with his private business, as long as he depends upon the public to enforce his rights and to enforce his contracts. The change of front, indeed, which has recently taken place in the decisions of the Supreme Courts of Tennessee and of West Virginia[2] and which has

[1] See opinion in People *v.* Dow, *supra.*

[2] State *v.* Peel Splint Coal Co., 36 W. Va. 802 17 L. R. A. 385, 15 S. E. 1000; Harbison *v.* Knoxville Iron Co., 103 Tenn. 421, 56 L. R. A. 316, 53 S. W. 955.

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been sustained by the Supreme Court of the United States[1] is noticeable and full of significance. In these states the courts, after having for many years steadily refused to allow the legislatures to interfere between employer and employee in the controversies in the mining districts arising out of the contracts of employment, regarding the method of the payment of wages, the weighing of the coal by which the wages should be determined, and the payment of the employees in orders on company or truck stores, on the ground that these matters were matters of private and not of public concern, suddenly announced a new doctrine of legislative concern and jurisdiction. They took the position that the employer was a necessary unit in the body politic, that the public was vitally concerned in his welfare, in protecting him from fraud, and in giving to him an equality as a contracting party. They also announced the rule, and emphasized it especially in the case of corporations, that wherever the conduct of private industries resulted in bloodshed and disorder, breaches of the peace or inconvenience to the public, the state had the right to regulate the same, and to that extent to interfere with individual liberty and the private right of property and of contract. They have thus paved the way for a body of law which shall look rather to the protection of society than that of the individual; to the interest of society rather than to those of vested rights; to the strengthening of the weak rather than to the entrenchment of the strong, and emphatically reiterated and applied to modern times the maxim that the public welfare is in truth the highest law. They have emphasized the obligation which all owe to the community as a whole. They have dealt a crushing blow to that conception of individual liberty which comes within the definition of the orator of Shays's rebellion when he said: "My boys, you are going to fight for liberty. If you wish to know what liberty is, I will tell you. It is for every man to do what he pleases, to make other folks do as you please to have them, and to keep folks from serving the devil."[1]

Whatever rule of conduct may ultimately be decided upon, whether it be that of the collectivist or that of the individualist, the same should be definitely settled and rigidly adhered to. The existence or nonexistence of the right of privacy should not be left, as it is now so often, to the whim of the police and to the waves of popular excitement or be dependent on the financial or political power of the parties sought to be interfered with. There has been but little litigation on these subjects, because in the past search warrants have not in America, nor has the power of summary arrest or the sweatbox process, or arbitrary entrance upon property, interfered with what we deem legitimate business interests, with the owners of property generally, nor with the influential members of the community. The power has been used against things which have been *mala in se* rather than *mala prohibita*, against practices tainted with immorality as the term is generally used and which the clergy have condemned; they have generally been used for the confusion of common gamblers, of thieves, and of other vulgar fellows. The public, for instance, has little concern with whether the tramp or the prostitute has the advantage of due process of law. The power of entry, of inspection, and in a large measure of self-incrimination, is now being used, however, on broader lines and to enforce broader ideals. Our statutes interfere no longer with the outcasts of society alone, but with the so-called respectable classes of our citizens. Their provisions interfere with the right of employment, of managing

[1] Knoxville Iron Co. *v.* Harbison, 183 U. S. 13, 22 Sup. Ct. Rep. 1; Dayton Coal & Iron Co. *v.* Barton, 183 U. S. 23, 22 Sup. Ct. Rep. 5; Holden *v.* Gardy, 169 U. S. 366, 18 Sup. Ct. Rep. 383.

[1] Woodrow Wilson, Hist. Am. People, Vol. III, 58.

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legitimate businesses as the owners desire. And as is so often charged, it is no doubt true that the inspections prescribed by statute and by municipal ordinances are so numerous that in many instances they are a burden even to the conscientious and law abiding. They, too, as a rule are enforced by ignorant officials.[1] Most of us would perhaps agree with the statement made by the Supreme Court of Iowa, that "no search warrant is unreasonable in the legal sense when it is for a thing obnoxious to the law and of a person and place particularly described and is issued on oath of probable cause,"[2] when such warrants are issued for the seizure of liquor illegally kept, or of contraband articles, but when they are directed for the furtherance of laws which regulate the conduct of our own private businesses which we have before deemed to have been our own concern and our own concern alone, and to detect illegal practices rather than to destroy illegal things, many of us demur. We at any rate insist that there shall be no irresponsible bureaucracies and that the entrances shall not be made at random or unreasonably, nor shall we be at all times subject to the duty of submitting to examinations. In all cases, therefore, a strict color of law should be present and the limitations of the right should be clearly defined. The searches and investigations should be reasonable; they should be reasonable though by that very reasonableness numerous violations of the laws would remain undetected.

Even a slight acquaintance with the history of the administration, or rather maladministration, of the law in our large cities will show that the most anarchistic and lawless of all Americans are the American police and in a large measure the American police justices; that is to say, if the overriding of the established rules of law constitutes anarchy. Especially is this the case in the foreign quarters of our cities where the defendants are unable to use the English language and are unacquainted with the rights which the English law has given to them, and are usually too poor to employ competent counsel. Our police too often enter and seize and arbitrarily arrest and apply the sweatbox system merely because the offender has no public sentiment behind him. In doing so, however, they endanger all respect for the law. There is, indeed, no doubt in the mind of the writer that the anarchy of the Haymarket riot in Chicago was the indirect if not the direct result of a long period of anarchy on the part of the Chicago police and Chicago police justices which led to a wide-spread disrespect for the law and for its officers. Even if the right to enter for the purpose of obtaining evidence and to prevent the commission of offenses, and to see that the laws are enforced must be conceded in order to protect the public under our complicated industrial system, let us at any rate have some due process of law. The writer himself has often viewed the spasms of police activity which have taken place in Chicago with a feeling of fear rather than of satisfaction. In the place of a steady and persistent enforcement of the law, without fear and without favor, there has for many years been in that city an open toleration of, if not connivance with, the lawbreaker, or at any rate with so many lawbreakers or classes of lawbreakers that other classes have come to the conclusion that there is no intention to enforce any law. Whenever public attention, however, has been called to any evil, the police have felt it incumbent upon them to make a show of diligence by wholesale arrests, often without warrants or evidence or authority, and by breaking and entering places without evidence which they themselves have tolerated with evidence and often patronized for many years. In all these matters they have too often gone beyond the law and the

[1] See quotation from Judge Cooley in note 29, *ante*.

[2] See opinion Santo *v.* State, 2 Ia. 165.

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consequence has been that the law has come to be in ill repute. The public, and especially the foreign element thereof, has come to look upon the police power as an arbitrary power exercised as the result of prejudice and not of right or good government. The violence and lawlessness of the means used have emphasized and encouraged violence and lawlessness. In the famous campaign, for instance, which was waged in Chicago some years since by Miss Jane Addams, of the Hull House, against the political boss, John Powers, three policemen stood by and saw a political supporter of the party of Miss Addams assaulted by a mob of Italians and driven from the polling place, and instead of arresting the assailants searched the victim to see if he carried concealed weapons upon his person. At the time of the assassination of President McKinley, Miss Emma Goldman, who was believed to have incited the deed, eluded the vigilance of the police for nearly three weeks; a show of diligence, however, appeared necessary, and to make such a showing every one who bore the name of anarchist, whether a scientific anarchist, a terrorist, or a socialist; whether a follower of the non-resistent Tolstoi or of the terrorist, bomb-throwing Nicolai Russakoff, and whether man, woman, or child, was arrested without warrant, without the filing of a complaint, and was denied the right of giving bail or of consulting counsel. The evil was not righted until Miss Jane Addams, of the Hull House, herself a quaker non-resistent, called attention to the fact that among those arrested was a young girl who had not passed the doll period, and that the surest way to encourage and promote anarchy was for the authorities themselves to brush aside the law and themselves to become anarchists.

We should bear in mind the fact that the Nihilist in Russia was originally with but few exceptions a theorist and a non-resistent; that he only became a terrorist and only began to resort to the bomb after the Russian government had itself become anarchistic, and after some fifty of his number who had been tried and acquitted by the courts had been arbitrarily exiled. Often the mob itself becomes politically powerful and the means which have been used to suppress it may in turn be used by it for the destruction of property and of property rights. The ruling classes of Russia gave to the Russian people their first lessons in lawlessness. They are to-day reaping in a large measure that which they have sown.

Obedience to and reverence for the law does not come from many arrests. It comes from its ethical nature, from its reasonableness, from the unswerving justice and evenness of its enforcement, from the knowledge by the people of what it is and their belief in its righteousness. The manufacturers of Illinois, for instance, first banded together and formed an association for the purpose of opposing the child labor law of that state. When, however, they investigated the law and became satisfied that it was to be enforced without fear and without prejudice they ceased their resistance and gave to it their approval.

In the same way it is believed that humanity in the factory, in the mine, and in the workshop, and honesty in business, will come, in the main, not from many statutory enactments and burdensome regulations, but from the awakening of a broader civic conscience, and above all an insistence upon that measure of individual liberty under the law which shall make employer and employee as equal in strength as possible and equal partners in the industrial effort to create wealth and social prosperity.

GRAND FORKS, NO. DAK., April, 1906.

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AN OLD FASHIONED LAW OFFICE

By George Carling

PROBABLY, among all the tenacious adherence to custom and precedent in the business methods of Great Britain, which are fast relegating that nation to a second place in the commercialism of the world, the cobwebs cling more jealously to the habits of lawyers and the practice of law than to any other business or profession.

Scarcely two decades have passed since I was an office boy, or junior, for a law firm in London. I say "law firm" advisedly, for although there was but one member still living, the old firm name, "Pierce, Boulton and Fielding," remained in sprawling letters across the heavy oak, outer door. The senior partner had been dead for forty years — the junior partner, twelve years.

The surviving partner, Mr. Boulton, a gentleman of the old school, was tall and of imposing appearance. With unbending dignity and unfailing courtesy he charmed and awed all with whom he came in contact. Of the most scrupulous honor himself, his detestation of "shyster" lawyers was as strong and as strongly expressed as of the meanest criminal.

The business of the firm was not extensive, but was of the highest grade. The clients were almost entirely members of the nobility, or of great county families. The business was confined to conveyancing, the making of wills, the private adjustment of grievous family difficulties, the locking of skeletons in closets, the dreary guidance of interminable chancery suits, with now and then the lighter human touch of marriage settlements or guardianship adjustments. No collecting of debts nor prosecuting of criminals was ever permitted to mingle with the dust-laden secrets of land and title. Such cases were invariably handed over to a newer and less fastidious generation of solicitors.

Down one side of the outer office were the clerks' desks, built of massive oak, black as ebony and carved with many initials of former generations of clerks. These desks were in pairs, the occupants facing each other, and each pair was surrounded by a paneled partition six feet in height, with a narrow door for each clerk. Inside this enclosure, in contented seclusion, they passed no little portion of their time in playing cards and making bets on the races. There were four of these men, the chief clerk occupying an exclusive pen, although he by no means confined himself to it, but frequently joined in a quiet, friendly game with the others, or threw his shilling or half crown into a pool on the "Derby" or the "Oaks."

If the "Governor," as Mr. Boulton without any meaning of disrespect was called, emerged from his private office, which he very rarely did, or a client pulled open the heavy door, which was about as rare an occurrence, a square yard of parchment, covered with legal phraseology, and with the words, "This Indenture Witnesseth," written in bold, old English letters across the upper left-hand corner, would be quickly pulled over the cards, and the talk in the ancient room as suddenly shifted to "Escheats and demesnes, entails and encumbrances."

In the corner of the room, by the chief clerk's pen, stood a tall marble pedestal surmounted by a discolored bust of Blackstone, upon which Mr. Robbins invariably deposited his silk hat. To me it was one of the mysteries of this weird office that the Governor would permit this sacrilege of the eminent jurist's bust. It was in plain sight, but he never appeared to notice it. Robbins said that it had been used as a hat-rack for many years, and expressed the opinion that the Governor would be displeased if the old-time procedure were discontinued.

Along the other side of the room was a

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rack extending to the ceiling, on which rested heavy tin boxes, securely padlocked, containing documents relating to estates or great law suits. Each had painted on it in big black letters, many of which were nearly obliterated by time, the name of the client or suit. One was there with "Gridson *v.* Gridson," faintly decipherable on it. It contained the dusty records of a standing chancery suit commenced over forty years previously and not yet decided.

Every day on my way to and from the office I passed a row of four-story brick dwellings, sixteen in the row, uninhabited, with crumbling shutters at the lower windows, and not a pane of glass within reach of a rock left in the upper sashes. Dismal, gloomy, rat-infested, specter-haunted things! They were the bone of contention in Gridson *v.* Gridson.

Another box contained the verbose and technical reports, made a half century before by legal agents in Russia, concerning the missing heir to one of the noblest titles of England. They had led to no discovery, the title became extinct, and with the heir has long since been forgotten.

The office was in New Square, leading out from Lincoln's Inn Fields. Around the small green enclosure were ranged dingy, three-story brick buildings, not one of which was less than a century old. It was "New" Square, however, compared with the "Fields." There buildings boasting three or four hundred years were the rule. Every one of these buildings, both in the Square and the Fields, was comprised solely of law offices. Many had been kept in good repair and equipped with modern furnishings and fittings. Others more conservative had known nothing for years, save the broom and the duster. Probably among them all none had been left so long undisturbed as ours. Mr. Robbins once related that when he was first engaged (thirty years before) the chief clerk told him that no repairs, changes, nor painting had been done in our rooms for over twenty years!

The sweeping and cleaning in all of these offices was performed by charwomen, always old and often decrepit, who came in the early morning and crept away before the first clerk arrived. There was a legend current in our office, that our charwoman was over a hundred years old when "Old Pierce" (the term is not mine) died. Anyway, her name could be traced back on the disbursement books for many years. At the time I was in the office she had not been seen by any eye connected with the firm for over six years. Her wages, together with money to defray her little scrawled bill for soap, brushes, or candles, was left every Saturday on the mantel, under an old metal clock which had not ticked for generations.

One morning I went to the office at eight o'clock. Our regular time was ten, but I had got behind with some work which was needed. Then, and then only during my four years' service, I saw our charwoman. To my intense surprise I saw, instead of an aged, feeble old woman, a young and rather pretty girl of eighteen. She seemed much embarrassed, as indeed I was myself, being considerably younger than she, but after a few sheepish remarks, between long intervals of silence, she stammeringly asked me to say nothing of having seen her there. I did not promise, being thoroughly saturated with the importance of everything connected with our office, so a day or two later I told Mr. Robbins. He questioned me closely and seriously, and within a week he had himself investigated the matter The girl, with two younger sisters, had been left destitute orphans, and were cared for by their grandmother, our aged charwoman, whose sole support was the trifling pittance she found each week under the clock. Three years before the old woman had died, and upon this fifteen year old girl had devolved the care of the little ones. She had continued her grandmother's cleaning-up job, fearing every day that the change would be discovered and her little income

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cut off. She cried bitterly when Robbins questioned her, and begged to be allowed to continue. The Governor sent for her, and during the interview sent me out to get a five-pound note changed. Later in the day he directed Robbins to make a substantial increase in the girl's wages. Guiltily feeling that I had been the cause of the girl's distress, I could have worshipped the grand old man for the happy outcome of it all.

There were absolutely no conveniences in these buildings, either modern or medieval. In most of them not even a water pipe could be found. In a court-way leading off one side of the square was a small, one-story building containing lavatories and other conveniences for the general use of all the lawyers and their clerks. Water for drinking, and perhaps a hand basin, was obtained from a pump in the square, it being the duty of the charwoman to fill a couple of big pitchers there every morning. Gas was not used, wax candles being substituted. One small fireplace only was supposed to furnish heat for our office, a room about forty feet by twenty! My pen was at the extreme end of the room, and I shivered with cold continually from October until April. My strenuous efforts to keep a roaring fire in that grate met with many a "call down" from Robbins, who was scorched close by.

Of appliances which were then considered absolute necessities in commercial offices we had none, not even a copying-press. All letters were copied by hand into a big green sheepskin-covered book. How I hated that book! It was one of my duties to copy those letters.

Robbins once ventured to suggest a copying-press to the Governor. We heard thunderous growlings in the sanctum, and when Robbins emerged his face was slightly flushed. He did not say what had happened, but simply told us that no press would be permitted.

I do not desire to give the impression that any feeling of economy prompted this poverty of appliances. It was not so. It was the ultraconservatism of a very old, generous, and high-minded gentleman, who had spent over half a century under the conditions I have described. The introduction of telephone or typewriter in his office would have been, I think, as serious to him as an attack on the British Constitution. I have no doubt he would have viewed it in the same light.

His dealings with tradesmen were characterized by the same disposition. Our stationery supplies came in as ordered, always from the same dealer, and without any attempt to compare prices with others. No invoices accompanied the deliveries. Once a year the bill came in, and without any scrutiny as to quantity or prices a check was drawn for the total. Mr. Boulton would as soon have thought of keeping his head covered in the presence of a lady as of scrutinizing the bill of a tradesman with whom he had dealt for forty or fifty years.

I have mentioned that our office force consisted of the chief and four clerks. These were a chancery clerk, conveyancing clerk, outdoor man, and copying clerk. I was the office boy, commonly called "The Infant."

At no time was there sufficient work to keep these men busy. At no time was there more work than would have sufficed for two hustling men; but the traditions of the office called for five men, there had been five men employed in the days of old Mr. Pierce, and no doubt Mr. Boulton would have thought that the institutions of the nation were crumbling did his chancery clerk undertake any outdoor work, or the conveyancing clerk engross his own verbose compositions.

In addition to this regular force there were two articled clerks, scions of wealthy county families. Stated in language which they would have described as "beastly bad form," they were "apprenticed for five years to learn law business."

A premium of two hundred guineas (some-

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thing over one thousand dollars) had been paid by the parents of each of these young fellows for the privilege of reading law in this most reputable of offices. Their studies, however, seemed to be almost entirely confined to wine, women, and horses. Now and then the governor would question them on what books they were reading, and would recommend their following up certain cases. and as the examinations approached they would make some attempt to "cram."

One of these men, Sutcliffe, of Cornish descent, had studied for the Church, his family having a fine living at their disposal, but some escapades of his had carried him even beyond the pale of a sporting parson and he was transferred to the law. Often would he come over to my desk and give me advice. His precepts were excellent, his language fearful. He would garnish the noblest sentiments with the lowest profanity, his eyes twinkling with amusement the while at my horror of it. He called it "winding up the infant."

When the long vacation came, that ten weeks' stretch when the courts were closed and judges and counsellors had gone to seaside and mountain, there was little to do in the office. There were many days when not a pen was dipped in the ink.

The Governor was touring Europe or perhaps yachting with some wealthy client. The clerks would assemble in a back room playing cards, smoking, and discussing sporting events during the entire day, keeping me fairly busy getting a big pitcher filled with "double stout," or "Bass." Many were the pennies which came my way in those days, and that they were not always ill spent can be proven by several treasured books in my little library, with the dates of purchases corresponding to those long vacations. I was an insatiable reader, devouring good or bad it as came my way. On one occasion Sutcliffe came to my desk, looked at the book I was intent upon, voiced his disapproval of it, and mentioned others which were "worth while." When he had finished I could have — given the literary ability — written an exhaustive treatise on "Cornish Oaths, Ancient and Modern."

"Did you buy this trash?" he asked.

I nodded. He glanced at the gaudy paper cover and noted the price — threepence. Then he pulled a silver sixpence from his pocket, threw it on the desk, and walked off with my book, and read it himself!

Three years ago I met Luke Collett, one time assistant to a stationer in Chancery Lane, and with whom I had been on intimate terms. He came to the states a few years later than myself, and when I met him he had just returned from a visit to his old home. He had walked through the Square and the Fields, and found but little change. The old pump was there, with a new generation of office boys filling pitchers. He called at the old office and noted a new sign on the door. It now read, Pierce, Boulton, Fielding and Robbins. The chief clerk had been taken into partnership. Inside there were few changes. Mr. Boulton had gone to the court of last resort. Mr. Robbins had expanded in girth and dignity, and of the old clerks two were still discussing the races behind the high partitions. In the well-known corner on its rack slumbered the record box of Gridson *v.* Gridson. They were expecting the case to be called at the next term or the term after. The little charwoman had married, and the boys had chipped in for a suitable wedding gift. A "new" old charwoman was sweeping out the dust and cobwebs within her reach; beyond it fresh accumulations were adding to those of a century.

LYNN, MASS., April, 1906.

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LIMITATIONS UNDER WHICH A PUBLIC SERVICE COMPANY MUST CONDUCT AN INDEPENDENT BUSINESS

By Bruce Wyman

I

NEW conditions seem to us often to create new laws, however much we may be told that nothing more is being done than the application of existing rules to present circumstances. In the case of the public service companies the increase in their power has led to such development in the law for their regulation that it is difficult to believe that this law is no more than a necessary deduction from established principles. We have been so used to the many liberties permitted those who carry on a private business, that it has not been seen how fundamentally different are the limitations upon public calling. Those who conduct a private business may adopt such policies as will produce the greatest profits; but those who profess a public employment must not do anything inconsistent with their public duty. This difference is seen in the very statement of the modern problem which is proposed for discussion in the title of this article — The Limitations under which a Public Service Company must Conduct an Independent Business.

For surely those who are engaged in private business may conduct another business if they please; and plainly they may put in force policies to foster that business, many of which it is certain a person carrying on a public business may not employ, if indeed he will be allowed to carry on such a collateral business at all. And this last doubt arises because it is feared by many people, who are examining into the dangers affecting modern commerce from these new conditions, that unless those in common calling are held to the strictest accountability in the performance of their public duties the competitive system with its market open to all is in the gravest peril. And the situation would become intolerable if those who control the destinies of trade through their ownership of the public utilities should be permitted to concentrate in their own hands the principal private businesses, which they might not inconceivably do if they were permitted to enter into general business and make use of their superior position to crush their competitors.

The open recognition of this law limiting the rights of one engaged in a public employment if he enters into competition with members of the public in various businesses in which his services are requisite, constitutes the latest development in this rapid growth of the law governing public calling. The question has as yet come before the courts for adjudication only a few times; but even the most conservative courts recognize the necessity of regulation here, while the radical courts are willing in certain instances to go to the extent of prohibition

II

Where a public service company is also engaged in another collateral business the temptation always is to use the power in its public business to promote its collateral business. An illustration of this was shown in the case of Louisville Transfer Company *v.* American District Telegraph Company (I Ky. L. J. 144). Plaintiff, in that case was a transfer company providing omnibuses and other carriages. Defendant was a telephone company, which also conducted a carriage and coupé service. To promote that business it refused to give full telephone service to the plaintiff, so that people might not call the plaintiff and order carriages. That a public service company may not thus protect a separate business carried on by it by refusing to its rival in that business the service that it offers the community

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in general seems plain, but it requires some discrimination to state it in legal terms.

Edwards, the chancellor who disposed of the actual case, puts it very well indeed: "It sufficiently appears that the disinclination or refusal of the defendant to serve the plaintiff on the same terms and in the same manner in which it serves the rest of the public is because plaintiff is a competitor of defendant in the carriage or coupé business aforesaid; defendant claiming that while it may be true that it is bound to serve the public in general and on like terms under like circumstances, it is not bound to so serve a competitor in the same business with itself. It sufficiently appears that the demands of plaintiff are reasonable and necessary, to enable it to serve the public properly and efficiently, and that plaintiff is ready, able, and willing to conform to all reasonable regulations of defendant. The real contention between plaintiff and defendant is confined to their carriage and coupé services; defendant insisting that, as against plaintiff, a rival in that business, it has the right to a monopoly of the use of its own telephone methods of communicating and receiving orders for coupé's; and that a mere rival in one branch of its business cannot force it to afford it the facilities which it has provided for another branch of its business. Upon the facts appearing upon the petition and affidavits of the plaintiff, it is the opinion of the court that defendant is engaged in two distinct employments — one in operating a telephonic exchange, and the other in operating a carriage or coupé service. Plaintiff and defendant are not rivals in the former business and, as to that part of defendant's business, it occupies the same position toward plaintiff as it does toward the rest of the public; that defendant is a quasi-public servant, and as such, is bound to serve the general public, including the plaintiff on reasonable terms with impartiality." [1]

[1] Compare People *ex rel.* Postal Telegraph Co. *v.* Hudson River Telephone Co. 19 Abb. N. C. 466 — accord.

III

An equally extreme case of unfair action may be seen in Mobile *v.* Bienville Water Supply Company (130 Ala. 379). In that case it was averred that the city, the original defendant, had constructed a sewerage system and at the same time had constructed water-works, while the complainant water supply company had been for a considerable time engaged in purveying water throughout the city to private consumers. It was complained that the city had never fixed any rate for the use of its sewers alone, but it would not allow any customers of complainant's water to connect with or use its sewers, except at the same price as the city charged for both its water and sewers together, in effect forcing its citizens and inhabitants to take the water of the city, or to pay for the water of complainant in addition to what each citizen would have to pay for the city's water and sewerage together, discriminating, it was alleged, against complainant and making it, in effect, furnish water for nothing, or to lose its customers by reason of the double charges so imposed on them; and that the city through its officers and agents threatened the people of Mobile that they would not be allowed to use the sewers, unless they subscribed for and took the city water, and that they would not be allowed to use the water of complainant in connection with the city's sewers. Obviously this was unfair competition, because in defiance of the public duty of the city to give either service at a fair rate for each.

The language of Mr. Justice Harelson in granting an injunction is well worth quoting: "Whether intended by the city to so operate or not, one can scarcely conceive of a more effective scheme to deprive the complainant of its customers than the one alleged in the bill. If complainant has to furnish its customers with water, and they are required by the city to pay for sewerage the same price it charges its own customers for its water

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and sewerage, it follows the complainant would have to furnish water practically free or abandon the business; for it would be unreasonable to suppose that any one would use the complainant's water and bear the additional expense imposed for so doing. These sewers of the city are for the public at large, and every one should be permitted to use them without any discrimination in charges against him. The franchise to construct sewers being in the nature of a public use, the duty is on the city to supply sewerage rates to all impartially on reasonable terms. As is said by Mr. Bates: All persons are entitled to have the same service on equal terms and on uniform rates. In addition, it is averred, as seen, that citizens are notified by the city that they cannot use its sewers unless they subscribe for the city water, and customers of complainant, desiring to return to it, are forbidden by the city from disconnecting from its pipes and connecting with complainant's, — a threat the city has the physical power to enforce."[1]

IV

Another case of the abuse of its power by a public service company to promote a collateral branch of its business was decided recently in Illinois — Snell *v.* Clinton Electric Light, Heat, and Power Company (196 Ill. 626). The defendant company in that case charged the plaintiff who had applied for electricity an additional price for a transformer, in pursuance of their policy openly announced to supply transformers free to those who had the wiring of their houses done by the company's own wiring department, but to charge applicants like the plaintiff who had their wiring done by other parties the full price of the transformer. This transformer was a necessary part of the system of distributing electricity for the protection of the consumer.

Upon this showing the highest court held that the treatment of the plaintiff by the defendant was unjustifiable. Mr. Justice Carter said: "It is entirely immaterial who does the wiring of the house,— the electric light company or some other party; the transformer is necessary in either case. If the company does the wiring, that is a business distinct from that of furnishing electricity for lighting purposes, just as the putting in of gas and water pipes into a house is a distinct business from furnishing the gas or water to flow through them. The jury found that the appellee had not demanded extra pay for the use of a transformer from any one else, and that it was its general practice and custom to furnish them free to its consumers. Appellee, being organized to do a business affected with a public interest, must treat all customers fairly and without unjust discriminnation. While it is not bound, in the absence of statutory enactments, to treat all its patrons with absolute equality, still it is bound to furnish light at a reasonable rate to every customer, and without unjust discrimination."[1]

V

In an important case before the Interstate Commerce Commission — Grain Rates of Chicago Great Western Railway (7 I.C.C. Rep. 33) — the decision was that the defendant carrier could not purchase grain, even for the purpose of securing the right to transport it, if that involved the evasion of the law which would have applied to it had it been owned by any other party. It was proved at the hearing in this case that the Chicago Great Western Railway Company owning the entire stock of the Iowa Development Company, which had been

[1] Compare Matter of Baldwinsville Telephone Co., 24 N. Y. Misc. 221.

[1] See Ladd *v.* Cotton Press, 53 Tex. 172.

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organized for the purpose of holding the title to certain lands of the railway company, caused grain to be purchased in Kansas City in the name of the development company, transported over the lines of the railway company, to Chicago, and there sold upon the market. The development company had no *bona fide* interest in the transaction. Neither the railway company nor the development company purchased the grain for the purposes of ownership, the whole transaction being simply a device to secure its transportation at other than the published rate; and the only rate paid was the profit upon the transaction, which varied with each shipment.

In the course of its decision the commissioner said, "Suppose that the development company be entirely eliminated from the consideration, and that the transaction be treated, as it in fact was, as the transaction of the railway company. In that case the railway company owned the grain, transported it for itself, and received for its compensation the difference in price between what was paid and what it sold for, less the commissions. There was no fixed rate. The rate varied with each individual shipment. The rate actually received was much less than was or would have been charged any other person for the same service under the same conditions. Clearly, therefore, the transaction was both a violation of the sixth section and an unjust discrimination under the second and third sections, unless the railway company, by virtue of the fact that it owned the merchandise transported, was relieved from the operation of the act. We hold that it was not. Granting that the railway company had the legal right under its charter to buy and sell this corn in this manner, still it must own it and transport it subject to the same limitations as every other individual. In its capacity of owner it was a private person; in its capacity of carrier it was a public servant. If it elected to become a private individual in respect of the ownership of this grain, it could extend to itself in its capacity as a public servant no other or different privileges than it extended to every other shipper. To hold that this respondent might become a shipper on its own account for the express purpose of avoiding the act to regulate commerce would be to nullify that act in many essential respects."[1]

VI

This development which is going on in the law was brought to the attention of all not many weeks ago by a striking decision handed down by the United States Supreme Court in regard to the coal roads — New York, New Haven & Hartford R. R. *v.* Interstate Commerce Commission (26 Sup. Ct. Rep. 272). The complaint in that case was filed by the attorney-general under the provisions of the Interstate Commerce Act, which forbid personal discrimination, charging that traffic was being moved at less than the published rates. It was shown that the Chesapeake and Ohio Railroad had sold to the New York, New Haven, and Hartford Railroad sixty thousand tons of coal to be delivered to the buyer at $2.75 per ton; and it was averred that the price of the coal at the mines where the Chesapeake and Ohio bought it and the cost of transportation from Newport News to Connecticut would aggregate $2.47 per ton, thus leaving to the Chesapeake and Ohio only about twenty-eight cents a ton for carrying the coal from the Kanawha district to Newport News, whilst the published tariff for like carriage from the same district was $1.45 per ton. Upon these facts the United States Supreme Court decided that there was in effect the evil of personal discrimination against other shippers in this arrangement; and the final decree, therefore, was that the Chesapeake and Ohio was perpetually enjoined from taking less than its published tariff of freight

[1] Compare Haddock *v.* Delaware L. & W. R.R., 4 I.C.C. Rep. 296.

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rates, by means of dealing in the purchase and sale of coal.

Mr. Justice White, who wrote the opinion of the court, puts the matter well when he says: "If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose? It was to compel the carrier as a public agent to give equal treatment to all. Now if by the mere fact of purchasing and selling merchandise to be transported, a carrier is endowed with the power of disregarding the published rate, it becomes apparent that the carrier possesses the right to treat the owners of like commodities by entirely different rules. That is to say, the existence of such a power in its essence would enable a carrier, if it chose to do so, to select the favored persons from whom he would buy and the favored persons to whom he would sell, thus giving such persons an advantage over every other, and leading to a monopolization in the hands of such persons of all the products as to which the carrier chose to deal. Indeed the inevitable result of the possession of such a right by a carrier would be to enable it, if it chose to exercise the power, to concentrate in its own hands the products which were held for shipment along its line, and to make it, therefore, the sole purchaser thereof and the sole seller at the place where the products were to be marketed; in other words, to create an absolute monopoly. To illustrate: If a carrier may by becoming a dealer buy property for transportation to a market and eliminate the cost of transportation to such market, a faculty possessed by no other owner of the commodity, it must result that the carrier would be in a position where no other person could ship the commodity on equal terms with the carrier in its capacity of dealer. No other person owning the commodity being thus able to ship on equal terms, it would result that the owners of such commodity would not be able to ship, but would be compelled to sell to the carrier. And as by the departure from the tariff rates the person to whom the carrier might elect to sell would be able to buy at a price less than any other person could sell for, it would follow that such person so selected by the carrier would have a monopoly in the market to which the goods were transported."

It was a fact shown in the record of this case that the Chesapeake and Ohio, as a result of its being a dealer in coal as well as a carrier, had become virtually the sole purchaser and seller of all coal produced along its line of road. As the court points out, the inevitable tendency will be toward such monopoly if the common carrier is permitted both to deal in a commodity and to carry it. The court is content, it seems, to decide no more at present than that the carrier must charge itself in its operations as a dealer with its own schedule rates as carrier; but much of its reasoning, if carried to the logical conclusion, would forbid the railroads to take the inconsistent positions of dealers and carriers.[1]

VII

The view expressed in the last opinion that a carrier in engaging in ordinary business must treat itself and its business rivals with equality is a conservative view. It may be that a more radical remedy is demanded to meet the situation, for it is not always safe to leave the matter in this shape. Thus in another case before the commission — McGrew *v.* Missouri Pacific Railway (8 I. C. C. Rep. 630) — the defendant rail way which owned many coal mines along its route, was shown to charge higher relative rates to its competitors in the coal mining business whose product was of a higher grade.

The commission pointed out that this could not be altogether stopped as the law stood, saying: "It may properly be observed

[1] But see Caledonian Coal Co. *v.* Seaham Colliery Co., 1901 A. C. 554.

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that in a case like that under consideration it is difficult to afford the complainant adequate relief. The defendant railway company owns most of the mines upon its system. It both mines the coal and transports it to market. It is a matter of entire indifference to it whether a profit accrues from the mining or from the transportation. It may so adjust its rates that the mining of its coal will be conducted at a loss, the profit being derived from the carriage, and in such event every coal operator upon its line paying those rates must do business at a loss. The only remedy available in such case to the independent operator is to secure to him a reasonable rate."

It cannot be insisted upon too strongly that the paramount duty of the common carrier is to the public. It must do nothing inconsistent with that obligation. To carry its own goods at lower rates than it carries those of the shipping public will enable it to market those goods at lower prices than other shippers can make. And this, it is submitted, is in substance discrimination, or at all events has all the effects of discrimination. Moreover, to a certain extent these evils are practically unavoidable from the nature of the case wherever a common carrier is also a dealer in the commodities it carries.[1]

VIII

A recent instance of the inherent dangers in the situation where a public service is combined with a private business is seen in the invention of a kind of railway, known to-day as the "industrial railway." This is a short line of railway owned by an industrial corporation or by the owners of some business enterprise which connects the factory or plant with the main line of some railway. It may be several miles in length or it may amount to no more than a short spur track, but it is organized as an independent railway corporation, so that it may enter into nominal through-rate agreements; and posing as the originating carrier, it demands and receives a considerable pro rata of the through rate. It has been shown again and again that this arrangement in reality gives a rebate to the concern which uses this scheme, and that its competitors cannot do business against it in many cases. But without thorough-going law this great abuse cannot be met.

The Interstate Commerce Commission will go no further than to forbid this practice if the industrial railway is not a common carrier. Thus in Central Yellow Pine Association *v.* Illinois Central Railway (10 Int. Com. Rep. 545) it said: "The logging roads or 'tap lines,' to the owners of which the Mobile and Ohio road makes allowances out of the published rate from the mills to destinations, do not appear to be common carriers, or carriers for the public, subject to the provisions of the act to regulate commerce, but the private property of the mill owners used for hauling logs to their mills. Those allowances are therefore unlawful."

But in an opinion, *Re* Divisions of Joint Rates, 10 Int. Com. Rep. 385, in discussing a short line of railway operated in connection with a harvester plant, but handling other freight at the same time, it said: "The mere fact that the road is to-day entirely owned by the largest individual shipper over it, or that it was originally organized and built for the purpose of doing the work of that shipper, is not, in our opinion, controlling against the legality of the transaction before us."

After all there seems to be the same commercial wrong in the second case as in the first. Indeed, if there is a competitor upon the industrial railway in the second case, the people who are carrying on both their private business and the industrial railway will get not only a rebate upon their own shipments but they will get a rebate upon all their competitors' shipments as well. Therefore it is now recognized that it is not

[1] Compare Coxe Bros. & Co. *v.* Lehigh Valley Ry. 4 I. C. C. Rep. 535.

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improbable that the law must forbid this combination altogether.[1]

IX

Because of general policy if for no other reason it generally should be held *ultra vires* for a public service corporation to engage in any collateral business outside of its direct duties to the public in the same line of service that it is conducting under its charter. This was said in an English case at an early date, Attorney-General *v.* Great Northern Railway (29 L. J. Ch. 794). There the question was whether a railroad was engaging in an *ultra vires* actively in buying coal from collieries along its route which it transported to market in competition with other coal of private shippers.

In holding that, it was Vice Chancellor Kinderley said, adverting to the policy of the matter: "There is no reason, as the affidavits show, why they should not — there is great danger that they may — get into their hands the entire business in the coal of all that district of the country. If they can do that in regard to coal, what is to prevent their doing it with every species of agricultural produce all along their line? Why should they not become purchasers of corn, of all kinds of beasts and sheep, and every species of agricultural produce ,and become great dealers in the supply of edibles to the markets of London; and why not every other species of commodity that is produced in every part of the country from which or to which their railway runs? I do not know where it is to stop, if the argument on the part of the company is to prevail. There is, therefore, great detriment to the interests of the public, for this reason, taking merely the article of coal."

But even granting that the public service company has some permissive clauses in its charter which might include the power to engage in some independent business, the problem is not to be dismissed. Natural persons engaging in a public employment have apparent power to engage in any collateral businesses that they please, and yet the law governing the conduct of a public business has certainly developed so far that they cannot discriminate in their own favor, and as will be seen in the next section the law may have gone so far as to forbid them from engaging in a collateral business in competition with the people they are serving. It is submitted that a corporation, whatever its *prima facie* powers, ought not to stand in any different position before the law from a natural person.[1]

X

Some courts seem disposed to go one step further yet and to say that it may be inconsistent with public service for the public servant to engage at all in the outside business and to make use of his own facilities in conducting it. A square decision in point is Central Elevator Co. *et al* *v.* People (174 Ill. 203). The informations made the same general allegations in each case,— that defendants had stored grain owned by themselves in the particular warehouse of which they were proprietors; that not less than three fourths of all the grain received in the public warehouses in Chicago was owned by the warehousemen; that the grades for inspection of grain were such that the grain of each grade was not of the same quality, but that separate carloads of different quality and value were graded in the same grade; that by reason of advantages of the defendants, as owners of warehouses, in mixing and manipulating grain, and rebating storage charges, and otherwise, they had been enabled to drive out competition, and to hold and enjoy the privilege of buying grain free from com-

[1] See *Re* Transportation of Salt, 10 Int. Com. Rep. 1; and Central Yellow Pine Assn. *v.* Vicksburg, S. & P. Ry., 10 Int. Com. Rep. 193.

[1] As the matters discussed in this section are questions of general corporation law, it is not thought necessary to subjoin any citations.

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petition; and that such storing of grain was unlawful and injurious to the public. All the informations prayed for the same relief,— a perpetual injunction to restrain defendants, as warehousemen, from storing grain in their own warehouses.

The court granted the application. Cartwright, the justice who wrote the opinion, said in part: "The public warehouses established under the law are public agencies, and the defendants, as licensees, pursue a public employment. They are clothed with a duty towards the public The evidence shows that defendants, as public warehousemen storing grain in their own warehouses, are enabled to, and do, overbid legitimate grain dealers, by exacting from them the established rate for storage, while they give up a part of the storag charges when they buy or sell for themselves. By this practice of buying and selling through their own elevators the position of equality between them and the public whom they are bound to serve is destroyed, and by the advantage of their position they are enabled to crush out, and have nearly crushed out, competition in the largest grain market of the world. The result is that the warehousemen own three fourths of all the grain stored in the public warehouses of Chicago, and upon some of the railroads the only buyers of grain are the warehousemen on that line. Where the warehouseman is a buyer, the manipulation of the grain may result in personal advantage to him. Not only is this so, but the warehouse proprietors often overbid other dealers as much as a quarter of a cent a bushel, and immediately resell the same to a private buyer at a quarter of a cent less than they paid, exacting storage which more than balances their loss. In this way they use their business as warehousemen to drive out competition with them as buyers. It would be idle to expect a warehouseman to perform his duty to the public as an impartial holder of the grain of the different proprietors, if he is permitted to occupy a position where his self-interest is at variance with his duty. In exercising the public employment for which he is licensed, he cannot be permitted to use the advantage of his position to crush out competition and to combine in establishing a monopoly, by which a great accumulation of grain is, in the hands of the warehousemen, liable to be suddenly thrown upon the market whenever they, as speculators, see profit in such course."[1]

XI

This at least may be regarded as conceded, that a public service company if engaged in private business for itself dependent upon the service it conducts ought not to prefer itself to its competitors in business among the general public who have already made application for service. But a position has already been taken far beyond this proposition; it is now urged that those who are undertaking a public service ought not to be allowed to engage in private business in competition with those whom they are professing to serve unless matters may be so arranged that the competition shall be upon equal terms. And it may very probably prove necessary for the maintenance of the highest type of public service to forbid those who undertake such callings from engaging at all in business of their own where their interests might come in conflict with the interests of those whom they are serving.

The case bears some analogy to that of the trustee whose duty forbids him from entering, for his own benefit, into transactions inconsistent with his duty to his *cestui*. Surely if the railroads should engage in manufacturing, in agriculture, in dealing in groceries, or in selling meats, there would be a great

[1] Accord, Hannah *v.* People 198 Ill. 77. — a more extreme case, holding an act passed to enable the warehousemen to do what was prohibited in this decision, unconstitutional because against the clauses declaring warehouses public.

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public outcry that the individual could not compete against them with any hope of success. Even if in the face of the temptation to prefer themselves an upright railroad management should treat its business department upon the same basis as its competitors, the fact would remain that all in all the railroad could afford to conduct its own transportation of its own goods at a lower margin of profit than it could handle others. If a railroad could not get two profits, one from trading and one from transporting, it would inevitably turn out that it would content itself with one from the whole transaction.

The present tendency therefore places the public service companies definitely in the position of conditions of commerce, free to all to use in their competition with one another. But from that competition the public service companies themselves ought to stand aloof, lest their entrance into the field disturb that equality which all may demand as of right. It would be too much to assert that this is established law as yet. However, it is not impossible to demonstrate that this ultimate rule is the logical consequence of the law establishing that public duty which requires of all who undertake any public employment the utmost public service.

CAMBRIDGE, MASS., April, 1906.

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

CURRENT LEGAL LITERATURE

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

ADMIRALTY (Torts, Master and Servant). In the April *Harvard Law Review* (V. xix, p. 445) Frederick Cunningham briefly discusses a subject closely related to that of Mr. Smith, in an article entitled, "*Respondeat Superior* in Admiralty," in which he again criticises the language of some recent decisions of our Supreme Court.

"The original liability in marine torts was only *in rem*, as shown above. This liability has now been extended to embrace actions *in personam*, for damage occurring through the negligence of the owners themselves or with their privity, and actions *in personam* for damage occurring by collision caused by bad navigation of the ship, *if navigated by the servants of the ship-owners*. This last extension, however, is rather one of convenience and conscientious discretion, giving the injured party a greater opportunity to get jurisdiction of the offender, and at the same time limiting the doctrine of the offending thing, and it is not to be regarded as a general introduction of *respondeat superior* into the admiralty jurisprudence."

"In collision cases the owner is liable *in personam*, if the ship is being navigated by the owner or his servants, on the ground *sic utere tuo ut alienum non lædas*, *not* on the ground of *respondeat superior*. If it is navigated by a charterer or his servants or a compulsory pilot, the owner is not liable *in personam* because he is not navigating the ship, but it is only to collision cases that this rule applies, and it is not on the ground of *respondeat superior*, as shown above. The owner is not liable for negligence in other cases of marine *tort* as a general rule, unless he is privy to it."

He then calls attention to the peculiar admiralty remedies given to seamen, which are not, however, rights to damages, and to the right to limit liability even in actions *in personam*.

"We see, then, that the liability in the admiralty for negligence *ex delicto* rests upon grounds entirely distinct and apart from *respondeat superior*, and if this liability is put upon the ground of *respondeat superior*, it naturally leads to much misconception, and the introduction into the admiralty of undesirable and technical doctrines belonging to the common law, such, for instance, as the doctrine of fellow-servant wholly transplanted and at variance with the giving or withholding of damages upon enlarged principles of justice and equity according to the rule laid down by Judge Story."

"Then, too, it will be observed that if *respondeat superior* is admitted into the admiralty, while at the same time the compensating defense of contributory negligence is excluded, as it has been since The Max Morris, the result will be that the liability of the owner for the negligence of his servants will be carried in the admiralty much further than it has been at common law, and this is not desirable, as shown in the beginning of this article.

"It must not be forgotten that in the admiralty the injustice and harshness of the doctrine of 'the offending thing' is counterbalanced by limiting the liability of the owner to his interest in the thing: the introduction of some common law doctrines and the exclusion of others will disturb the whole balance of the maritime jurisprudence, which had, it would seem, been nicely adjusted by the gen-

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eral sense of the commercial world during a number of centuries, and tend to destroy that uniformity of the general maritime law, which is so important in commercial affairs."

ADMIRALTY (Seamen, Personal Injuries). In the April *Harvard Law Review* (V. xix, p. 14) Fitzhenry Smith, Jr., analyzes the cases relating to "Liability in the Admiralty for Injury to Seamen."

"The conclusions reached may be summed up as follows:

"(1) That in the case of an injury by *accident* the seaman is entitled to no indemnity.

"(2) That in the case of an injury resulting from *negligence* there is likewise no right to an indemnity, unless the act or acts of negligence constitute a breach of some contractual duty.

"(3) That in the case of an *intentional* injury no indemnity can be recovered, unless the wrong also amounts to a breach of a contractual duty or unless the offender was at the time acting as the agent of the owner and within the scope of his employment.

"(4) If *any* injury happen while the seaman is in the 'service of the ship,' he is entitled to maintenance and cure, to his wages and a passage back to the port of shipment, or the cost of the same — in the absence of wilful misconduct upon his own part.

"(5) If an *intentional* injury is a breach of the shipping contract, the ship, in America, is liable *in rem*.

"These statements, we believe, represent the law. The questions to be settled include the enumeration and definition of the implied obligations of the shipping contract (especially with respect to the treatment due the mariner), the delimitation of the duration of the disabled mariner's right to cure and maintenance, and of the period during which he is entitled to wages, and a decision as to the adaptability to the admiralty of the fellow-servant doctrine."

AGENCY. In the April *Michigan Law Review* (V. vi, p. 433), Floyd R. Mechem publishes an advance chapter from his forthcoming book on agency, entitled "The Nature and Extent of an Agent's Authority." He summarizes his views as to what constitutes authority as follows:

"Putting all of these principles together, it will be seen that the authority of the agent, so far as it concerns the rights of third persons, may be a composite matter made up of a number of elements. It consists:

"First, and primarily, of the powers directly and intentionally conferred by the voluntary act of the principal.

"Second, of those incidental powers which are reasonably necessary and proper to carry into effect the main powers conferred and which are not known to be prohibited.

"Third, of those powers which usage and custom have added to the main powers, and which the parties are to be deemed to have had in contemplation at the time of the creation of the agency, and which are not known to have been forbidden.

"Fourth, of all such other powers as the principal has, by his direct act or by negligent omission or acquiescence, caused or permitted persons dealing with the agent reasonably to believe that the principal had conferred.

"Fifth, of all those other powers whose exercise by the agent, the principal has subsequently, with full knowledge of the facts, ratified and confirmed.

"For the acts done in pursuance of those powers which were directly conferred or which were incidental to those powers and not prohibited, the principal is of course responsible, because they are the direct result of his voluntary and intentional act. He is likewise responsible, and for the same reasons, for those acts which he has intentionally led third persons to believe that he had authorized. He is responsible for the acts of the agent which he has, by negligent omission or acquiescence, led the persons dealing with the agent to believe he has authorized, because to deny them would be a fraud upon innocent persons. He is responsible for those acts which he has subsequently ratified and confirmed, upon the ground that such a ratification is equivalent to a precedent authority.

"As between the agent and the principal the authority would consist of the same elements as in the case of third persons, with the exception that the forbidden powers and secret limitations which would not affect third persons who were ignorant of them, bind the agent who must necessarily have knowledge of them."

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He also discusses the old distinction between "universal, general, and special agencies," and shows that they have a foundation in fact but not in law. He concludes by discussing the duty of persons dealing with an agent to ascertain the extent of his authority.

BIOGRAPHY (Lincoln). A further chapter of Frederick Trevor Hill's "Lincoln the Lawyer" appears in the April *Century Magazine* (V. lxxi, p. 939). He discusses Lincoln as a jury lawyer. Undoubtedly his knowledge of human nature played an important part in his success. He possessed another quality, however, which is almost, if not quite, as essential in jury work, and that is clearness and simplicity of statement. He was quick to get at the kernel of a case. Wit and ridicule were his chief weapons. Even in those days when there were no shorthand reporters he rarely took notes. The author then cites many instances of his great skill as a cross-examiner. He was not well qualified for work in the criminal courts, but in some cases of great importance where his sympathies were strongly aroused he scored great successes. His standard of ethics in this practice was in keeping with the methods described in previous chapters. The superficial impressions of his methods gained from current anecdotes is combatted by the author in a full explanation of Lincoln's handling of very important law cases for the great railroads of Illinois.

BIOGRAPHY (Porter). An interesting account of "Alexander Porter," a judge of the first Supreme Court of Louisiana and later a United States senator, by William Wirt Howe, is published in the April *Columbia Law Review* (V. vi, p. 237).

BIOGRAPHY (Stanley). "Sir John Stanley," by S. C. Dey, *Bombay Law Reporter* (V. viii, p. 65).

CONFLICT OF LAW (Crimes). "Jurisdiction of the Courts of one State over an Act of Bigamy in Another State." The Collins Case, by H. M. Hanson, *Central Law Journal* (V. p. 216).

CONSTITUTIONAL LAW. An interesting history of proceedings leading to "The Location of the Federal Capital in the United States" with a brief discussion of the difficulties of interpreting the similar Australian clause, by A. Inglis Clark, appears in the January *Commonwealth Law Review* (V. iii, p. 115).

CONSTITUTIONAL LAW. An article entitled "Section 117 of the Constitution," by F. L. Stow, in the January *Commonwealth Law Review* (V. iii, p. 97), discusses a provision in the Australian Constitution forbidding discrimination by one state against citizens of another.

CONSTITUTIONAL LAW. "Notes on the Constitution of the United States, showing the Construction and Operation of the Constitution as determined by the Federal Supreme Court and Containing References to Illustrative Cases from the Inferior Federal Courts and State Courts," by William A. Sutherland, of the California Bar, San Francisco. Bancroft-Whitney Company, 1904. pp. xv, 974.

In this book the author has undertaken to state briefly the construction that has been given to and the application that has been made of every clause of the Constitution by the decisions of the courts. There is no attempt to give a history of the development of the constitutional law of the United States nor a philosophical discussion of the theories or principles. Taking the Constitution clause by clause, the author states briefly what has been decided with regard to it, and references are made to the decisions of the Supreme Court and to illustrative cases in the inferior federal courts and in the state courts, and the result is a compact digest of the authoritative decisions and a statement of the conclusions reached by the courts on every disputed question that has arisen with regard to every clause of the constitution. The statements are terse and clear, and taken together they form a brief, orderly, and comprehensive account of the judicial explanation and application of the successive clauses of the Constitution. The course of reasoning by which the conclusions have been reached is not given, and there is no discussion of the development of the law nor of the tendency of judicial opinion on the practical or political questions involved, but within the scope of the plan adopted; the work is well done, and brief as the notes are they fill more than eight hundred pages, and the

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names of the cases alone fill a hundred and fifty pages more. The subject is a very broad one, and it has been treated in many ways, and this book has a place of its own and will be of distinct service to the profession.

E. Q. K.

CONSTITUTIONAL LAW (Contracts. In the March *American Law Review* (V. xl, p. 175), "The Dartmouth College Paralogism" is discussed by William Trickett. He analyzes and criticises Marshall's famous decision, showing that the charter was a grant and not a contract that if there were a contract it must have been between the English parliament and the individuals named in the charter; that a sovereign cannot create an obligation irrevocably binding on itself, and that therefore there was no obligation to such supposed contract which the Constitution could protect, even admitting that the state of New Hampshire succeeded to such obligation. He reminds us that the decision was speedily made non-effective by the passage of general laws making future charters subject to amendment, and insists that there is no difference between a charter which by its terms or by general laws is subject to amendment, and one which is impliedly so, such as the charter granted by parliament.

CONSTITUTIONAL LAW (Treaties). United States Senator A. A. Bacon, of Georgia, contributes to the April *North American Review* an article on the treaty-making powers of the Senate. In the main he holds the view that the Senate is entitled to advise with the President in making treaties. It is not always necessary that the Senate insist on cooperation before a treaty is drafted, but in his judgment the Senate cannot be regarded as guilty of intrusion upon the presidential functions and prerogatives if at any time it should call upon the President for information as to a treaty which may be in progress of negotiation.

In conclusion he says:

"It is a salutary practice for the President to be advised by the Senate whether there should or should not be an attempt to make a treaty, or to interfere in any manner with the affairs of other nations. There are senators who have been in office for a generation and whose advice and counsel would be valuable to any President, however learned and able and patriotic he might be. It has rarely happened that a President is superior, in either natural or acquired ability, to the average ability of the Senate. It has frequently happened that the President chosen has been without any experience in national public affairs. There may be at some time in the future an impulsive and strong-willed or even, possibly, a weak President. An election to the presidency does not *ipso facto* endow one with all knowledge and all wisdom; and it is not an unreasonable suggestion that, in the aggregate of ninety senators, many of them men of great capacity and of large experience, there is more of knowledge of public affairs, more of conservatism, more of correct judgment of the requirements of the public interests, than is possessed by any one man in the United States, whoever he may be."

CONTRACTS. "Contracts — Impossibility of Performance," by N. S. Natesau, *Calcutta Law Journal* (V. iii, p. 39 n.).

CONTRACTS. "Restraint of Trade," by E. J. Blake, *Bombay Law Reporter* (V. viii, p. 76).

CONTRACTS (Guaranty). "Demand on Principal before Action against Guarantor" is discussed by William P. Rogers in the April *Columbia Law Review* (V. vi, p. 229). It is frequently stated that such a demand is necessary, but a demand as a rule is required only to place the party upon whom it is made in default. If he is already in default there is no necessity for it. It is not disputed that where a demand is required in ordinary contracts to put the opposite party in default, under similar conditions in contracts of guarantee, a demand must be made on the principal and notice given to the guarantor as a condition precedent to action on the contract of guaranty, but the converse proposition that demand on the principal will not be required except in those cases where generally a demand is necessary to place the other party to the contract in default while apparently logical is disputed in many jurisdictions.

COPYRIGHT. Acland Giles contributes to the January *Commonwealth Law Review* (V.

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iii, p. 107) a discussion of the law of "Literary and Artistic Copyright in the Commonwealth."

CORPORATIONS (Foreign). In *La Revue Legale*, for February (V. xii, p. 66), appears an article entitled "De La Situation Juridique Des Societes De Commerce Etrangères Dans La Province D'Ontario (Canada)," by Robert B. Henderson and Edouarde-Fabre Surveyor. They show that the rights of strangers, whether or not British subjects, are identical with those of inhabitants of the province, but since corporations are creatures of charter the courts decided that a foreign company could not sue to enforce contracts, because one country could not confer by charter or otherwise the right to do business in a foreign country. This doctrine has been modified, however, by subsequent decisions and is now governed by statute.

CORPORATIONS (Names). H. C. McCollum discusses "Protection by Equity of Corporate Names against Unfair Competition" in the April *Columbia Law Review* (V. vi, p. 244). A corporation is protected in the use of its name upon principles very similar to those which govern the protection of trademarks. An individual as such has the right to the use of his own name in his unincorporated business even though a previously existing company has acquired a valuable goodwill by the use of the same name. In exercising this right, however, the new competitor must act honestly and refrain from any active attempts to deceive the public. In granting relief the circumstances of each case must be considered and the probability of loss must be shown. Most authorities hold that fraud is necessary to support an action based on alleged unfair competition. The question on the cases is, however, still an open one. The strongest argument against the majority of cases is the analogy from trademark cases. The author contends for an extension of those rules to the cases under discussion, and that a corporate name when applied to the services or articles offered by the corporation stamps them as acceptable just like a trademark. Since fraud is usual in such cases courts have assumed that it is essential.

CORPORATIONS (Promoters). In the February *American Law Register* (V. liv, p. 95) Boyd Lee Sparks begins an analysis of "The Liability of Corporation Promoters to Account for Profits." The statement that a promoter is in a fiduciary relation to the corporation has been assumed to solve the problem.

"It is submitted that whether a person is in a fiduciary relation to a corporation to be formed depends on the facts of each case. Now it is perfectly logical that one may be a projector of a corporation before becoming the promoter of it. He may conceive the idea of forming a company to purchase property he already owns, or of forming a company to purchase from him property which he intends to buy; he may decide whom he will approach with his scheme, he may plan more detailed propositions, but so far as he is acting for himself only he is a projector and not a promoter. He becomes a promoter only when he has approached others who are to be members of the corporation, and he acts as a promoter only when he acts as an agent for himself and such others."

"There is no liability to account where the contract of purchase of property, on the resale of which the profit is made, is made at a time when no fiduciary relation exists between the purchaser and the corporation. Obviously this is true where the purchase is made simply as an investment, with a view of a possible future sale to a party not ascertained. If that is so, it is immaterial whether the resale takes place ten years later or whether the purchaser turns up the next day. In either event the person selling is entitled to as much as he can get, and if the purchaser is a corporation he is entitled to be paid in cash or stock if he chooses."

"Nor is the original vendee made responsible to the corporation by the fact that his purchase is conditional on the subsequent formation of the corporation, or by the fact that his vendor is to be paid in part in stock of the proposed company."

"The fact that later such vendor to a corporation becomes a director of it does not render him liable to account for the profit he acquired, if he acted openly and honestly and as an independent vendor."

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"If the purchase is made before any acts of incorporation are attempted, or before any prospectus is issued, or before any other inducements are made to the public, and all that has been done is that the purchase has been made in expectation of resale to the projected corporation, then such parties when the corporation is formed, even though they helped to promote it, may sell it at the best price obtainable, provided they in no way misrepresent to the corporation material facts in connection with the property; and provided that the contract is entered into on behalf of the corporation by directors who are capable of acting independently and who are not merely puppets of the vendors. Their duty to truthfully state material facts does not mean that they must disclose the price they gave for the property, but it does mean that, as in the case of any ordinary bargain and sale, the vendor must not represent the facts so as to create a false impression of the value of the premises."

"Assuming that such a disclosure is made in the prospectus of the proposed corporation as answers the requirements laid down, is it necessary that the projectors who have by this time become promoters disclose to the corporation the price which they originally paid for the property, that is, in order to resell must they state that they are reselling at a profit and at what profit? It would seem not, if those requirements be met."

"If the projector has become a director he should disclose to his associates his connection with the property, but failure to do that is not sufficient to support an action to account for his profit. He is under no liability to account for his profit, since at the time he originally bought he was acting solely for himself and not for the company which was later formed to purchase of him."

"The gist of these decisions is, that while the owner has a right to dispose of his property at any figure upon which an agreement may be reached, yet such sale must be free of false representations on his part, and any profit made on the resale becomes illegal only because of such false representations."

"It would seem that it is immaterial whether the original contract is an out-and-out purchase (for the purpose of resale to a corporation) or whether it is an option. In either case, if the purchaser is acting for himself alone, whatever his secret intentions may be, and *bona fide* secures the purchase or the option, he should be at liberty to resell at a profit, whether he has in himself the fee or whether his interest is merely a right to demand the fee."

CRIMINAL LAW. "Administration of Criminal Justice in England and India — A Comparison," by Syld Ameer Ali, *Criminal Law Journal of India* (V. iii, p. 65).

CRIMINAL LAW. "The Criminal Liability of an Inciter or Abettor of Suicide," by "C. L. J.," *Madras Law Times* (V. i, p. 31).

CRIMINAL LAW. "Cheating in Indian Criminal Law," by Satya Chandra Mukerji, *Allahabad Law Journal* (V. iii, p. 49).

CRIMINAL LAW. "Blackmail and Extortion," by James W. Osborne, *Bench and Bar* (V. iv, p. 90).

CRIMINAL LAW. "Suggested Changes in Criminal Practice," by F. B. Whiting, *Virginia Law Register* (V. xi, p. 969).

CRIMINAL LAW. J. J. Beauchamp contributes to *La Revue Legale* (V. xii, p. 60) an article on the history of "Usury."

CRIMINAL LAW. Maynard Shipley contributes to the March *American Law Review* (V. xl, p. 240) an account of "The Abolition of Capital Punishment in Italy and San Marino," in which he gives the usual arguments in favor of this reform and concludes from the evidence presented and other evidence to which he refers that "homicides have decreased to any considerable extent in Italy only in those regions where educational and industrial progress have been most in evidence," and that crimes of violence in general are fast disappearing before the recent rapid advances industrially and educationally.

CRIMINAL LAW (Conspiracy). Amasa M. Eaton discusses in the April *Columbia Law Review* (V. vi, p. 215) "Conspiracy to Commit

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Acts not Criminal *per se*." While he does not contend that at common law no kind of cheating and defrauding is an indictable offense he does maintain that no mere fraud of this kind in the absence of a statute is indictable unless it affects the public, such as the use of false weights in trade, the selling of unwholesome provisions, or the rendering of false accounts by a public officer. The cases in the United States, however, are in conflict.

CRIMINAL LAW (see Conflict of Laws).

DOMESTIC RELATIONS. "Difficulties in Marrying in the United States," by R. Vashon Rogers, K. C., *Canadian Law Review* (V. v, p. 145).

DOMESTIC RELATIONS. "Some Defects in the Quebec Civil Code Respecting Inheritance Rights of Women," by F. P. Walton, *Canadian Law Review* (V. v, p. 172).

EQUITY. "Can a Court of Equity Circumvent the Law?" by J. M. Sullivan, *Albany Law Journal* (V. lxviii, p. 37).

EQUITY (Injunctions, Boycotts). In the March *American Law Review* (V. xl, p. 196) James Wallace Bryan publishes a valuable treatise on "Injunctions against Boycotts and Similar Unlawful Acts." He confines his article chiefly to acts unlawful in their essence.

"Violent and coercive measures are, of course, universally condemned. The courts as a rule, however, allow combinations of men to compel a person to grant their legitimate demands, or to respect their proper interests, by simultaneously ceasing to do business with him and by procuring others, through fair and reasonable circulars and other persuasive means or even through notices that their refusal will lose them the patronage of the combination, to do likewise."

"Coercion and intimidation may never be employed as boycott measures. These terms are not confined to acts such as cause abject fear, but embrace all compulsory and wrongful acts calculated to overcome the will and judgment of a man of average firmness and make him submit to dictation in his business.

"Intimidation means more than threats of violence to person or property. There are other effective coercive methods which are used in boycotts. One of them is a threat by a union to order strikes among the employees of those who will not shun the boycotted person. The strike by way of boycott has always incurred the displeasure of the courts."

It is as unlawful to drive off prospective and probable customers as those who have already contracted

"We have already shown that solicitation to join a union or to strike may generally be addressed to workmen unless they are bound by contracts of service, in which case it may be enjoined as violating the employer's rights. The same is true when persuasion is accompanied by acts illegal by nature. Since, therefore, it is a restraint upon personal liberty to stop men upon the streets and compel them to listen to importunate arguments which they are unwilling to hear, an injunction, at the suit of the employer whose rights as master are infringed, may issue against such acts, even though the laborers so tampered with are not under contract, but work for him only from day to day. For a stronger reason, strikers or union agents may be enjoined from entering upon a person's premises in order to induce his workmen to leave him; because this is trespass against his property, causing continuous and irreparable injury for which damages are no adequate remedy."

The courts agree on the law of intimidation, but differ when they apply it to particular cases.

"The rule, however, which may be gathered from the authorities seems to lay down that a wholly peaceful picket system, whose aim is only legitimate persuasion and argument addressed to willing listeners, or the collection of information regarding the progress and condition of the strike, which news is not designed for an oppressive use, is harmless; but that a picket system which is employed as a measure of coercion and violence, or which has in reality that effect, is illegal and enjoinable in a proper case. But the federal courts, though affirming this rule in theory, announce as a result of their experience, that in practice 'this system, constantly kept up, in its nature leads to disturbance, and has a tendency to intimidate.'"

There are also a series of important cases under the Federal Interstate Commerce Act and more important still under the Federal

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Anti-Trust Act. The letter seems to apply to consolidated labor as well as consolidated capital.

" It permits the government of the United States to seek, in the prevention of wrongful strike measures which jeopardize interstate and foreign commerce, the same weapon which private individuals or corporations may employ when their interests are similarly threatened. And hence, the rules which we have shown to regulate injunctions at common law doubtless apply here."

The rights and liabilities extending to strikes apply to lockouts. Blacklists and unfair lists are not necessarily illegal.

EQUITY (Injunctions, Municipal Corporations). " Injunction as a Remedy to Restrain Passage, Test Validity, and Prevent Enforcement and Violation of Municipal Ordinances," by Eugene McQuillin, *Central Law Journal* (V. lxii, p. 257).

EVIDENCE (Presumptions). Albert Martin Kales contributes to the April *Harvard Law Review* (V. xix, p. 401) an important analysis of the somewhat loosely reasoned cases relating to " The Presumption of Foreign Law." The author finds that there are three possible rules on this subject.

" The first position is as follows: when the court of the forum takes judicial notice that the foreign state has fundamentally the same system of law as that of the forum, the court of the forum will presume that the law of the foreign state is the same as that of the system of law (exclusive of statutory changes) fundamentally common to both; otherwise there is no presumption at all.

" The second position is that the law of the forum (even though it be statutory) is always applicable in the absence of proof of the foreign law.

" In the application of this rule it is entirely unnecessary to make the slightest distinction between whether the foreign state is one which has fundamentally the same system of law as the forum or not. The rule is a definite one in regard to all cases where the foreign law is involved and has not been proved, and where the forum has any law on the subject.

" The third possible position is a combination of the first and second. It is like the first when the court of the forum takes judicial notice that the foreign state has fundamentally the same system of law as that of the forum. It is like the second when the court of the forum takes judicial notice that the foreign state has fundamentally a different system of law from that of the forum."

The author finds that the third view is hard and illogical and concludes that " the third position is one the existence of which may fairly be doubted, and which, if it does exist, is an irrational and inconsistent development, heaping an unjust burden upon one who ordinarily does not have to go forward with proof in the first instance. The second is extreme but consistent, and has some advantages of certainty in its application. Its fault is that it also, without any adequate ground, places a burden of going forward with evidence upon the party who ordinarily does not have to do so.

" The first position, on the contrary, presents a rational and logical development of the law. It does more accurate justice between the parties by leaving the natural burden of going forward with evidence where it belongs unless there is a good reason for changing it. It has also, it is submitted, the support of such eminent judges as Lord Eldon, Chancellor Kent, and, more recently, Mr. Justice Holmes."

EVIDENCE (See Practice).

GUARANTY (See Contracts).

INTEREST. " The Law of Interest," by K. B. Dastin, *Bombay Law Reporter* (V. viii, p. 78).

INTERNATIONAL LAW. " Need of an International Conference," by Edwin Maxey, *Albany Law Journal* (V. lxviii, p. 35).

INTERNATIONAL LAW. " Need of a Practical Provision for Amending International Law," by Edwin Maxey, *American Lawyer* (V. xiv, p. 116).

INTERNATIONAL LAW. " Treaties as a Source of International Law," by Edwin Maxey, *Virginia Law Register* (V. xi, p. 863).

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INTERNATIONAL LAW. In the March *American Law Review* (V. xl, p. 188) Edwin Maxey prints a third instalment of his narrative of "The Development of International Law," covering the period from American independence to the present time.

INTERNATIONAL LAW. "The Growing Conception of Neutrality" is the title of an interesting contribution to the March *American Law Review* (V. xl, p. 52) by Dr. Hannis Taylor. He shows that this idea vaguely and incoherently put forth by Grotius has become the most important development of the last century. He discusses first the right of belligerent ships in neutral ports and finds that while they may not improve their fighting power they may repair to the point of seaworthiness, and they cannot insist upon a coal supply nor upon general supplies and repairs except under such conditions or limitations as the neutral may see fit to impose according to the dictates of its own policy.

LEGAL ETHICS. Frank P. Pritchard publishes in the January *American Law Register* (V. liv, p. 1) a discussion of the problem which most perplexes the young lawyer, "Legal Ethics." This is the most valuable discussion of this subject which it has been our pleasure to read, combining an abundance of practical sense with sound morality. It is impossible to summarize it, but we commend it to all students and young practitioners.

LEGISLATION. "Laws and Legislation to Protect our Gas and Oil Interests," by S. M. Porter, *American Lawyer* (V. xiv, p. 122).

LEGISLATION. Don E. Mowry discusses "The Growing Complexities of Legislation" in the March *American Law Review* (V. xl, p. 212). He advocates measures to improve the qualities of our legislatures, and thereby our legislation, and for this purpose advocates the following measures of reform:

"(1) Make legislative sessions annual. (2) Elect representatives for two years. (3) Withdraw some of the power now held by the 'sifting committee' and give it to a department of state to be known as the legislative bureau, this bureau to act only as an adjunct of the legislature. (4) Elect the governor for four years."

LIENS. "Woodmen's Lien Law in New Brunswick," by Edward P. Raymond, *Canadian Law Times* (V. xxvi, p. 249).

MASTER AND SERVANT (See Admiralty).

MUNICIPAL CORPORATIONS (See Equity).

PUBLIC POLICY. "Election Reforms: The Trend towards Democracy," by J. C. Ruppenthal, *American Lawyer* (V. xiv, p. 108).

PUBLIC POLICY (Government). To the March *American Law Review* (V. xl, p. 161) Wilbur Larremore contributes a striking article on our theories of government entitled "The Consent of the Governed." He believes that the reverence of average Americans for the work of the fathers of the Republic has had both good and bad effect. He deprecates a too superstitious veneration of Jefferson's famous principles borrowed from Rousseau and incorporated in the Declaration of Independence, especially that relating to the consent of the governed. He shows that Rousseau derived his doctrines from earlier English philosophers but applied them with French logic in a manner that would have startled their authors. The Americans adopted the principles, but ignored them in creating their government. As proof of this he cites the toleration of slavery, the Louisiana purchase, our treatment of the Indians, and the Monroe Doctrine. He shows that the peril most feared by the founders was the development of aristocratic or monarchical institutions. They sought only the essential equality of white men before the law. He believes there is an inextinguishable race instinct in the Anglo-Saxon people which has shown itself in the English colonial governments where alien races have outnumbered the dominant white population in a form similar to that which exists in our Southern states. The growing solidarity of English-speaking people is another manifestation of this race instinct. This competition of races is saved from a mercilessly selfish attitude by the influence of Christianity.

The author does not discuss the expediency of definite policies, but merely wishes to direct attention to an infirmity of political thought. He believes that veneration for the work of the

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fathers should be repressed rather than stimulated. The great success of the constitution arose from the wisdom of its framers in principally employing generalizations and abstractions and confining even them largely to matters of English political experience. The liberal interpretation of John Marshall was almost as important. He believes that in our general relations with foreign nations our policy will continue to be dictated by our own interests, and likewise in dealing with men of imperfect or different civilization.

PRACTICE. "What are *Obiter Dicta?*" by M. J. Gorman, *Canadian Law Review* (V. v, p. 152).

PRACTICE. "Suit by Assignee on Official Bond," by E. M. Fulton, *Virginia Law Register* (V. xi, p. 867).

PRACTICE. "Is a Party to an Action Immune from Service of Civil Process while Attending Court in a State other than that of his Residence?" by Sumner Kenner, *Central Law Journal* (V. xlii, p. 280).

PRACTICE (Evidence). "The New Act Concerning Demurers to Evidence," by Hon. S. S. P. Patterson, *Virginia Law Register* (V. xi, p. 959).

PROCEDURE. "In Praise of New Jersey's System of Courts and Procedure," by Herbert A. Drake, *New Jersey Law Journal* (V. xxix, p. 100).

PROCEDURE (Juries). S. M. Bruce publishes in the March *American Law Review* (V. xl, p. 222) an address on "The Jury System," in which he explains the history of its origin and development, criticises its theory as applied to modern conditions, and concludes that "all logic points to the ultimate elimination of every form of jury trial."

PROPERTY. "Whether a grant by Deed of a Fishing and Hunting Right is Limited in its Scope to the Conditions within the view of, and Surrounding the Parties at the Date of the Deed, or is to be Construed Relative to the Advancement of Society and the Improvement in Facilities affecting the Exercise of the Granted Right?" by A. H. Robbins, *Central Law Journal* (V. xlii, p. 238).

TORTS. "The Intent in Libel," by John King, K. C., *Canadian Law Journal* (V. xlii, p. 209).

TORTS. "Accidents du Travail," par J. J. Beauchamp, *Revue Legale* (*v.* xii, p. 103).

TORTS. "Presumptive Negligence," by Silas Alward, *Canadian Law Times* (V. xxvi, p. 191).

TORTS. (see Admiralty, Equity).

WITNESSES (Expert Testimony). "Expert Testimony from the Standpoint of the Witness," by Albert S. Osborn, reprint from *Albany Law Journal* (V. lxvii, no. 11).

WITNESSES (Expert Testimony). In the April *Michigan Law Review* (V. iv, p. 413) H. B. Hutchins treats of a question that has been seldom discussed under the title of "The Compensation of Medical Witnesses." It has been generally assumed by text writers that such witnesses are entitled to extra compensation for professional opinions, but there is little authority for the proposition when such opinions are based wholly on assumed facts. The state is as much entitled to the knowledge of a medical witness as to that of any other citizen, and a refusal to answer may be punished as a contempt. It is otherwise, however, when he is obliged to make special preparation for his testimony. The author advocates some method for compensation by the state and calls attention to the working of a recent Michigan Statute for that purpose.

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NOTES OF THE MOST IMPORTANT RECENT CASES COMPILED BY THE EDITORS OF THE NATIONAL REPORTER SYSTEM AND ANNOTATED BY SPECIALISTS IN THE SEVERAL SUBJECTS

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

BILLS AND NOTES. (Negligence.) **Mass.** — Costello *v.* Bardnard, 76 N. E. Rep. 599, contains a holding which while probably legally correct, jars somewhat on one's sense of justice. Defendant in the case executed what purported to be a note of a town, unlawfully signing thereto the names of persons holding offices of selectmen and treasurer. Defendant, of course, knew that the note was false and executed it with a general fraudulent intent. Thereafter he negligently permitted it to pass from his control without any representation or misfeasance, and it is held that he was not liable upon the note to a person who took it for value, believing it to be genuine.

CARRIERS. (Passengers — Misconduct of Servants.) **Mass.** — In Hayne *v.* Union Street Railway Company, 76 Northeastern Reporter, 219, it is held that a carrier is absolutely liable for injuries to a passenger caused by the misconduct of its servants, while engaged in the performance of the contract of carriage, so that where the conductor of one of defendant's cars threw a dead hen at motorman of the car on which plaintiff was riding, and missing the motorman, struck the window near where plaintiff was sitting, breaking the glass and injuring plaintiff, the company was liable.

CARRIERS. (Passenger Elevators.) **R. I.** — The growing volume of the law relative to the duties of owners of passenger elevators receives an addition in the case of Edwards *v.* Manufacturers' Building Co., 61 Atl. Rep. 446. It is there held largely on the authority of the decision of the New York Court of Appeals in Griffen *v.* Manice, 166 N. Y. 197, 59 N.E. 925, that a landlord who maintains an elevator in his private building for the use of tenants and their employees and customers is not a common carrier, nor bound to the same degree of care as that imposed on a common carrier, but is bound only to exercise reasonable care for the safety of those who enter upon his premises and use the elevator. There are holdings to the contrary, as for instance, Marker *v.* Mitchell, 54 Fed. 637; Goodsell *v.* Taylor, 41 Minn. 207, 42 N.W. 873; Treadwell *v.* Whittier, 80 Cal. 574, 22 Pac. 266. These cases are cited by the court, but their doctrine is disproved on the ground that the owner of a passenger elevator is not like a common carrier, a servant of the public, but his duties are limited to persons who have contracted with him for the use of his premises, and those who have business with his tenants.

In maintaining and operating an elevator for passengers, the owner is, according to the majority of the cases, under a duty to exercise the same measure of care as is required of a public carrier of passengers, viz., the highest degree of care which human foresight can suggest: Marker v. Mitchell, 54 Fed. 637, affirmed in 62 Fed. 139; Treadwell v. Taylor, 80 Calif. 574, 5 L.R.A. 498, 13 Am. St. Rep. 175 (full discussion); Goodsell v. Taylor, 41 Minn. 207, 4 L.R.A. 673, 16 Am. St. Rep. 700; Hartford Deposit Co. v. Sollitt, 172 Ill. 222, 50 N. E. 178, 64 Am. St. Rep. 35; Edwards v. Burke, 78 Pac. (Wash.) 610; Kentucky Hotel Co. v. Camp, 97 Ky. 424, 30 S. W. 1010; Southern, etc. Assn. v. Lawson, 97 Tenn. 367, 37 S. W. 86, 56 Am. St. Rep. 804 (monograph note); Wise v. Ackerman, 76 Md. 375 (great care and caution required); Lee v. Knapp, 55 Mo. App. 391 (reasonable or ordinary care).

In refusing to follow the general rule, the court, in the principal case, holds that the rule which requires a common carrier of passengers to exercise the highest degree of care is imposed, not on account of the danger of the journey, but because of the relation to the public, and in as much as the owner of the elevator is not engaged in a public calling, there is no occasion for imposing the extraordinary liability. But the courts which lay down this rule do not regard the owner of the elevator as a common carrier for all purposes in the sense that he is engaged in a public calling and obliged to serve all without discrimination. In the matter of exercising care his position is analogous to that of the common carrier of passengers,

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but beyond this the analogy ceases. The extraordinary liability of the carrier of passengers does not arise out of the nature of the calling, but rather out of the high regard for human life. Due care is care commensurate with the circumstances. One of the determining circumstances is that human life and safety are involved, and when such is the case, more diligence and circumspection is exacted than in other situations. The confusion as to the origin of the carrier's extraordinary liability is attributable, in part, at least, to the classification of care into degrees (Steamboat New World v. King, 16 How. 474).

The court in the principal case accepts the theory announced in Griffin v. Manice, 166 N. Y. 197, 59 N. E. 925, where the right to ride in an elevator is held to be based on the implied invitation by the owner extended to all persons having business on the premises. The owner's duty is the same as that owed to an invited business visitor, which is to use reasonable care and prudence to keep the premises in a safe condition. The criticism of this is that it takes a rule which is applicable to a condition of premises, a passive situation, and applies it to a situation where the injury arises, not from any defect in the premises in their passive state but from negligence in respect to a moving situation (Gallagher v. Humphrey, 6 L.T. Rep. n.s. 664).

E. A. Gilmore.

COMMERCE. (Federal Regulation — Discrimination.) **U. S. Sup. Ct.** — The legal aspect of a case which had attracted considerable attention is contained in New York, New Haven & Hartford Railroad Company *v.* Interstate Commerce Commission, 26 Supreme Court Reporter, 272. The United States Supreme Court here determines that an interstate carrier not empowered by its charter or any legislation existing at the time of the adoption of the act to regulate commerce, to mine and market coal, violates the mandate of that act respecting the maintenance of published rates and its prohibition against undue preferences and discriminations by stipulating to sell and transport coal at an agreed price which is insufficient to yield its published freight rates after deducting the cost of purchase and delivery. It was also held that prohibitions of the commerce act as to rebates, favoritism, and discrimination having been construed by the interstate commerce commission to be inapplicable to freight rates for coal charged by interstate carriers empowered to mine and market coal by their charter, or by legislation existing at the time of the adoption of that act, this construction having long obtained in practical execution and been impliedly sanctioned by the reënactment of the statute without alteration in the particulars mentioned, must be treated as read into the statute.

CONFLICTS OF LAW. (Domicile — Divorce.) **Eng.** — Few cases have attracted more attention in England than Armitage *v.* Attorney-General (Gillig cited), Times Law Reports, February 22, 1906, Eng., in which the president of the divorce division of the High Court of Justice was asked to make a declaration of the legitimacy of the children of a petitioner whose wife had married, relying upon a decree of divorce obtained in South Dakota. According to the opening statement of petitioner's counsel Mrs. Armitage was an English woman by birth, and in 1883 she married, in England, Charles A. Gillig, an American citizen, who had come to England when seventeen years old and who was residing and had been carrying on business in England for some years. There were two children of the marriage. Differences occurred between the parties, and in 1886 a separation deed was entered into in England. In 1889 Mrs. Gillig qualified herself as a teacher of cooking and having obtained a diploma proceeded to Yankton, South Dakota, where she took a house and furnished it. After three months' residence there she instituted divorce proceedings against her husband on the ground of desertion. The defendant, who was personally served in England, entered an appearance, pleaded to the jurisdiction and the merits of the claim, and filed a cross-bill. In his answer he stated that he was a citizen of the United States temporarily residing in England. He called no evidence and Mrs. Gillig obtained her decree by default. She then left South Dakota, and seven months afterwards married Mr. Armitage, an Englishman whom she had known before she left England. The parties have since lived together in England. Mr. Gillig also married again, and unhappy differences having again arisen between him and his wife, he filed his petition in the English court for a declaration of the nullity of his second marriage on the ground that the South Dakota divorce was invalid. Mr. Armitage then instituted the present proceedings for a declaration of the legitimacy of the children born of his marriage with the former Mrs. Gillig. No evidence was called by the attorney-general or Mr. Gillig. Mrs. Armitage testified that when she departed from England to go to South Dakota she had no intention of returning and that she had taken up her residence in good faith in that State. She also stated that Mr. Gillig had retained his domicile of birth in New York. The president in the course of his judgment said that the question

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whether these marriages were good or bad depended on the validity of the South Dakota judgment. He had not to consider the effect of the South Dakota judgment on English law, except on one point, because he had found that Mr. Gillig was domiciled in the State of New York and had submitted to the jurisdiction of South Dakota. Such importing of jurisdiction to a court was absolutely ludicrous in English law and would be of no effect whatever, unless the court had jurisdiction founded on domicile. It was true that Professor Dicey had discussed the question and seemed to incline to the opinion in one passage that litigants can import jurisdiction to a court of divorce by submitting to it, but that was not in accordance with the law of this country as he held it to be. But that view did not prevail in the United States, and he had to find as a fact what was the law in that country. The evidence before him went to show that the courts of New York — the state of Mr. Gillig's domicile — would recognize the South Dakota judgment, inasmuch as he had taken part in the South Dakota proceedings and had made a cross-charge against his wife in the court of that state (Jones *v.* Jones, 108 N. Y. 415). And this recognition obtained in spite of the fact that in the state of New York divorce could only be obtained by reason of adultery, while in South Dakota cruelty and desertion were sufficient causes for a dissolution of marriage. That being so, the only question remaining was to consider the case in respect to English law. Were they to recognize as binding in this country a decree obtained in a state where the husband was not domiciled, which nevertheless was recognized as such in the state in which he was domiciled? That question had not yet really been decided, but the cases most in point were Harvey *v.* Farnie, Ap. Cases, 43, and Bater *v.* Bater, otherwise Lowe. 21 The Times L. R. 517.) Was this court to recognize a divorce recognized in the State of the husband's domicile? He must answer that question in the affirmative. The husband's *status* had been determined in South Dakota and recognized as altered in the state of New York. The parties had ceased to be man and wife in the state where they were domiciled. Their union had been dissolved and recognized as dissolved in the state of the husband's domicile, and must be recognized as dissolved all the world over. That was the only logical way of looking at the matter. Therefore, by recognizing the South Dakota divorce, the first marriage of the petitioner was dissolved, and accordingly her marriage with her present husband and that of Mr. Gillig with his second wife were valid marriages. The finding entitled the petitioner to a declaration of the validity of her marriage with Mr. Edward Armitage. In concluding his judgment the judge made the following observations of peculiar interest to American lawyers and legislators. "I wish to make one general observation. On this side of the Atlantic we have difficulties enough in dealing with questions arising in suits for divorce. But I think I am right in saying that throughout the British Empire there is a general recognition that it is the husband's domicile which decides the tribunal to try the cause. This principle enables the courts of our empire to deal with cases more simply than can the courts of the United States, for it is obvious that there are more difficulties in cases where questions of different jurisdiction arise, when a court has not the one simple test of the husband's domicile to guide it. I can only hope that the efforts that are being made by the Commissioners on the Conference for the Uniformity of Legislation throughout the United States and the labors of the various societies having that object in view may successfully bring about a unified law in matters of divorce. Perhaps the publicity of this case will attract their notice."

CONSTITUTIONAL LAW. (Combination to Fix Gas Rates.) U. S. Sup. Ct. — Peoria Gas and Electric Company *v.* City of Peoria, 26 Supreme Court Reporter, 214, determines that an agreement between rival gas companies, to fix the price for gas in violation of the Illinois anti-trust act, does not, after they cease to act under it, defeat their right to invoke the due process of law clause of the Federal Constitution to prevent the enforcement of a municipal ordinance, which by establishing unremunerative rates, has the effect of taking private property for public use without just compensation.

CONSTITUTIONAL LAW. (Impairment of Obligation of Contract — Franchises.) U. S. Sup. Ct. — An important decision involving considerable difference of opinion among the members of the court is contained in Knoxville Water Company *v.* The Mayor and Aldermen of the city of Knoxville, 26 Supreme Court Reporter, 224. A majority of the court there held that the obligation of an agreement by a municipality to give a water company an exclusive franchise for thirty years as against any other person or corporation, is not impaired by the municipal establishment of its own independent system of water works under subsequent legislative authority. This decision seems to proceed very largely on the ground that grants of franchises and special privileges are always to be construed most strongly against the donee and in favor of the public, so that the fran-

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chise in question cannot be regarded as including anything not coming within its express terms.

CONSTITUTIONAL LAW. (Police power — Liberty of Contract.) **Wis.** — The scope, extent, and application of the police power, as its latitude has been extended by modern decisions, is involved in the decision of the case of State *v.* Cary, 105 Northwestern Reporter, 792. The Supreme Court of Wisconsin there declares that where the legislature has power to regulate a business, it is vested with the power to legislate against the injurious consequences that inhere in the conduct of such business, and possesses discretion to determine what means are necessary to the accomplishment of that end, and its action is valid, unless it has exceeded its authority by imposing such arbitrary restrictions upon the individual and his occupation as are palpably foreign to the legitimate purpose sought to be accomplished by the legislation. Pursuant to this principle it is held that Wisconsin Laws, 1905, p. 419, c. 278, prohibiting the loaning of money on chattel mortgage, bill of sale, pledge, etc., at a greater rate of interest than 10 per cent per annum, or the acceptance of more than 14 per cent per annum, in full for all examinations, views, fees, appraisals, commissions, renewals, and charges of any kind in procuring and making the loan, is a reasonable and proper exercise of the police power and not an unconstitutional interference with liberty of contract. The further provision of the statute making it a misdemeanor punishable by fine of not less than $25 nor more than $300, or by not more than six months' imprisonment or both for violations of the provisions of the statute, is held not in conflict with the constitutional guarantees of liberty.

CONTRACTS. (Legality — Lobbying.) **Cal.** — In Le Tourneux *v.* Gilliss, 82 Pac. Rep. 627, it is declared that "lobbying," which has a well-defined meaning and signifies the addressing or soliciting of members of a legislative body for the purpose of influencing their votes, is contrary to public policy, irrespective of the question whether it is carried on in such manner as to constitute a crime under the statute, and hence, that a note given for money advanced for the expenses of a person to enable him to engage in the business of lobbying cannot be enforced.

CORPORATIONS. (Contracts — Ultra Vires.) **U. S. C. C. Ind.** — A company organized under a statute providing for the organization of manufacturing and mining companies, for the purpose of furnishing natural gas to consumers, is held in Quinby *v.* Consumers' Gas Trust Company, 140 Federal Reporter, 362, to be engaged in performing a public service and to be a *quasi* public corporation, so that it can exercise no powers not granted by its charter or by some other act of the Legislature. In view of this, an agreement by such a company in a franchise contract with a city, giving the city an option to purchase all its property, is beyond its powers and void, and since its performance by the company would at once incapacitate it from performing the statutory duties for which it was chartered, and since it is in violation of the declared public policy of the state, the company is not estopped by its acceptance and use of the franchise from asserting the invalidity of the agreement, nor is the contract rendered valid and enforceable by the fact that when it was sought to be enforced natural gas had failed in the locality where the company had its wells.

EVIDENCE. (Deed — Parol Explanation.) **So. Dak.** — A case of considerable local importance because involving the construction of a statute not previously authoritatively passed upon is that of Bernardy *v.* Colonial & United States Mortgage Co., Limited, 105 N. W. Rep. 737. It is there held that the provision of the South Dakota Code, that every transfer of property as security for the performance of an act is to be deemed a mortgage, does not authorize parol evidence as to the intent of the parties in the execution of a deed absolute in form and without limitations or qualifications as to the interest intended to be conveyed. Independently of the statute, it is held that such a deed cannot be varied by parol evidence as to the intention of the parties.

The first impression created by reading this case is that it declares, contrary to the almost universal rule in equity, that parol evidence is not admissible to show that a deed absolute in form was given as security and is, therefore, a mortgage. When, however, the opinion is read in connection with the opinion on a former appeal (17 S. Dak. 650) where the facts are stated, it appears that the effort made was to restrict the operation of the deed to the interest then possessed by the grantor and that it was not claimed that the deed was given as security. What is said with reference to a mortgage is *obiter*, for the purpose of meeting an argument that the cases are analogous. The court very properly says that the principle under which parol evidence is admitted to show that the deed absolute in form was given as security is not applicable to the case at bar, but

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unfortunately proceeds in such a way as to convey the impression that the rule admitting parol evidence in such cases does not extend to deeds that purport clearly and without ambiguity to convey a fee simple. We cannot believe that the courts and the Bar of South Dakota will permit this unfortunate dictum to draw that state out of line with the vast weight of authority. F. J.

INJUNCTION. (Criminal Prosecution.) **Cal.** — In Sullivan *v.* San Francisco Gas & Electric Co., 83 Pac. Rep. 156, it is held that injunction will not lie to restrain the prosecution of house movers for violating Cal. Pen. Code, imposing a penalty on every person who unlawfully and maliciously removes or obstructs any electric line. The mere allegation that plaintiffs were not guilty of any such violation is held not sufficient to give a court of equity jurisdiction. It is admitted that courts of equity will in proper cases enjoin the attempt to enforce a law or ordinance making certain acts a criminal offense and imposing a punishment therefor, where the law or ordinance is invalid and its enforcement will injure the plaintiff's property or property rights; but it is pointed out that every person is subject to being prosecuted for some offense of which he is not guilty and that if this is done without reasonable or probable cause, he has his remedy by action for malicious prosecution. There is, however, no rule which permits a person to substitute a court of equity for the courts of law in the decision of matters of fact relative to criminal prosecutions, and by anticipatory action to take from the regularly constituted criminal courts their jurisdiction of criminal offenses.

INJUNCTION. (Boycott — Injury to Business.) **N. J.** — Van Der Plaat *v.* Undertakers' & Liverymen's Association of Passaic County, 62 Atl. Rep. 453, indicates that though injunction may be resorted to to prevent a suitor being forced out of an established business, it cannot be resorted to to enable him to force himself in. Complainant alleged that he was educated as an embalmer and undertaker, and that he desired to engage in that business in a certain city, but had been prevented from doing so by the defendant association and its members. It was not alleged that he owned any appliances necessary or convenient for the transaction of the business, but he averred that he relied on purchasing coffins and other supplies of that kind from persons engaged in the business of furnishing such supplies, and on hiring hearses carriages, and horses, etc., for funeral purposes from persons engaged in keeping those articles for hire for such purposes. It was alleged that the defendant association included all the undertakers in the county and most of the livery stable men; that plaintiff had applied for membership and had been refused, and that dealers in coffins had also refused to sell him such articles, and that keepers of livery stables had refused to furnish him with horses, hearses, and carriages, except at a higher price than that charged the members of the defendant association. Under these facts, it is held that complainant was not entitled to an injunction, inasmuch as he had no established business which the injunctive process could be used to protect.

INSURANCE. (Life Policy — Incontestability.) **Mass.** — Reagan *v.* Union Mutual Life Insurance Co., 76 Northeastern Reporter, 217, declares that a provision in a life insurance policy, making it incontestable for fraud after the expiration of a specified time, is binding on the insurer, but that a provision making it incontestable for fraud from the date of the policy, is invalid, so that the insurer in an action on the policy may rely on fraudulent representations prior to the issuance of the policy, notwithstanding that by the terms of the policy the entire contract is contained in it and the application. In support of the holding, the court cites Massachusetts Ben. Life Association *v.* Robinson, 104 Ga. 256, 30 E. S. 918; Welch *v.* Union Cent. Ins. Co., 108 Iowa, 224, 78 N. W. 853; Ritter *v.* Mutual Life Ins. Co., 169 U. S. 139, 18 Sup. Ct. 300; Hatch *v.* Mutual Life Ins. Co., 120 Mass. 550; Burt *v.* Union Life Ins. Co., 187 U. S. 362, 23 Sup. Ct. 139; and Patterson *v.* Natural Premium Life Ins. Co., 100 Wis. 118, 75 N. W. 980.

LANDLORD AND TENANT. (Covenant for Quiet Enjoyment — Wrongful and Negligent Acts not Authorized by Lessor.) **75 L. J., K. B. 174, Eng.** — In this case the plaintiff sued the personal representatives of his deceased landlord for damages for breach of a covenant for quiet enjoyment contained in a lease for twenty-one years. The covenant entered into by the lessor with the plaintiff (the lessee) was that the lessor should "peaceably enjoy the demised premises" during the term "without any interruption or disturbance by the lessor or any person claiming under him." It appeared that the demised premises consisted of the ground floor of a flat building, and that proceedings had been taken by the sanitary authorities against the lessor because of the condition of the building, the result of which was that all parts of the structure, except

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that portion of which the plaintiff was tenant, were ordered to be taken down. At the time the order for demolition was made the lessor's interest in the premises had been assigned and the assignees in pulling down the building did it in such a manner as to expose the plaintiff's premises, thereby forcing him to leave. The court held that the lessor by the covenant was bound for any act of interruption by himself or by any person whom he had expressly or impliedly authorized to do the acts; and that, if the lessor had parted with the property or adjoining property to a person who could rightfully claim that under his title from the lessor he was authorized to do those acts, the lessor would still be responsible. Thus the landlord had been held responsible to a tenant under a similar covenant for noise and vibration caused by dancing where he had authorized another tenant to use his rooms for dancing, when he well knew that the dancing caused a nuisance. (Jenkins *v.* Jackson (1888), 5 Q.B.D. 602); so a landlord had been held responsible to a tenant because his tenant of adjoining land had in the proper use of certain drains damaged the complaining tenant, but he was not held responsible for an improper use of the drains (Sanderson *v.* Berwick-upon-Tweed Corporation, L.R. 13 Q.B.D. 547). The court held that the parties to the lease could not have contemplated that the lessor was to be responsible for wrongful or negligent acts of his assignee which he had not authorized.

LIMITATION OF ACTIONS. (**Liability of Stockholders — National Bank.**) **U. S. Sup. Ct.** — A recent decision of the Supreme Court which has attracted considerable general attention is that of Rankin *v.* Barton, 26 Supreme Court Reporter, 29, where it is held that a state statute of limitations does not begin to run against the right to enforce the individual liability of stockholders in a national bank until the amount of such liability has been ascertained and assessed by the Comptroller of the Currency. It is pointed out that a national bank is an instrumentality of the United States, its circulating notes being guaranteed by the United States, so that if the United States should be compelled to pay them, it has a paramount lien on the assets of the bank for reimbursement. The administration of the bank's assets is therefore vested in the Comptroller of the Currency, as an officer of the United States. The individual liability of a stockholder can only be enforced by his order. Consequently a right of action against the stockholder does not accrue until the Comptroller of the Currency has determined the extent of the liability.

MANDAMUS. (**Supervision of Official Action.**) **Ill.** — The limitations necessarily inherent in the nature of a writ of mandamus are illustrated in People *ex rel.* Bartlett *v.* Dunne, 76 N.E. Rep. 570. It is there held that a duty to be enforceable by mandamus must be specific in its nature and of such a character that the court may prescribe the performance of a definite act or series of acts, and though such duty need not be susceptible of performance by a single act, but may require the doing of a succession of acts, if they are such that the court can supervise their accomplishment, yet the writ will not lie where the issuance would compel the court to control and regulate a general course of official conduct, and enforce the performance generally of official duties, as, for instance, to remedy neglect by the mayor of a large city to enforce the laws and ordinances providing for Sunday closing of the seven thousand saloons of such city.

MASTER AND SERVANT. (**Fellow Servants.**) **La.** — A rather noteworthy holding on the labor question and one for which the court cites no precedent is contained in Farmer *v.* Kearney, 39 So. Rep. 967, where the court declares that responsibility of contractors for injury received by workmen rests upon their freedom of action in respect to selection of and superintendence over the latter, so it is said that when the individual workmen, instead of allowing matters to take their usual shape and course, make it a condition of their accepting service that the contractor will yield in their favor this right of freedom of action, they absolve him from the responsibility which otherwise would be thrown upon him, and look to that of their own selected agencies. Thus, when the workmen delegate to a labor organization which they have joined, and others in privity with it, this right of selection and superintendence, they agree so far as the contract is concerned, to accept the membership of their fellow-workmen in their respective organizations, and the action of those associations is *ipso facto*, good and sufficient guaranty to them for their individual safety and protection.

MASTER AND SERVANT. (**Messengers.**) **Mass.** — A case for which there seems to be no direct precedent is that of Haskell *v.* Boston Dist. Messenger Co., 76 Northeastern Reporter, 215. The Messenger company furnished a messenger to plaintiff, which messenger was not during the time of his employment by plaintiff under the control of the company. The plaintiff intrusted a bill for rent to the messenger, who collected the

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same, but failed to turn over the proceeds to plaintiff. Under these circumstances it is held that the company is not liable for the money collected by the messenger, in the absence of any showing that the company was negligent in selecting the messenger. It is also determined that the company did not become a common carrier and insurer of the bill and money.

NEGLIGENCE. (**Mental Suffering — Telegrams.**) **Tex.** — The Texas Court of Civil Appeals, in Western Union Telegraph Company *v.* Shaw, 90 Southwestern Reporter, 58, which was an action for mental anguish suffered by a mother, by reason of the telegraph company's failure to deliver a message announcing the death of plaintiff's son in time to permit her to attend the funeral, holds that the plaintiff was not guilty of misconduct in appearing on the witness stand in deep mourning, or in giving way to her emotions during her examination in chief, when she was asked concerning the death and burial of her son. It was also held that the defendant telegraph company, having negligently failed to promptly deliver the message and thereby causing mental suffering to the addressee, was liable for damages for such suffering, though she would have suffered other anguish if the telegram had been delivered promptly so as to enable her to be present at the funeral.

PHYSICIANS AND SURGEONS. Tenn. — A rather peculiar system of therapeutics which, however, the court holds to be a practising of medicine, is revealed in O'Neil *v.* State, 90 S. W. Rep. 627. Defendant, who was convicted of practising medicine and surgery without a license, diagnosed his patient's diseases by microscopic examination of a drop of blood, and treated them by placing them under the rays of electric arc lights, and also incidentally prescribed certain medicines, for which prescription, however, he made no charge. This is regarded by the court as the practising of medicine within the meaning of Tennessee Statutes, relative to that subject, and it is also held that defendant was not an optician within the meaning of the statute excepting opticians from the provisions of the general statute as to licensing persons practising medicine.

PROPERTY. (**Adverse Possession.**) **Ia.** — A point which the court says is in record with the unbroken voice of authority but nevertheless is of sufficiently rare occurrence to justify giving it notice, is contained in Garst *v.* Brutsche, 105 N. W. Rep. 452, where it is declared that where a person executed a deed which by mistake conveyed certain land not intended to be conveyed, and after the deed was recorded, paid taxes on such land, and fenced it so as to include it with an adjoining and larger field, this did not constitute an adverse possession which would entitle the grantor to hold the land either as against the grantee or a subsequent purchaser from him. The mere fact that a grantor remains in possession after the execution and delivery of a deed is held not to be sufficient to ultimately give him title unless he disclaims holding for the grantee and openly asserts his own title in hostility to the title claimed under his previous deed. In support of the holding, the court cites Ivey *v.* Beddingfield (Ala.) 18 So. Rep. 139; Evans *v.* Templeton (Tex.) 6 S. W. 843; Hennessey *v.* Andrews, 6 Cush. 170; Paldi *v.* Paldi (Mich.) 47 N. W. 510.

SCHOOLS AND SCHOOL DISTRICTS. (**Religious Instruction.**) **N. Y.** — O'Connor *v.* Hendrick, 96 New York Supplement, 161, Appellate Division 4th Dept. involves a rather novel point. The laws of New York provide that the superintendent of public instruction shall visit the common schools and advise the teachers and officers, and require him to make to the legislature an annual report, containing plans for the improvement of schools. He is also authorized to remove from office any school officer disobeying any regulation adopted by him, and to transmit to school officers information deemed to be conducive to the proper management of the schools. With these powers it is held that the superintendent has authority to direct that the garb worn by a religious order shall not be worn by the teachers of the public schools, and that the superintendent has power to dismiss a teacher who refuses upon his order to discard such distinctive clothing. It also appeared in this case that a teacher in a public school wore the garb of a Catholic religious order to which she belonged and that immediately before the regular time for opening the school, and at the close of the morning and afternoon sessions, she said the prayers of the Catholic Church. The Catholic children were required to be present at the prayers, while the non-Catholic were allowed to be absent. Held to constitute religious teaching within Const. art 9, § 14, prohibiting the state or any subdivision thereof from giving aid to any school under the control of any religious denomination.

It is not quite clear from the opinion whether the decision proceeds upon the ground that the appearance of a teacher in the public schools in a sectarian garb constitutes sectarian teaching

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within the constitutional prohibition, or whether the order of the superintendent of public instruction against the wearing of such garb was regarded as controlling. Against the soundness of the latter position the reasoning of the dissenting opinion seems convincing, even conceding to the superintendent of public instruction the large administrative power for which New York has become conspicuous.

In Pennsylvania the point which caused the controversy in this case is covered by statute (Law of June 27, 1895).

SLANDER. (Privileged Communications.) Cal. — In Carpenter *v.* Ashley, 83 Pac. 444, a provision of the California Civil Code that a privileged communication is one made in any legislative or judicial proceeding, but irrelevant or immaterial matter voluntarily or maliciously published in the course of judicial proceedings is not privileged, is construed, and it is held that a district attorney conducting a criminal case in a justice's court is not privileged to charge opposing counsel with perjury or subornation of perjury.

TAXATION. (Excise Taxes — Trading Stamps.) Mass. — Another phase of the trading stamp question, several decisions on which have been previously noted in this magazine, is presented by O'Keeffe *v.* City of Somerville, 76 N. E. Rep. 457 Mass. Const., art. 4, § 1, authorizes the legislature to impose reasonable duties and excises upon any produce, goods, wares, merchandise, and commodities whatsoever brought into, produced, etc., within the commonwealth. Statutes 1904, p. 376, c. 403, § 1, provides that every person selling, giving, or delivering trading stamps in connection with a sale of articles shall pay an excise tax for carrying on such business. This statute it is held is not justified by the constitutional provision inasmuch as the right to conduct the business in the manner provided in the section is not a commodity within the meaning of the Constitution.

WILLS. (Probate — Appeals.) Ky. — A rather peculiar holding, the force of which, it is true, is to some extent limited by its dependence upon local statutes, is contained in Brooks *v.* Paine's Ex'rs, 90 S. W. Rep. 600. Ky. St. 1903, §4849, gives the county court of the county of decedent's residence original jurisdiction to probate his will: section 4852 declares the probate of a will before the county court conclusive, except as to the jurisdiction of the court, until superseded, reversed, or annulled; section 4857 authorizes the court to permit a document to be proven *ex parte*, or to cause all parties in interest to be before the court, while section 4859 authorizes any person interested in the probate of a will to prosecute an appeal to the circuit court. Under this statutory system for the probating of wills, it is held that general creditors of an insolvent heir of a decedent, who claim that a purported will disheriting their debtor is fraudulent as to them, may appeal from an order probating the will where their debtor himself fails to prosecute such an appeal.

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THE LIGHTER SIDE

With Apologies. — In our April number we published in this department a story which had previously appeared in the *Boston Herald* of events purporting to have occurred in a suburb of Boston called Brookline. We were later called up by the clerk of the Brookline Police Court and asked to insert in this issue the following correction. For the benefit of any others who may have heretofore taken this department seriously we are glad to publish it. Hereafter the scenes of all comedies will be laid in Chelsea.

"CORRECTION

IN the last issue of the GREEN BAG, under department "Lighter Side," on page 258, there appeared a story referring to the Brookline Court. This story was copied from the *Boston Herald* of February 11, 1906. The editor has since learned that this story is without foundation and that the *Herald* has recently published the following:

The story referring to the Brookline Court sent by me to *The Boston Herald* and published among the prize stories in the magazine section of its issue of February 11, 1906, and since that time copied in other papers, I have since learned has no foundation. The story was told of another court or justice and occurred many years ago, and I misunderstood it as applying to the Brookline Court. I desire to acknowledge the mistake innocently made and to correct the error.

(Signed) HELEN M. CANNING."

Select Objections. — We have from an anonymous source a pamphlet which is too good to keep. After trying in vain to find the author and get permission to share it with our readers we will take a chance without authority.

"Select Objections as Applied to the Trial of Civil Causes in Courts of Record," by Ben. Johnson, L.L. D., of the Tennessee Bar Notes by Chancellor O'Toole:

Preface. — The author of this little pamphlet has for several years devoted a great deal of time and study to the principles involved in the subject of Objections, and realizing that no treatise has been prepared for the legal fraternity upon that subject, it has given him much pleasure to be able at this time to present to his brother attorneys at the bar for their consideration this little treatise on objections with notes.

While it will be seen at a glance that within the few pages contained in this little pamphlet a great many of the minor objections have been omitted, the object of the author being to bring out the principal ones which are ordinarily applied to the rules and practice of pleading and the conduct of trials in courts of record, we hope that it will be especially helpful to the younger members of the bar.

The interposition of an objection for the purpose of raising a proposition before the court and the strict observance of the rule, can no more be dispensed with than any other important rule of law or practice; whatever may be imagined to the contrary, it will be generally conceded that a disregard of the objection ordinarily will bring disaster to the one that fails to observe this important matter. — *O'Toole.*

The following are a few of the more important objections and the manner of interposing the same which the author desires to place before the legal fraternity of the State of New York:

First. — An objection should always be interposed whether the party desires to raise any question or not, the object being to convey to the client the idea that something is being done in the cause.

[Note.]— This is universally true unless the contrary appears. — *O'Toole.*

Second. — Never state the grounds of the objection unless you are compelled to do so, for the reason that it may be of advantage to the other side in disclosing your position.

[Note.] — Obscurity is a trait which should be closely adhered to. — *O'Toole.*

Third. — If the court should be unkind enough to compel you to state the grounds of your objection, do so with the greatest care and in language that is so meaningless that no one will be able to ascertain what you are trying to get at.

[Note.] — To be able to do this scientifically you should use terms and expressions that

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have no application to the question under consideration. — *O'Toole.*

Fourth. — If there is no merit in your case, object to everything at all times and whenever an opportunity is given. This is done that the minds of the court and jury will be drawn from the main issue.

[Note.] — It requires some skill, however, to do this without detection. — *O'Toole.*

Fifth. — If the court discovers the real issue in the cause and is inclined to be against your version of the matter, then by all means interpose objections to everything whether you have grounds for it or not and whether there is any reason for it or not. Make as many as you possibly can, even if you have to repeat the same objection over and over, the idea being to over-awe the court, oftimes causing the judge to change his mind in your favor.

[Note.] — This cannot be worked on all judges. — *O'Toole.*

Sixth. — In making objections always stand before the court, and never give way or sit down, because it will give the other side an opportunity to say something if you do, and standing a long time before the court, whether you say anything or not, sometimes causes the judge to rule in your favor through sheer exhaustion.

[Note.] — This is sometimes tiresome, but must be closely followed. — *O'Toole.*

Seventh. — When you rise before the Judge to interpose an objection, commence in a solemn and low tone of voice. If you discover, however, from the countenance of the judge holding the court that he does not agree with all your views, assume a swelling attitude, leaning backwards, throw your hands in the air and if necessary take a swimming position; look serious, the idea being to infuse the mind of the court with your earnestness. In raising an objection of this particular kind, it isn't what you say so much as how you look that carries conviction to the mind of the court.

[Note.] — In order to successfully work this swelling attitude, a large amount of practice is necessary, and before you try to work this on all judges, it will be well for you to practice on those of a quiet disposition and who boast of their honesty in purpose. It will not do to work the swimming attitude on a nervous judge at first. — *O'Toole.*

Eighth. — If you have made numerous objections to a proposition and repeated them as many times as you possibly can, and after you have argued the questions over and over again, you still discover that the court is inclined to be against you, either from the way he looks or what he says, you should then try and make further objections, stuttering if necessary, changing your phraseology, jumping up and down, take the position that you haven't stated all the grounds of your objection. Then if this proves of no avail, ask to withdraw a juror on the ground that you are surprised in the court's attitude. This usually causes the court to rule in your favor.

[Note.] — This style of objection is to some extent tiresome, but usually brings victory. — *O'Toole.*

Ninth. — If in making your objections you discover that you have taken up a great deal of the time of the court, whether unnecessarily or not, to the detriment of other litigants who may be waiting to have their causes heard, still you must not pay any attention to them, for it is the persistent practitioner that succeeds and always insists on being heard and seen, no matter how much time it requires.

[Note.] — If the court permits you to make long arguments and interpose numerous objections and repeat them and change the phraseology of the grounds of the objection, it indicates to the ordinary client that you are a learned practitioner, otherwise the court would not give you such attention. — *O'Toole.*

Too Much. — Counsel for the defense in a murder trial in Chicago recently had been trying to bring out testimony along a certain line to which the assistant state's attorney, who was conducting the prosecution, had in each instance objected and been supported by the ruling of the court. Finally after an unusually spirited tilt between the opposing lawyers, which had been terminated by the court's ruling in favor of the position taken by the prosecution, the attorney for the defense addressed the presiding judge with some heat, intimating that sufficient leeway in the introduction of evidence had not been given him.

"I think you have had a proper degree of freedom with regard to the introduction of evidence, Mr. Attorney," remarked the court mildly.

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"I have not had too much, certainly," replied the lawyer warmly.

For a moment the affair appeared serious and the court room was silent. Then the judge said quietly, "Do you want too much?"

The attorney saw the point and proceeded with his case without remark.

THE LITTLE LAWYER MAN.

It was a little lawyer man
Who softly blushed as he began
Her poor, dead husband's will to scan.

He smiled while thinking of his fee,
Then said to her, so tenderly,
"You have a nice, fat legacy."

And when, next day, he lay in bed
With bandages upon his head,
He wondered what on earth he said.

A Letter of Attorney. — This was actually received from a "judge" of whom a leading law publisher inquired as to an attorney's standing.

Dear, sir, You Riten me in Regard to, an atorney, That is in our town, I will say that i, Am well Aquanted, with him, and will say that he is not verey well heald finanshieley, heald but has A, farm, and is A, srude, Young man, and I beleave he is honest, and as square in all, his delings, as enneywone, I hav perfck confidence, in him, in evry, Respect, he is well likeby all in this place, Yours Truley,

Judge, ———

Continued in Both Cases. — Many years ago there lived in Camden, Me., two neighbors, Dr. Huse and Judge Thayer. The doctor had occasion to sue a man, and of course employed his neighbor, the judge, as his counsel. After a session of court he met the judge and asked about his case. The judge said it was continued. Meeting him again, after another session, and asking again about his case, the same answer was given.

As it cost $2 or $3 each time it was continued, the doctor thought by the time it was settled, after paying the judge, he would get nothing.

Some time afterward the judge was afflicted with a felon, and of course employed his neighbor, the doctor. After suffering a while, he met the doctor and said: "Doctor, this thing is getting along very slowly. I have walked the floor nights for a week. What are you doing to it?"

The doctor, who stammered badly, replied: "Co-co-continuing it, by George." — *Boston Herald.*

Law Versus Common Sense. — Tillman's phrase of "cornfield law" is likely to go far, as the French say; and it reminds me of what two or three chief justices said of the New Hampshire courts, when the judges were farmers and parsons, or country justices of the peace, endowed with what it has been the fashion to call "horse sense." John Dudley, of Raymond, was one of these, and of him Chief Justice Parsons said: "You may laugh at his law and ridicule his language, but Dudley is, after all, the best judge I ever knew in New Hampshire." Arthur Livermore, another chief justice, said, with Dudley in his mind: "Never was justice better administered in New Hampshire than when the judges knew very little of what we lawyers call law." Here is one of Dudley's charges to the traverse jury:

You've heered what has been said by the lawyers, the rascals! but no, I won't abuse 'em. 'Tis their business to make out a good case — they're paid for it, and they've done well enough in this case. But you and I, gentlemen, have sunthin else to think of. They talk about law — why, gentlemen, it's not law we want, but justice. They want to govern us by the common law of England; trust me for it, common sense is a much safer guide for us — the common sense of Raymond, Exeter, Ipin (Epping), and the other towns that sent us here to try this case between two of our neighbors. A clear head and an honest heart are wuth more than all the law of all the lawyers. There was one good thing said by 'em though; 'twas from one Shakspeare, an English stage-player, I believe. No matter for that; 'twas e'enamost good enough to be in the Bible — "Be just and fear not." That's the law in this case, gentlemen, and law enough in any case in this court. It's our business to do justice between the parties; not by any quirks o' the law out of Coke or Blackstone — books that I never read and

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never will — but by common sense and common honesty between man and man. That's our business; and the curse of God is upon us if we neglect or turn aside from that. And now, Mr. Sheriff, take out the jury; and you, Mr. Foreman, don't keep us waiting with idle talk — too much o' that a'ready! about matters that have nothin' to do with the merits of this 'ere case. Give us an honest verdict that common sense men needn't be ashamed on. — *Springfield Republican.*

Both Bankrupt. — My client Beebe, after a series of misfortunes, trying to work a copper mine, without money, sickness in his family, etc., was involved deeply, but hesitated long about filing a petition in bankruptcy on account of the marked kindness of one creditor, John James, and his consequent fear of James's reproaches. He braced himself to it, however, on my assurance that he could afterwards pay James without reviving any other debt. As the day of his creditors' meeting grew near, his fear of meeting James worked on him. I assured him that as he had no property the chances of meeting James there were very remote, but when we arrived at the referee's office, there sat a man whom from the expression of Beebe I knew to be James. Each avoided speaking. Beebe was whispering to me that he was going; he would abandon the whole matter, when the referee announced: "We have two matters for this afternoon, creditors' meeting of Beebe, a bankrupt, creditors' meeting of James, a bankrupt; which shall we hear first?" Both faces relaxed. Each gave a cordial nod.

Source of Sherman Hoar's Law. — When the late Sherman Hoar, a lawyer of recognized ability, left the law school and opened an office in Boston, his father, Judge Hoar, was at the height of his legal reputation.

The young man's first client was an Irishman, and the case, though only some small matter of a boundary line, was one that required the examination of a number of deeds and records. Mr. Hoar accordingly told his client to come back in two days for his opinion.

The Irishman left the office, evidently very reluctant at the delay. Turning at the door, he asked: "Couldn't ye give me the answer to-morrow, Misther Hoar?"

"No, no," was the reply; "come on Thursday."

The client went as far as the stairs. Then he turned and tiptoed back to the door and put his head inside, with a finger at his lips.

"Whist!" he whispered. "Couldn't ye get to see your father to-night, Misther Hoar?" — *Boston Herald.*

Got There First. — *The Judge.* — "But if you tooted your horn, how is it that the plaintiff did not hear you in time to get out of the way?"

"*The Defendant* — "I am convinced, your Honor, that the accident was due entirely to the inferior velocity of sound." — *Pick-Me-Up.*

Not There. — "Judge," said Mrs. Starvem to the magistrate who had recently come to board with her, "I'm particularly anxious to have you try this chicken soup."

"I have tried it," replied the magistrate, "and my decision is that the chicken has proved an alibi." — *Philadelphia Press.*

Byles on Bills. — Among the humorous memories connected with English judges is one of Justice Byles and his horse. This eminent jurist was well known in his profession for his work on "Bills," and as this gave a fine opportunity for alliteration his associates were accustomed to bestow the name on the horse, which was but a sorry steed. "There goes Byles on Bills," they took pleasure in saying, and as the judge rode out every afternoon they indulged daily in their little joke. But the truth was that the horse had another name, known only to the master and his man, and when a too curious client inquired as to the judge's whereabouts he was told by the servant, with a clear conscience, that "master was out on Business."

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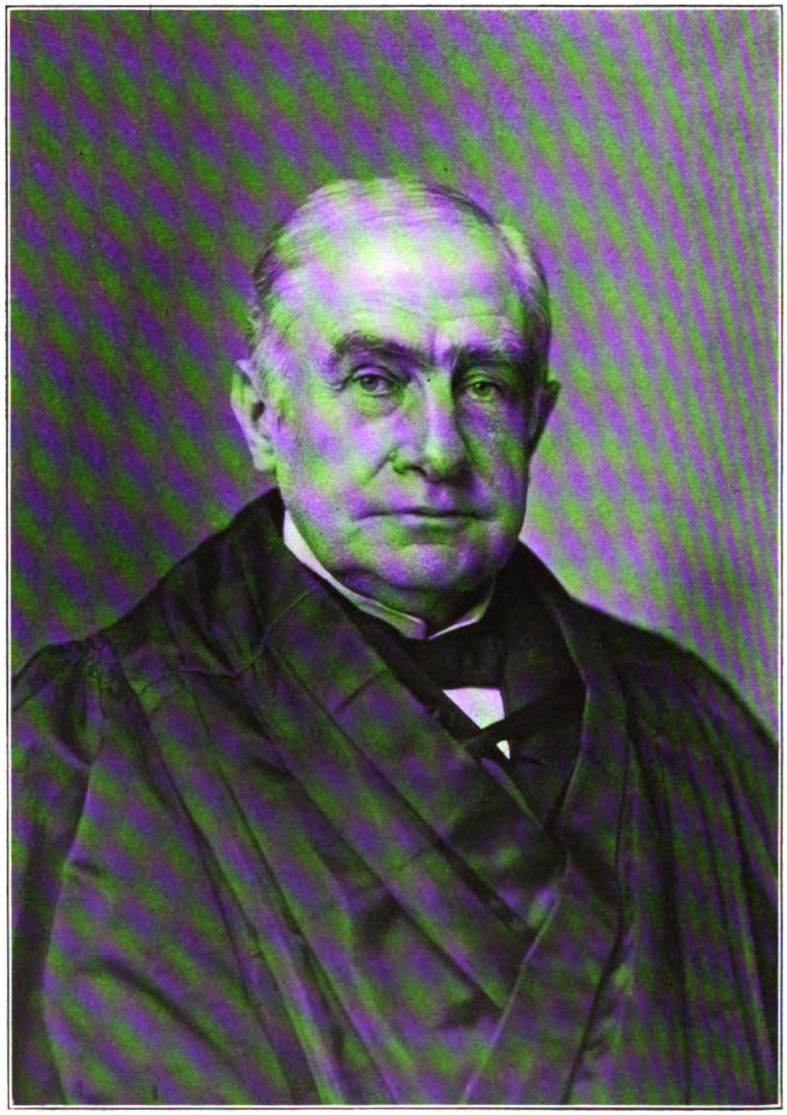

Henry B. Brown.
Associate Justice Sup. Ct. U. S.

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The Green Bag

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MR. JUSTICE BROWN

By Charles H. Butler

IN October 13, 1890, the Supreme Court of the United States met after the summer vacation. It reassembled, as the chief justice announced, in immediately adjourning the court and postponing the visit customarily paid on the opening day of the term to the President of the United States, under the shadow of a great affliction. Samuel Freeman Miller, then the senior justice of the court and one of its most distinguished members, lay dangerously ill in his Washington home. That afternoon he died and the court entered upon the term with a vacancy.[1] He had been appointed twenty-eight years before by President Lincoln, and, as Attorney-General Miller said a few days later, in presenting to the court the resolutions of respect and sympathy by the Bar, "the finding of such a judge by the President was only less fortunate than the finding of such a President by the country."

Congress did not meet until December and on the twenty-third of that month President Harrison sent to the Senate, as Justice Miller's successor, the name of Henry Billings Brown, then judge of the United States District Court for the Eastern District of Michigan, in the Sixth Circuit. The nomination was confirmed unanimously forthwith and the commission dated the twenty-ninth, but the court had adjourned for the Christmas holidays and so it was not until the opening of the court, on January 5, 1891, after the recess, that he formally took the oath prescribed by law, and, as Mr. Justice Brown, took the seat on the extreme left of the Bench which is always left vacant for the justice last sworn in, and which had been last occupied by Justice Brewer, Justice Brown's immediate senior who thirty-four years before had graduated with him in the same class at Yale College.

The rule of seating the associate justices by order of seniority — the oldest sitting on the right of the chief justice, the next in order on his left, the next on the right of the senior associate, and so on, has prevailed in the court since its organization, and whenever a justice retires his seat is occupied by his immediate junior, the seat so vacated being taken by the one next in seniority, and so on, thus always leaving vacant for the last appointee the chair on the extreme left. It is only those justices who survive all of their seniors who finally reach the chair on the right hand of the chief justice. Since the formation of the court this has happened in fifteen cases. Of the fifty-four associate justices who have sat upon the Bench since its organization, only Justices Rutledge, Paterson, Cushing, Chase, Washington, Miller, Johnson, Duval, Story, McLean, Wayne, Nelson, Miller, Field, and Harlan, have occupied the chair assigned to the senior justice.

At the time of his appointment Justice Brown was somewhat over fifty-four years of age, having been born in South Lee,

[1] The court at that time consisted of the present chief justice, from Illinois, and, in the order of their seniority, Justice Field from California, Justice Bradley from New Jersey, Justice Harlan from Kentucky, Justice Gray from Massachusetts, Justice Blatchford from New York, Justice Lamar om Mississippi, and Justice Brewer from Kansas.

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Massachusetts, March 2, 1836, where his father, Billings Brown, carried on a manufacturing business. He graduated from Yale College in 1856, and after attending the law school at both Yale and Harvard and studying in the offices of John H. Brockway of Ellington, Connecticut, and of Walker & Russell of Detroit, he was admitted in July, 1860, to the Bar of Wayne County, Michigan, where he had gone in 1859, regarding it as a good place for starting in business.

In the spring of 1861 he was appointed by President Lincoln Deputy United States Marshal and subsequently, Assistant United States Attorney for the Eastern District of Michigan, which position he held until 1868 when he was appointed judge of a state court to fill a vacancy. He held this office but a few months and then returned to the active practice of the law. With John S. Newberry and Ashley Pond, both of whom became prominent members of the Bar of their state, the latter still living and one of its honored members, he formed the firm of Newberry, Pond & Brown. This relation continued until 1875, when President Grant appointed him district judge for the Eastern District of Michigan, to succeed Hon. John W. Longyear, which office he held until his promotion to the Supreme Bench of the nation.

The Eastern District of Michigan includes the city and port of Detroit and as one of the great mercantile centers in the Great Lakes region of this country there was a large amount of admiralty business connected with the shipping on the Lakes. Until the passage of the Act of 1845 extending the admiralty and maritime jurisdiction of the United States courts to the Great Lakes the Federal courts, under the authority of the *Thomas Jefferson*, 10 Wheat. 428, the opinion in which was written by Justice Story, had confined their admiralty jurisdiction under the old English rule to the ebb and flow of the tides. The constitutionality of this act was sustained in the case of the *Genessee Chief* (12 How. 443), the opinion being written by Chief Justice Taney. Justice Daniel alone adhered to the old rule and in his dissenting opinion consoled himself in his loneliness by the fact that he at least had the support of Marshall, Kent, and Story if he had committed any error. It must be noted that this apparent extension of admiralty jurisdiction was not based exclusively on the act of Congress but on the ground that the Lakes and navigable waters connecting them were within the scope of the maritime and admiralty jurisdiction of the courts of the United States when the Constitution was adopted; in fact in the *Genessee Chief* the court practically overruled its earlier decision in the *Thomas Jefferson*.

Judge Brown had not long occupied his position in the District Court before he established for himself a reputation as an eminent authority in admiralty, and his decisions were read with interest throughout the country and were treated with universal respect. In many cases no appeal was taken from his decisions and of the forty-four appeals which were taken, in only five instances were his judgments reversed during his entire incumbency of fifteen years in that office. Amongst the opinions which he rendered as district judge were: the *Manitoba*, reported in 2 Flippen, 241, involving liability for a collision on the Lakes and what constituted due diligence after the collision became imminent and in this, as in all his cases, both in the District and the Supreme Court, Judge Brown laid great stress on the necessity for prompt action, and especially in the case of a steamer, of stopping and reversing as soon as the danger was discovered. In fact, he said, that "if a collision has become imminent almost any error will be pardonable except that of not stopping and reversing." The *Alberta*, 23 Fed. Rep. 807, was another case of collision in which both steamers were held in fault because of similar negligence.

In the *Trenton*, 4 Fed. Rep. 657, an Amer-

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ican vessel while in a port of Ontario had been libeled by material men who had furnished supplies to her at her home port in Ohio and for which they claimed a lien under the law of that state. The Ontario court declined to enforce the lien for want of jurisdiction, but in the meanwhile seamen filed libels for wages and in their actions the vessel was condemned and sold, after which she was registered in the custom house in Toronto. Subsequently the vessel was seized in the Eastern District of Michigan by the material men and the owner under the judicial sale in Ontario set up his claim. Judge Brown held that the judicial sale of the vessel under the claims of the seamen of which the court had jurisdiction extinguished all the liens upon her and vested an indefeasible title, clear of liens, in the hands of the purchaser. He based his decision on the fact that this was the law in all or in almost all, of the civilized nations of the world, and that to permit the prior lien holders to enforce their liens after such a sale would result in rendering it impossible for judicial sales *in rem* to be conducted as no one could purchase at such a sale unless perfect title, good the world over, could be obtained. The material men were relegated to whatever remedies they might have as against the surplus money at the place of sale.

Judge Brown's judicial duties were by no means confined to the decision of admiralty cases but extended over the whole range of Federal jurisdiction. In United States *v.* Clark, 31 Fed. Rep. 710, he delivered an opinion which was commented on in the press, reviewed in several of the law journals, and incorporated into one of the Harvard law text-books, and also made the basis of a military order. Clark, a sergeant in a United States regiment, had shot a private who while confined under a conviction for some offense by a court-martial had attempted to escape. A court of inquiry acquitted him of all blame but he was taken before Judge Brown as a committing magistrate, charged with murder by the district attorney and there pleaded the finding of the Court of Inquiry and also that he was acting in the discharge of his duty.

Judge Brown took jurisdiction holding that the finding of the Court of Inquiry, while entitled to weight as an expression of the views of the military court as to the necessity of using the musket to prevent the escape, was not a bar to a legal prosecution. He held that a homicide committed by a military guard without malice and in the performance of his military duties is excusable unless the act is so far beyond the scope of his authority or is such that a man of ordinary sense and understanding would know that it was illegal; that the sergeant had the right to shoot a military convict attempting to escape, if there was no other possible means of preventing his escape, and that the common law distinction between felonies and misdemeanors has no application to military offenses. In conclusion he found that as Clark only did what he conceived to be his duty, and there was an entire absence of malice, he should be discharged.

When Justice Brown took his seat on the Supreme Court Bench, the Second Circuit was represented by Justice Blatchford, who, in his previous capacities of district judge of the Southern District of New York and circuit judge of the Second Circuit, had had a large experience as an admiralty judge. Justice Blatchford died in 1893, and while other members of the court also wrote opinions in those cases after that event most of the opinions in admiralty were delivered by Justice Brown.

Prior to the passage of the Judiciary Act of 1891, making the judgments of the Circuit Courts of Appeals final in admiralty cases, there was an appeal as a matter of right in these cases, but since the passage of that act these cases are only reviewed in the Supreme Court when petitions for writ of *certiorari*, provided for in the act, are

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granted; hence cases of that description are far less numerous now than they were prior to 1891.

Justice Brown, however, has had frequent opportunities to write opinions on what is undoubtedly his favorite subject. Many of them are of great interest involving the extent of the jurisdiction of the Federal courts under the clause of the Constitution giving them jurisdiction in cases of admiralty and maritime law. He has always been in favor of a wide construction of the jurisdiction of the court, and in one of his recent opinions, the *Robert W. Parsons*, 191 U. S. 17, he expressed for the court the rule that admiralty has exclusive jurisdiction of the enforcement of a statutory lien *in rem* for repairs made in the home port of a canal boat, engaged wholly in traffic on the Erie Canal and the Hudson River; and that although that canal is wholly within the state of New York, as it affects navigable waters and is a great highway of commerce between ports in different states and foreign countries, it is a navigable water of the United States within the legitimate scope of the admiralty jurisdiction of the courts of the United States. This decision of the court was not reached unanimously, and, as it has been expressed, "the admiral's flag was hoisted on the Erie Canal" only in the face of a vigorous dissent from Mr. Justice Brewer in which the chief justice and Justice Peckham concurred, Mr. Justice Harlan also separately dissenting.

In the *Plymouth*, 3 Wall 20, it was held that where damage was done wholly upon land, the fact that the damage originated on water subject to the admiralty jurisdiction did not make the case one for the admiralty, and the court declined to take jurisdiction of a cause in which it appeared that a vessel lying at a wharf took fire, and the fire spreading to certain warehouses on the wharf, consumed them and their contents.

Relying on that opinion, delivered in 1865 by Justice Nelson, the District Court in Alabama dismissed a libel *in rem* against a vessel for damages caused by negligently running into a channel beacon attached to the bottom of a river within the admiralty jurisdiction. The case came to the Supreme Court — the *Blackheath*, 195 U. S. 361 — and the decision was reversed, Justice Holmes writing the opinion, to the effect that the rule announced in the *Plymouth* did not apply, as in that case there was nothing maritime in the nature of the tort for which the vessel was attached, but that in this case admiralty could under the circumstances take jurisdiction without transcending the limitations of the Constitution or encountering the *Plymouth* or any other authority binding on the court.

Mr. Justice Brown did not actually dissent, but separately concurred in what amounted to a dissenting opinion, and expressed as his view that the conclusion of the court was only reached by practically overruling the case of the *Plymouth*. He, however, believed that admiralty should have jurisdiction and accepted the *Blackheath* not only as overruling the *Plymouth* but the cases of the Phœnix Insurance Company, 118 U. S. 610 and the Chicago & Pacific Elevator Company, 119 U. S. 388, and also as recognizing the principle adopted by the English Admiralty Court Jurisdiction Act of 1861 extending the admiralty jurisdiction to any claim for damages by any ship.

It will be impossible in the brief space allotted for this review of Justice Brown's work in the Supreme Court of the United States, to refer to more than a few of the several hundred opinions which he has delivered during the sixteen years that he has sat upon that Bench and gradually progressed from the extreme left of the Bench to the seat next but one on the right of the chief justice. Of his opinions, some of which will be found in every volume of the reports from No. 137 to No. 202 the last volume of the current term, only a few can be selected.

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His first opinion was in Cope *v.* Cope, 137 U. S. 682, which had been submitted prior to his appointment, and involved the validity of a statute of Utah, passed in 1852, providing that illegitimate children and their mothers inherit in like manner from their father provided the paternity was proved to the satisfaction of the court. He showed that the statute was within the powers conferred upon the territorial legislature by the act establishing the territory and that it had not been abrogated, annulled, or repealed by the subsequent act of 1862 for the prevention of polygamy, and he declared that the annulment of the statute by implication would not be favored any more than a repeal would be favored by the same method. "Legislation," he said, "for the protection of children born in polygamy is not necessarily legislation favorable to polygamy. There is no inconsistency in shielding the one and denouncing the other as a crime."

One of his earliest patent cases involved the validity of the Glidden barbed wire patent which the Circuit Court had held was void for want of novelty. Mr. John R. Bennett, who so recently met an untimely death in a railroad accident, was for the appellants, and Mr. A. H. Blair and Mr. W. H. Singleton for the appellees, with whom Mr. David B. Henderson, afterwards Speaker of the House of Representatives, as counsel on the brief. Barbed Wire Patent case, 1891, 143 U. S. 275.

The crucial point was whether Glidden could broadly claim the use of the plain or twisted wire, the sharp thorns or barbs or indeed the combination of the two as they appeared in previous patents; Justice Brown in his opinion showed that while affixing the barbs to the fence wire did not apparently give a wide scope to the ingenuity of the inventor, a step had been marked in the progress of the art and though the difference between Glidden's wire and the one last patented was not radical but slight, still it was apparently that slight difference that had made the barbed wire fence a practical and commercial success, so that the sales, which under the previous patents had never exceeded 3,000 tons per annum, under the Glidden device had reached the enormous amount of 173,000 tons. "Courts have not been reluctant," he said, "to sustain a patent to the man who has taken the final step which has turned a failure into a success. In the law of patents it is the last step that wins. . . . Some one of the experimenters may have, in a crude way, hit upon the exact device patented by Glidden. . . . But it was Glidden, beyond question, who first published this device; put it upon record; made use of it for a practical purpose; and gave it to the public, by which it was eagerly seized upon and spread until there is scarcely a cattle raising district in the world in which it is not extensively employed. Under these circumstances we think the doubts should be resolved in favor of the patentee." Justice Field dissented on the ground that there was no novelty in the invention.

In Westinghouse *v.* Boyden Power Brake Co., 170 U. S. 537, involving the breadth and scope of the Westinghouse brakes, he held that the Boyden device for a fluid pressure brake was not an infringement of the Westinghouse patent of 1887 for fluid pressure automatic brake mechanism. Westinghouse claimed that his patent was a pioneer invention and that he for the first time had brought to light a method or process "which," as Justice Shiras said in his dissenting opinion in which Justice Brewer concurred, "by the operation of the air from the train pipe with that from the car reservoir, created the 'quick action' brake." But the majority of the court did not so regard it and, in the opinion delivered by Justice Brown, held that although credit might be due to Mr. Westinghouse for having invented the function, Mr. Boyden had exhibited sufficient ingenuity in the discovery of a new and more perfect method of performing that function; and while he

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might have intended to accomplish the same results accomplished by the Westinghouse patent, yet under the circumstances he would be entitled to be regarded as an independent inventor.

The embodiment in the interstate commerce and anti-trust laws of provisions requiring officers of corporations to answer questions notwithstanding they may incriminate themselves, and granting them immunity from prosecution in regard to the matters testified to, has been the basis of a number of proceedings which have found their way to the Supreme Court, and to Justice Brown has been assigned the task, on more than one occasion, of writing the opinions. One of the earlier cases was Counselman *v.* Hitchcock, 142 U. S. 547, in which Justice Blatchford wrote the opinion, and in which a witness was relieved from answering questions before a grand jury investigating violations of the interstate commerce act because § 860 Revised Statutes, under which immunity was promised, was not sufficiently broad. After Congress had met the situation by the passage of the act of February 11, 1893, a similar case came before the Supreme Court and the immunity was held sufficient — Brown *v.* Walker, 161 U. S. 591, which was argued by Mr. James C. Carter for a witness who, after having declined to answer and been committed for contempt, had sued out a writ of *habeas corpus*. The court below dismissed the petition; Senator Edmunds represented the Interstate Commerce Commission. The case was argued January 23, 1896, and was decided March 23, 1896. Mr. Justice Brown delivered the opinion of the court, the chief justice and Justices Field, Harlan, Brewer, and Peckham forming the majority while Justices Shiras, Gray, and White dissented. The opinion analyses the Fifth Amendment saying that,

"if it be construed literally, as authorizing the witness to refuse to disclose any fact which might tend to incriminate, disgrace, or expose him to unfavorable comments, then he must necessarily to a large extent determine upon his own conscience and responsibility whether his answer to the proposed question will have that tendency, . . . and the practical result would be that no one could be compelled to testify to a material fact in a criminal case, unless he chose to do so, or unless it was entirely clear that the privilege was not set up in good faith. If, on the other hand, the object of the provision be to secure the witness against a criminal prosecution, which might be aided directly or indirectly by his disclosures, then, if no such prosecution be possible — in other words, if his testimony operate as a complete pardon for the offense to which it relates — a statute absolutely securing to him such immunity from prosecution would satisfy the demands of the clause in question."

The latter construction was the one adopted by the court and the statute was held sufficient. In commenting on Counselman *v.* Hitchcock, Justice Brown said:

"The danger of extending the principle announced in that case is that the privilege may be put forward for a sentimental reason, or for a purely fanciful protection of the witness against an imaginary danger, and for the real purpose of securing immunity to some third person who is interested in concealing the facts to which he would testify. Every good citizen is bound to aid in the enforcement of the law, and has no right to permit himself under the pretext of shielding his own good name to be made the tool of others who are desirous of seeking shelter behind his privilege."

These very conditions recently arose in the prosecutions by the Government of suits against the tobacco and paper trusts, and a few weeks ago, just ten years after delivering that opinion, he delivered the opinion in Hale *v.* Henkel, 201 U. S. 43, holding that the officers of corporations whose actions were under investigation by the Federal grand jury or which were sued by the United States could not, in view of the various immunity statutes which have been passed in connection with the interstate and trust legislation, assert their privileges under the Fifth Amendment for the purpose of shield-

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ing those corporations against the arm of the law and the process of the court. The result of the decision was seen a few days ago when the counsel for various paper companies appeared in court, withdrew the answers, and permitted a decree of dissolution to be entered against the central company.

The first Income Tax Case was decided in April 2, 1895, 157 U. S. 429, the chief justice writing the opinion. It held the tax on lands or income from real estate to be a direct tax, and the tax on income derived from interest on municipal bonds to be a tax upon the power of the state and its instrumentalities to borrow money and consequently repugnant to the Constitution of the United States, and that in these respects the provisions of the act of 1894 were unconstitutional. As to the other questions the court was equally divided, Justice Jackson, by reason of illness not having been able to hear argument in any case after October 23, 1894. Justice Field wrote a concurring opinion; Justices White and Harlan dissented; Justice Brown at that time concurred with the chief justice and the majority of the court, but wrote no opinion. On reargument the court held, 158 U. S. 601, that the tax on personal property and the income of personal property were likewise direct taxes and that the entire scheme of the income tax provisions of the act was void because not apportioned according to representation. The chief justice again delivered the opinion of the court; Justice Harlan delivered a dissenting opinion and Justice Brown also dissented and his view in this regard was as follows:

"I regard it as very clear that the clause requiring direct taxes to be apportioned to the population has no application to taxes which are not capable of apportionment according to population. It cannot be supposed that the convention could have contemplated a practical inhibition upon the power of Congress to tax in some way all taxable property within the jurisdiction of the Federal Goverment, for the purposes of a national revenue. And if the proposed tax were such that in its nature it could not be apportioned according to population, it naturally follows that it could not have been considered a direct tax within the meaning of the clause in question."

One of Justice Brown's leading opinions was delivered in Holden *v.* Hardy, 169 U. S. 366, involving the constitutionality of the Utah statute limiting the period of employment of working men in underground mines to eight hours per day, except in cases of emergency where life or property were in imminent danger. The statute was sustained as a valid police regulation on the ground that work in underground mines involved greater risk to health and life of the community than the ordinary classes of employment. In the recent case of Lochner *v.* New York, 198 U. S. 45, in which the New York statute limiting the hours of a baker to ten declared unconstitutional as an interference with liberty of contract, Holden *v.* Hardy was not overruled but distinguished on the ground that a baker's employment did not involve those special risks to the general health of the persons employed as existed in the case of underground mining. Justice Brown united in the majority opinion which was written by Justice Peckham, who with Justice Brewer had dissented in Holden *v.* Hardy.

In the Insular Cases there were several opinions delivered. In the first — De Lima *v.* Bidwell, 182 U. S. 1, Justice Brown delivered the *opinion* of the court. The case involved the constitutional right of the United States to collect tariff duties under the Dingley Act on goods brought from Porto Rico *after* the ratification of the treaty of peace with Spain. The majority of the court concurred in the opinion, which was to the effect that after the ratification of the treaty, Porto Rico was not a foreign country within the meaning of the tariff laws, and that the duties were illegally exacted.

In the first Dooley Case, 182 U. S. 222,

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Justice Brown also wrote the opinion of the court, in which the majority concurred holding that duties paid in Porto Rico on goods brought from New York after the ratification of the treaty and prior to the Foraker Act were illegally exacted.

In Downes *v.* Bidwell, 182 U. S. 244, which involved the right to recover for duties paid on goods brought from Porto Rico to New York after the passage of the Foraker Act, which imposed a duty equal to 5 per cent of the Dingley tariff, Justice Brown announced the *judgment* and *conclusion* of the court to the effect that Congress has the power to levy these duties. There was no *opinion* of the court. It was in this case that "Mr. Dooley" made his famous remark that "Mr. Justice Brown delivered the opinion of the court from which only eight of the justices dissented." The case having been assigned to Justice Brown he announced the conclusion, basing his own opinion on the right of Congress to impose a tariff as Porto Rico "is not a part of the United States within that provision of the Constitution which declares that all duties, imposts, and excises shall be uniform throughout the United States." Mr. Justice White delivered a concurring opinion in that case in which Justice Shiras and McKenna concurred in which he advanced the theory of "incorporation" of territory and that until territory acquired by the treaty making power had actually, by some action of Congress, become incorporated as a part of the United States it remained under the control of Congress. Justice Gray concurred in a separate opinion, though he stated that in substance he agreed with Justice White, while the chief justice dissented from the conclusion of the court in a separate opinion in which Justices Harlan, Brewer, and Peckham concurred.

Justice White's theory which at that time was only supported by three members of the court, as now constituted, including himself, was subsequently practically adopted by a large majority of the court in Rasmussen *v.* United States, 197 U. S. 516. In this case a man indicted for keeping a disreputable house in violation of the Alaska Code was tried by a jury of six men and convicted. He came by writ of error to the Supreme Court of the United States on the ground that as Alaska was a part of the United States he was entitled to a jury trial as understood by the common law requiring the unanimous verdict of twelve jurors. The Government contended that Alaska was territory under Congressional control and Congress could provide for a jury irrespective of common law rules applicable to those territories over which the Constitution of the United States had been extended. The judgment was reversed; Justice White delivered the opinion, basing it upon the theory demonstrated by him in Downes *v.* Bidwell, and which, he maintained, had been adopted in Dorr *v.* United States, 195 U. S. 138. None of the justices dissented from the judgment, but Justice Harlan concurred in a separate opinion in which he disclaimed the "incorporation" theory, and Justice Brown also separately concurred in an opinion in which he regretted that the disputed doctrine of "incorporation" should have been made the mainstay of the opinion of the court when it might have been so easily disposed of on grounds which would have prevented any utterances of disapproval.

One of the last opinions written by Mr. Justice Brown, and within a few weeks of his retirement was in the only case in which the Supreme Court of the United States has had occasion to decide a divorce case upon the merits, De La Rama *v.* De La Rama, 201 U. S. 303. Under the act creating the courts of the Philippine Islands an appeal lies from the Supreme Court of those Islands to the Supreme Court of the United States from final judgments where the amount involved is over $25,000. Those divorce cases which have come from the state courts have involved questions of law only as in those cases the Supreme Court is bound by

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the facts found by the state court. Under the Territorial Practice Act of 1874, the court considers questions of law and not of fact, but that law does not apply to appeals from the Supreme Court of the Philippine Islands.

Owing to the community property system in vogue in the Philippines conjugal property in case of divorce is divided, and in this case the Court of First Instance decreed the wife a divorce and awarded as her share of the conjugal property an amount exceeding $25,000. The Supreme Court of the Islands reversed the decree and she brought the case to the Supreme Court of the United States. It was impossible for that court to determine whether the judgment should be affirmed or reversed and the wife given, or deprived of, her share of the conjugal property without full consideration of all the facts, and, therefore, it was necessary for the court, for the first time in its existence, to examine the evidence in a divorce case.

It met the situation bravely and found that the wife was entitled to the decree and the award. The only question as to infidelity of the husband was whether his conduct had or had not been scandalous. In the Philippine Islands it appears, mere infidelity of the husband did not as it then existed entitle the wife to a divorce but only in case it is accompanied by public scandal. The fact that the husband had since his marriage, lived with three separate mistresses each of whom had borne him children, seemed to Justice Brown to amount to a public scandal within the meaning of the statute. A letter on which the Supreme Court of the Islands based its reversal, on the ground that it was a confession by the wife of her own guilt as charged by the husband, is included in the opinion and was held not to be susceptible of that construction. The wife was granted her divorce and the judgment giving her her share of the conjugal property was reinstated.

All of Justice Brown's opinions bear evidence of broadmindedness and a recognition of the fact that the law is a progressive science which must keep in touch with the progress of the world. In Holden *v.* Hardy (p. 385) he says:

"An examination of the cases under the Fourteenth Amendment will demonstrate that in passing upon legislation under that Amendment, this court has not failed to recognize the fact that law is, to a certain extent, a progressive science; that in some of the states, methods of procedure, which at the time the Constitution was adopted were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary; that restrictions which had formerly been laid upon the conduct of individuals, or of classes of individuals, has proved detrimental to their interests; while, upon the other hand, certain other classes of persons, particularly those engaged in dangerous or unhealthful employments, have been found to be in need of additional protection."

Nor does he believe that this progress is likely to stop, for he says (p. 387):

"Of course it is impossible to forecast the character or extent of these changes, but in view of the fact that from the day Magna Charta was signed to the present moment, amendments to the structure of the law have been made with increasing frequency, it is impossible to suppose that they will not continue, and the law be forced to adapt itself to new conditions of society, and, particularly, to the new relations between employers and employés, as they arise."

Mr. Justice Brown also delivered the opinions in a number of extradition and removal cases, notably Tucker *v.* Alexandroff, 183 U. S. 424; Benson *v.* Henkel, 198 U. S. 1, and Grin *v.* Shine, 187 U. S. 181. This very imperfect review of a few of his opinions may help to show their scope and the breadth of mind which has inspired his utterances therein. There are many other of his opinions which are worthy of special mention, but space will not permit.

In social life Justice Brown has always been a favorite both in Detroit and Wash-

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ington. He was twice married: on July 13, 1864, to Miss Caroline Pitts, who died in Europe in 1901; and on June 25, 1904, to Mrs. Josephine E. Tyler.

A few years ago he suffered severely from an attack of neuritis which so affected one of his eyes that he practically lost the use of it — and about two years ago a return of this trouble seriously affected the optic nerve of the other eye and, while the threatened loss of sight, which so alarmed his friends at that time has been averted, the delicate condition of his eyes has more or less influenced his retirement at the present time.

After an honorable service of over fifteen years on the Bench of the court having the greatest and most extensive jurisdiction in the world, during which he has won not only the respect and esteem, but also the affection of all those associated with him, he now retires full of years and dignity to that active repose which he will certainly enjoy as his mind is yet in full strength and vigor and he has a host of friends and admirers.

WASHINGTON, D. C. May, 1906.

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THE CASE OF THE BRIG GENERAL ARMSTRONG[1]

By Chas. Noble Gregory

DURING the war of 1812 the brig *General Armstrong* was commissioned as an American privateer under the command of Capt. Samuel Reid. There is some dispute as to her armament, but she seems to have had from seven to nine guns, the largest, apparently, a twenty-four pounder. Her crew is stated to have consisted of ninety men. About midday on the 26th of Sept., 1814, the *Armstrong* entered the harbor of Fayal, in the Azores, a neutral port belonging to Portugal. She entered to get fresh water and the Portuguese governor gave permission, ordering her to depart within twenty-four hours. Just as the sun sank, between seven and eight o'clock on the same day, there sailed into the port a British squadron of three ships, carrying one hundred and thirty guns, the largest ship being the *Plantagenet* with seventy-four guns, the smallest, the *Carnation*, carrying eighteen guns. The latter was the first to enter, and she anchored within a pistol shot of the American brig. Captain Reid saw that escape was impossible, but thought he might trust to the protection of the neutral port. Presently, however, he noticed an exchange of signals between the ships, and fearing an attack he cleared his ship for action and had her warped in shore close under the guns of the castle. While occupied in this he saw four boats well manned, and apparently armed, approach. He believed that they intended to board him, and hailed them, warning them to keep off. As they continued without changing their course he ordered his men to fire, and they did so with fatal effect, killing and wounding several in the boats. The Portuguese governor, Ribeiro, did not see this incident, but shortly after nine o'clock on that evening Mr. Dabney, the American consul, communicated to him that there had been an attempt to surprise the privateer by four or five armed boats, that this attack had been repulsed, but a more formidable one was feared, and that the protection of the governor was prayed. He also asked that the Americans on shore be allowed to go to the brig to aid in her defense "in a contest so unequal." The governor refused the latter request, but at once wrote the British commander asking him to abstain from hostilities, and supposed that this would terminate the difficulty. However, about eleven o'clock he saw by the light of the moon that a new attack was prepared. Shortly after midnight a large number of boats, as many as twelve or more, put off from the squadron and attacked the brig. The governor reports that the British force engaged numbered about three hundred men, and in an encounter lasting about twenty-eight minutes, that they were almost entirely destroyed. The British Consul stated that the loss in killed and wounded was one hundred and sixteen, but it was generally believed to be greater. The loss on the privateer was two killed and seven wounded. Ten minutes after, the governor received a note from the British commander saying that one of the boats of his ships had been fired on without the slightest provocation by the American schooner, *General Armstrong*, in consequence of which two men were killed and seven wounded; that he intended to respect the neutrality of the port, but that such neutrality had now been violated, and in consequence he was determined to take possession of the vessel and wished the governor to order the forts to

[1] Reference is made as to this case, to :

Moore's International Arbitrations, Vol. II, pp. 1071 to 1133.

Snow's cases on International Law, 399.

Scott's cases on International Law, 687.

Wharton's Digest on International Law (2d edition), p 604.

Calvo "Le Droit International," § 1732 and § 2662.

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protect the force employed for that purpose. At one o'clock the governor answered that, from the accounts, the British boats first attacked and urged the British commander to put an end to hostilities. No response came and an hour later the governor again wrote asking a suspension of hostilities. He got a reply, through the consulate, that the Americans having first violated the neutrality of the port, the commander of the British squadron would fire on the American schooner, and if his ship encountered any hostilities from the castle he would regard the island as an enemy and treat the town and castle accordingly. At six o'clock on the morning of Sept. 27th the attack on the privateer was begun by the *Carnation*. It was at first repulsed, but Captain Reid having learned through his own consul, of the communication of the British commander to the governor, saw that further resistance was useless, scuttled his brig, and at half-past seven went ashore with his crew, taking their baggage and part of the ship's provisions and rigging. At eight o'clock the British ship cannonaded the privateer, then fast on the rocks, for fifteen minutes, then sent boats to her, looted her, and burned her. By nine o'clock the brig was destroyed. The British fire damaged some houses on the shore and wounded three persons.

On the 28th of December the governor reported to his own government this affair, which he characterized as "a horrible and bloody combat brought about by the madness, pride, and haughtiness of the insolent British officer who would not respect the neutrality maintained by Portugal in the existing contest between his British majesty and the United States of America." The report of Mr. Dabney, the United States consul, supported that of the governor, and said that the British commander in the face of the testimony of all Fayal tried to throw the odium on the Americans, claiming to have sent boats merely to reconnoitre the brig without hostile intentions, that the British were informed of the character of the brig by the pilots the moment they entered. "To reconnoitre," he said, "an enemy's vessel in a friendly port at night with four or five boats carrying by the best accounts one hundred and twenty men, is certainly a strange proceeding." On the day the ship was destroyed, Captain Reid entered before his consul a protest, sworn to by himself, two of his lieutenants, and seven of his lesser officers, setting forth the facts as heretofore, and described the approach to his vessel of the four boats "filled with armed men." He says that he repeatedly hailed and warned them to keep off, and they disregarding this he ordered his men to fire on them, which was done; that the boats returned the fire and killed one man and wounded the first lieutenant; that they then retired; that he put the ship within one half a cable's length of the shore and one half a pistol shot of the castle; that soon after midnight over twelve or fifteen boats, believed to contain over four hundred men with small cannon, swivels, and other arms, attacked the brig; that a severe conflict ensued, lasting nearly forty minutes, ending in the total defeat of the attacking party and the destruction of their boats with great slaughter; that the loss to the Americans was one lieutenant and one seaman killed, two lieutenants and five seamen wounded. He further describes the destruction of the brig, and enters a protest against the government of Portugal for inability to protect and defend the neutrality of the port.

The British commander reported that on entering the harbor for refreshments he discovered a suspicious vessel at anchor ordered the captain of the *Carnation* to watch her movements, and sent the pinnace and the cutter of his own ship to assist him, and, seeing her under way, sent the pinnace about eight o'clock to observe her proceedings; that on approaching the schooner they were ordered to keep off or they would be fired upon, upon which the boat was immediately backed but received a broadside

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of grape, round, and musketry; that the officer in charge of the boat repeatedly requested them to leave off firing as he was not come to molest them, but they continued firing until they had killed two and wounded seven without return fire.

The affidavit of the lieutenant in command was also obtained, saying that he was ordered with the pinnace or guard boat, unarmed, to go to the *Carnation* and inquire as to this vessel; that the captain of the *Carnation* bade him make his inquiries of the vessel "which by information was said to be a privateer"; that when they approached the privateer they were ordered to keep off or they would fire into her; that he ordered his men to back water and with the boat hook was in the act of so doing when the Americans fired into the English boat, notwithstanding he frequently called out not to murder them; that they struck and called for quarter; that the British made no resistance nor could they make resistance, being without arms, and not sent to attack. He also adds that several Portuguese boats were going ashore at the same time which were said to be armed. The report of the British commander further shows that every American in Fayal was armed and concealed in the rocks overhanging the brig, and that when the British gained her deck "they were under the painful necessity of returning to their boats from the very destructive fire kept up by those above them from the shore." According to the official report the British lost thirty-four killed and eighty-six wounded. It appears that the defenses of the island were in a miserable condition, and that the governor was incapable of offering adequate resistance to the action of the British.

In December the agents of the privateer sent to Mr. Munroe, then Secretary of State, a copy of Captain Reid's protest, and other papers, and said that they believed themselves to have an equitable claim against Portugal for the damages sustained, adding that the cost of the vessel and outfit were $30,000. They asked the United States to demand compensation and enclosed the account of expenditures of Mr. Dabney, amounting to $700, chiefly for supplies for the privateer's crew and their passage home.

As is well known, the Portuguese court had been driven from Europe, temporarily, and was settled at Rio de Janeiro. Mr. Munroe forwarded to our minister at this place the communication directing him to lay the circumstances before the Portuguese government, and to state the claim of the injured party. This message was sent June 3, 1815. Ten days earlier the Portuguese government had opened correspondence with our minister at Rio de Janeiro, saying that Portugal had adopted a system of strict neutrality, and that the Prince Regent had heard with the greatest grief of the affair so repugnant to his sentiments and so contrary to established principles, and suggesting that the United States could not complain of the governor, he having done all that he could to prevent the conflict; that the Prince Regent regretted this as an attack on his sovereignty, by violation of his territory, and had addressed the British minister and ordered his minister at London to make reclamations. The communications made to the British minister were more fully stated and the "base attempt" of the British commander to ascribe his actions and violence to the acts of the Americans by pretending that in repelling the British armed barges the Americans were the aggressors, was characterized as "manifest duplicity"; the moderation of the governor was described as censurable, and it would be punished save only that it was to save the island from the ravages of the British. It was stated that the Prince Regent had directed his minister in London to require satisfaction and indemnification for his own subjects and the American privateer. Three years seem to have intervened without redress, then John Quincy Adams, Secretary of State, wrote to the

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Portuguese minister asking a full indemnity for the sufferers. Nothing seems to have followed, but a claim was made before Congress for the officers and crew of the privateer and sixteen years after Mr. Adams's communications, in 1834, $10,000 was appropriated by Congress to be distributed as prize money among the officers and crew and the representatives of those deceased. Just before this Captain Reid presented a memorial to our Secretary of State as to the claim, and Mr. McLain, then Secretary of State, replied that Portugal was in such a situation that the time was unsuitable for pressing the claim, that the claim would be revived at a proper season. In 1835 our acting Secretary of State wrote our minister at Lisbon that this claim appeared well founded and that the minister was instructed to present it to the government of Portugal. The claim was based on the fact that the Portuguese authorities, having failed to give this vessel the protection she was entitled to in a friendly port which she had entered as an asylum, that government was bound by the law of nations to make good to the sufferers all consequent damage resulting from such neglect of duty. Our minister postponed action, but presented the claim in 1837, and was orally informed by the Portugese minister that the claim appeared inadmissible, as the Portuguese force at Fayal was at the time incompetent to resist the British and the governor had done his best. President Van Buren was addressed in favor of the claim three years later, and the Secretary of State replied that the matter had been repeatedly presented to Portugal without success but that our *chargé* had instructions to urge the matter. In 1841 Mr. Webster became Secretary of State and he was applied to in favor of the claim. Finally, in June, 1842, he instructed our legation at Lisbon to aquaint itself with the facts, and to address the foreign minister of Portugal on the subject. He further bade it inform its own government if Portugal showed a disposition to compromise the claim. The foreign minister promised consideration, but a change of ministers delayed action. In 1843 Portugal sent a formal reply. It expressed surprise at the revival of the claim after a silence of so many years. It said all accounts agree, that the privateer, under the pretext that the British boats were approaching her, fired on them. That Great Britain affirmed that the boats carried only unarmed men going ashore from their ships, and that they casually met the privateer as she was preparing to leave the port; that it was undeniable that the first shot came from the privateer and she thus became the aggressor; that notwithstanding this the Portuguese authorities employed every means to prevent hostilities; that Great Britain subsequently apologized to Portugal for the rashness of its officers and indemnified the inhabitants for damage inflicted, although by the reasoning of the United States Great Britain might rather have expected an apology from Portugal for the attack made by the privateer in a Portuguese port. The hope was expressed that the United States would perceive that there was no just ground for demanding an indemnity. Mr. Upshur was now Secretary of State, and he sent a copy of the Portuguese reply to the son of Captain Reid, who was acting as agent for the claimants, and the latter contested the conclusions of the note. The Secretary of State replied, in 1844, that the matter having been presented repeatedly, and every effort made to secure reparation, and those efforts having proved unavailing, the department was unwilling to make further application, believing that it would be fruitless. In vain the agent of the claimants sought to obtain a reconsideration from Secretary Upshur, and after his death from Secretary Calhoun. Senatorial pressure was evidently brought to bear, and in 1844 Mr. Calhoun replied to a letter of Senator Johnson, of Louisiana, that there was no good reason for renewing correspondence on the subject. The claimants now applied to Congress, and in June, 1845, a

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resolution was adopted in the Senate, offered by Senator Johnson, asking the President for the correspondence and papers in this matter, and in December of that year President Polk communicated the correspondence and papers accordingly. The matter was referred to the committee on foreign relations, and in May, 1846, that committee reported that there was no warrant for any claim against the United States; that the United States only became responsible for spoliation by a foreign government when indemnity was obtained from such government, and that it should be left to the discretion of a nation when it should seek redress for its citizens against foreign governments. The committee therefore recommended a resolution that it be discharged from further consideration of the matter.

The ruling against the claimants remained undisturbed for some four years. Then Mr. Clayton, Secretary of State, reopened the case, and instructed our minister at Lisbon to give it his earliest attention. He did so and demanded a final decision as early as the 1st of October, 1850. On the 29th of September the Portuguese government replied, arguing that the report of the governor was written in great excitement as to matters which he did not personally see; that it was based on the statements of the American consul, and that the communication made to the British minister by the Portuguese government had no greater force than the report of the governor on which it was founded; that the British boats were unarmed, according to the statements of the British commander and the lieutenant in charge. The Portuguese minister in Washington also argued that his country was the victim of both belligerents, that she was not bound to have every place in her dominions fortified so as to enforce neutrality against any belligerent.

Later the Portuguese government offered to arbitrate all the claims of the United States. In 1850 Mr. James B. Clay, of Kentucky, eldest son of Henry Clay, was our representative at Lisbon. He was instructed that the President would not refer the matter to arbitration; that the answer of this country would be sent by a "man of war"; that if after waiting a reasonable time for adjustment none was made, our minister would demand his passports, and that he might wait for the Portuguese decision twenty days or longer if necessary.

When the instructions arrived upon the "man of war," Mr. Clay addressed the Portuguese government, and that government acceded to the payment of the other claims made against it but made a sole exception as to those arising from the destruction of the *General Armstrong*. Mr. Clay replied that all the claims were believed to be just, and none more so than that of the privateer, and that he was not allowed to entertain any proposition which did not include the adjustment of every claim. He demanded his passports, and on July 13th they were sent him, with expressions of regret and a suggestion that the refusal to submit the claim, as had been proposed, for arbitration caused doubts as to its justice. When these transactions were reported at Washington, President Taylor was dead and Mr. Webster was again Secretary of State. Mr. Webster, for the preservation of relations of amity with Portugal and to bring matters to a close, accepted the proposal, and a treaty was concluded for the settlement of all other claims between the nations by the payment of $91,727 by Portugal and for the submission of the claim as to the *General Armstrong* to arbitration. It was agreed that the claim of the American government for the captain, officers, and crew of the privateer should be submitted to the sovereign or chief of some nation in amity with both of the high contracting parties, that copies of the correspondence between the nations on the subject should be laid before the arbiter, and that his decision should be binding.

The United States suggested that the

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President of the French republic, Louis Napoleon, be chosen as arbiter, and this was acceded to by Portugal. Our minister at Paris and the Portuguese minister at the same place submitted to the minister of foreign affairs twenty-one documents embracing the correspondence, and November 30, 1852, a little over thirty-eight years after the destruction of the brig, the arbiter rendered an award.

The award recited that the Americans fired on the British boats without any attempt having been made to repel force with force by the boat's crew; that the Americans did not ask protection until blood had been shed; that the Portuguese governor had repeatedly intervened with the English to obtain a cessation of hostilities; that the weakness of the garrison and the decay of the guns made armed intervention impossible; that Captain Reid did not apply for protection in the beginning or until he had recourse to arms to repel an unjust aggression of which he claimed to be the object, and thus released the neutral sovereign from the obligation of protection other than by pacific intervention. The award proceeded to declare that the claim of the United States against Portugal had no foundation. Much misunderstanding arose from too literal a translation of this award in which the word "*pretendait*," as applied in the award to Captain Reid, was treated as the equivalent to the English word, "pretended," instead of, as would have been more just, the word "claimed."

The matter was taken up in the Senate in 1852, and the papers were called for. Secretary Marcy and Secretary Everrett declared the award binding and final, but Mr. Reid for the claimants protested that the matter was submitted to arbitration without the knowledge or consent of the claimants, and that their rights against their own government should not be prejudiced by the award. A memorial was accordingly submitted to Congress in 1854, and a favorable report was made by Mr. Slidell from the committee on foreign relations on the ground that the claim against Portugal was just, that Mr. Webster refused to forward to the arbiter an argument by the agent of the claimants on a ruling that it was not allowed by the treaty; that the United States minister at Paris was not consulted or heard in the matter; that an indemnity would stimulate citizens to emulate the conduct of Captain Reid; that if the United States would compensate injuries done to its citizens in violation of neutral rights, other countries would more earnestly maintain the inviolability of their territory. Like report was made in the Lower House. A measure granting compensation was offered. In the debate leading men took part. Messrs. Slidell, Clayton, Seward, and Bayard supported the claim. Messrs. Toombs, Chase, and Clay opposed. It was lost almost two to one. The matter was reconsidered, however, and a bill offered limiting the recovery to such amount as might be allowed by the Secretary of State, not exceeding $131,600, was substituted. This was finally carried by twenty-two to seventeen. Eminent lawyers like Bayard, Benjamin, Cass, Douglas, and Seward voting with the majority, and equally eminent lawyers like Chase, Clay, Fessenden, and Sumner, voting with the minority. The matter was ultimately referred to the Court of Claims, where Charles O'Conor led for the claimants and Montgomery Blair for the government. The majority of the court sustained the claim in 1856, and established the damages at $70,739, but on rehearing one justice changed his opinion and thus the court rejected the claim. The grounds of the rejection were that the question of who began the conflict and whether its commencement was justifiable lay in doubt; that if the privateer had come to the possession of Portugal she would have been bound to restore her, but as she was destroyed she could not be restored; that the Portuguese governor had no force by which he could prevent her destruction; that the

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matter was proper to submit to arbitration; that such arbitration must be controlled by the government and not by the private claimants; that even if the arbitration were mismanaged by Mr. Webster, our Secretary of State, that imposed no liability on the government which incurs no liability for the wrongs or negligence of its officers; that by the law of nations a government in all such negotiations exercises its own judgment and discretion and such action is wholly independent of the judiciary; that the bravery of the officers and crew in the conflict cannot be too highly admired; that they had received from Congress $10,000 for their valor, and that they must rely for any further compensation, not on legal rights, but on the liberality of Congress. It was claimed that a portion of the correspondence bearing on the case was not presented to the arbiter, but Mr. Blair showed that the same matter was fully set out in the papers actually submitted. However, this omission was the principal foundation of a new report favoring the payment of the amount of damages, found by the Court of Claims, less the $10,000 already appropriated. The bill passed the Senate but the House took no action. In 1878 the claim was revived and laid before the President. He referred it to the Department of State, whose examiner reported that the history of the case was contained in three printed volumes, and that among the facts clearly established was that this British fleet, intended for the capture of New Orleans, was kept busy by the *Armstrong* long enough to enable General Jackson to reach that city and save it. In fact, however, the British fleet of fifty sail left Jamaica for New Orleans on the day before the contest in the harbor of Fayal. The examiner concluded that our government had incurred an obligation to its citizens which it was bound in equity, in morals, and in honor to discharge. Favorable reports were made from time to time upon the claim, and in 1882 the matter was pressed by Mr. Pendleton "because it appeals to patriotism, to good feeling, and to an admiration of the heroism of our countrymen, which was displayed on that occasion." A bill referring the matter to the Secretary of State to examine and adjust all claims of the captain, owner, officers, and crew upon the evidence before the Court of Claims, and authorizing him to settle the same "to the amount of $70,739, as proved before" that court, finally passed by a vote of more than three to one in the Senate and nearly four to one in the House, and became a law on May 1, 1882, without the President's approval. The matter was still surrounded with difficulty, for by a joint resolution in 1867 it was made unlawful to pay any account against the United States that existed prior to April 13, 1861, to any person who sustained the rebellion. Some of the claimants came under this provision, but Dr. Wharton, solicitor of the Department of State, held that the provisions did not apply, as the claimants had no claim prior to the passage of the act in 1882, which act, he said, "gave them the fund in question as a gratuity." Ultimately, Mr. Reid was allowed one half of the amount awarded to the owners of the brig and forty per cent of that awarded to the officers and crew for his services in prosecuting the claim. So ended the famous case of the brig *General Armstrong*. The case as a precedent, however, survives and is still the matter of controversy among publicists.

It is obvious that Louis Napoleon was suggested by the United States as arbitrator in the matter of the *General Armstrong*, because as President of a sister republic he was deemed less hostile to the United States than sovereigns of a different type. His award was dated Nov. 30, 1852, and on the second day thereafter he was inaugurated as Emperor of France. He devoted himself to maintaining an alliance with England, joining her in a war against Russia in the following year. It is therefore difficult to consider his award as entitled to

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weight on the score of impartiality, and it is certainly not supported by any reputation for learning in the law of nations on the part of the arbiter.

Our own writers have by no means acceded to the doctrine of the award or to the assumed facts on which it was based. Thus Hon. Hannis Taylor ("International Law," page 701) says most convincingly the doctrine of the award "should certainly be modified in one particular. There can be no doubt that when a belligerent is attacked by another in neutral territory his primary duty is to appeal to the neutral sovereign for protection and to rely on him for it, provided time suffices, and such sovereign has the will and the power to respond to it effectively. If either of these conditions are wanting the unjustly assaulted belligerent should be permitted to exercise his natural right of self-defense without freeing the neutral from responsibility." He supports this view by the opinion of Judge Story in the Anne (3 Wheeler, 447) and by the potent names of Dana and Lawrence.

The precedent of the *Armstrong* revived its interest from an incident in the recent Russian-Japanese war.

On the night of August 11, 1904, a lieutenant and party of men from the Japanese destroyers *Asashio* and *Kasumi* boarded the Russian destroyer *Reshitelni* in the neutral Chinese harbor of Chifu, demanding that the Russians leave the port before dawn or surrender. The Russians instead assaulted the boarding party and sought to destroy their own ship. The *Reshitelni* was captured and towed from the port by the Japanese.

Japan replying to strictures on this violation of a neutral port cited, as a principal authority, the case of the *General Armstrong*, where a belligerent injured by such a breach was denied compensation from the neutral because he (the claimant) was the aggressor.

On this Messrs. Smith & Sibley observe "It is, further, mere refinement to insist that the Russians were the aggressors in the *Reshitelni* incident, because the Russians offered resistance after the Japanese had boarded their vessel. So far as the *Reshitelni* incident is a question between the belligerents it is difficult, on any construction of the case of the *General Armstrong*, to defend the action of Japan, which was clearly the aggressor. That case, further, seems no less clearly to show that China has incurred some liability to Russia. If anything is certain in the matter, it is that the Russian commander had previously applied to the Chinese commanders for protection. But this circumstance decisively distinguishes the *Reshitelni* incident from the case of the *General Armstrong* where the neutral was held not liable." This opinion from British sources cannot be suspected of unfriendliness to Japan.

See "International War" as interpreted during Russian-Japanese war, by Smith & Sibley, pp. 120 *et seq.*

Mr. Hall, after stating the case of the *Armstrong*, lays down a broad rule thus:

"A neutral state which overlooks such violation of its neutrality as it can rightly be expected to prevent, or which neglects to demand reparation in the appropriate cases, becomes itself an active offender. It is bound, therefore, to give satisfaction in some form, if satisfaction be required, to the belligerent whose interests have been prejudiced by its laches. The nature of this satisfaction is, of course, a matter for agreement between the parties."

Hall's "International Law" (fifth ed.) p. 625.

IOWA CITY, IOWA, May, 1906.

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THE CLOSED SHOP CONTROVERSY

By Charles R. Darling

AMONG the trade and industrial questions with which the courts have had to deal so largely in recent years, the chief interest just at present seems to center about the contract of the unions for exclusive employment, or, as it has come to be called, the "closed shop." In the questions most mooted heretofore, arising from the activity of labor unions in their efforts to unionize labor, the unions have not had the advantage of a contract such as that referred to. Now they come armed with this contract, and the question arises as to its legality, both for the purpose of enforcing it between the parties, and to justify the discharge of third persons from employment in fulfilment of its provisions. Is such a contract against public policy and void as in restraint of trade or for any other reason? That question, after being litigated in the lower courts of several states, which are said to have generally decided against the validity of the contract, has within a year reached the courts of last resort in two states, viz., Massachusetts[1] and New York,[2] the decision being, roughly speaking, against the validity of the contract in Massachusetts, and in favor of its validity in New York, the decision in New York, however, being a majority decision of four to two, while that of the Massachusetts court is unanimous.

To state these decisions more accurately, Berry *v.* Donovan, the Massachusetts case, was an action for damages brought by a workman against the representatives of a labor union, for causing his discharge from employment, the union having made a contract with the employer to employ only union men and thereafter requesting the discharge of the plaintiff pursuant to the contract, after giving him an opportunity to join the union. In sustaining the action the court does not commit itself in terms to the general proposition that an agreement of the kind in question is illegal and void. The case is put upon the ground of unlawful interference with a workman already employed, the plaintiff having been in the employment of the master prior to the contract, and the court reserves its opinion as to whether the same result would follow in the case of a workman seeking employment and prevented from getting it. The effect of the decision seems, however, to be that the contract is unlawful; for, if lawful, it would justify all acts done under it, including the discharge of workmen in accordance with its terms.

In Jacobs *v.* Cohen, the New York case, the question arose in an action upon a promissory note given by the employer to the union as liquidated damages for violation of an agreement for the exclusive employment of members of the union. This raised directly the question of the lawfulness of the contract, and it was held that it was lawful and the action was sustained. The force of the decision may be thought to be weakened by the fact that an earlier case, viz. Curran *v.* Galen, 152 New York, 33, which seems to have held the contrary, is not overruled, but an attempt is made to distinguish it. In Curran *v.* Galen the action was, as in Berry *v.* Donovan, an action for damages brought by a discharged workman against the members of the union, and on demurrer to an answer setting up a contract between the employer and the union for the employment of only union men, the demurrer was sustained. The opinion in Jacobs *v.* Cohen does not make it plain on what ground the earlier case is distinguished. It is said that in Curran *v.* Galen there was a plan to compel the workman to join the union at the peril of being deprived

[1] Berry *v.* Donovan, 188 Mass., 353.

[2] Jacobs *v.* Cohen, N. Y. Court of Appeals, Nov. 28, 1905.

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of his employment, which element is said to be absent in Jacobs *v.* Cohen, but the opinion in Curran *v.* Galen goes on the ground that the contract itself is unlawful, saying distinctly that, if lawful, it justified the acts complained of.

It is well to remember that the question at issue is one of the freedom of contract, and furthermore that it is a question of common law. There may be cases where legislation regulating or forbidding certain classes of contracts would be eminently proper, although in a like case the courts unaided by legislation would have no right to afford relief. Judicial decision must conform in particular cases to general principles, and where it departs therefrom to relieve the hardship of special instances it introduces confusion and does more harm than good; while legislation, which is confessedly arbitrary, may except certain classes of transactions from the operation of a general principle without violating the integrity of legal theory.

What objection is there, then, to a contract for the exclusive employment of certain men or a certain class of men? Approaching the subject somewhat indirectly, may an employer of labor engage a contractor to furnish the labor needed in his shop, factory, or business? May he lawfully give to such person the entire management of his shop, factory, or business, so far as relates to the employment of workmen? It seems plain that he may. Such a proceeding is not so common in practice as the letting out of a contract to build a building or to do other specific work, but it is the same kind of a transaction and it would sound strange to say that either contains any feature making it illegal. In Berry *v.* Donovan the contract between the employer and the union provided that the former should hire only members of the union and should not retain any workman in his employ after notice that he was objectionable to the union; in short, gave the union full control over the employment of men. The opinion makes a point of the fact that the contract not only provided for the employment of union men exclusively, but gave the union a right to interfere and deprive any workman of his job. But why is this unlawful? If an agreement such as we have supposed, farming out to a contractor the employment of labor is lawful, this agreement, which only approaches that, must be so. One may engage another to employ his workmen for him; or, employing his workmen himself, may agree with another to employ or retain only such as the latter approves; or finally he may agree to employ only a certain class of workmen. Here are three forms of transactions, the first the most sweeping of all. The two latter must be lawful if the first one is, and that the first one is so appears to be self-evident.

Considering another phase of the subject what shall be said of collective bargaining? That has been thought to have some advantages for the employer as well as for the workman. Is there any legal objection to that kind of a contract? If not, that is if an employer may make a bargain for labor with a body of men instead of individuals separately, the result is that competition in the labor market between organizations on the one hand and individuals on the other is recognized as allowable. It cannot be said, then, that the exercise by such an organization of the ordinary rights of a competitor, such as supplanting a rival, is unlawful. It cannot be objected that such an organization or its contracts are illegal as in restraint of trade or as tending to monopoly. A labor organization is put on the same footing as an individual and may lawfully supplant the individual if it can succeed in doing so. In what, then, does the illegality of the contract for a closed shop consist? The employer agrees with a labor union, or its representatives, to employ the union, or what is the same thing, to employ only members of the union. If that is a lawful and binding contract and

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the performance of the contract is entered on, any non-union man than or thereafter in the employer's service, who is discharged in pursuance of the contract, will have no ground of action against the union or its members because he was discharged at their request. He has lost his job to a competitor and that is all.

It would seem, then, that if ordinary analogies hold, the contract for exclusive employment is unobjectionable. It may be added to what has already been said that the employer may desire to make such a contract, finding it for his advantage to do so in that the workmen are more contented and harmonious and render better service if they are all members of some guild or organization than if they have nothing in common. He should have a right to make such a contract, and he should be bound by it when made.

The principal arguments advanced against the validity of the contract are that by means of it men are driven out of employment or forced to join the unions, that the purpose is to prevent competition by forcing men into the unions and to obtain a monopoly of the labor market.

These arguments appear to take into consideration that there is a widespread movement to unionize labor and derive their principal force from that consideration. A contract for exclusive employment, considered in a solitary instance, would not be held void because it excluded others from the employment. Men are entitled to name the terms on which they are willing to work, including a stipulation as to who shall be their associates. They are for obvious reasons interested in various ways in who shall be their associates and to deprive them of the right to contract about it is an infringement of natural rights. The workman who is excluded has no legal ground of complaint, for he has no claim to be employed and he cannot require the contracting workman, any more than the employer himself, to consider his interests. The contracting workman is fully justified in looking out for his own interests exclusively and consulting his own tastes. He need not give a reason why he prefers to work with certain associates and not with others. If a band of Italian or Chinese laborers, for example, undertook a job on the terms that no outsider should be employed with them, it would hardly be contended that that was not a lawful and valid contract. If some one else already on the job should be discharged in consequence, it seems safe to say that he would not have a cause of action.

We may say, then, that there is nothing in the nature of the contract for exclusive employment as such which makes it invalid, and it would probably never have been claimed to be so but for the increasing power of the unions which has led the courts to scrutinize more closely than they otherwise would the methods used by the unions to achieve success. If the objection to the contract for the union shop is that its adoption on a large scale is attended with certain injurious tendencies, not being such as apply to contracts for exclusive employment generally, it suggests that that is an evil which should be dealt with by legislation rather than by the courts of their own initiative.

But passing by this view of the matter, let us consider the objections raised in the light of the existing industrial situation. The coercion argument is put in different ways. At one time it is said that independent workers are forced to join the union, that that is the purpose and intent of the movement demanding the closed shop. Men are forced to do something against their will, something which they have a right not to do. This is coercion, is it said, and is unlawful. At another time it is said that men are driven out of employment and deprived of an opportunity to make a living, because they will not join the unions. This is not lawful, it is said, because men have a right to pursue their vocation and earn a living unmolested. The charge as a whole is,

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let us say, that the labor unions drive men out of employment unless they join the union and that they have no right to do so. The answer is, the unions have a right to drive men out of employment by the means by which they in fact do it, viz., by getting their job. That is competition and is lawful. The union men and the non-union men are both looking for work, and if the union men can get a job away from the non-union men, they are justified in doing so. When the union gives the non-union man an opportunity to keep his job by joining the union, that is a concession which the union is not obliged to make and which softens the harshness of the competition. It cannot be alleged as a fault against the union, much less as a distinct kind of coercion. If the union has a right to compete for business, the charge of coercion of any kind has no force. The kind of coercion involved is the kind which competition implies and justifies. The discussion, proceeding in an orderly way, should first take up the question whether unions have a right to compete. If they have, all else follows as a matter of course.

It may be objected that this answer does not fully cover the case, that, under the contract to employ only union men, non-union men may be and often are discharged without filling their places, in which case the excuse of competition fails. If we accept this view, the only effect is that the union must not ask for the discharge of non-union men unless it is ready to fill their places, and that the contract must be so drawn as to express this. This would not seriously hamper the unions, as, with their large membership and the system of affiliation in vogue, they have a great advantage over isolated organizations in regard to supplying labor. But we are not called upon to make even this concession. On the contrary, we assert the right of the union to make a contract which will have the effect to exclude outsiders absolutely, and require their discharge without provision for filling their places. The union, if it has a right to compete, is justified in refusing to admit outsiders as co-laborers with its own members as a measure of self-protection. Its strength lies in the fact that its members act as a unit in dealing with the employer, and to get the full benefit of that, it needs to avoid colaboration with competitors. The object of the union is to maintain a certain standard in regard to wages and other terms of employment. If the staff of workmen in a shop or factory includes non-union as well as union men, the latter may underbid the former and render the position of the former insecure and their efforts abortive. The advantage and importance to the union of holding aloof from others is apparent; only thus can the full benefits of organization be obtained. If, therefore, the unions are called upon to give a reason why they choose to work separately from others, the reason is given and their right so to do would seem to be put beyond question or cavil. To deny them the exercise of this right is to require them to renounce the advantage to them of separate employment for the benefit of others. But the law does not require one workman to consider the interests of others.

When the conduct of the union is described as an attempt to force men to join the unions, the argument has a certain plausibility, but its force entirely disappears when we reflect that the only compulsion used is to compete with them and thus make it for their advantage to join the unions. As well might it be said that a tradesman who outstrips his competitor in business, gets his trade away from him, and then offers him a partnership, is guilty of forcing the latter into the partnership. In the popular use of words it may be true that the one has forced the other to the wall and forced him to accept an offer which he did not want to accept, but there is no coercion in a legal sense.

In what has just been said we have re-

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served the question of the right of a labor union to compete with individuals. This question is the key to the whole problem, for all that the union does is to compete with individuals.

It is universally admitted to-day that a trade union is a lawful body and that workmen have a right to combine to advance their interests. The most conservative courts concede the right of organization, the right to carry on the contest for better terms of employment, not only through local unions, but through federations of unions, such as the brotherhoods of locomotive engineers and locomotive firemen.[1] Although it seems strange to us of the present day that this right should ever have been questioned, we need to recall that at one time the trade union was an illegal body and a strike was regarded as a criminal conspiracy to raise wages; that the present state of the law has been reached only after a long struggle with courts and legislatures. It should also be noticed, as giving point to this right of laborers to combine, that the rule applying to them in their relation to employers appears to be directly the opposite of the rule applying to dealers in commodities in their relation to the public. Combination to raise wages is permitted, but combination to raise prices is not. The old law, in making the rule the same for wages as for prices, was strictly logical and consistent, but it was opposed to common sense and common justice and had to yield. The reason for permitting combination among laborers seems to be that it is required for their protection, it is their only available weapon in dealing with capital. In an English case, Wood *v.* Bowron, L. R., 2 Q. B. 21, 25, it is said by Chief Justice Cockburn, "Large numbers of men, who have not the advantage of wealth, very often can protect their own interests only by means of association and coöperation, and we ought not to strain the law against men who have only their own labor and their association by which they can act in the assistance of one another." It follows, then, that combinations of workingmen have the same rights as individuals in bargaining for employment. They can compete with individuals as one individual can compete with another. Combination, which is allowed primarily for the purpose of contest with the employer, may incidentally result in some disadvantage to individuals by obliging the latter to compete with organized bodies, but the disadvantage, if such it is, must be taken with the advantages. On the whole, the right of combination is important, even vital, to workingmen generally, and individuals cannot object that they suffer by the exercise of it. Most of the reasoning directed against the conduct of the unions relies to a considerable extent upon the feature of numbers and combination. All such argument must be rejected as unsound.

And does not this view dispose of the argument from monopoly? It is said that the contract for the closed shop tends to monopoly. The monopoly argument is one that is always to be viewed with suspicion. As in the struggle for success every one is trying to get all he can, anything in the line of achievement may be said to tend toward monopoly. At all events when it is admitted that combination is permissible, the contention that such combination tends towards monopoly is deprived of its force. Suppose, to take a simple form of combination, that all the workmen in a certain trade, *e.g.*, carpenters, combine and agree not to work for less than certain wages, say ten dollars a day. According to the conceded right to combine this is lawful. Yet here is the monopoly complained of.

The opinion in Berry *v.* Donovan, *supra*, after dwelling upon the fact that workmen are forced to join the unions by the danger

[1] Wabash R. R. Co. *v.* Hannahan, 121 Fed. Rep. 563. Thomas *v.* Cincinnati, N. O. T. P. Ry. Co. 62 Fed. Rep. 803, 817. Union Pacific Ry. Co. *v.* Ruef 120 Fed. Rep. 102. See Arthur *v.* Oakes 63 Fed Rep. 310.

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of losing their jobs, supposes a time when the unions "by a combination of those in different trades and occupations would have complete and absolute control of all the industries of the country," and hence concludes that the purpose of the unions is unlawful. But in the familiar case of Commonwealth *v.* Hunt (4 Met. 111), which was an indictment for conspiracy against the members of a trade union, alleging that, by combining and agreeing among themselves not to work for an employer who should employ non-members, they compelled the employer to discharge a non-union man, that they conspired to impoverish the latter, and to prevent him from following his trade and conspired to impoverish the employer, Chief Justice Shaw, in giving judgment for the defendant, answered the argument as to compulsion by saying that "whatever might be the force of the word 'compel' unexplained by its connection, it is disarmed and rendered harmless by the precise statement of the means by which such compulsion was to be effected" (page 133); and, referring to the "manifest intent of the association to induce all those engaged in the same occupation to become members of it" said that "such a purpose is not unlawful" (page 129). In short, the ground of the decision in Commonwealth *v.* Hunt is that the conduct of a trade union in demanding exclusive employment is the exercise of ordinary competitive rights and is not rendered unlawful by the injury thereby inflicted on others or by the attempt to extend the system so as to bring the whole body of workmen within it.

It should not be overlooked that monopoly, as applied to the employment of labor, differs from monopoly as applied to the purchase and sale of goods. For it may be considered that the public have some rights in regard to the possession and use of commodities, especially the necessaries of life, which limit in a way the right of private ownership therein, but no man has a claim on the services of another; the right of the individual to give or withhold the labor of his hands is absolute and it may be said, therefore, that the organized refusal of however large a body of workmen to work at all or to work except on certain terms cannot be complained of in a court of law.

The dissenting opinion of Vann in Jacobs *v.* Cohen, *supra*, attacks some minor provisions of the contract for a union shop there in question, including provisions against overtime work, requiring the employer to allow representatives of the union to act as inspectors to see that the contract is not violated, and permitting sympathetic strikes. It is said that the employer is thus subjected to arbitrary domination in the conduct of his business. But does the law prevent the parties from agreeing to what is thus called arbitrary domination? That cannot be, unless on some theory which requires the workman to himself remain subject to arbitrary domination and deprives him of the right of free contract. The idea behind all such argument evidently is that the workman must not get the upper hand in bargaining with the employer and that, if he does, the law will step in and protect the latter by depriving the former of the benefit of his bargain. The weakness displayed in this part of the argument furnishes a good reason for distrusting the conclusion reached on the main question. Competitive rights on the part of the workman seem to be recognized only so far as they are exercised in a harmless and inoffensive way.

When the law concedes to laborers the right to combine, it is to enable them to make a contest on something like equal terms with employers; it recognizes that to require them to deal separately with the employer would be the height of injustice, and would deprive them of the only means by which they can escape from practical serfdom. The right to organize carries with it the right to render the organization effective by excluding disintegrating influences.

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The union is a fighting body and can reach a high order of efficiency only by excluding outsiders, who are its rivals, from the field of its operations. It does this by simply declining to work in company with non-members. To deny to it the right to do this is to impose a condition which weakens and renders ineffective the right of organization which is pretended to be granted. It is as if the lawgiver, after making a certain concession, repented and sought to render the grant nugatory.

It is sometimes said that the immediate purpose of the unions, in excluding independent workers from association with them and thus forcing them, as is said, into the unions, is merely to strengthen the unions for the contest with employers and that the ultimate purpose to win victories over the employer does not justify the conduct. What has been already said answers this contention, it is submitted. If organization for fighting purposes is lawful, means adopted to strengthen the organization or make it effective are equally so. Has it ever been heard, or can it be contended, that even strategy in a competitive struggle is forbidden? A trader may undersell his competitor in order to drive him out of business, although in doing so he sells at a loss.[1]

The ultimate purpose of making profits after the competitor is out of the way justifies the conduct. It would never be thought of applying to traders so narrow a rule as is sought to be applied to workmen in regard to what is embraced within the lines of competitive conduct.

It may be said that the vice of the union scheme is that it discriminates between different classes of workmen and that, while professing to be for the benefit of workmen, it involves great hardship to large numbers of them. It does discriminate, it is true, but discrimination is lawful, except when practised by public service corporations toward customers, when it is unlawful because such corporations are bound to serve the public and to serve all alike. The point is, that certain workmen are not bound to consider the interests of other workmen. They may be as selfish as they please. The recent case of Boyer *v.* Western Union Tel. Co., 124 Fed. Rep., 246, furnishes an example of discrimination by employers towards workmen. In that case a telegraphers' union sought an injunction against the Western Union Tel. Co., alleging a combination to destroy the union by discharging and blacklisting the men belonging to it. It was held that the action would not lie, that the employers had a right to discriminate, that they might discharge and blacklist men for any cause whatever, as, for example, because they belonged to the G. A. R. Here, then, is a decision that a trade union has no right to be protected against discrimination. Can it be held consistently that others have a right to be protected against discrimination by it? Furthermore statutes forbidding such discrimination as was practised in this case, forbidding an employer to discharge men because they are union men, are held to be unconstitutional.[1] The argument against the unions actually, although perhaps not often professedly, seeks to introduce a new rule as to discrimination. There is a feeling which is manifested in statutes like the one above referred to, that such discrimination as is practised is not fair, and it is thought that the law should forbid it; but since the law does not forbid discrimination, it should be admitted that the labor unions may practise it by making contracts for the closed shop. In this, as in most of the arguments against the closed shop, loose popular notions are relied on instead of legal principles.

The discussions on this subject deal more or less with malice, but that topic hardly calls for separate treatment. When the term is used in its negative sense, meaning

[1] Mogul Steamship Co. Case, 23, Q. B. D. 598, A. C. (1892) 25.

[1] State *v.* Julow, 129 Mo., 163. People *v.* Marcus, App. Div. Supreme Ct. 1st Dep. N. Y. Jan. 1906. Stimson Hand Book of Labor Law, p. 182.

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without legal excuse, it merely brings up for consideration the sufficiency of the reasons here presented as justifying the conduct in question. If, on the other hand, it is used in its positive sense referring to vindictive conduct, it presents an issue of fact which is purely personal, depending on the actual motive of the individual, and which, in the case of a group of persons taking part in the same transaction, may be determined one way as to one person and another way as to another. We need not consider the vexed question whether such malice will render conduct unlawful which would otherwise be lawful, for, even if the question is answered in the affirmative, no general rule of law is arrived at, which determines whether a certain thing may be done or not.

It is now submitted that a careful analysis of the subject discloses no element of illegality in the contract for a closed shop. As a result of coöperation among workingmen in the attempt to better their condition, they have developed an ability, which was lacking before, to cope with some measure of success with their employers, so that they are no longer forced to accept without question such terms of employment as may be offered to them. As an incident of the movement toward coöperation thus inaugurated bodies of workingmen acting together have been brought into competition with independent workers, and this has resulted at times to the disadvantage of the latter, although there is a compensating advantage when the employer prefers the independent worker. So long as the union men refrain from violence and misrepresentation and rely on peaceful persuasion to advance their cause, no one's rights are violated. There is no intimidation or coercion in a legal sense. What is mistakenly called so is merely the pressure which their success produces by making it for the advantage of employers to deal with them and of other workers to unite with them. As their methods are lawful, their purpose and motive cannot properly be impugned. What is called monopoly is only such monopoly as is necessarily involved in combination and it is too late to deny the right of combination among workingmen. Employers have the same right to resist and reject the demands of such a combination as the combination has to make them, and they must rely on that right for their remedy. In a contest between labor and capital the advantage in general is on the side of the latter. As laborers must work in order to live, no permanent monopoly is possible. As a practical matter it is a significant circumstance that, in many of the leading cases on labor controversies, the contest has been not between union and non-union men but between rival unions.[1]

There is abundant reason for saying that, in the struggle between employer and workmen (which may properly be designated as competition for want of a separate word to distinguish it from the struggle between workmen and workmen), the methods here described are not only lawful but are fair; the competition is fair competition. If, however, the contrary is claimed and it is said that it is not fair competition, the answer is that the common law does not permit any inquiry as to whether competition of a certain kind is fair or unfair. That is laid down in the Mogul Steamship Company case,[2] and the decision in that case furnishes a strong illustration of the proposition. Many economists of the present day favor the regulation of competition by forbidding what is called predatory competition, meaning thereby such practices as underselling or selling below cost in certain localities or at certain times in order to drive out competitors. This is the remedy which they propose for the

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[1] See for example Allen *v.* Flood A. C. (1898) 1 Plant *v.* Woods, 176 Mass., 492. Nat. Protective Assn., of Steam Fitters *v.* Cumming 170 N. Y. 315.

[2] 23 Q. B. D. 598, 615, 625, 626.

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evil of trusts.[1] But the Mogul Steamship Company case is an authority that that cannot be done without legislation and a further question might arise in the United States whether such legislation would be constitutional. The condemnation of the contract for the closed shop belongs in the same category. In each case what is proposed is a reform of the competitive system under which we live. There are admitted evils in the competitive system and the increasing keenness of competition tends to bring them out in strong relief, but such changes as are contemplated cannot properly be made piecemeal through judicial decision. It must be done, if at all, by legislation, including, if necessary, constitutional changes. It would probably be difficult to persuade our legislatures to forbid the making of contracts by labor unions or others for separate and exclusive employment. The courts are therefore appealed to rather than the legislatures. When they declare against such contracts do they not simply infringe without warrant that freedom of contract which is reckoned among the fundamental rights?

BOSTON, MASS., May, 1906.

[1] See Control of Trusts by John Bates Clark, Macmillan, 1902.

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TWO RECENT CASES ON INTERSTATE MARITAL RELATIONS

By H. A. Bigelow

THE validity of marriage with a husband or wife divorced from the former spouse and the consequential question of the legitimacy of the children of such marriage are questions of such importance both legally and socially that the recent decision of the Supreme Court on the first of these, in the case of Haddock *v.* Haddock (*New York Law Journal*, April 27, 1906) cannot fail to be of interest. The essential facts in this case are as follows: The husband and wife both domiciled in New York were there married. Thereafter, as he alleged and as the Connecticut court whose decree was in question found, his wife deserted him and he then went to Connecticut and there acquired a *bona fide* domicile, his wife retaining her New York domicile. After being domiciled several years in Connecticut the husband filed there a bill for divorce; service on the wife being made only by publication and by mailing a copy of the summons to her last known address, this being a compliance with the Connecticut statutes on the point. The divorce was thereupon granted by the Connecticut court. Eighteen years later the husband being in New York, was personally served in a suit by his wife for a separation from bed and board and alimony. He pleaded the Connecticut decree. The referee before whom the case was tried refused to admit the decree in evidence and found the facts as above stated, except that he found that the husband had deserted the wife, and decreed the separation and alimony. It was on the refusal to admit the Connecticut decree as fixing the status of the husband that the husband went to the Court of Appeals of New York, and thence to the Supreme Court of the United States. A majority of the court, premising that the sole question before them was whether the New York courts had failed to give full faith and credit to the Connecticut decree within the constitutional requirement, held that it had not so failed because the Connecticut court was without jurisdiction to pronounce a decree that could affect the status of a person domiciled in New York who had never submitted to the Connecticut jurisdiction, and that the finding of the Connecticut court that the wife had deserted the husband was not conclusive against her. In the course of its opinion the court lays down "certain legal propositions irrevocably concluded by previous decisions of this court." These embrace, among others, the following:

(1) That when husband and wife are domiciled in a state that state has jurisdiction to grant divorce, and

(2) That when either party has acquired a *bona fide* domicile in a state and the other party though not there domiciled, submits to the jurisdiction, that state may grant a valid divorce. For these two propositions the court relies on Cheever *v.* Wilson, 9 Wall. 108, (1879).

(3) That a husband cannot by wrongfully abandoning his wife in the state where they were domiciled thereby change either her domicile or the matrimonial domicile. Barber *v.* Barber, 21 How. 582 (1858).

(4) That the state where the married couple had their last matrimonial domicile and where the husband is still domiciled has jurisdiction to grant divorce effective on both spouses even though the wife has in fact left the state and, so far as she can, taken up a domicile in another state. Atherton *v.* Atherton, 181 U. S., 155 (1900).

To these may be added the proposition that where both parties are domiciled in one state an attempt by them both, while so domiciled, to give another state by submission to it, jurisdiction to grant divorce

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is ineffective. Andrews *v.* Andrews, 188 U. S., 14 (1902).

The court then goes on to give the reasons upon which it reaches its ultimate conclusion. These reasons may be briefly stated as follows: That divorce is necessarily a proceeding that involves the status of two different persons. That while it is admittedly competent for a state as being the jurisdiction primarily interested, to determine for itself the status of that one of the spouses who by being there domiciled has become a part of that state, it is for precisely this same reason that it cannot speak as to the status of the other spouse not thus domiciled; that whether divorce proceedings be regarded as being *in personam* or *in rem* with the matrimonial relation as *res*, a decree cannot affect that person in the one case or that part of the *res* in the other case which is out of the jurisdiction.

Coming as it does within a few years after the important case of Atherton *v.* Atherton (ante) the present decision while it must be accepted as the latest word of the Supreme Court naturally suggests a comparison with its predecessor. While it cannot be said to be necessarily in conflict with the Atherton case it is difficult to avoid the conclusion either that if the Atherton case is to be accepted at its face value the distinction between it and the present case is technical and based on not very sound principle, or else that the court is attempting to limit tendencies that as manifesting themselves in the Atherton case, it regards as going too far.

The facts in the Atherton case are as follows: The husband and wife were married in New York and at once took up their domicile in Kentucky, the husband's former domicile. The wife thereafter left the husband under such circumstances (as she alleged) that he could no longer compel her to live with him because of his cruelty. She returned to New York and so far as possible acquired a *bona fide* domicile in that state. Her husband thereafter brought divorce proceedings in Kentucky, of which she had actual notice and notice by publication in accordance with the Kentucky statutes and obtained a divorce decree from the Kentucky court based upon her desertion. Later the wife instituted divorce proceedings in New York. The husband appeared and pleaded the Kentucky decree. The New York court refused to recognize that decree and this refusal the Supreme Court of the United States held to be error. This conclusion the court says in the Haddock case is to be explained on the ground that Kentucky was the state of the matrimonial domicile. The New York court, however, in the Atherton case had found that Kentucky was no longer such because the wife had rightly left the husband and taken up her domicile in New York; but the Supreme Court in that case declared the finding of the Kentucky court that she had deserted her husband was conclusive as against the wife. In the Haddock case New York had been the matrimonial domicile; but if the finding of the court of Connecticut was to be taken as conclusive the latter state had become the matrimonial domicile as the husband had gone there under circumstances that rendered it the duty of the wife to follow; but in this case the Supreme Court declared the finding of the Connecticut court not conclusive. If the Kentucky court could conclusively declare that the wife had wrongfully deserted the husband and therefore her domicile was in legal theory still with him, it is hard to see why the Connecticut court could not conclusively decree that the wife had wrongfully deserted the husband in New York and that, therefore, in legal theory her domicile followed his admittedly *bona fide* Connecticut domicile. In both cases there was a decree pronounced by a court of the state where the husband alone was in fact domiciled. In both cases it was sought to have the decree affect indirectly the status of the wife who in both cases throughout the entire proceedings had been in fact permanently located in another state. In

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both the degree of extraterritorial effect, the impingement upon and affecting of the status of the person in fact permanently located in another state was the same. The only difference between the cases seems to be that in the Atherton case the wife had at one time been in fact domiciled in the state granting the divorce, and in the Haddock case she had not. The reason, however, upon which the right to grant a divorce is based is, as the court pointed out in the Andrews' case (ante) the interest and necessary control that a state must have as to the status of persons composing it, citizens as distinguished from those temporarily sojourning therein. If the husband and wife have their matrimonial domicile in New York and then separate, she going to Massachusetts and he to Connecticut, and they there settle down and become members of the respective communities, the state where each is domiciled has just as much interest in and, it is submitted, ought to have just as much power to affect the status of that person as though he or she had lived there from the beginning of their married life. If one of them remains in New York the real reason why New York ought to be able to speak in regard to that one's status is not because they both *have* lived there but because that one *is* living there. Why the mere fact that the wife had at one time been domiciled in the state where the husband is still domiciled should determine the right of the court to find conclusively that she still was in legal theory there domiciled is not clear.

Is the case then to be regarded as practically if not technically overruling the Atherton case? As already pointed out the court professes no such intention and it is possible to make a distinction between them. But it is submitted that there is a fundamental difference in the principles underlying the two cases. The Atherton case expressly says (181 U. S., at 162, 163) that the rule as to notice in divorce suits is different from that in suits *in personam*. It cites with approbation cases where divorce decrees granted by states where only one of the parties was domiciled were sustained and enforced elsewhere as against the other spouse, and it is believed that the gist of the case is embodied in the following language (page 162). "The marriage tie when . . . dissolved as to one party, ceases to bind either. A husband without a wife, or a wife without a husband, is unknown to the law." That is to say: The husband being domiciled in Connecticut that state must necessarily and inherently have the power to fix the status of one of its own citizens. If it does so and by a proper decree declares him to be an unmarried man he thereupon becomes such, not only in Connecticut but elsewhere. But to say that he is unmarried necessarily means that he has no wife; for the court of another state to attempt in one breath to say that he is unmarried and in the next to proceed with a divorce suit against him by a plaintiff who can have a *locus standi* only on the theory that she is still his wife is to attempt to combine two necessarily conflicting ideas.

As to the rule laid down in the Haddock case, on the other hand, it is not entirely clear whether any effect need be given to the Connecticut decree outside the state. The older New York view as laid down in Baker *v.* Baker, 76 N. Y., 78 (1879) was that the New York court would recognize the right of the state where the husband was domiciled to fix his status and would respect it as so established even in New York, that is, would treat the husband as single while they still regarded the wife as married. The unfortunate complications that might readily result from such a view are obvious; but the New York courts in claiming to control absolutely the status of their own citizens recognized a logically similar right on the part of other jurisdictions. In the present case it is not clear that the court considered that the decree would be entitled to any weight in New York. The court says:

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"The proposition presupposes that because in the exercise of its power over its own citizens a state may determine to dissolve the marriage tie by a decree which is efficacious within its borders, therefore such decree is in all cases binding in every other jurisdiction. As we have pointed out at the outset, it does not follow that a state may not exert its power as to one within its jurisdiction simply because such exercise of authority may not be extended beyond its borders into the jurisdiction and authority of another state. . . .

"It (the holding of the court of the present case) does not deprive a state of the power to render a decree of divorce susceptible of being enforced within its borders as to the person within the jurisdiction and does not debar other states from giving such effect to a judgment of that character as they may elect to do under mere principles of state comity . . . that is, it compels all the states to recognize and enforce a judgment of divorce rendered in other states where both parties were subject to the jurisdiction of the state in which such decree was rendered."

If these passages mean that the Connecticut decree is entitled to no recognition in New York the result is that Connecticut is prevented from effectually settling the status of one of its own citizens; and in a case where the public policy of Connecticut demands that this person should have the status of an unmarried man, New York can prevent Connecticut from doing this in any such way as to establish that person's status everywhere beyond question. In other words, the Atherton case says that a state may effectually fix the status of its own citizens, even though it does thereby indirectly affect the status of non-citizens; the Haddock case apparently says that one state can prevent another state from taking action effectually to remedy a state of affairs that may produce an extreme hardship upon one of its own citizens, although the first state may be at the same time equally powerless to act with any greater effectiveness. As between a rule that allows a state to regulate effectually the status of its own citizens even though it incidently affects others and a rule that because of an incidental effect in another state refuses to allow a state to effectually act as to its own, the choice would seem clear. It may well enough be admitted that a doctrine which allows action under such circumstances will permit, say, Connecticut indirectly to produce an effect in New York. But this is a result by no means peculiar to divorce proceedings. A decree in admiralty directing the sale of A's vessel, that being within the jurisdiction, and he not being within the jurisdiction will when carried out effectually operate to make it not his vessel, and the result of that decree may incidently affect A's relations in half a dozen other ways. Yet the efficiency of such a decree has never been questioned. An even closer analogy may be found in the garnishee cases. If instead of husband and wife in the Haddock case the parties had been a New York creditor of a Connecticut debtor, and a creditor of the New York creditor had proceeded as plaintiff in Connecticut to garnish that obligation, the Connecticut court could have given a judgment which when satisfied would have operated to destroy the debtor and the creditor relation between the garnishee and the defendant and which would have been everywhere entitled under the constitution to recognition as protecting the garnishee against any claim by his creditor for that amount (see R. & I. P. R. R. *v.* Sturm, 174 U. S., 710 (1899), King *v.* Cross, 175 U. S., 396 (1899), and it would have made no difference that the defendant was never in Connecticut and never appeared in the case (so long as he had notice thereof) or that the garnishee was merely temporarily in the state, Harris *v.* Balk, 198 U. S., 215 (1905). It may be said that the relation of debtor and creditor is not a status, but it still remains true that the state is held by virtue of its control over one of the parties

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to the relation to have a jurisdiction sufficient to enable it to effectually terminate this relation whether it is considered from the point of view of the person in the state or the person outside the state.

Finally one may say, as does the court in the Haddock case, that an application of this doctrine to divorce cases would produce the result that "the states whose laws were the most lax as to length of residence required for domicile, as to causes for divorce and speed of procedure concerning divorce, would in effect dominate all the other states." This objection, however, would seem to be sufficiently met by the salutary doctrine of the Andrews' case (ante). It would seem, therefore, that both as a matter of analogy and public policy the reasoning of the dissenting minority in the Haddock case has more to commend it.

There are many other interesting questions that the decision suggests that can only be alluded to briefly. Suppose the wife justifiably leaves the husband in New York, their matrimonial domicile, and goes to Connecticut, there acquires a *bona fide* domicile and brings divorce proceedings. Connecticut, according to the Haddock case, has no jurisdiction to grant an effective decree because it is neither the state of the domicile of the husband nor of the matrimonial domicile. Suppose the husband, keeping his New York domicile, appears in the divorce proceedings. Has Connecticut jurisdiction? Before the Haddock case this would not have been open to doubt but the reason that would have been given would be that Connecticut had jurisdiction because of the domicile of one of the spouses. The court in the Haddock case says that Connecticut would have jurisdiction because the husband appeared, and cites therefore Cheever *v.* Wilson (ante). The facts in that case were just these but the court laid no weight on the fact that the husband appeared, but on the contrary used the following language (9 Wall. at 124): "The proceeding for a divorce may be instituted where the wife has her domicile. The place of the marriage, of the offense, and the domicile of the husband are of no consequence." But this is not the theory of the Haddock case. That goes on the reasoning that the foundation of the jurisdiction in divorce is domicile over both parties, that to allow a state because one of the spouses is there domiciled to project its decree even incidently in another state and affect the other spouse there domiciled would be to permit it to affect a matter that relates to the status of a member of another community and so give its decree extra territorial force. Now it is clear from the Andrews case (ante) that divorce proceedings involve more than the parties alone; and it may be fairly asked how, if both parties cannot by consent give a state not their domicile power to affect their status, which is the holding in the Andrews case, and if the domicile of one party is not in itself enough to give a state jurisdiction to affect the other party, how the mere consent of that other party can add anything to the jurisdiction of a state in which he is not domiciled.

Again, suppose a state of facts like O'Dea *v.* O'Dea, 101, N. Y., 23 (1885). Husband and wife were married and domiciled in New York. The wife deserted the husband and resumed so far as she could her former domicile in Canada. The husband removed to Ohio and there acquired a *bona fide* domicile and then obtained a divorce from his wife because of her desertion, she having notice of the proceedings but taking no part therein. The wife then married O, where it does not appear, but they apparently afterward became domiciled in New York where O brought proceedings against his wife to have his marriage annulled on the ground that at the time thereof his wife was a married woman. The court granted the decree. There was a dissent pointing out that at the time of the divorce the wife was domiciled either in Ohio or in Canada, certainly not in New York, and

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that by the law of Ohio it was clear that the decree operated to change her status and there was no showing that it did not so operate by Canadian law. This decision seems unsustainable. The result of it is to allow New York to determine the status not only of persons at the time domiciled therein but of persons who were formerly and again later became so domiciled and to determine that status in direct contradiction to the law that governed them at the time of the act affecting their status.

Again suppose that Mr. Haddock after the Connecticut decree had married a second wife in Connecticut, had had children born there and then had later with his second wife and children returned to New York. What would have been their status? Would New York be compelled to recognize them as a lawful wife and legitimate children? If so, but if at the same time New York need give no credit to the Connecticut decree, the second Mrs. Haddock and her children would be the lawful wife and children of a man who was still the undivorced husband of the first Mrs. Haddock. Or the New York courts might take the position of recognizing the Connecticut decree to the extent of saying that Mr. Haddock was no longer the husband of the first Mrs. Haddock though she still remained his wife. Or finally may New York say that the whole foundation upon which the claim of the second Mrs. Haddock rests is the Connecticut decree, that that is worthless, that consequently she is neither a lawful wife nor the children legitimate children? If this last be possible it would seem that not only may Connecticut not decree the status of one of its own citizens who has married a New York citizen but it may not effectually determine the status of persons who have been born and brought up in its confines.

These are but a few of the problems suggested by the decision; at the same time it must be remembered that the only point necessarily involved in the case is that if a state refuses to recognize a decree under the circumstances of this case its refusal so to do is not a violation of its constitutional obligations. On the other hand, if it is the law of a state, as it would seem to be of most of the states, that a decree so pronounced is effective to alter the status of one of its own citizens there is nothing in this decision to change that common law rule.

In connection with the last contingency above discussed, a recent English case on a similar question is worth noting. That is the case of Armitage *v.* Attorney General, referred to at length in the May number of the GREEN BAG, reported in full in 22 Times Law Reports 306 (1906). The facts in that case are these. A, a domiciled English woman married in England G, who was domiciled in New York but temporarily sojourning in England, where they continued to live after their marriage but apparently not as their domicile. Later they separated, A went to Dakota, acquired a domicile, brought divorce proceedings in which G appeared and obtained a divorce for desertion. Seven months later, while in Colorado, she married H, an Englishman by birth and domicile, and returned with him to England, where they lived as man and wife. Later, the validity of the Colorado marriage being incidently raised in proceedings by G, A's first husband, H filed a bill to have established the validity of his marriage with A and the legitimacy of his children. The court found for the petitioner as to both points. It rested its conclusion on the ground that as New York, the domicile of G at the time of the Dakota divorce, would have recognized it as divorcing him, because of his appearance, the English court would do no less, though it remarked in the course of its decision that "such importing of jurisdiction to a court was absolutely ludicrous in English law and would be of no effect whatever, unless the court had jurisdiction founded on domicile."

Certain difficulties of principles that arise in the light of the Haddock decision in at-

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tempting to hold that mere consent can give jurisdiction to grant a divorce as against a defendant as regards whom the jurisdiction would not otherwise exist, have already been pointed out. It is submitted, however, that assuming that the law was and still is in New York that a husband may confer jurisdiction by submitting himself to the state where his wife is domiciled, so that the decree would also be good to determine his status (although this question of how far submission can give jurisdiction is expressly left open in Jones *v.* Jones, 108 N. Y. 415, upon which the English court relies for its New York law) and that consequently the Dakota decree was good against the husband, if the status of any person was involved in the Armitage case it was not that of G, A's former husband, but of A herself, and the effect of the divorce decree as to her status ought to have been settled by the law of her domicile, Dakota. At the time of this decree (1891) it seems clear that whether G had appeared or not, if A had been really domiciled in Dakota, a fact which seems not to have been seriously questioned, that even in New York she would have been recognized as divorced (People *v.* Baker, ante).

After all, however, was the question of the New York status of either G or A really involved as a matter of principle? The immediate question before the court was as to the validity of A's marriage with H. That took place in Colorado. The general rule prevailing in this country, and which seem to be sound, is that the validity of a marriage and the capacity of the parties thereto are settled, as a matter of public policy, to favor legal rather than illegal unions, just like any other contract, by the law of the place where the parties enter into the relation. Commonwealth *v.* Lane, 113 Mass. 458 (1873); Wall *v.* Williamson, 8 Ala. 48 (1845); Whart., Conflict of Laws, 3d ed., sec. 165 a. There are certain exceptions to this, viz: polygamous or incestuous marriages, and possibly where the contracting parties leave the state of their domicile for the express purpose of evading the laws thereof, which forbid their union. Whether as a matter of decision the bulk of these latter cases involves anything more than the proposition that persons who live together as man and wife under these circumstances may be punished for so doing, is perhaps an open question. Be that as it may, in the present case there was no evidence of any facts to bring the case within any of the above exceptions, for certainly the law of Colorado does not make valid or recognize either polygamous or incestuous marriages. Consequently it would have seemed that the short and correct test in this case would have been to refer the validity of the marriage to Colorado law.

It must be admitted, however, that there has been a tendency among the English decisions to refer the capacity of the parties to a marriage to the *lex domicilii*. Sottomayer *v.* De Barros, L. R. 3 Prob. Div. 1 (1877) was the first case clearly so to do. The present case is perhaps to be recognized as standing for the same principle, and the line of reasoning that it pursues to be explained on that ground. The collateral inquiries that such a principle involves are obvious and numerous. A general adoption thereof in this country, taken in conjunction with the decision in the Haddock case and the principles that apparently underlie it, could not be said to make with very great force toward a simplification of the problems of interstate divorce and remarriage.

CHICAGO, ILL., May, 1906.

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CURRENT LEGAL LITERATURE

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

ADMINISTRATIVE LAW. "What is an Act of State," by H. S. Gour, *Bombay Law Reporter* (V. viii, p. 97).

AGENCY. "Ratification of Agency Without Knowledge of Material Facts," in the May *Yale Law Journal* (V. xv, p. 331) by Arthur L. Corbin, concludes "that whether between principal and agent, principal and third party, or principal and outsiders, whether the principal is suing or being sued, a ratification is never to be based upon the doctrine of imputed notice, although in one case knowledge of extrinsic facts may be imputed to the principal even in the absence of any ratification. The doctrine of ratification and the doctrine of imputed notice have no connection. Ratification requires actual knowledge of all material facts, and there is no exception."

AGENCY. "Can the Authorized Act of an Agent be Ratified by the Principal after the Third Party has Receded from the Contract?" by Wilmer T. Fox, *Central Law Journal* (V. 62, p. 338).

AGENCY. "Character of Servants, Blacklisting," by C. B. Labatt, *Canada Law Journal* (V. xlii, p. 289).

BANKRUPTCY. "Duties of Receivers in Bankruptcy," by Edw. R. French, *The Brief* (V. vi, p. 89).

BIOGRAPHY (Jay). In the May *Columbia Law Review* (V. vi, p. 289), James B. Scott publishes an interesting account of "John Jay, First Chief Justice of the United States." Of his capacity, he says:

"The cast of his mind was judicial and the course of his life off the Bench was a daily proof of his fitness for the Bench, but the best justification of the appointment is nevertheless the judicial gravity and capacity shown in his conduct of the affairs of State.

"Had Jay never sat on the Bench his fitness for the position would have been as patent to posterity as it was to his contemporaries. Had Marshall remained in active politics it is probable that we would hardly know that we had lost our greatest judge."

The article continues with an interesting account of the part played by Jay in the Revolution and its subsequent diplomacy. His brief experience on the Supreme Bench is then described and some of his important decisions analyzed, as well as his service in laying the foundation for the modern rules of court.

Though Jay resigned in the belief that the court was a failure, the author believes that short as his service was, it was of great importance and that he fully justified the appointment.

CODIFICATION. "A Code for the New State of Oklahoma," by C. O. Blake, *American Lawyer* (V. xiv, p. 195).

CONFLICT OF LAWS (see Corporations, Foreign).

CONSTITUTIONAL LAW. "Federal Control of Life Insurance," by George J. Benson, *The Brief* (V. vi, p. 116).

CONSTITUTIONAL LAW. "The Validity of State Statutes Prohibiting Contracts of Exemption by Carriers Concerning Interstate Commerce," by J. R. Tucker, *Virginia Law Register* (V. xii, p. 1).

CONSTITUTIONAL LAW. "The Next Constitutional Convention of the United States" by Walter Clark, Raleigh, N. C., 1906.

CONSTITUTIONAL LAW (England). In the May *Yale Law Journal* (V. xv, p. 315), D. H. Chamberlin publishes a consideration of the effect of Mr. Balfour's refusal to dissolve Parliament after an adverse vote of the Commons, under the title of "A Recent Chapter of the English Constitution." From an examination of the evidence he finds that on a fair and notified occasion in a full house, on a serious and vital question of administration or policy the government was beaten when by-elections had been for a considerable period running heavily and steadily against

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the government. He holds that the only constitutional course was resignation or dissolution.

CONSTITUTIONAL LAW (Rate Regulation). In the May *Harvard Law Review* (V. xix, p. 487), Adelbert Moot discusses a variety of practical points in connection with the subject of "Railway Rate Regulation." The point of chief interest to the profession which he takes up is whether Congress may delegate to a commission the power to condemn regulations and practices of common carriers without fixing any standards by which to test the lawfulness of such regulations and practices, and he concludes that it cannot. He also seems to conclude that under the due process clause a temporary injunction to protect legal rights until a court of equity could finally hear and determine the case, cannot be refused.

CORPORATIONS. "A Treatise on the Incorporation and Organization of Corporations created under the business corporation acts of the several states and territories of the United States" by Thomas Gold Frost, Little Brown & Co., 2d edition, Boston, 1906. The first part of this book contains chapters concisely treating of the law and practice relating to the organization of corporations, the issue of stock, and legislative control over domestic and foreign corporations. The second part consists of a synopsis of incorporation acts of the several states and territories and of the Dominion of Canada and Manitoba. Part three consists of forms and precedents. It includes an excellent selection of object clauses for charters. There are also extensive tables of organization and annual franchise fees for both domestic and foreign corporations in the different states, and tabulations of the answers to various questions which arise when selecting a jurisdiction in which to incorporate. Such for example, as whether or not there are any residential requirements as to directors.

So long as our present highly artificial condition of interstate corporation law is permitted to continue this work will prove a valuable guide to lawyers in the selection of jurisdictions in which to incorporate, and in the preparation of charters and by-laws. It is the most effective work of a general nature on this subject which has yet been published.

CORPORATIONS (Foreign). A further discussion of legal fictions entitled "The Legal Personality of a Foreign Corporation," by E. Hilton Young, appears in the April *Law Quarterly Review* (V, xxii, p. 178).

"Since the time when trading corporations first began to carry on business in civilized states other than those in which they were incorporated, difficulties have been felt in understanding their status in the foreign states by lawyers whose minds have been held by the prevalent theories of fiction and concession. Its personality is conceded to a corporation by the state, and exists only as a fiction of the municipal law of the state which conceded it. The authority of the state does not extend, and its municipal law has no jurisdiction, beyond the frontiers of the state. How, then, can the corporation exist outside the medium, as it were, of which it is composed.

"But it is questionable whether this geographical manner of considering the problem of the status of a migrating corporation is not a misleading manner. A truer statement of the problem is from the point of view rather of metaphysics than geography. The problem has usually been discussed in connection with questions of jurisdiction, and for that reason the geographical aspect of the question has been pushed into the foreground. The physical absence of a corporation from the scene of its activities in a foreign state is material in considering the question whether the courts of that state can exercise jurisdiction over the corporation; but it is not material in considering another and a more fundamental question, whether the fictitious personality which is conceded to a corporation by one state can become in another the 'subject' of any legal rights and duties at all. In the special case of a contract, for instance, the first question is, how can the contract of the foreign corporation be enforced? The second and the more fundamental is, can the foreign corporation make a valid contract at all? The law of agency, it is said, will help us to answer the first question, in which we are concerned with jurisdiction: but it will not help us to answer the second, in which we are concerned with power and capacity; for if a principal has no power or capacity in law to perform an act himself, he cannot in general

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perform it by an agent. An agent can cross a physical barrier, but not one which exists in legal theory.

" It is possible to say of the personality of a corporation that, although it does not come into existence until there has been a concession from the sovereign authority, yet once the concession has been made, it has an objective existence of its own, apart from the continued exercise of the will of the sovereign authority; and this is a view which has found favor in France. But in that case it is not a personality which is conceded, but recognition of a personality, and concession is thus reduced to a formality akin to registration in the sense in which a motor car is registered, and the fiction theory is implicitly abandoned in favor of a view which is indistinguishable from the realistic view, that ' within its own sphere and for its own purposes the artificial identity of a corporation is just as real as any other identity.' "

The author concludes that:

" We must, in short, have many fictions or none. The theory of a fictitious personality applied to the status of migrating corporations leads to conclusions which are in conflict with common opinion and common sense, and, if we reject them, we are accepting the theory of a real personality."

CORPORATIONS (Stocks). A recent New Jersey decision is analyzed by H. S. Richards in the May *Michigan Law Review* (V. iv, p. 526) under the title of " Exchange of Stock for Capitalized Profits." In this case a trust was formed by combining existing corporations and issuing stock to a promoter who distributed it to the vendors. Stock was also given as a bonus on the sale of bonds. " The court ruled that all the defendants who received stock as a bonus or received it through Stein under the promoters' agreement were liable for the par value of the stock or so much thereof as should be found necessary to meet outstanding obligations of the corporation. All holders of stock who came in on the ground floor, that is, who received stock as a bonus with the bonds purchased, are treated as standing in the same position as original subscribers for stock."

The rule as to bonus stock had been previously settled. While allowed in a reorganization for the purpose of rehabilitation of capital, such a bonus cannot be given with a bond issued on the original incorporation. The important part of the case, however, is the refusal to permit property conveyed for stock to be valued on the basis of future earning power. The court held that the good will of the existing plants was covered by the terms of the original options and that the combined business had no good will as yet.

The author concludes as follows:

" The rule forbidding the capitalization of speculative profits does not in the least interfere with legitimate enterprise or prevent the sale of incorporeal rights or good will. It does not in reality question the good faith rule generally accepted. It is in substance an application of that rule stated in a different form."

CORPORATIONS (see Municipal Corporations).

CRIMINAL LAW. " The Doctrine of Previous Jeopardy," by G. W. Payne, *Central Law Journal* (V. lxii, p. 295).

CRIMINAL LAW. " The Prevalence of Perjury," by Hon. Judge Wallace, *Canada Law Journal* (V. xlii, p. 255).

CRIMINAL LAW. " Criminal Anthropology," by W. P. Archibald, *Canadian Law Review* (V. v, p. 201).

CRIMINAL LAW. " The Bearing of Custom upon the Question of what is ' Mistake of Law,' and what is ' Mistake of Fact,' " by Herbert J. Adams, *Central Law Journal* (V. lxii, p. 360).

CRIMINAL LAW (Insanity). In the May *Law Magazine and Review* (V. xxxi, p. 315), " Criminal Responsibility," a criticism of a recent work on that subject by Charles Mercier, is published by A. M. Rickett. Mr. Mercier concluded " that justice will be done if the test is satisfied that they (*i.e.*, the insane) did not know the nature and quality of the act, and that it was wrong; *provided* that this knowledge includes knowledge and appreciation of the circumstances in which the act was done; and *provided* also it is held in mind that knowledge is a matter of degree, and that a person

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may know his act is wrong without knowing how wrong it is."

The author admits that this would work well in a majority of cases but thinks it would not prevent possible misjustice. He suggests the following test. "No act is a crime if the person who does it is at the time prevented, either by defective mental power, or by any disease affecting his mind —

(*a*) From foreseeing the natural and probable consequences of his act; or

(*b*) From appreciating the legal significance of his act; or

(*c*) From appreciating the moral quality of his act; or

(*d*) From controlling his own conduct.

"The general conclusion of Mr. Mercier's reasoning seems to be this. The law as to criminal responsibility is antiquated, and if construed in its strict narrow sense would make for injustice. But on the whole, justice is done because the judges interpret the rules in *Macnaughten's Case* so liberally, and juries are naturally sympathetic when the question of insanity is raised. It is best then to leave things as they are. With this conclusion I cannot agree. Juries, as Stephen very justly said, are apt to go by the apparent madness of the action. When an act looks mad they exonerate, where it looks rational they commit. This is too rough and ready a test. Amplify the legal criterion of responsibility and you put the issue on a much clearer and more comprehensible basis.

"The plea of irresistible impulse should be regarded with the closest scrutiny: but to rule out lack of self-control, as Mr. Mercier desiderates, seems quite opposed to the trend of modern progressive thought."

COURTS (England). "Ought the County Court to be Made a Branch of the High Court" is answered in favor of consolidation by Francis K. Munton in the May *Law Magazine and Review* (V. xxxi, p. 328).

The same subject is also agitated in the April *Law Quarterly Review* (V. xxii, p. 127) in an article entitled "The Consolidation of the High Court and the County Courts," by Thomas Snow.

EDUCATION. "The American Lawyers and Their Making," by Charles Noble Gregory, *American Lawyer* (V. xiv, p. 147).

EVIDENCE. "Notes on the Law of Evidence," by Sir Joseph Walton, *Medico-Legal Journal* (V. xxiii, p. 675).

EVIDENCE (Legislation). John H. Wigmore in the May *Illinois Law Review* (V. i, p. 9), calls attention to "Some Evidence Statutes that Illinois Ought to Have."

HISTORY. The first article in the opening number of the new *Illinois Law Review* published by the students and teachers of the Northwestern University Law School and devoted to matters of interest to the Bar of Illinois, is an interesting account of "The Earliest Courts of the Illinois Country," by George A. Dupuy.

HISTORY. Charles Foster Kent in the April *Yale Law Journal* (V. xv, p. 284), presents briefly "A Tentative Codification of the Old Testament Laws."

HISTORY. "Civil War and Reconstruction Interstate Controversies," by George C. Lay, *The Brief* (V. vi, p. 98).

HISTORY. A continuation of the story of Lilburn's Trial in 1649 with especial reference to its bearing on the development on the distinction in our law between "The Province of the Judge and of the Jury," by G. Glover Alexander, is related in an interesting manner in the May *Law Magazine and Review* (V. xxxi, p. 289).

INTEREST. "Law of Interest," by K. B. Dastur, *Bombay Law Reporter* (V. viii, p. 111).

INTERNATIONAL LAW. "Decisions of the Courts as a Source of International Law," by Edwin Maxey, *Albany Law Journal* (V. lxviii, p. 88).

JURISPRUDENCE. "The Principles of Chinese Law and Equity," by Edward H. Parker, *Law Quarterly Review* (V. xxii, p. 190).

JURISPRUDENCE. "Responsibility in Law," by Rankine Wilson in the *Law Magazine and Review* (V. xxxi, p. 257) is the first instalment of a psychological analysis of the distinction between cases where a man should be held accountable for his acts and where he should not.

JURISPRUDENCE. "The Growth of Mohammedan Jurisprudence," by Abdur Rahim, *Calcutta Law Journal* (V. iii, p. 55[n]).

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JURISPRUDENCE (Legal Fictions). James Edward Hogg in the April *Law Quarterly Review* (V. xxii, p. 172), considers "Legal Conceptions from a Practical Point of View." He shows that legal conceptions bear a considerable resemblance to those scientific conceptions which are known as hypothetical assumptions. They differ, however, in that (1) the legal conception may at one time have been a correct representation of actual fact, (2) it is not regarded as a convenient general statement but as an entity, whose existence is assumed to be immutable until changed by competent authority. As a result of the latter quality, legal views of rights which have to be determined in courts of justice, are not identical with the popular views. The author collects illustrations from the fields of constitutional law, property, persons, and procedure. Under the law of persons he supports the contentions recently much discussed in legal literature regarding the fiction theory of corporate existence.

"The necessity or desirability of making such changes in the law as to bring legal conceptions into line with popular views must, of course, vary greatly in individual cases. Probably the fictions involved in the conceptions of constitutional law cause less general inconvenience than the fictions in other branches of law, and have some sentimental arguments in favor of their retention. All conceptions, however, which are really fictitious, involve waste of power to the community, and the burden of proof should be on those who advocate their continued existence. Particularly with respect to fictitious conceptions of property rights does reform seem to be advisable; the existence of fictions necessarily impedes transactions with property, and renders the law of property more difficult to acquire and practice. The inconvenience produced by long delayed reform in legal conceptions is illustrated in the case of Fines and Recoveries. The conception of an estate tail being incapable of being barred otherwise than by means of fictitious litigation continued to exist for about 180 years after the first attempt, made during the Commonwealth, to change it.

"If legal conceptions could be made to accord with existing modern conditions, further necessary law reform would be made easier, and business men and owners of property would have far less difficulty in understanding their rights."

JURISPRUDENCE (Sovereignty). In the April *Juridical Review* (V. xviii, p. 1), Prof. W. Jethro Brown discusses "Sovereignty." He concludes as follows:

"Sovereignty is a conception whose meaning and incidents must vary with the particular department of thought with which the student is more immediately concerned. In Political Science it may refer to the *practical* supremacy of

(1) A Government;
(2) An Electoral Body;
(3) A Popular Majority;
(4) The State as a Moral Organism.

In Jurisprudence the conception may refer to the *formal* supremacy of

(1) A Government;
(2) The highest Law-making Body, ordinary or extraordinary;
(3) The State as a Juristic Person.

"Such a list can make no pretence to completeness, but will serve for the purposes of a practical discussion. The choice between the various types of theory thus grouped must vary according to conditions of time and circumstance. So far as the jurisprudence of our time is concerned, the sovereign may be defined as the power whose authority is regarded by law as unlimited, and as the source both of all law and of the authority of all law-making or governmental institutions. Although the location of the sovereign varies in the different legal theories of different nationalities, it seems probable that the jurisprudence of a near future will recognize that the State itself is the true sovereign, and that such a body as the Parliament of Great Britain should be described, not as the sovereign, but as the sovereign-organ."

"When lawyers have escaped from the tyranny of forms and have overcome the superstition that they must not regard things in their totality, when they have learnt that, on the contrary, it is only when we so regard them we can hope to comprehend them, they will find some place in legal theory for ideas which have already profoundly affected less conservative branches of learning. They will

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not fear to think of the State as a unity, a personality, a sovereign — a sovereign in whose presence the visible ruler can aspire to no higher title than that of sovereign-organ. The law may elect to accept the declared will of that visible ruler as conclusive of the will of the sovereign, but the fact need not prevent the lawyer from recognizing, even as a lawyer, that the visible ruler is but an organ of the organized community."

JURISPRUDENCE (see Corporations).

LAW BOOKS. "Some Observations on Case Law Reporting," by John R. Rood in the May *Michigan Law Review* (V. iv, p. 516), begins with an interesting account of some of the early English reporters and concludes with criticisms of modern methods of reporting, chiefly because lack of sufficient cross reference to other series of reports.

LAW BOOKS. "North Carolina Digest," Vol. II, by Zeb V. Walser and Zenobian I. Walser, Durham, N. C., 1906.

LEGAL ETHICS. "The Ethics of the Practice," by W. R. Biddle, *American Lawyer* (V. xiv, p. 197).

NAMES. A collection of cases relating chiefly to unfair competition is made by Bernard C. Steiner in the May *Yale Law Journal* (V. xv, p. 341), under the title of "A Man and His Name."

MARITIME LAW (Salvage). "Maritime Salvage," by H. Birch Sharpe in the April *Law Quarterly Review* (V. xxii, p. 163), considers the origin of the obligation under a policy of marine insurance to make good to the owner of property salved what he has been called upon to pay for this service. He finds from the fact that all foreign codes of maritime law, both ancient and modern, contain provisions and enactments on the subject of salvage, "that there is probability approximating to certainty, that such an obligation indissolubly attached to the *res* itself at risk must in the thirteenth century have been within the contemplation of the inventors of the system of insurance, and of the framers of their special form of contract for indemnifying an owner of property at sea."

He finds an analogy between salvage and general average:

"1. Though not contemporaneous, each is the creature of early maritime law.

"2. The object of each is the rescue of property at sea from impending destruction.

"3. By danger each is called into existence, and by loss of the property or attainment of its safety this existence is determined.

"4. Contribution to each is assessed on the net arrived value of the property saved.

"5. What has beeen sacrificed contributes equally in proportion to its value with what has been saved. Seeing, then, that this compensation must be paid by an owner out of the *res* itself, if he would retain, or — as in the case of a derelict — regain its possession, salvage is a sacrifice as ample and complete as goods thrown overboard, or a mast cut away to lighten a ship in a storm.

"Inasmuch, therefore, as it is not deducted but remains a component part of the assessable value of the property saved, salvage contributes to its own loss in as real a manner as jettisoned cargo in general average.

"6. Where, ultimately, nothing has been saved, there is no contribution for property sacrificed."

From a discussion of the cases the author concludes that authority is unanimous in establishing the doctrine that salvage is the direct and immediate consequence of a peril insured against.

MUNICIPAL CORPORATIONS. "The County of the City," an article denying that any advantage accrues to the city under the Scotch law by being recognized as a county in itself, by G. W. Wilton, appears in the April *Juridical Review* (V. xviii, p. 65).

MUNICIPAL CORPORATIONS (Bonds). In the May *Michigan Law Review* (V. iv, p. 497), Charles L. Dibble discusses "The Doctrine of the Federal Courts as to the Validity of Irregular Municipal Bonds." He summarizes his views as follows:

"1. No issue of bonds is absolutely ultra vires unless the municipality attempting to issue them is totally without power to issue bonds for any purpose or under any circumstances.

"2. Where there is a mere informality in some step prior to the issuance of the bond, and the officer issuing the bond is empowered, expressly or impliedly, to determine whether such step has been duly taken, his decision is absolutely irrebuttable, except on an imme-

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diate direct attack, and the bonds issued by him are absolutely valid, with or without recitals.

" 3. Where facts or conditions precedent to the issue, or the amount and purpose of the bond itself, must have come within the cognizance of the issuing officer (or other person empowered to make a recital) prior to the issuance, and that officer makes in the bond a recital of conformity with the statute (or with the constitution, if the restriction be imposed by the constitution) the municipality is estopped to deny the validity of the bond in the hands of a bona fide holder, unless such holder has constructive notice of invalidity.

" 4. To constitute constructive notice of invalidity there must be some statement on the bond, which if taken in connection with the statute or some single, formal, and easily accessible record prescribed by the statute as a criterion, would give the purchaser notice that the statutory authority had been exceeded.

" To these may also be added:

" 5. Estoppel will also arise against a municipality from long acquiescence in the validity of bonds, or from receiving and using the proceeds, or paying interest, or other equitable considerations. Such circumstances have the same power of estoppel as would a recital, and are open to the same rebuttals, such as absolute ultra vires or constructive notice of invalidity.

" In the five rules just stated the conditions are laid down under which an irregular bond will, in spite of its irregularity, be enforced. Once you have established its enforceability, however, it is on an equal footing with bonds which are absolutely unexceptionable. Hence it follows that it, like all municipal bonds, is a negotiable instrument. A bona fide holder ' is entitled to transfer to a third party all the rights with which he is vested, and the right so acquired by his indorsee cannot be affected by proof that the indorsee was acquainted with the defenses existing against the paper.'

" In brief, the theory of this paper is that, when the question of the validity of municipal bonds was first presented, the court held that irregularities of every sort were cured by the decision of the officers issuing them, and that this decision might be attacked only in a direct proceeding begun before the bonds had passed out of the hands of the first taker. Later, cases came up in which the defects in issuance were graver, or the equities of the holder less strong, and the court, desiring to modify its former holding without reversing it, held that in such cases there was no authority to issue. This, however, leads to a conclusion utterly untenable, — that authority to issue is affected by any equity or want of equity on the part of the holder. These later cases are, then, in reality decided not on the basis of authority or lack of authority, — but on the basis of estoppel (and the courts in most of the recent cases have so stated their ground). The early doctrine of a decisive judgment on the part of the issuing officers is limited to cases of irregularity in some precedent formality; and as to graver defects, defects which are entirely beyond the judgment of a tribunal, the recital of the officers operates merely by way of estoppel, rebuttable by constructive notice."

PARTNERSHIP. " The Right of Surviving Partner to Sell Real Estate which Belonged to the Firm," by W. A. Gardner, *Central Law Journal* (V. lxii, p. 319).

PERSONS. In the April *Yale Law Journal* (V. xvi, p. 263), Gordon E. Sherman writes of " Emancipation and Citizenship." He discusses the history of the constitutional theories on this subject in our country and also the history of the development of the law of Rome on the same subject.

PERSONS. " Curatory of Minors in the Civil Law," by James McIntosh, *Juridical Review*, (V. xviii, p. 18).

PRACTICE. " The Misconduct of the Bench as Reversible Error," by Wm. A. Purrington, *Bench and Bar* (V. v, p. 10).

PRACTICE. " Setting Aside an Award," by D. C. Banerji, *Allahabad Law Journal* (V. iii, p. 97).

PRACTICE (Personal Injury Litigation). From a series of addresses on legal tactics before the students of Northwestern University Law School, two on personal injury actions appear in the May *Illinois Law Review* (V. i, p. 16). " The plaintiff's standpoint," by Andrew J. Hirschal, announces with

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startling frankness "modern" reasons for soliciting accident cases and gives some sage suggestions as to trial methods. "The defendants' standpoint," by Samuel S. Page presents fairly his side of the question.

PROCEDURE. "Effect of an Order Absolute for Sale," by H. S. Gour, *Allahabad Law Journal* (V. iii, p. 83).

PROCEDURE. "Some Changes in Procedure," by Geo. Martin Rae, *Canadian Law Times* (V. xxvi, p. 319).

PROPERTY. "Manx Land Tenure," by Reginald D. Farrant, *Law Quarterly Review* (V. xxii, p. 136).

PUBLIC POLICY. "The Corrupt Practices Act," by Richard A. Dana, *American Lawyer* (V. xiv, p. 163).

PUBLIC POLICY. "The Disregard of Law," by Alphonso T. Clearwater, *Albany Law Journal* (V. lxviii, p. 82).

RAILROADS. American Railroad Rates, by Walter Chadwick Noyes. Boston: Little, Brown & Co., 1906, 12 mo. pp. 277.

The qualifications of the author are obvious from a glance at the title-page. He is a judge of the Court of Common Pleas in Connecticut, president of the New London Northern Railroad Company, and author of an excellent treatise upon Intercorporate Relations. And his treatment of the railway rate problem shows the manifold advantages of being able to appreciate all aspects of the problem. Since it does take all sides of the question into account it is one of the safest books to recommend to the general reader who wishes an understanding of one of the most important questions of the century. There are upon this fundamental problem, as upon every vital question which engages the attention of all thinking men, three schools of thought. There are the conservatives who feel that the present situation is well enough, many of them believing that the state is going too far already in regulation; then there are the radicals who know no limits to the extent to which state regulation ought to go; and then, of course, the moderates who believe in state regulation of some sort. Judge Noyes plainly belongs to this last school, or rather to the conservative wing of it; and it is very necessary that this school should make its influence felt at this time. But if one can judge the spirit of the times, public opinion has carried the law beyond the position taken by the author. Charging what the traffic will bear, for example, is a good enough working principle for a traffic manager perhaps, but it is not believed that any court to-day will justify it. Again it is plain that the only constitutional protection which the courts will grant the railroads is to be secured under proper circumstances of a reasonable return upon the present value of the property, regardless of anything else. Judge Noyes recognizes this undoubtedly but he is hardly reconciled to it.

B. W.

RECORDS. The careless treatment of some English records is criticised by W. P. W. Phillemore in an article entitled, "Our Local Records: A Policy," in the May *Law Magazine and Review* (V. xxxi, p. 281).

TAXATION. "The Succession Tax," by "T. A. S.," *Law Notes* (V. x, p. 26).

TORTS. Commentaries on the Law of Torts. A philosophic discussion of the general principles underlying civil wrongs *ex delicto*. Edgar B. Kinkead, of the Columbus (Ohio) Bar, Professor of Law, Ohio State University. Two volumes, pp. viii, 1739. Bancroft-Whitney Company, San Francisco.

These two volumes present in a most excellent way the law of torts within the scope of the author's preface. A clear and logical classification of the law has been adopted by the author, and that, in dealing with so vast a subject, is half the battle. The discussion is thoroughly independent, not bound down by mere precedent, but illumined by those wider considerations drawn from history, reason, common sense, and logic, that make the law what it is, an ever progressive science, an ever advancing art. We demand of commentaries of this kind that they afford a clear survey of the whole field, a thorough but concise discussion of principles, and, last, not least, a style that makes their reading a pleasure, and not an effort. All this we find, and, in addition, copious references to cases, with double citations to the American Decisions, American Reports, American State Reports, and the Reporter System, a feature

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that makes the work of great value to the practitioner and student. Where there is conflict of authority what appears to the author to be the true doctrine is worked out in the text, while the position of each state with respect to the doctrine discussed is given in the footnote. The commentaries might, with advantage, have taken a fuller view of the English cases on the subject, and it would have been well to discuss the so-called Massachusetts rule established in Litchfield *v.* Hutchinson, 117 Mass. 195, adopted in Indiana, Minnesota, Wisconsin, and New Hampshire, and criticized in Boddy *v.* Henry, 113 Iowa 462. The plan of the work is much to be commended, the entire field seems to be fairly covered, and alike for reading, study, and consultation these volumes offer every reasonable facility.

W. E. WALZ.

University of Maine School of Law.

TORTS. "Cheating in Indian Criminal Law," by Satya Chandra Mukerji, *Allahabad Law Journal* (V. iii, p. 113).

TRADES UNIONS. The English cases on "The Law Relating to Trades Unions" are collected in the May *Law Magazine and Review* (V. xxxi, p. 272) by J. A. Lovat-Fraser.

TRADES UNIONS. "Incorporation of Labor Unions," by Caroll G. Waters, *Albany Law Journal* (V. lxviii, p. 68).

TRADES UNIONS. A criticism of the English cases relating to "Trades Unions and Trade Disputes," by F. A. Umpherston, appears in the April *Juridical Review* (V. xviii, p. 45). While he approves of the "Taff Vale" case as in accordance with reason and common sense, he finds that by its subjection of insurance funds of the unions to actions for damages, it is dangerous in effect. He doubts the possibility of overruling it, but approves of the suggestion of a definition of agency with reference to trades unions. He regards the picketing decisions as the result of a system of applying to acts of parliament canons of construction which exclude consideration of historical growth or of political movements. He regards as still more serious the decisions regarding the common law of conspiracy. These are criticised as being "based on statements of law so vague and indefinite, so different and so fluctuating as to form not a consistent elucidation of any legal principle but a congeries of ill fitting dicta which appear to most people incoherent and unintelligible.

"And the fact that the circumstances in which the unions act differ from those surrounding other forms of trade competition has been used in the recent decisions, not as a reason for adapting the law of conspiracy to all legitimate forms of rivalry in trade, but for narrowing the scope of what is to be held lawful, and so tightening the cord round the neck of trade unionism.

"It has been said that a combination to cause loss to another in his trade or calling is *prima facie* unlawful. But all the judges admit the possible existence of something they call 'sufficient justification' or 'a just cause or excuse' for the conspiracy. What will and what will not amount to such justification or excuse none can say; but all agree that if in any case they find this unknown and undefined consideration, the action will not be allowed to succeed.

"If that is the law, it is time that Parliament took the matter in hand and declared in definite and intelligible terms what may be done without being considered an undue interference with the rights of others, and what may not. Otherwise, the only possible method of procuring the fulfilment of trade union agreements, whether with their own members or with outsiders, will disappear. At present that can only be done by bringing such pressure to bear as is likely to cause loss to the defaulting party, and that without infringing any legal right which he is entitled to maintain in a court of law."

TRUSTS (Capital and Income). The rule of trusts regarding the apportionment of profits between capital and income as laid down in England in the case of Howe *v.* Earl of Dartmouth is held to be no longer the law of Scotland in an analysis of a recent Scotch decision in the April *Juridical Review* (V. vxiii, p. 30), by Will C. Smith, entitled, "The Rule in Howe *v.* the Earl of Dartmouth."

TRUSTS (Charitable). "American *v.* British Ecclesiastical Law," by Epaphroditus Peck, in the April *Yale Law Journal* (V. xv, p. 255) discusses the "Free Church Case in

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England" which it is said holds "that no church can unite with another church from which it had differed in any point of faith or polity without abandoning its entire property to a protesting minority, however insignificant." This is compared with the American doctrine which is stated as follows:

"1. The first of these is when the property which is the subject of controversy has been, by the deed or will of the donor, or other instrument by which the property is held, by the express terms of the instrument devoted to the teaching, support, or spread of some specific form of religious doctrine or belief.

"2. The second is when the property is held by a religious congregation which, by the nature of its organization, is strictly independent of other ecclesiastical associations, and so far as church government is concerned, owes no fealty or obligation to any higher authority.

"3. Third is where the religious congregation or ecclesiastical body holding the property is but a subordinate member of some general church organization in which there are superior ecclesiastical tribunals, with a general and ultimate power of control in some supreme judicatory over the whole membership of that general organization.

"In the first case the express trust created by the deed must be enforced, however difficult the questions involved may be; in the second, the usual rules governing voluntary associations will prevail, that the majority governs; in the third, the controversy must be submitted to the church tribunals, and the courts will not act except to follow and enforce their decision. This opinion has indeed made a plain path for the American courts to follow, and has cleared up whatever confusion before existed. But even before Watson *v.* Jones, the American courts had almost uniformly affirmed the power of the majority in the self-governing churches. Some of them had gone so far as to permit a majority to pass over recognized denominational lines."

TRUSTS (Following Trust Property). James Barr Ames in the May *Harvard Law Review* (V. xix, p. 511) publishes a treatise on "Following Misappropriated Property into its Product." He formulates the rule as follows:

"If property of any kind is misappropriated in any manner by one who knows it to belong, either at law or in equity, to another, the true owner may charge the wrongdoer as a constructive trustee of any property in his hands which is the traceable product of the misappropriated *res*, or, if he prefers, he may enforce an equitable lien upon this traceable product to the extent of the value of the misappropriated *res*.

"If the misappropriated *res*, or its product, has been transferred by the wrongdoer, the rights of the defrauded owner to assert a trust or lien against the transferee will vary accordingly as the latter is a *mala fide* transferee, a *bona fide* donee, or a *bona fide* purchaser.

"The *mala fide* transferee, obviously, is in the same case as the original wrongdoer. If he gets the legal title from the wrongdoer he will hold it as the wrongdoer held it. If he gets merely the possession from a thief or other converter, he is himself a converter and becomes a trustee of any property which he may receive in exchange for the converted *res*."

If the *bona fide* donee dispose of the property before discovering the fraud he is not accountable for its value, but must account for anything of value he receives for it, at least to the extent of the value of the trust *res*. If the *bona fide* donee did not get title he must surrender or account and the owner will have a lien on any proceeds of its transfer. A *bona fide* purchaser from the thief must surrender or account for the value, but if he gets title, of course, is under no obligation. Where the trust *res* is mingled with other funds, the owner may have a charge on the entire mingled fund or its product so long as its identity can be established.

TRUSTS (Resulting, Statute of Frauds). "Resulting Trusts and the Statute of Frauds" are discussed by Harlan F. Stone, in the May *Columbia Law Review* (V. vi, p. 326). "The proper application of the statute," he says, "presupposes an accurate classification of trusts." He contends that the common classifications are inaccurate, and suggests that all trusts should be classified as (1) real trusts or (2) constructive trusts, being based on the presence or absence of intention of the party sought to be held as trustee. "Resulting trusts" are usually regarded as either equivalent to constructive trusts or as a class

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distinct from either. The author believes that they should be regarded as real trusts being trusts implied in fact analogous to contracts implied in fact in the law.

" The importance of distinguishing this, the resulting trust, as something essentially different in nature and origin from the constructive trust, or trust imposed by operation of law, becomes more apparent upon consideration of the relation of the Statute of Frauds to the case under consideration, namely, when A conveys property to B upon a parol trust for the grantor. Before the Statute of Uses such a case would have been a typical case of resulting use, which was *prima facie* established by proof of the conveyance to B without consideration. Since the resulting trust is not within the prohibition of the Statute of Frauds, the fact that there was no written declaration of trust would seem to be immaterial, and since B can offer no affirmative proof of an intention that no trust was to result to A, A should logically be allowed to establish the trust by the same means and with the same facility after as before the enactment of the Statute. Such would undoubtedly have been the law, were it not for the anomalous result reached by the decisions which establish that in the case of a conveyance without consideration the resulting trust has disappeared from our law, although in the case where A purchased land from a third person, who, at A's request conveys it to B, a volunteer, it is held that a trust still results to A, which is not within the operation of the Statute of Frauds.

" The fact, however, that the voluntary gift from A to B does not raise a resulting trust should not preclude A from recovery upon the theory that there is a quasi or constructive trust in his favor. Since, as has already been pointed out, the resulting trust is not a form of constructive trust as above defined, the decisions holding that there is no resulting trust in the case under consideration are not inconsistent with the existence of a constructive trust in A's favor, if upon accepted principles of equity some basis for raising such a trust should be found, since constructive trusts, *i.e.*, trusts arising *ex maleficio* are concededly not within the Statute.

" In the precisely analogous cases of money, property or service given by one in performance of his contract, the performance of which on the other side cannot be enforced by him because of the Statute of Frauds, a different result has been reached, and one which it is believed is more consistent with principle.

" The general tendency of the courts, therefore, in those jurisdictions which have failed to find the constructive trust in the case supposed, has been to reach in a great number of cases by indirection, a result which the English courts and the courts in a few of the United States have reached directly by a logical application of the principles of equity, accepted and applied in analogous cases, and while correct results reached by inadmissible methods are sometimes to be desired, it is to be hoped that in jurisdictions where this case may arise as a case of novel impression, it will receive the careful consideration which it deserves, and its final disposition be governed by principles controlling courts of equity in analogous cases, and leading to a more just result than has been reached by the courts in the majority of jurisdictions."

USURY. " The Construction of the Moneylenders' Act, 1900," by L. J. Sturge, *Law Quarterly Review* (V. xxii, p. 213).

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NOTES OF THE MOST IMPORTANT RECENT CASES COMPILED BY THE EDITORS OF THE NATIONAL REPORTER SYSTEM AND ANNOTATED BY SPECIALISTS IN THE SEVERAL SUBJECTS

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

CARRIERS. (Freight — Conversion.) W. Va. — An attempt to hold a common carrier liable for conversion upon a rather unusual state of facts gives rise to the case of Dudley *v.* Chicago, Milwaukee & St. Paul Railway Co., 52 Southeastern Reporter, 718. A quantity of apples was shipped with drafts on the buyer for their value according to the contract of sale, attached to the bills of lading. The buyer of the apples on hearing of their arrival sent his agent to inspect them, and the railroad company allowed him to do so without his producing the bills of lading or showing any right or title to the possession of the apples. The agent reported to the buyer that the apples were not such as the seller had agreed to deliver and thereupon the buyer refused to accept the apples or pay the drafts. After some correspondence the railroad company sold the apples for much less than the original contract price. Under these circumstances the buyer sought to charge the railroad company with the value of the apples on the theory that the wrongful act of the company in allowing the inspection constituted a conversion. Recovery upon this theory is denied upon the ground that though the act of the railroad company may have been wrongful it did not amount to an exercise of dominion over the property or a change of possession so as to constitute a conversion.

The case seems to correctly hold that a carrier is not liable as for a conversion because it permits a wrongful inspection of goods. The goods in this case were consigned by the consignor to himself. The carrier permitted the person who was expected to purchase them to inspect them without the permission of the consignor. If this person had been the consignee, he would have plainly had the right to inspect and the carrier would be bound to afford him such privilege, even though expressly instructed not to deliver the goods until they were paid for. Hutchinson on Carriers, Sec. 393. In Lyons v. Hill, 46 N. H. 49, the carrier allowed the consignee to take away a coat, on paying to the carrier the price, under an agreement that if the coat proved unsatisfactory the carrier would return the price, and this conduct on the part of the carrier was fully approved by the court. The only ground of complaint as to the carrier in the present case seems to have been that the intended purchaser was not the consignee. Submitting the goods to an unauthorized inspection would plainly fall short of a conversion under the definition given by Bouvier "An unauthorized assumption and exercise of the rights of ownership over goods or personal chattels belonging to another to the alteration of their condition or the exclusion of the owner's rights." He says further that "a mere trespass with no further intent is not conversion." Thus it was held in Fouldes v. Willoughby 8 M. & W. 540, that a ferryman who, under claim of misconduct on the part of a passenger upon his boat, ordered the passenger from the boat with his horses, and upon his refusal to leave the boat, took the horses ashore and left them with a brother (of the ferryman), the passenger continuing his journey upon the boat; that the ferryman was not guilty of conversion of the horses unless there was an intent to convert to the taker's own use or that of third persons, or unless the act done has the effect either of destroying or changing the quality of the chattel. See also Stevens v. Curtis, 18th Pick. 227. So where one claimed that a lease had terminated and removed the plaintiff's goods from the premises and took them to plaintiff's place of business and plaintiff with a shot-gun prevented their deposit there and defendant then placed them in a ware-house in plaintiff's name, it was held that there was no conversion. Browder v. Phinney, 79 Pac. 598 (1905).

The case under consideration also holds in reliance upon section 432 of Hutchinson, that a carrier in an emergency acting as agent for all concerned, may sell perishable freight. The only cases cited by Hutchinson for this doctrine involved the rights of carriers by water. They

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were Rankin v. Packet Co., 9 Heisk. 564, where a carrier sold cotton seed in his hands for transportation, claiming that it was perishable and that he was compelled to sell it by necessity. The court holds that it is not so perishable as to support any such right and all that is said upon the subject of the right of the carrier to sell perishable freight is by way of argument and dictum.

The other case is Arthur v. the Schooner Cassius, 3d Story 81.[1] Hutchinson at Sect. 433 points out " that in the case of carriers by sea the master of the vessel is vested by law with power to sell the goods of the shipper of the cargo in case of absolute necessity " . . . " or where the goods in case of accidental delay are about to perish," and this doctrine he supports by many cases.

It has often been held that a carrier has no right to sell for the enforcement of his carrier's lien unless the right is given him by statute, and this rule has been applied frequently even in the case of perishable freight. It was so held in Briggs v. Boston & L. R. Co., 6 Allen 246, 1863, as to flour which was fermenting, and in Indianapolis & St. Louis R. R. v. Herndon, 81 Ill. 143 (1876), as to packages of trees. The right even of carriers by water to so sell has been sometimes denied, Hunt v. Haskell, 24 Me. 339, but seems much more freely allowed than that of a carrier by land.

Charles Noble Gregory.

CONSTITUTIONAL LAW. (Commerce.) **Mass.** — In Commonwealth *v.* Caldwell, 76 Northeastern Reporter, 955, tea and coffee are excluded from the category of provisions, and apparently classed with drugs or possibly in connection with the latter portion of the court's argument with liquors. Massachusetts Revised Laws (c. 65, §§ 15, 16), prohibit peddling without a license, but except the sale of provisions from the operation of the act. The word " provisions " as here used, says the court, means " food, victuals, fare, and provender." Tea and coffee, it is stated, are not used as food, in the form in which they are sold by shopkeepers, but are used to make decoctions, to be taken as a beverage for their agreeable taste or their stimulating effect. In this respect they are not very different from wine and beer, which in many countries are in common use at meals. Hence the court holds that they are not " provisions." A holding of more genuine importance contained in this case is that the statute under consideration which permits the sale by peddlers of agricultural products of the United States without a license, but forbids unlicensed sales of agricultural products of other countries, is a regulation of commerce in conflict with United States Constitution, Art. 1, § 8, providing that Congress shall have the power to regulate commerce with foreign nations and among the several states.

CONSTITUTIONAL LAW. (See Patents.)

COPYRIGHT. (Infringement — City Directory.) **U. S. C. C. 1st Circuit.** — The case of Sampson & Murdock Co. *v.* Seaver-Radford Co., the Circuit Court opinion in which was noted and discussed in this magazine at the time it was published in 134 Federal Reporter, 890, has been reversed by the Circuit Court of Appeals for the First Circuit. The opinion on appeal is in 140 Federal Reporter, 539. Complainant published a general directory of the city of Boston in July, 1903, purporting to give facts as they existed in the spring of that year. This directory was duly copyrighted. In February, 1904, defendant published a general directory of the city which purported to give the facts as they existed just prior to that time. After completing its original canvass for names, defendant copied on slips from complainant's directory such names there printed as it had not obtained in its own canvass, with the information given about them, and with such slips as a guide it verified them by sending canvassers to the addresses given therein, and when found correct reprinted the same without alteration in its own directory. It was this republication which plaintiff complained of as an infringement and which the Circuit Court held not to be such. The court disclaims any intention of taking issue with the holding in Edward Thompson Co. *v.* American Law Book Co., 122 Fed. 922, 59 C. C. A. 148, but holds that the proper purpose of the usual alphabetical directory is to afford a searcher information of the residence, occupation, and other details of the particular person whom he desires to investigate, and that it is not within the proper purpose of such a work that any one should use such information for correcting his own book of like character, and hence, that defendant's use of complainant's directory was an infringement.

CORPORATION. (See Insurance.)

CRIMINAL LAW. (Confronting Witnesses — Deaf and Dumb Defendant.) **Ga.** — In the case of Ralph *v.* State, 52 Southeastern Reporter, 298, may be found a decision which appears to be entirely without precedent. It involves the question as to what constitutes a confrontation by witnesses within the meaning of the constitutional provision that every person charged with an offense shall be confronted with the witnesses testifying against

[1] Where lumber was carried by sea from N.Y. to Texas and Justice Story held lumber was not perishable freight and therefore the master had no right to sell on its not being received. This too is not a direct authority for Hutchinson's doctrine involves the right of a carrier by sea.

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him. Defendant in a criminal prosecution was deaf, and it was contended that because of this the court committed error in declining to postpone the trial until an expert typewriter could be obtained to take down the evidence as it was given by the witnesses and furnish it to accused to be read by him. The court holds that in view of the inability of accused to hear the evidence of the witnesses for the state, the judge should permit some reasonable mode of having their evidence communicated to him, but in view of the facts shown in this case, the rights of the accused were not infringed. It was shown that there was no official stenographer, and it did not appear that an expert typewriter could have been obtained without unduly delaying the trial. The court, however, offered to let counsel write down the testimony as the trial progressed, and give it to his client to be read by him, and this is regarded as sufficient to satisfy the requirements of the constitution.

Professor Wigmore has made it clear (Wigmore, Evidence 1395 et seq.) that the Constitutional provision construed in this case secures a common law right and creates no new right; that the common law right was subject to necessary exceptions, and that the chief purpose of the provision is to secure the right of cross examination. Although the cross examination be conducted by counsel for the accused, the accused himself should hear and understand the testimony and also see the witness in order that the cross examination may be rendered entirely effective by suggestions made by the accused to his counsel. The case decided is closely analogous to the cases frequently occurring where the witness testifies in a foreign tongue and it is held that the Constitutional privilege is preserved by an interpretation in the presence of the accused (see 12 Cyc. 545). The extent to which the accused shall have the advantage of confrontation must, nevertheless, depend upon what is practicable. If the accused be blind he must necessarily lose the advantage of observing the witness's demeanor. If he be dull of comprehension the confrontation will be of less advantage to him than if he be of alert intelligence. Does the provision require more than that the examination shall be conducted in the presence of the accused in order that he may exercise such faculties as he may possess, aided, as in the present case, only where aid is practicable.

F. I.

CRIMINAL LAW. (Manslaughter— Negligence.) Iowa. — State *v.* Moore, 106 N. W. Reporter, 16, is a conviction of manslaughter based upon facts so unusual that they give rise to one or two other peculiar propositions of law. Defendant was a professional horse breaker or trainer and while engaged in this occupation a horse escaped from him in the street. Defendant procured another horse which he mounted and rode off in pursuit. During the chase, deceased, who was a man considerably advanced in years, saw the runaway horse and sought to check him by running out into the roadway and flourishing his cane. Failing in this attempt and while trying to get back to the sidewalk, he was struck by the horse ridden by defendant and received the injuries from which he died. Under these facts it is held that a conviction of manslaughter was proper, the court observing that express intent is not a necessary element of manslaughter, but that negligent and reckless indifference to the lives and safety of others will supply the intent for the purposes of criminal law. It is also said that evidence that defendant was riding at a greater rate of speed than was allowed by ordinance, while not conclusive, was properly considered in connection with other evidence on the question of defendant's negligence. In response to the contention that in order to convict the defendant of negligently and recklessly causing the death of deceased, the state should have negatived negligence on the part of the latter, the court delivers the holding that contributory negligence is not an excuse or defense for crime.

EVIDENCE. (Witnesses — Self-incrimination.) U. S. S. C. — Several related questions of great growing interest at this particular time are decided in Nelson *v.* United States (Paper Trust Case), 26 Supreme Court Reporter, 358. The court there determines that evidence, whether documentary or oral, sought to be elicited from witnesses summoned in an action brought by the United States, to enjoin an alleged conspiracy, by manufacturers of paper, to suppress competition in violation of the Anti-Trust Act, by creating a general selling and distributing agent is material where it would tend to establish the manner in which such agent executed its functions. It is also held that the materiality of the evidence sought to be elicited cannot justify the refusal of witnesses to obey the orders of the Federal Circuit Court, requiring them to answer the questions put to them and to produce written evidence in their possession on their examination before a special examiner. A contention resting upon a very shadowy foundation is disposed of by the further holding that the refusal of corporate officers to obey orders of a Federal Circuit Court requiring them to produce documentary evidence on their examination before a special examiner, cannot be justified on the theory that such evi-

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dence was not in their possession or under their control because their possession was not personal but was that of the corporation. The act of February 25, 1903, is also construed, and it is held that the right of a witness to claim his privilege against self-incrimination afforded by United States Constitution, 5th Amendment, when examined concerning an alleged violation of the Anti-Trust Act is taken away by the proviso to the act of February 25, to the effect that no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence in any proceedings, suit, or prosecution, under certain named statutes, of which the Anti-Trust Act is one. This proviso, it is held, furnishes a sufficient immunity from prosecution to satisfy the constitutional guaranty, although it may not afford immunity from prosecution in the state courts for the offense disclosed.

INSURANCE. (Additional Insurance — Eighty Per Cent Clause.) Mass. — The effect of the now quite common eighty per cent average or co-insurance clause on a condition prohibiting other insurance is passed on in the recent case of Woolford *v.* Phenix Insurance Company, 76 Northeastern Reporter, 722. The court takes the position that the two clauses are not necessarily inconsistent, but that, to a certain extent at least, they can stand together, each having its due scope. In support of this proposition is cited Cutler *v.* Royal Ins. Co., 70 Conn. 566, 40 Atl. 529, 41 L. R. A. 159, and also Allen *v.* Germania American Ins. Co., 123 N. Y. 6, 25 N. E. 309. Applying the principle thus stated, the court holds that a policy containing the above-mentioned clauses is violated if insured procures additional insurance so as to make the total insurance exceed the entire value of the property. The court announces its refusal to follow Pool *v.* Milwaukee Mechanics' Ins. Co., 91 Wis. 530, 65 N. W. 54, 51 Am. St. Rep. 919, and Catoosa Springs *v.* Linch, 18 Misc. Rep. 210, 41 N. Y. Sup. 377, in so far as they are inconsistent with the conclusion arrived at.

The 80 per cent average or coinsurance clause is of recent origin, but has, nevertheless, been litigated in several cases with reference to its effect on the usual policy provision prohibiting other insurance without the insurer's consent. In the Cutler case it was held that the policy was forfeited as insured had taken out insurance in excess of 80 per cent of the value of the property insured. And a similar doctrine was announced in the Allen case with reference to a clause permitting other insurance up to a stated amount. In the Poole Case the court simply held that the 80 per cent clause impliedly authorized other insurance, especially as the insured's agent was instrumental in placing the additional insurance procured. But it does not appear that the total insurance exceeded 80 per cent of the value of the property. This case can, therefore, be considered to hold that the 80 per cent clause only authorizes other insurance to that extent. And this view is supported by the Catoosa Springs Case and Nestler v. Germania Fire Ins. Co., 91 N. Y. Supp. 29. It should also be noted that in the Woolford and Cutler cases the court intimates that in a proper case the 80 per cent clause might be regarded as superseding the forfeiture clause so as to permit insurance to the extent of 80 per cent. The various authorities therefor do not appear to be in open conflict with one another. On the other hand they may be regarded to be in harmony and to support what is unquestionably the true doctrine that where a policy prohibiting other insurance contains an 80 per cent average or coinsurance clause, the clause prohibiting the taking out of other insurance without the insurer's consent is waived, in so far as to permit other insurance in an amount which, together with the policy containing the clause, does not exceed 80 per cent of the value of the property insured, but that the forfeiture clause is not waived beyond this.

G. H.

INSURANCE. (Mutual Companies — Reorganization.) Wis. — In a lengthy opinion by Justice Marshall, the Supreme Court of Wisconsin lays down several interesting propositions of law relative to the reorganization of mutual life insurance companies. Huber *v.* Martin, 105 Northwestern Reporter, 1031. A mutual insurance company having a charter provision to the effect that membership could only be created by accepting a policy and could only continue until the end of the policy period, transacted business for some time and accumulated a considerable surplus. A statute was then enacted authorizing a reorganization, under a general law for the creation of insurance corporations, with the consent of two thirds of the existing policy holders, representing at least one half the outstanding insurance. The reorganized concern was to be the owner of the property of the superseded company for its use in the conduct of its business. The act further provided that any existing policy holder of the mutual company, in case of its being superseded, should be entitled at his option to take stock in the new company to the extent of such part of the total stock as the amount paid by him on his policy bore to the total amount of risks in force, or to receive such proportion of the surplus as the

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company's actuary might deem equitable, this, however, being coupled with the provision that all the property of the superseded company should become that of the new concern. Under these statutory plans of reorganization policy holders of the mutual company could have obtained only about one third of the surplus stock of the new company. In considering the validity of this statute, the court declares that while the title to the property of a mutual insurance company is in the corporation, the equitable interest therein is vested in the members, the same as in the case of a stock corporation, and that these equitable property rights of the members are within the guaranties of the state constitution, as regards the inhibition against laws impairing the obligation of contracts and the inhibition of the national constitution as regards the equal protection of the laws and deprivation of property without due process of law. On this basis it is determined that inasmuch as the statute under consideration would result in the distribution of the assets of the mutual company and the bestowal thereof on the reorganized corporation without the consent of all the members of the mutual company, it is in conflict with constitutional provisions referred to.

LANDLORD AND TENANT. (See Property.)

MASTER AND SERVANT. (Personal Injuries — Safe Place to Work.) **N. Y. Sup. Ct., App. Div., 2d Dept.** — A peculiar case in which liability for personal injuries was sought to be predicated upon the ground that the relation of master and servant existed, is that of Walker *v.* Gleason, 96 New York Supplement, 843. The plaintiff in that case rented four rooms over which defendant who was the landlord retained no control. By the same contract apparently by which the premises were leased plaintiff was employed to keep the hall lamps in the building in order and was allowed a certain sum per month for performing these services. Plaintiff took the lamps into one of her own rooms for the purpose of cleaning and filling them, and while engaged in this work a portion of the ceiling fell and injured her. She sought to hold the landlord responsible for these injuries on the ground that as her employer he had failed to furnish her a safe place to work. Recovery is denied on the ground that the landlord did not furnish plaintiff's rooms as a place to work in, but that she rented the rooms on her own account and while occupying them even for the purpose of performing service for the landlord, her status was that of a tenant.

MINES AND MINERALS. (Surface Support.) **W. Va.** — A case of unusual interest and one in which the average mind feels inclined to take issue with the decision of the majority and to agree with the dissenting judge is that of Griffin *v.* Fairmont Coal Co., 53 S. E. Rep. 24. In this case it was held that a deed conveying the coal under a tract of land, together with the right to enter upon and under said land, and to mine and excavate and remove all of it, without a reservation that the grantee must leave coal enough to support the surface in its original position, conferred the right on the grantee to remove all of the coal even though by so doing it removed the support of the surface and thereby caused it to fall. The court fortifies its position by holding that deeds conveying coal with rights of removal should be construed in the same way as other written instruments, and that the intention of the parties as manifested by the language used in the deed itself should govern; and also by announcing as a proposition of law that a deed conveying coal under land with a right to enter the same and remove all of it does not impliedly reserve subjacent support to the surface.

In a dissenting opinion, Judge Poffenbarger points out that the majority opinion avowedly disproves and repudiates the principles of law of subjacent and lateral support declared by every American court that has ever applied that law to a deed or contract by which the surface of land has been separated entirely from the underlying coal, as well as the decisions of the English courts. He reviews at length the decisions of the English courts and of several American courts, and shows that the decision of the majority is at variance with the principles of law announced by the courts reviewed on this subject. He repudiates the announced doctrine that a conveyance of coal together with the right to mine and remove it does not reserve the right of subjacent support to the grantor retaining the surface; and in this as well in his other contentions, he appears to be supported by the unquestioned weight of authority.

An interesting side light is thrown on this case by the decisions dealing with ways of necessity. Where a grantor conveys away all of his land except a piece from which he has no way out except over the granted land the law implies a grant back to him from his grantee of a way of necessity. 1 Tiffany Real Property, p. 714 & cas. cit. even though the grantor gives a deed containing general covenants of warranty. Brigham v. Smith, 4 Gray (Mass.) 297.

This doctrine is a recognized exception to the general rule that in construing deeds the intention of the parties as manifested by language used in the deed itself should govern. The exception exists because public policy demands such an implied regrant despite the general words of warranty in the deed. Buss v. Dyer, 125 Mass. 287, 291.

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Public policy would seem to call just as strongly for the implied right of subjacent support, and in the principal case the implication of such a right is not as inconsistent with the express grant as is the implication of a way of necessity in the face of general covenants of warranty. It is submitted that the dissenting opinion in the principal case was right.

Geo. P. Costigan, Jr.

MUNICIPAL CORPORATIONS. (Highway — Automobile Racing.) N. Y. Sup. Ct., App. Div., 2d Dept. — A decision which is to some extent burdened and restricted by the local statutes involved in it, but which nevertheless contains some principles of general scope, is contained in Johnson *v.* City of New York, 96 New York Supplement, 754. The Penal Code of New York declares that an act which annoys, or endangers the comfort, health, or safety of any considerable number of persons, or which in any way renders a considerable number of persons insecure in life or use of property, constitutes a public nuisance. Section 666 makes it a misdemeanor for any person to operate an automobile upon a public highway within a city at a greater rate of speed than eight miles an hour, except where a greater rate of speed is expressly permitted by ordinance. The charter of Greater New York authorizes the board of aldermen to regulate the speed of vehicles in the streets, and provides that the board shall not pass any special ordinance in relation to any such matters. Another charter provision requires every legislative act of the board of aldermen to be by ordinance or resolution, and the form of ordinance is prescribed. The board of aldermen by a special resolution authorized a specified automobile club to conduct speed trials on a certain highway on a certain day, and suspended ordinances regulating the speed of vehicles for that day and place. The specified highway was accordingly fenced in and guarded, many precautions against injury were taken, and on the day fixed the speed trials were held. Plaintiff voluntarily attended the exhibition and was injured by being struck by an automobile going at a high rate of speed and which for some unexplained cause left the highway near the place where plaintiff was standing. In a suit against the city for injuries so sustained, the first contention of the defendant to the effect that the special resolution conferred authority to conduct the speed trials is negatived and it is declared that the resolution had no efficacy, and that the speed trials constituted a nuisance *per se* for the results of which the city and everybody else connected with such trials were liable. It is also held that the unauthorized running of the automobile at the illegal rate of speed would as a matter of law be deemed the proximate cause of plaintiff's injuries in the absence of any evidence that the accident would have happened had the automobile not been running at an unlawful rate of speed. The last question decided in the case seems to encroach somewhat upon the doctrine that every one is supposed to know the law, for it is declared that the fact that plaintiff was a voluntary spectator of the contest did not constitute such contributory negligence on her part as to preclude her from recovering for the injuries in the absence of proof that she knew or had any reason to know that the contest was unlawful.

NEGLIGENCE. (Manufacturer and Vendor — Mental Suffering.) Ga. — The liability of the manufacturer of an article for injuries resulting from defects therein receives a novel exposition in Watson *v.* Augusta Brewing Company, 52 Southeastern Reporter, 152, where it is held that a manufacturer who makes and bottles for public consumption a beverage represented to be harmless and refreshing is under a legal duty not to negligently allow a foreign substance which is injurious to the human stomach to be present in a bottle of the beverage, when it is placed on sale, and that one who relying on this obligation without negligence on his own part, swallows several pieces of glass while drinking the beverage from the bottle, may recover from the manufacturer for injuries sustained in consequence. It does not matter, says the court, that the plaintiff did not buy the beverage from the defendant, or that there was no privity of relationship between them, but the duty not to negligently injure is due by the manufacturer not merely to the dealer to whom he sells his product, but to the general public for whom his wares are intended. One element of damages sought to be recovered by the injured person in this case is, however, held to be too remote for consideration by the jury, and while the plaintiff was allowed to recover on account of mental suffering caused from the fear of death while the glass was in his stomach, it was declared that a vague fear after the glass had been removed and he had been apparently restored to health, that at some time in the future he might again suffer as a result of his injuries, was not a proper element of damage.

NEGLIGENCE. (Trespasser — Turntable.) Va. — In a case which by coincidence actually involves a turntable, the Supreme Court of Appeals of Virginia repudiates the doctrine of the so-called "Turntable Cases." The chief interest in the case, of course, arises from the fact that the doctrine as originally announced in Sioux City Railway Company *v.* Stout, 17 Wall, 657, and the cases which follow it, has been the subject of such wide discussion and so much diversity

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of opinion. The case under consideration is, the court says, the first case involving that well-known doctrine which has come before it for decision. The case contains little argument that is not already familiar to every one who has taken the trouble to examine the cases presenting the different views as to the duty of the landowner maintaining a dangerous and attractive instrumentality upon his land. After a review of all of the leading cases and a rather brief discussion of the principles involved, it is concluded that under the common law rule that a landowner owes no duty to a trespasser, a railroad company is guilty of no negligence in maintaining an unlocked and unfastened turntable on its premises at a distance of from fifty to three hundred feet from public grounds, and hence is not liable for an accident causing the death of a child, twelve years of age, who trespassed upon such ground. Walker's Admr. *v.* Potomac F. & P. R. Co., 53 Southeastern Reporter, 113.

PATENTS. (Constitutional Law.) **Wis.** — A statute which has several counterparts in other states has been declared unconstitutional in Wisconsin in the case of J. H. Clark Company *v.* Rice, 106 Northwestern Reporter, 231. The Wisconsin statute declares that all promissory notes given for any patent, patent right, or interest therein, shall have written or printed thereon in red ink the words, "The consideration for this note is the sale of a patent, patent right, or interest therein," and provides that any person who shall sell a patent or patent right without complying with the statute shall be liable to a penalty equal to the face of the note, and that all notes or other evidences of indebtedness taken as required by the provisions of the statute shall be non-negotiable and subject to all the defenses in the hands of an innocent holder that would exist if they had not been transferred. This statute is declared to be void because in conflict with United States Constitution, Art. 1, § 8, providing that Congress shall have the power to secure to inventors for a limited time the exclusive right to their discoveries, and with Rev. St. U. S. § 4898 (U. S. Comp. St. 1901, p. 3387) declaring that every patent or interest therein shall be assignable in law by an instrument in writing, and that the patentee or his assigns or legal representatives may in like manner grant and convey an exclusive right under the patent to the whole or any specified part of the United States. Several courts have reached the same conclusion. *Ex parte* Robinson, Fed. Cas. 9932; Woollen *v.* Banker, Fed. Cas. 18,030; Castle *v.* Hutchinson, 25 Fed. 394; Pegram *v.* American Alkali Co., 122 Fed. 1000; Crittenden *v.* White, 23 Minn. 24; Cranson *v.* Smith, 37 Mich. 309; Rumbley *v.* Hall, 107 Ky. 349, 54 S. W. 4.

PLEDGE. (Stock Brokers.) **N. Y. C. App.** — In Content *v.* Banner, the New York Court of Appeals, reversing both the trial court and the Appellate Division (88 New York Supplement, 1095), holds where a stock broker advances all the money and buys securities for a customer, a written notice to the customer to take up the securities so bought or supply margins for carrying them, and stating that unless he does so before a certain date the broker will sell the stock for his account and hold him responsible for the loss, is defective where it contains no statement as to the time or place of sale, and that in the absence of any agreement dispensing with notice a sale "on the curb" constitutes a conversion, though the customer has failed to respond on the date stated. The fact that the stock broker instead of requiring a margin advanced the whole amount of the purchase is held to render the relation between the parties that of pledgee and pledgor, so that the same formalities with respect to notice of sale must be given in this instance as would be required in the case of any other pledge.

PRACTICE. (Appeals.) **Idaho.** — "This is a novel case of mistaken identity — novel because the bewildered refugees, two soulless corporations of diverse origin, in their flight from a decree in equity (a thing abhorred by corporations), became so completely lost in the labyrinth of names that the plaintiff has been thence ever wont to turn the restraining clauses of her decree upon the twain with but a single name, so indiscriminately that they are driven hither to tell their story." So says Judge Ailshie in his opinion in Shephard *v.* Cœur d'Alene Lumber Co., 83 Pac. Rep. 601. The facts appeared to be as follows: The action was commenced and prosecuted to judgment by default in Idaho against a domestic corporation named the "Cœur d'Alene Lumber Company, Limited," but in the findings it was recited that the defendant was a Washington corporation, and throughout the findings and judgment the word "Limited," was omitted. There was, in fact, a Washington corporation by the name of the "Cœur d'Alene Lumber Company," and it appealed from the judgment which through this mistake was entered against it. At the hearing on appeal it was admitted by the plaintiff that the interchange of names and the finding that defendant was a foreign corporation was a mistake or clerical error. Under these circumstances it is held that it was proper to remand the case to the trial court with instructions to correct and modify the judgment so that the decree might run against the true defendant.

PROPERTY. (Oil Lease — Construction.) **W. Va.** — An exception in an oil and gas lease receives

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construction in Ammons *v.* Toothman, 53 Southeastern Reporter, 13. A deed conveyed one half of the oil and gas in certain lands excepting from the conveyance "the well that is now producing oil on said land." At the execution of the deed the well excepted from the grant was being operated by a prior lessee and some time after the deed was made it ceased to produce oil. The lessee thereupon deepened it to a different sand rock not previously known to be an oil-producing stratum, as no wells had prior to that time been drilled to that stratum. Oil was, however, found there in paying quantities This oil was held to be within the exception in the deed, the court pointing out that the grantee in the deed never granted oil in or which was to come through the well in question; in other words — and this seems to be the gist of the court's argument — the well remained the same well after it had been sunk to the lower stratum. A search for authorities in support of this holding seems to have had but meager results, as Spencer *v.* Scurr, 31 Beavans Rep. 337, and Crouch *v.* Puryaer, 1 Rand. 258, are the only precedents referred to.

PROPERTY. (Oil and Gas Leases — Implied Covenants.) U. S. C. C. A. 8th Circuit. — A number of points of considerable importance are contained in Brewster *v.* Lanyon Zinc Company, 140 Federal Reporter, 801. An oil and gas lease on three separate tracts of land gave the lessee two years within which to drill a well on said premises, and provided that the time might be enlarged by the payment of an annual rental from the expiration of the second year until the well was drilled, and that if no well should be drilled upon the premises within five years, the lease should be void. In construing this lease the court holds that the measure of diligence which the lessee was required to exercise in prosecuting the work of exploration and development during the first five years was expressly defined, and not left to the implication which otherwise might have arisen from the nature of the lease, and the other stipulations therein, and that a well having been drilled on one of the tracts during the fifth year, and the stipulated rental having been paid from the end of the second year until that well was drilled, the lease was not avoidable merely because other wells were not drilled during the five year period. Further provisions of the lease granted all the oil and gas under the lands, together with the right to enter at all times for the purpose of drilling and operating, to erect and maintain structures, pipe lines, and machinery necessary for the production and transportation of oil and gas, and touse sufficient water, oil, and gas to run the necessary engines for the prosecution of the business. Substantial royalties in kind and in money were reserved to the lessor in proportion to the oil produced and saved and the gas used off the premises, and it was apparent from the terms of the lease that the promise of these royalties was the controlling inducement to the grant. As previously mentioned, the lease while requiring the drilling of one well during the first five years did not expressly define the measure of diligence to be exercised in the work of development and production after the expiration of that period. These provisions construed together are regarded as amounting to a covenant by the lessee, that if during the five years allowed for original exploration and development either oil or gas were found in paying quantities, the work of development and production should be continued with reasonable diligence, that is, along such lines as would be reasonably calculated to make the extraction of oil and gas from the leased land of mutual advantage and profit to the lessor and lessee. Consequently on failure of the lessee to take any steps to develop the land after its value had become apparent from the drilling of an experimental well, it is held that the lessor was entitled under this implied covenant to enforce a forfeiture by suit in equity and this despite the fact that equity will not ordinarily grant relief by the enforcement of a forfeiture.

PROPERTY. (Easements — Party Walls.) Iowa. — A decision which conforms to the principles which govern decisions concerning party walls, although the facts are a trifle peculiar, is contained in Jackson *v.* Bruns, 106 Northwestern Reporter, 1. It is there held that the owner of the second story of a building has no equitable right to compel the owner of the first story to keep the foundation and walls of the first story in repair for the purpose of furnishing continuing support to the second story in the absence of any express or implied contract on the part of the owner of the first story to do so. Cases concerning party walls including Sherred *v.* Cisco, 4 Sandf. 480; Partridge *v.* Gilbert, 15 N. Y. 601; Heartt *v.* Kruger, 24 N. E. 841; Hoffman *v.* Kuhn, 57 Miss. 746; and Odd Fellows Ass'n *v.* Hegle, 32 Pac. 679, are referred to and from them is deduced the rule that the owner of the second story does not have a perpetual easement, so as to be entitled to have the owner of the lower story replace the lower walls in case of total destruction, for the purpose of furnishing support to the upper story of the other party. From this the court argues that if no obligation exists to rebuild in case of destruction, one cannot be required to keep the foundations and walls in repair so as to support the upper story.

PUBLIC LANDS. (Bona Fide Purchaser.—

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Notice.) **U. S. S. Ct.** — A purchaser of timber lands after receiver's final receipt has issued, is held in United States *v.* Clark, 26 Supreme Court Reporter, 340, to be entitled to protection under act June 3, 1878, as a *bona fide* purchaser against the cancellation, for the original frauds of the entrymen, of the patents afterward issued, unless he is shown to have actual knowledge of such fraud. The entrymen conveyed to a person who was an alleged partner in their frauds, and this person conveyed to Clark, the first conveyance being made before the patents were issued. It was the position of the government that even if Clark did not have actual knowledge of their original frauds, yet inasmuch as he did not purchase on the faith of the patents, he had no better title than the entrymen would have had if the title had remained in them, but the court holds that the fact that while Clark had a merely equitable claim against the government, held it subject to any defect which it might have, whether he knew it or not, as generally is the case with regard to assigned contracts not negotiable, was not equivalent to the actual notice of the defect. In view of the act of March 3, 1891, recognizing the fact that there may be a *bona fide* purchaser before a patent issues, it was decided that the title when conveyed relates back to the date of the original entries.

WITNESSES. **(See Evidence.)**

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THE LIGHTER SIDE

The Interruption of Counsel by Judges. — Possibly rather more progress would be made with the business of the Court of Appeal if counsel were subjected to less interruption. Here is part of the dialogue in Dealtry *v.* The Countess of Aberdeen on Tuesday: Lord Justice Vaughan Williams: " You had better go on with your narrative, Mr. Lush." Mr. Lush: " I intend to do so if I am not interrupted either by my learned friend or by —— " Lord Justice Vaughan Williams: " I notice that you did not finish your sentence. You said, ' If I am not interrupted either by my learned friend or by —— ' " Mr. Lush: " Perhaps I may be allowed to finish the sentence on another occasion." It cannot, of course, be an easy thing on the Bench, any more than in less exalted spheres of life, to strike the happy mean between saying too little and saying too much. The difficulty that belongs to the Bench has been admirably expressed by the Lord Chief Justice. " The absolutely silent judge," he said not long ago, " is one of the most unpleasant judges to practise before, because the advocate never knows what is in his mind; the garrulous judge is an intolerable nuisance, because he lengthens the proceedings and diverts attention from the points in the mind of the advocate; to strike the happy mean — to say just enough to indicate to the advocate what he should address himself to, and yet not disturb the advocate, particularly if he be a young advocate — is a task of great difficulty." That it is a task of great difficulty is proved by the failure of certain judges to accomplish it. " It is no grace to a judge," says Bacon, " first to find that which he might have heard in due time from the Bar, or to show quickness of conceit in cutting off evidence or counsel too short." The proceedings in certain courts would probably be more expeditious — they would certainly be more harmonious — if there were less occasion to remember that an " over-speaking judge is no well-tuned cymbal." — *The Law Journal.*

More Time. — Misunderstandings between a judge and prisoner do not occur often, but when they do they are fatal. Sometimes they are based on ill-will, sometimes on mere indiscretion. Rarely is a misunderstanding so purely accidental as in the following case:

A judge in a Pennsylvania court of Quarter Sessions complained to the traverser at bar that his leniency when he had appeared before him on a charge of vagabondage for the first time was disappointed.

" I gave you only thirty days then," the judge said, " and now I see you again on the same charge before me."

" I'll improve," the wretched fellow begged, " if you'll give me more time."

What time did the fellow want, in or out of jail?

" Nine months! " was the judge's prompt and solemn conclusion.

Would Let the Old Lady Go. — A few years ago, when Chief Justice Doe was conducting a murder trial in Nashua, N. H., the work of impanelling the jury was going on. A juror from Wilton was called and asked by Judge Doe if he believed in capital punishment. The juror said he didn't think he did.

" Well," said the judge, " suppose a man was going to kill your wife, but by your killing the man you could save your wife's life, would you do it? "

The juror answered that he thought he would.

" Well," said the judge, " suppose it was your wife's mother who was going to be killed, and you could save her by killing the man, would you kill him? "

The juror answered that he guessed he " would let the old lady go." — *Boston Herald.*

Warm Work. — " Say, old boy, I scorched a bit in my new auto, and now I find myself in hot water."

" What can I do for you? "

" Why, bail me out! " — *Baltimore American.*

A Jail Bird. — *Stranger.* — How long since you made an arrest, constable? "

Constable Hi Medder. — Quite a considdyable spell. I'm goin' a leetle slow 'bout haulin' em in jest now. We hain't got no

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place to put 'em 'ceptin' Cy Tedder's chicken coop — an' Cy's got a settin' hen on. — *Cleveland Plain Dealer.*

Unpaid Views. — The Hon. Ellery A. Hibbard of Laconia, N. H., a former member of Congress and Supreme Court Justice, was famous for his droll sayings. It was a custom among the citizens of his home to ask the judge any legal question that happened to interest them, but in many cases they would act upon his advice without revealing the true state of affairs to him or paying him for his services, thinking that the judge would not know of the value of the information to them.

During the later years of his practice Judge Hibbard formed the habit of not expressing himself as decidedly as formerly, and of closing his conversation with the remark:

"That probably is the law, but I don't wish to express myself so strongly that I can't change my opinion if I am paid to do so."

This usually brought the customary fee. — *Boston Herald.*

Juvenile Offender. — *Scene.* — The Cook county juvenile court.

Dramatis Personæ. — Judge, jurors, state's attorney, one McGreevy (red-headed), Mrs. Casey (probation officer and police matron), spectators and numerous children, the latter especially unwashed.

Plot. — An attempt by the state to take away from McGreevy a flock of children whom he compelled to beg and to live in squalor, while he and his wife lived on the proceeds of the begging and — largely — on alcoholic stimulants.

Mrs. Casey, called by the state, takes the stand and is sworn.

"Yer Honor, th' jedge, and gintlemin av th' joory, I'm Mrs. Mary Ca-asey, an officer av this coort.

"I wint to this mon's house — this rid-headed mon McGreevy, here — an' rapped on th' dure, an' he come to th' dure an' opened it.

"'You're Mrs. Ca-asey?' he says to me.

"'I am Mrs. Ca-asey,' I says to him, I says, 'I'm a probation off'cer,' I says, 'av th' joov-nile coort,' I says, 'an' I'll see yer wife,' I says, 'she's in th' room beyant.'

"'Ye'll not see my wife,' says he. 'Any talkin',' says he, 'that's done by this fam'ly,' says he, 'll be done by me,' he says.

"'An' thin,' Yer Honor the jedge, an' gintlemin av th' joory, he says to me, this rid-hidded mon McGreevy says to me, 'Mrs. Ca-asey,' he says, 'you can go to haitch e-double-l,' he says to me, 'an,' he says (impressively), 'th' coort can go with you,' he says.

"'An' Mrs. Ca-asey,' he says — this rid-hidded mon McGreevy a-standin' here says to me, he says — 'Mrs. Ca-asey, you can take away my childer av ye dee-a-m-n plaze,' he says (pause to gather breath), 'fer,' he says, 'I have more a-coming.'"

Sensation in court, and finale.

Concealed Weapons. — One good legal joke lies buried in the files of New York newspapers, whence it seems worth while to resuscitate it. Some years ago there was a wide public demand for a legislative investigation into the office of the New York County District Attorney. A friendly newspaper, however, insisted that the head of the office "was armed with his honesty." "If he is," said the *New York Sun* the next morning, "he is certainly guilty of 'carrying concealed weapons.'"

Under Oath. — Another pitfall of cross-examination was recently seen in a New York Court. Opposing counsel was endeavoring to show the jury that witness had called upon him, and while in his office had made certain admissions:

Q. Did you not say to me, while in my office, that you were directly interested in this lease?

A. I did not.

Q. (Thundering) Do you mean to tell his Honor and the gentlemen of the jury, then, that I am a liar?

A. (Hestitatingly) As I'm under oath, I'm bound to tell the truth. I think you are!

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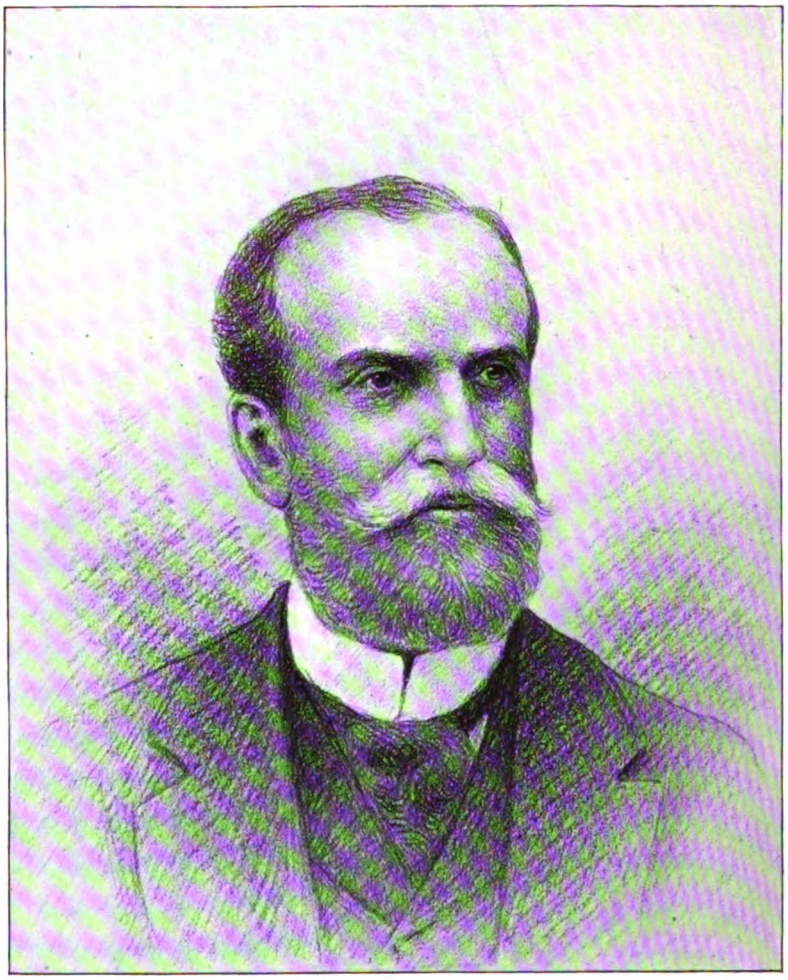

Señor Carlos Calvo

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The Green Bag

Vol. XVIII. No. 7 BOSTON July, 1906

CALVO AND THE "CALVO DOCTRINE"

By Percy Bordwell

ON December 29, 1902, while interest in the enforcement of the claims of Great Britain, the German Empire, and Italy, against Venezuela was at its height, Luis M. Drago, the Minister of Foreign Affairs of the Argentine Republic, despatched a note to Señor Martin García Méron, Minister of the Argentine Republic to the United States, on the subject of the collection of public debts by force, which aroused widespread interest and brought to the attention of the people of the United States the name of the subject of this sketch to whom the origin of the doctrine embodied in the note was generally attributed.

Señor Drago at the outset stated that he understood the origin of the disagreement to be, in part, the damages suffered by subjects of the claimant nations during the revolutions and wars that had recently occurred within the borders of Venezuela, and in part also, the fact that certain payments on the external debt of the nation had not been met at the proper time. To the latter phase of the question, the non-payment of the public debt and the use of force by other nations to collect it, he devoted his argument.

He pointed out that in making a loan to a foreign state, a capitalist always takes into consideration the resources of the country and the probability, greater or less, that the obligations contracted will be fulfilled without delay and makes his terms more or less onerous accordingly. One of the facts which he takes into consideration, claimed Señor Drago, is that he is entering into a contract with a sovereign entity, "and it is an inherent qualification of all sovereignty that no proceedings for the execution of a judgment may be instituted or carried out against it, since this manner of collection would compromise its very existence and cause the independence and freedom of the respective government to disappear." He admitted that the amount of a public debt may be determined either by the tribunals of the country or by boards of arbitration, and that the payment of the entirety of such judgments is absolutely binding on the nation, but said it could in no wise be admitted that it should be deprived of the right to choose the "manner and the time of payment, in which it has as much interest as the creditor himself, or more, since its credit and its national honor are involved therein." The elimination of forced execution, he urged, does not render public obligations valueless. "The State continues to exist in its capacity as such, and sooner or later the gloomy situations are cleared up, resources increased, common aspirations of justice and equity prevail, and the most neglected promises are kept."

Guided by the above sentiments, Señor Drago continued, the Argentine people had felt alarmed at the knowledge that the failure of Venezuela to meet the payments of its public debt had been given as one of the determining causes of the use of force, and felt that "if such proceedings were to be definitely adopted they would establish a precedent dangerous to the security and peace of the nations of this part of America." He said that there had been a tendency of late in European opinion to turn towards South America as the field of conquest for the future and, accordingly, that it would give great satisfaction to the Argentine Republic to see adopted by the United

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States the principle "that the public debt cannot occasion armed intervention nor, still less, the actual occupation of the territory of American nations by an European power." In closing he cited instances where the Argentine government had been obliged for a time to suspend the payment of its debts, but where eventually it had paid them in full to the great advantage of her credit, which advantage could never have been obtained had there been armed interference in the meantime.

Señor Méron left a copy of this note with Mr. Hay, and on February 17, 1903, Mr. Hay inclosed a memorandum to him in reply, in which he expressly avoided assenting to, or dissenting from the proposition advanced by the Argentine minister of foreign relations, but said that the general attitude of the United States government was indicated in recent messages of the President, from one of which, President Roosevelt's message of December 2, 1902, he quoted the following:

"No independent nation in America need have the slightest fear of aggression from the United States. It behooves each one to maintain order within its own borders and *to discharge its just obligations to foreigners.*[1] When this is done they can rest assured that, be they strong or weak, they have nothing to dread from outside interference."

The reference to the discharge of the "just obligations to foreigners" must have been cold comfort to the Argentine minister, despite the disclaimer of passing on the question which preceded it, and so the reply of Mr. Hay officially closed the incident, but it by no means put an end to the discussion to which the note had given rise. In the press quite generally the doctrine expressed in the note came to be known as the "Calvo Doctrine," and whatever Calvo's influence, writings, or counsel may have had on its formulation by Señor Drago, he was, at any rate, the means of eliciting some most interesting and valuable comments on it from his associates in the Institute of International Law and the Institute of France.

Señor Carlos Calvo was at this time Envoy Extraordinary and Minister Plenipotentiary from the Argentine Republic to France and the Holy See, residing at Paris. A publicist of wide reputation, he had enjoyed the acquaintance of most of the men prominent in international law circles for the preceding generation, and accordingly, on April 17, 1903, wrote a circular letter to a number of them in which he enclosed Señor Drago's note, expressed his own opinion that it was inspired by sound principles of international law, and said that it would be particularly agreeable to him to find them in accord with him in this view.

Of the twelve of his correspondents whose replies are given in the *Revue de Droit International*, three — Bar, Asser, and Campos, were members of the International Court of Arbitration of The Hague, and the first two of these felt precluded by their position from discussing the question. Of the ten who did express an opinion on it, Passy, Moynier, Campos, Féraud-Giraud, Weiss, and Olivecrona, six in all, expressed themselves in agreement with the main argument of Señor Drago's note. The remaining four, Westlake, Holland, Charmes, and Fiore, expressed themselves more guardedly. Westlake agreed that the funded debt of a nation should not be the occasion of intervention, but considered that the floating debt, which is usually not entered into with the consideration of the credit of the country that the bonded debt is, may equally, with wrongs ordinarily so-called, be the occasion of armed intervention. Holland gave as his opinion that the question was one not yet settled by international law, but expressed the hope that it might soon be. Charmes considered the question rather one of practice than of general principle and

[1] The italics are the writer's.

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cited the recent use of force by France against Turkey to compel the latter to pay its debts, while Fiore likewise considered the question one to be settled on the facts of each case, which might, he conceived, warrant collective intervention.

It would seem that nobody will question the general proposition that the mere non-payment of public debts will not warrant armed intervention. A state may be suddenly placed under extraordinary expenses which it is unable to meet, or it may have a bad monetary system which forces it to suspend payment although its natural resources are ample, or it may be in the throes of a revolution which for the time prevents it borrowing abroad. None of these situations in itself, it would seem, would warrant a foreign government stepping in and compelling payment by force. But when a government can pay, but won't, when, in short, it is guilty of bad faith, on what principle shall we say that a foreign government shall not intervene as much as for wilful injury to person or property? Under the old principle that a king could do no wrong, it was impossible to sue a government without its permission, and when its permission had been gained the execution of any judgment against it, against its will, was of course impossible; but the principle that the king could do no wrong, rightfully interpreted, was a civil and not a political or diplomatic or international rule. Kings could do wrong to each other, and they used arms to show how grievously they felt these wrongs, and how determined they were that they should not suffer from them in the future. If, then, an injury to a private citizen, either in his person or property, may be considered a grievance against the state itself, why may not the exercise of utter bad faith towards him in the non-payment of debts, resulting, very probably, in infinitely greater loss to him, be likewise considered an affront to the nation to which he belongs and equally be dealt with by the armed hand? Certainly practice has been that way, and practice is not to be treated lightly. It would seem to be a question of fact to be dealt with according to the circumstances of each case.

Before leaving this narrower and so-called "Calvo Doctrine" for the broader one for which Calvo more properly stands, it may be well to say that the claims of the bondholders which the allied powers pressed were classed by them as claims of the second rank, the enforcement of which was not the primary object of their action. In the Protocols of February 13, 1903, between Venezuela and the different allied powers, it was provided that new arrangements should be entered into by the respective governments with regard to the payment of these bonds, but it was expressly provided that they were not to be paid out of the thirty per cent of the receipts of certain customs houses, as other of the claims were, and so the question of the validity of collecting them by force never came before The Hague Tribunal. It will, however, undoubtedly come up for extended discussion before the Pan-American Congress which is to meet soon at Rio.

The part that we have just noticed Calvo to have played in eliciting opinions from eminent European publicists, valuable as it was, would hardly warrant the attachment of his name to the doctrine expressed in Señor Drago's note, so that, if we would find warrant for it, we are compelled to turn to his works to see if we can find enunciated there the principles which the note of the Argentine minister brought so conspicuously to public notice. If we do so turn, it is probably his treatment of the subject of intervention in the first volume of his "Le Droit International" that is most directly in point.

In his treatment of that subject he first considers the practice of European nations among themselves, and then their practice towards American states, and concludes that while among themselves intervention has nearly always rested on some important

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principle of international politics, such as the balance of power, in their conduct towards American states, it has rested in part on the difference in the political systems of the two continents, and, in part, on the failure to recognize that the American states are to-day independent and free and as fully entitled to have their sovereignty respected as the older states of Europe. He further concludes that the intervention of Europe in the affairs of different American states has not rested on any legitimate foundation, and that it cannot be invoked as a precedent of the least authority, but that, on the contrary, it has constituted the most regrettable use of force and merits, being condemned by history as it already has been by all the publicists and men of affairs who have not been blinded by a false patriotism. The right to pecuniary indemnity he then leaves for consideration to a subsequent section of his work dealing with the mutual duties of states, but in parting says:

"We will content ourselves here with remarking that, according to strict international right, the recovery of debts and the pursuit of private claims does not justify *de plano* the armed intervention of governments, and that, as European states invariably follow this rule in their reciprocal relations, there is no reason why they should not follow it also in their relations with nations of the new world."

Here we find a much broader doctrine than any Señor Drago emphasizes in his note. Here the distinction between injuries and the non-payment of debts is swept away entirely, and the broad claim advanced that private claims, whether arising in tort or contract, should not be made the basis of armed intervention. This broad doctrine is properly the "Calvo Doctrine," and not the narrower one expressed in Señor Drago's note. John Macdonell, in an able article in *The Nineteenth Century*, for April, 1903, calls it "the corner-stone of the so-called American public law," on which South American writers are wont so strenuously to insist. It behooves us then to examine into the applications Calvo makes of this doctrine to see whither he would lead us.

On page 231, of volume six, of his "Le Droit International" we find the following:

"It is certain that strangers who establish themselves in a country have the same right to protection as the nationals, but they ought not to pretend to a protection more extended. If they suffer any wrong they ought to count on the government of the country pursuing the delinquents, and ought not to claim from the state to which the authors of the violence belong any pecuniary indemnity."

And on page 140 of volume three he says:

"The rule that, in more than one case, it has been attempted to impose on American states is that strangers merit more consideration and regard and privileges more marked and extended than those accorded even to the nationals of the country where they reside."

In uttering this complaint Calvo only reiterates what time and time again South American governments and writers have inveighed against with all the ardor of the Latin race. In it lies the crux of the whole matter. Where the laws of a country afford adequate remedies and do not conflict with the law of nations, where, in short, substantial justice can be obtained, it would indeed, as Calvo says, be unwarranted to pass by the remedies provided by the laws of the country and seek redress through diplomatic action; but where such is not the case, where, for instance, the courts are notoriously under the control of an unprincipled dictator, so that an appeal to them would be a mockery and sham, it would indeed be a perversion of justice for an alien to be confined to his remedy in them even though a citizen of the country should have no other. Back of Calvo's complaint, no doubt, is the conviction that European countries have been too ready to assume the latter situation to be true in Latin-American countries, and very likely such

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has often been the fact, but if so the trouble has been one of fact rather than one of law. The remedy would appear to be for Latin-American peoples to make sure that the facts are on their side, rather than shelter themselves behind legal principles, the validity of which is doubtful.

Another application of the wider "Calvo Doctrine" is that a country is not liable for damages suffered by aliens in time of riots or insurrections. In this bald form, and it is in this form that Calvo puts it, it is not likely to find general acceptance. While a government is not liable for acts of insurgents who have attained the dignity of belligerents any more than for the acts of an enemy whose sovereignty is unquestioned, yet in suppressing an insurrection which has not yet reached the stage of legal war, it does not seem unfair to set up certain international standards as to the care necessary to be taken by the titular government in protecting persons and property from the acts of the insurgents, and if the titular government does not live up to such standards, to hold it responsible for damage resulting to aliens in consequence, even though it make no compensation to its own subjects for similar injuries. Of course it is impossible to lay down very definite general rules as to when a government does fail in its international duty in a case of this kind, but as, in general, it is extremely difficult to lay down a rule to fit all cases, but in a particular case not difficult to see that the rule applies, so here it is almost impossible to say what the international standard is, but often not difficult to see that some government has not lived up to it. Again the question whether as a matter of fact European governments have treated Latin-Americans so unjustly as Calvo and Spanish-Americans claim would appear to be rather a question of fact than of law. Demands for indemnity in such cases have been apparently less frequent in the relations of European countries among themselves than in their relations with Latin-American countries, and accordingly it has seemed to Latin-Americans that a different rule of law were being applied by Europeans towards them than that employed among themselves, but again it would seem unjustly. Whether as a matter of fact Latin-American countries have been treated unjustly, whether as a matter of fact their weakness has been taken advantage of by the stronger powers of the old world would require too intimate a knowledge of Latin-American history for the writer to express an opinion on.

From the "Calvo Doctrine" we now turn to Calvo himself. Carlos Calvo was born at Buenos Ayres in 1824. In 1852 he was made vice-consul at Montevideo and was consul-general and diplomatic representative of Buenos Ayres there from 1853 to 1858. In 1859 he was a deputy of the lower house and from 1860 to 1864 represented Paraguay as chargé d'affaires at Paris, being also accredited to Great Britain. He was the official delegate to the geographical congress which met in Paris in 1878, and plenipotentiary to the postal congresses of Paris in 1878, and of Vienna in 1891. In 1883 he was accredited as Envoy Extraordinary and Minister Plenipotentiary to Berlin, and in addition was accredited to the Russian Emperor in 1889, and to the Austrian Emperor in 1890. In 1899 he was transferred from Berlin to Paris, being accredited both to France and to the Holy See. He was one of the original members of the Institute of International Law, founded in 1873, and was made a correspondent of the Institute of France in 1869, and a foreign associate of the same in 1892. He also received numerous decorations. He died in Paris, May 2, 1906, where funeral services were held in the church of Saint-Pierre de Chaillot, preliminary to his removal and burial at Buenos Ayres.

His principal works are a collection of Latin-American State Papers, his annals of the Latin-American Revolution, his Manual of International Law for the use of students first published in 1881, his examination of

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the three rules of the Treaty of Washington, his dictionaries of International Law and Diplomacy, and, finally, his great work, "Le droit international théorique et pratique, précédé d'un exposé historique des progrès de la science du droit des gens." The first edition was published in Spanish at Paris in 1868, but the subsequent editions were in French, of which the first volumes appeared respectively in 1870, 1880, 1887, and 1896. The final or fifth edition comprises six large volumes.

Calvo was a man of whom it can be rightly said that he was "learned in the law." His powers of research and industry were tremendous, and his great work, "Le Droit International," is a storehouse of information, but he was not possessed of a keen analytic mind and it is extremely difficult to place him on disputed points, as he is liable to give both sides of a question as the law without recognizing the conflict between them. This is true even where he is advocating a traditional Latin-American view, such as the doctrine just noticed of the equal liability of a government to its own citizens and to strangers, where he largely undermines his own case by his previous expression of the very extended protection which governments owe. He was essentially a compiler rather than a deep thinker or man of affairs, and it was not until he was well along in life that he was given an important post, that of Minister to Berlin, which was apparently given him as a recognition of the reputation his work on International Law, which was then in its third edition, had won for him. The work on which his future name will depend is almost certainly his voicing of the traditional views of the Latin-American peoples on questions of international law and polity, the most important of which we have just considered.

New York, N. Y., June, 1906.

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CAN STOCK WITH EXCLUSIVE VOTING POWER BE TREATED AS A TRUST?

By Robert Rentoul Reed

CORPORATION law has been the patient growth of many generations of Bench and Bar, each striving to keep this child of alien birth within obedience to its adopted parentage of common law and equity. In the present generation its large possibilities and peculiar defects have been rapidly developed, and our courts are at times challenged by a corporate prodigy that refuses to be governed in equal justice by the principles and precedents of their jurisprudence. In other words, the corporate form, as judicially recognized, has been ingeniously made use of to effect dangerous results not otherwise sanctioned or possible. I have in mind one class of cases now prominent, in which, under the guise of a corporation, the property of B and C is *irrevocably* entrusted to the exclusive control of A, a control that is represented by stock, divisible and transferable at will, and takes the form of a recognized property right, which defies both courts and legislatures to destroy it, even upon proof of its gross abuse.

One, if not the most striking, illustration of this class, is the Equitable Life Assurance Society, before whose ingenious structure of corporate fraud, lawyers and judges stand in almost helpless confusion. Here is a property of some $400,000,000, *owned*, "capital," surplus and profits, by hundreds of thousands of policyholders throughout the country. The keys to the treasure-house were until quite lately in the hands of Mr. Hyde, who, as the owner of a little more than $50,000 par value of "stock," held the majority vote in the election of directors and through them the power to manage and control the investment of these enormous funds, subject only, it has been said, to the "contract rights" of the policyholders. But these "contract rights," be it noted, were by the charter, by the official statements of the company, and by the policies, or "contracts" themselves defined to include the entire beneficial ownership of its property, while the "stock" or "proprietary" rights of Mr. Hyde entitled him only to the par value of his investment and a limited return by way of "dividend," payable by resolution of his own directors out of the capital contributed by the policyholders.

The statute under which the Equitable Life charter was drawn, in 1859, was chapter 463 of the Laws of 1853 as amended by chapter 551 of the same year. It was silent as to the form of organization, though it required a paid-up "capital" of $100,000, and spoke of the "members or stockholders" as the controlling body of the corporation. The *corporate charter*, under assumed permission of the statute, made the original subscribers to this capital the voting stockholders of the society, but authorized the insurance business only on the mutual plan, and made the policyholders in effect the owners or beneficial "members" of the corporation.[1] Their position is primarily

[1] Its pertinent provisions are as follows: "Article 2. The business of this Company shall be to make assurances upon the lives of individuals, and every insurance appertaining thereto or connected therewith; and to grant, purchase, or dispose of annuities, as set forth in the act aforesaid, passed June 24, 1853, and amendments thereto. And this Company shall possess and enjoy all the powers, privileges, and franchises granted to, and shall be subject to all the regulations, restrictions, and obligations imposed upon incorporations organized and existing under the said act of the Legislature of the state of New York, passed June 24, 1853, *and any amendments thereof*.

"Article 3. The capital of said Company shall be one hundred thousand dollars in cash,

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defined by the charter, and is a part of the corporate organism of the society, which their policies, like certificates of stock, evidence, but do not abridge. Any policy which does not express this interest in the assets would as a contract be *ultra vires*.

Another illustration is the case of a railroad company which until recently was controlled by the exclusive voting power of some $13,000 preferred stock, the substantial capital being represented by several millions of common stock, without a voting power.

A somewhat similar result has been attempted in the case of a well-known land company, operating in New York City, which, with a "capital stock" of $100,000, operates on a *capital* of several millions of dollars obtained from the sale of so-called "profit-sharing certificates," payable in instalments, the holders of which are entitled at the end of a period of years, first to the amount paid in, then to share with the "stock" in the accumulated profits, dollar for dollar on the par value of their investment. The interest of the stock in the capital and profits is apparently about one-fortieth. But in the meanwhile its holders control the offices, management, and operations of the company — in other words the use of the certificate-holders' moneys in the business of buying and selling real estate. These cases are taken as illustrations: it is not intended to suggest that there has been any wrong connected with their management.

There is of course a distinction between

divided into one thousand shares of one hundred dollars each; which shall be personal property, transferable only on the books of the Company, in conformity with its by-laws. The holders of the said capital stock may receive a semi-annual dividend on the stock so held by them, not to exceed three and one-half per cent of the same, such dividends to be paid at the times, and in the manner designated by the directors of said Company. *The earnings and receipts of said Company, over and above the dividends, losses, and, expenses, shall be accumulated.*

"Article 4. The corporate powers of said Company shall be vested in a Board of Directors and shall be exercised by them, and by such officers and agents as they may appoint, and from time to time empower. The Board of Directors shall consist of fifty-two persons, a majority of whom shall be citizens of the State of New York, each of whom shall be a proprietor of at least five shares of the said capital stock. . . .

"In the election of directors, every stockholder in the Company shall be entitled to one vote for every share of stock held by him, and such vote may be given in person or by proxy. *At any time hereafter, the Board of Directors, after giving notice at the two previous stated meetings, may, by a vote of three-fourths of all the directors, provide that each life policyholder, who shall be insured in not less than five thousand dollars, shall be entitled to one vote at the annual election of directors, but such vote shall be given personally, and not by proxy.* . . .

"Article 6. *The insurance business of the Company shall be conducted upon the Mutual Plan.* All premiums shall be payable in cash. In case any policyholder shall omit to pay any premium due from him to the Company, or violate any other condition of the policy of insurance, the Board of Directors may forfeit his policy, and apply all previous payments to the benefit of the Company. The officers of the Company, within sixty days from the expiration of the first five years from December 31st, 1859, and within the first sixty days of every subsequent period of five years, *shall cause a balance to be struck of the affairs of the Company, which shall exhibit its assets and liabilities, both present and contingent, and also the net surplus, after deducting a sufficient amount to cover all outstanding risks and other obligations. Each policyholder shall be credited with an equitable share of the said surplus.* Said equitable share, after being ascertained, shall be applied to the purchase of an additional amount of insurance (payable at death or with the policy itself), expressing the reversionary value of such equitable share at such interest as the directors may designate; or if any policyholder so direct, such equitable share of surplus shall be applied to the purchase of an annuity, at such rate of interest as the directors shall designate, to be applied in the reduction of his or her future premiums. In case of death, the amount standing to the credit of the party insured at the last preceding striking of balance as aforesaid, shall be paid over to the person entitled to receive the same; and the proportion of surplus equitably belonging to him or her, at the next subsequent striking of balance, shall also be paid, when the same shall have been ascertained and declared."

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the methods adopted in these cases. In that of the railroad, the common stockholders are in form and in law, as well as in fact, the owners of the franchise, capital, and profits of the corporation, and the preferred stock, with its voting power, has a share in such ownership, relatively so small as to be in legal intent and effect a mere peg on which to hang the trust control.

In that of the Equitable Life, the contributions of the policyholders became the capital and they the owners or beneficial "members" of the corporation, though without a voting power. The so-called voting stock, like the preferred stock in the other case, became a mere peg on which to hang the control. Its rights in distribution are, however, postponed to those of the policyholder, and it was in legal intent simply the security fund required by the statute, upon which the contributors are entitled to a seven per cent dividend out of the accumulations. A distinction is of course necessary between contract insurance and mutual insurance. In the former, the policyholder exchanges his property for a contract. In the latter, he places this property in a joint venture, in which he acquires a share of the joint ownership, in exchange for the individual ownership he surrenders. *In the case of the Equitable, this joint ownership attaches not to any particular fund, but to the assets of the society as such, — in other words, to the society itself, as an association of the policyholders, vested by law with a corporate entity.*[1] *It is this association that is controlled by the voting stock.*

In the case of the real estate concern, the charter is that of a straight stock company with $100,000 capital, and its officers have apparently assumed the power to issue "profit-sharing certificates," the holders of which are by their contract entitled to a fixed return and to a share in the profits proportioned to their investment. They also by these dubious contracts become the substantial owners of the corporation, but are not of course in any sense its corporate "members."

A further supposititious, but perfectly possible illustration may complete our view. It is that of the simplest form, a corporation organized for the primary purpose of entrusting to the control of A, the property say of B, for investment. B, having entire trust in A, a so-called preferred stock in a small amount is issued to him, for services, and a non-voting common stock is issued to B. A has agreed to manage the property for a share in the returns on the investments, represented by dividends on his voting stock. In the confidence of a moment, the property of B has been absolutely and irrevocably placed in the control of A, his representatives and assigns forever.

Now it will not be contended that there is anything morally wrong with any one of these plans of corporate finance, resting as they do on the trust and confidence of the parties. We will also assume that they are permitted by statute at least in some of the states. It may indeed be opposed to public policy, that the legal title and control of A over the property of B and C should be irrevocable and be represented by stock divisible and transferable for cash.

It is probable that the essentially trust relationship established and its attendant dangers have been largely ignored. Where they have been recognized, as in the case of eleemosynary institutions, the statute has given to the members or trustees a strictly trust position, generally without financial interest or possibility of "honest graft" in the management. An illustration of such an institution, having some bearing on our subject, is found in the early Pennsylvania case of Philadelphia Savings Institution, 1 Whart. 461, (1836). The legislature had specially incorporated certain men and their successors, as "members" of the Savings Institution, giving them, through their elected governing board, entire control of the institution, with power to elect their

[1] Cooley's Briefs on Insurance, Vol. I, pp. 51–53.

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own successors. It also authorized them to raise a security fund by the sale of $200,000 profit-sharing capital, and the question litigated was whether or not the purchasers of this capital, the so-called "stockholders," were members of the corporation, and entitled to a share in its management. It was held that they were not. There was no question of fraud or abuse of power. The charter in this case clearly recognized the trust imposed upon the members, who, as such, had no financial interest in the company, and were selected and to be selected as chosen trustees of the business and funds of the institution.

The Equitable in its origin had the clever appearance of closely imitating this plan, with the addition that the distinguished and responsible members themselves subscribed to the security fund, and incidentally that their control was represented by the stock issued therefor, which they of course could transfer to desirable successors, necessarily for cash, as it represented a gilt-edge seven per cent lien on the accumulations of the company. The initial and continued success of this company was undoubtedly due to the great names that as stockholders stood sponsor for its inception, and have since as dummy directors stood sponsor for its abuses.

This arrangement entirely ignored the essentially trust character of the control vested in the stock. It resulted, as all such arrangements must have a tendency to result, in the accumulation of the stock in one hand, that of the highest bidder, and he can bid highest who is the least scrupulous in the use he intends to make of the power. But disregarding or ignoring these considerations, the statute law is silent, and its permission has been assumed to effect just such arrangements, including that of the Equitable Life, whose proposed charter was approved, as required in the statute, by the state comptroller.

Conceding their legality, what are the nature and consequences of the legal status created, *and what are the effective remedies of B, the common stockholder, the Policy holder or "member," if the holder of the stock control is guilty of fraud and a gross abuse of the powers incident to the voting stock?*

The case is distinguished in kind and precedent from the well-recognized trust relationship of the directors of a corporation. Is it not also as clearly distinguishable from the actual property control ordinarily incident to the ownership of the majority stock of a corporation? As judicially recognized in many decisions, the stock of a corporation is nothing more or less than the ownership of its franchise, capital, surplus, and profits, divided into shares, and the right to vote is the presumed incident of such ownership and of the stock representing the same.[1] This right to vote is the ordinary control of ownership, surviving the change in character from that of joint ownership to ownership of stock in the corporation.[2] But in the cases we are considering, a device is resorted to, and welded into the very being of the corporate entity, for the express purpose of taking from the ownership the right of control, and vesting this right in those possessing either a lien without ownership or a share in the ownership so small as to be in legal intent and effect a mere peg on which to hang this right of control. And this right, separated from the true ownership, is made divisible and transferable, by being vested in a restricted "stock" having exclusive voting power.

The control so acquired is clearly something other than a mere incident of majority ownership. The cases we are considering thus fall into a class by themselves, never perhaps recognized in the precedents of corporation law. To determine their legal nature and the rules of law and equity by which they should be governed, recourse

[1] Burrall *v.* Bushwick R. R. Co., 75 N. Y. 211 216. People *v.* Coleman, 126 N. Y. 433.

[2] See Taylor on Corp., 5th ed. sec. 559b.

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must be had to the general jurisprudence of equity, to precedents and principles, including the general maxim, *ubi jus ibi remedium*.

We may further premise our inquiry by the candid recognition of the fact, that, whatever its legal nature or effect, this arrangement necessarily creates, and is in fact, a trust, a means by which B places his property in a joint venture and, while retaining the ownership, surrenders its control to A. If A himself has a bona fide interest and ownership in the venture, he is then in effect nothing more than a trustee for himself and others, a well-recognized instance in the law of trusts. Such indeed would be the legal relationship were any other means adopted of effecting it, but where it is effected through a corporate form, precedent and principle combine to make the question a new one, and the answer difficult. The form is that of a corporation, and the tendency has undoubtedly been to treat this form, while it survives, and the rights existing under it, as inviolable.

For instance, a client recently inquired as to the possibility of permanently vesting the control of certain corporate interests in three men, which he wished to accomplish by a voting trust. He was advised that a voting trust would be subject to equitable control and possible cancellation, and that it must be limited in time and reasonable in purpose, but that in the present state of law, the same thing could be more safely and surely effected by the organization of a holding company, in which a small amount of preferred stock should hold the exclusive voting power, and the ownership be vested in the common stock, without such voting power. This advice was based on the assumption that the control so acquired would be honestly exercised.

The approved legal idea of a corporation is that of an artificial person, *existing only in contemplation of law;*[1] a lawful means for accomplishing lawful ends, a contract between the state and the parties *inter se*,[1] the sum of the legal relations defined in the charter and governing statutes.[2] This artificial entity is created either by express mandate or by permission of statute. It may be that the express authority of a legislative charter could place enough sovereign force in this artificial entity to override legal rules, but where the statute is permissive only, and is silent in respect to the extraordinary powers claimed by a charter drafted under it, this charter should conform and be in some degree amenable to general rules of law and equity. Such are the cases with which we are dealing. An instance of a corporate control vested by legislative mandate is found in the ordinary case of an eleemosynary corporation — such as that of the Philadelphia Savings Institution already mentioned.

The question of membership in a corporation, with or without special rights as creditors, has been quite generally held to be a matter of contract between the parties, acting under statutory permission, and the fact of membership is determined by the statute and the contract, by the fact and not by the name with which it is labelled. A member of a corporation may have special contract rights in connection therewith, and be at the same time a creditor.

In McLaughlin *v.* Railway Company,[3] the holder of a stock certificate on its face entitling him to "interest" at seven per cent was held a stockholder and member of the corporation but as to unpaid interest a creditor, and therefore not bound by a resolution postponing the interest payment to which he had not assented.

In Jones *v.* Wooley,[4] a paper agreeing to pay plaintiff $926.80 one year after notice, with "what interest it makes in proportion

[1] Marshall, C. J., in Dartmouth College *v.* Woodward, 4 Wheat. 418.

[1] Taylor on Corporations, 5th ed. sec. 31 *et seq.*

[2] *Ibid.*, secs. 23–24.

[3] 8 Mich. 100 (1860).

[4] 26 Pac. 120, 3 Idaho 48 (1891).

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to all the shares of the institution," was held not stock but an enforceable promise to pay.

In Burt *v.* Rattle,[1] the Act of March 25, 1870, authorized a manufacturing corporation to issue "preferred stock" to pay debts and for working capital, and made it lawful for the corporation to guarantee dividends thereon, at a rate not exceeding the legal rate, and the final payment at a time specified, and also authorized a provision for its conversion into common stock, and prescribed that such preferred stock should not vote, nor be liable for debts. In an action to recover on the guaranty and mortgage given to secure the same, it was *held*, that the holders of the "preferred stock" were creditors and not stockholders.

In these decisions we find the general tendency of the courts to give effect to the intention of the parties and to permit them to use the corporate form to define and effect the terms of their intended contract. In none of them, however, was any question of trust or fraud involved. It is undoubtedly the general understanding that our statutes and courts would not permit an abuse of this corporate form, to effect, protect or perpetuate a legal or equitable wrong. In every important instance our higher courts have promptly and effectually swept aside the corporate form to reach and prevent the intended wrong.

In the case of People *v.* North River Sugar Refining Company,[2] the New York Court of Appeals held the acts of the stockholders of different corporations in pooling their stock to be in effect a partnership between the corporations, and as such *ultra vires* and void, at the suit of the state. The court said at page 621:

"The abstract idea of a corporation, the legal entity, the impalpable and intangible creation of human thought, is in itself a fiction, and has been appropriately described as a figure of speech. It serves very well to designate in our minds the collective action and agency of many individuals as permitted by the law."

The Supreme Court of Ohio, in reaching a similar conclusion in the case of State *v.* Standard Oil Company (49 Oh. St. 137), said at page 177:

"The general proposition that a corporation is to be regarded as a legal entity, existing separate and apart from the natural persons composing it, is not disputed; but that the statement is a mere fiction, existing only in idea, is well understood by anyone who pretends to accurate knowledge on the subject."

The same court, in the later case of Bank *v.* Treibein (59 Oh. St. 316), said, page 326:

"The fiction by which an ideal legal entity is attributed to a duly formed incorporated company, is of such general utility and application, as frequently to induce the belief that it must be universal, and be in all cases adhered to, although the greatest frauds may thereby be perpetrated under the fiction as a shield. But modern cases, sustained by the best text writers, confine the fiction to the purposes for which it was adopted, *and have repudiated it in all cases where it has been insisted upon as a protection to fraud or any other illegal transaction.*"

In Northern Securities Company *v.* United States (193 U. S. 197), the Federal Supreme Court sustained the advanced position taken by Mr. Knox, and dissolved the holding corporation created under a state statute for the purpose of effecting a consolidation by stock ownership between competing railroads, on the ground that its formation was in legal intent and effect a violation of the Sherman anti-trust law.[1]

With all these precedents in mind we approach a new state of facts in the cases we are considering, where the ownership of

[1] 31 Oh. St. 116 (1876).

[2] 121 N. Y. 582.

[1] See also Donovan *v.* Purtell, 216 Ill. 629, reported with valuable note. L. R. A. New Series, 176.

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the capital, profits, and surplus of a corporation is in B, the exclusive control is vested in A, the holder of a so-called voting stock, with none or but a minimum share in such ownership, *and the holder of such control is guilty of fraud sufficient with any other form of contract to terminate the trust under decree of equity.* Assuming that the courts have power to remedy past abuses and to compel the restitution of property wrongfully acquired from the corporation by those acting as its directors and officers we ask further, first — have they power to treat the holder of this stock control as a trustee in the fullest sense, and as such to compel him to account for all profits, otherwise lawful, *acquired through such ownership* directly or indirectly by his control over the officers of the company; and second — have they the power to in any way restrict or cancel his control? As a pertinent illustration to my first question, I would instance the well-known sequel to the Equitable Life situation. The owner of this stock control sold it, it seems, for a sum based, not upon his property interest in the corporation, but upon the value of the control given to the $51,000 stock over the $400,000,000 assets of the company. If there is any difference in equity between the sale of this control and the sale of a majority interest in any other corporation, then is this difference sufficient to impose upon the vendor the ordinary liability of a trustee to account for his profit on the sale of his power? Is the fact that his control rests in the ownership of "stock" sufficient to protect him from the plain duties and liabilities which would attach to it if it rested in any other form of contract? *In other words, can the corporation recover from him the money he received for such control, over and above the full fair value of his stock as an assured and permanent seven per cent investment?* The New York Court of Appeals has held directors of an insurance company liable to an action to refund to the corporation moneys received by them for resigning and turning over its control to other parties.[1] The same ruling would apply to the above case of the Philadelphia Savings Institution. If its charter members or their successors should, by successive resignations and new elections, transfer their membership for a cash consideration, they would undoubtedly be held as individual trustees, liable to the corporation for their unlawful profit. The difference in the case of the Equitable, as we have seen, is that this control is made incident to a so-called stock, divided among the original members, representing an actual investment, relatively small, but, assuming the legality of the scheme, a proper subject of sale. This stock by subsequent transfers has vested the majority interest in one man. We have seen, however, that this device was resorted to for the very purpose of taking from ownership that control which is otherwise its incident. Does it also take from the actual trust thereby created all the incidents and safeguards otherwise belonging to it? Such a sale is, one might think, clearly distinguishable from a mere sale of a majority interest, carrying the control as an incident, and should be within the principle of the New York cases to which I have just referred. But these adjudged cases lie within precedent, and the case we are now considering is somewhat without precedent. Counsel of repute have advised and effected the sale referred to, relying no doubt on the inviolability of the corporate contract and on the general assumption that the owner of stock may sell it for the best price obtainable. Their judgment has apparently not been influenced by the consideration that this stock control was in any sense a trust, not for the minority stockholders, but for the $400,000,000 of policyholders, who by the charter contract are the real owners of the capital, surplus, and profits of the company. Are these

[1] McClure *v.* Law, 161 N. Y. 78; Bosworth *v.* Allen, 168 N. Y. 157.

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gentlemen right, and is the moral wrong legally protected? It is to be noted that the actions already brought against Mr. Hyde charge him for his unlawful gains acquired as a director. It *yet* remains for the management or the policyholders to sue him on his possibly greater liability for all that he has acquired directly or indirectly through his control of the stock ownership.

Our second question — have the courts power to in any way restrict or cancel the control vested in this so-called voting stock, on proof of its fraudulent abuse? — is one of greater importance and even greater difficulty, to which we must look long for an almost hopeless answer. Starting with the clear and hopeful recognition of the fact that a trust relation exists, we land hard and roughly against the stone wall of a body corporate, supported by precedent and principle in the claim that its chartered organization is inviolable against judicial attack. Certainly it seems without precedent that a court of equity should amend a corporate charter, to take away the voting power from the class holding it under the charter, or should enjoin the voting by such class merely on proofs of past abuses, and give power to vote to another class, or should name its own trustee to cast such vote and thereby control the management and business of the corporation. In all these respects our courts are in a degree controlled both by precedent and by statute. The Philadelphia Savings Institution case affords an instance of so-called "stockholders" in a similar institution, whose "stock" represented a mere security fund, not entitled to a share in the management. But it would seem impossible for our courts, by reason of the wrong of Mr. Hyde, to deprive the minority stockholders of the right to vote, a right of little value so long as the majority stock is held by one man. The least impracticable remedy in the existing state of affairs would probably be an act of the legislature, authorizing a court upon proof of fraud by the holder or holders of a majority stock, to transfer to the policyholders the voting power of the stock participating in such fraud. Such an act has been suggested to the chairman of the New York legislative investigating committee, and one of the remedial measures proposed is apparently based upon the principle suggested by it, that this control can only be taken away by a judicial proceeding based upon the recognition of the trust and of its unlawful abuse. The question is one of great difficulty, if any effective remedy is to be found.

We pride ourselves in these latter days upon our legal ingenuity in using or abusing the form and license of incorporation, but these astute gentlemen of '59 evolved a corporate puzzle before which we stand in awed confusion. Neither more nor less than a trust cloaked and shielded in a corporate guise, it bids defiance to an array of legal precedents that cannot touch it. We cannot, however, admit that our courts are in fact powerless to deal with the situation It is this very defiance, this very fact of an anomaly that evades us, that calls upon the courts, without the possibility of a refusal, to find a remedy that will be both adequate and sound.

The legal relations involved in a corporate form are generally simple, and our precedents and principles are based very largely upon the ordinary corporate form. But this form, we now observe, is not stereotyped, and the legal relations may be quite complicated. They may effect a trust relationship such as we are considering, in which recognized principles and precedents fail to effect substantial justice.

The Equitable Life Assurance Society as a legal entity is not, as has been suggested, the trustee for its policyholders. It has not made, and cannot make, any profits that do not belong to the policyholders. Its assets, as a corporation, belong to them as its beneficial "members." The stockholders holding the "legal title" to the control, without the beneficial ownership,

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are as to the policyholders the trustees of this control. Both the stockholders and policyholders are in legal contemplation "parties" to the charter whose legal relations are defined in it. As a general proposition, based upon the cases cited, these relations and the rights of the parties growing out of them are contractual, and these rights and their acts are to be determined, not by the test of the formal shadow, but by the substance which it represents or effects. *While the form may affect the remedy, it will not defeat it, and in the absence of a remedy, regarding the form, the form will be disregarded, and a remedy found based upon the substance.*

Where precedents fail, and modern conceptions prove a bar to effective justice, it may still be possible to fall back on general principles and inherent equities, and bring to light the residuum of the chancery powers that at one time exercised a salutary control not only over the soulless corporation, but over the acts and consciences of individual men, whose legal rights, resting on precedent when they shocked the consciences of the chancellor, became subject to his restraining hand. Certainly this would be preferable in public policy to the sight of lawyers and judges standing helpless before this "divine right of property," claimed, exercised, and defiantly abused by a captain or brigand of modern finance. Public opinion may prove an effective substitute for law, but when it does so, and is so considered, then the promise of beneficent anarchy will seem capable of realization. It lies of course with the legislature to make new laws, but it is or should be within the equity power of the courts to prevent the perpetuation of fraud whatever the form or authority to which it clings.

NEW YORK, N. Y., June, 1906.

NOTE. — Since the above article went to press, the new charter of the Equitable Life Assurance Society has been adopted by its stockholders and directors. This charter gives to the policyholders owning $400,000,000 of its assets, the right to elect twenty-eight directors, leaving twenty-four to be elected by the $100,000 stock — a clearly inadequate and seemingly deceptive remedy. It repeals the plain provision authorizing mutualization by a vote of the directors (see Art. 4 of Charter *supra*) and the more essential provisions of Article 6, upon which all proprietary rights of the policyholders have always rested. This article as amended, provides only that "The *insurance business* of the Company shall be conducted upon the Mutual Plan" and omits the provisions giving "each policyholder . . . an equitable share" of the Society's surplus, thus taking from the policyholders their existing membership in the corporation and the beneficial ownership of its assets, and leaving them only such contractual interest in the insurance fund as is given by their policies within the broad limits of "the mutual plan," an interest which under the decision in Greeff *v.* Equitable Life Ass. Soc., 160 N.Y. 19, does not necessarily attach to the surplus of $80,000,000. With new force and meaning, the amended charter reaffirms the provisions of Article 3 (relating to the stock) that "The earnings and receipts of said Company over and above the dividends, losses, and expenses shall be accumulated." Under Sec. 83 of the Insurance Law as amended this year, an annual distribution of surplus is provided for future policies, but it is not clear that this protects present policyholders in the present surplus, or takes the place of the charter provisions thus omitted.

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JOINDER OF ACTIONS IN FIRE INSURANCE LITIGATION

By Frederick T. Case

IN nearly every fire insurance litigation, whether large or small, there are several companies involved on separate and distinct policies, and the important question must inevitably suggest itself to the attorney for the assured of whether or not he shall bring one single blanket action against all of the insurance companies or shall bring a separate action against each. The practice heretofore with a few exceptions seems always to have been to bring a separate action on each separate policy, but just why that has been done, whether from choice or fancied necessity, no one seems to know.

In view of the fact that the question of joining the several companies in a single action must so frequently come before the attorneys in their practice, it is surprising that it should so seldom be brought into court, and that there should be very little authority upon it. The probable reason for this is practical rather than legal, and arises no doubt from the caution and uncertainty of the attorney and his unwillingness to take any chances in exploring new fields, rather than because the law is so well settled as to clearly mark out his proper course of procedure. This caution arises generally from his unwillingness to risk his whole recovery in one single trial, when he has the opportunity to discover the opponent's case in a first more or less preliminary trial, perhaps upon one of the smallest of the policies, and then go into the subsequent more important cases knowing just what he will have to meet. But he may also be influenced by a fear that in the slow process of determining in the courts whether he may properly join all of the defendants in one action, the twelve months statute of limitations in the Standard Form policy might run, and that he might then find himself thrown out of court, with his complaint dismissed on the mere technical ground of misjoinder of several causes of action, and without the right then to start afresh.

Under our present Standard Form policy, however, there would seem to be a perfectly proper basis on well-recognized principles for a single omnibus suit against all of the companies involved in the loss. That is by reason of the pro rata clause that is found in every policy, expressly providing that the company issuing it shall not be liable for any greater proportion of any loss to the described property than the amount thereby insured bears to the whole insurance whether valid or invalid. It thus happens that each company is immediately interested in, and affected by, the two principal questions involved in the fight between each company and the assured, namely, the amount of the loss and the amount of the insurance which is to bear the loss. But before deciding whether or not it is correct at law to sue all of the insurers in one suit, many will pause to see whether that would be a desirable course. Besides the man who has a doubtful or uncertain loss on his hands and who will wish to string out his litigation so as to draw his opponent's fire in one or more preliminary cases there will also be found the smaller and less attractive specimen of attorney who, having plenty of time on his hands and little work of value, wishes to extend the work over as much ground as possible, provided he can thereby heap up court costs. And for the companies too, this course may often be the best, as for example in a series of cases that recently came to the writer's attention where the defenses were fraud, false swearing, and arson. In that instance it was impossible to know what the assured and his associates would swear to, and it seemed almost certain that they would go so far astray in their first testimony that they could not testify again without contradicting themselves and proving their own unreliability

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— in such a case the companies naturally desire as many trials as possible. In the large majority of cases, however, it would no doubt be most satisfactory for all concerned to let the whole question be determined in one single suit to which all companies on the risk are parties and by which all shall be bound. By this process the litigation will be most quickly terminated, and the rights of all the parties most certainly and fully determined, and with the least possible expense in money, and time of attorneys, parties, and witnesses in court.

The companies themselves, where they have been sued in separate actions at law, have on a number of occasions sought to have all the issues consolidated and determined in a single trial. And they have usually succeeded in this by bringing a bill in equity for the purpose, based upon the undoubted jurisdiction of courts of equity to prevent a multiplicity of suits. In one recent instance of this sort the court said: "We think the equity jurisdiction is maintainable on the ground of the prevention of a multiplicity of suits, as well as upon the inadequacy of the remedy at law. The very same principles of law and the very same facts determine each case. Besides, it is important to note that there could be but one true fixation of the amount of loss and yet each jury might put it at a different sum." Tisdale *v.* Ins. Co. of No. Am. (1904 Miss.) 36 Southern 568. See also, Virginia Carolina Chemical Co. *v.* Home Ins. Co. *et al* (1902) 113 Fed. 1.

The same principles should apply with equal force where it is the plaintiff instead of several defendants who seeks to litigate his rights all in a single suit, and such is the trend of the few decisions that there are upon the question. We find, however, in the Hartford Fire Insurance Co. *v.* Post (1901) 25 Texas Civil Appeals 428, the opposite view, in spite of the fact that each policy contained the usual pro rata clause. In that case Pleasants, J., gives the reasons on this side of the argument most excellently and fully in the following language:

"Appellants' first assignment complains of the ruling of the trial court in not sustaining the first special exception made by both defendants to plaintiffs' petition on the ground of misjoinder of causes of action. These exceptions should have been sustained. There is no privity between the defendants in this case, and no equities to be adjusted between them which would authorize a joinder of the separate and distinct causes of action sued on by plaintiffs. The contracts sued on were executed by different persons and at different times, and create no joint liability, and we know of no principle of law which would authorize the plaintiff to join these defendants in one suit upon both contracts. It may be that under the facts in this case no injury could result to the defendants by being sued jointly, but each has the legal right to have his case submitted to a jury entirely disconnected from any claim which the plaintiff may have against the other, and such right cannot be disregarded by the courts. The exception should have been sustained, and the plaintiffs required to amend their petition and elect upon which of the causes of action they would prosecute this suit."

The weakness or defect in the above decision lies in taking a too narrow view of the equities of the situation, and failing to see that the companies by their pro rata clause had in a sense joined all the contracts into one, and had brought themselves into a position where they might all be affected by the disposition of a suit against any one. But the complete answer to the position of the court cannot be better stated than in the language of the decision in the recent case of Fegelson *v.* Niagara Fire Insurance Co. (1905 Minn.) 103 N. W. 495, where the court said:

"It follows that the several policies set out in the complaint are not wholly independent of each other, for they are so far correlated that by express stipulation of

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each the extent of the liability assumed in each is to be measured by the total amount insured by all of them. It is necessary, then, in order to determine the amount which the plaintiff is entitled to recover against each of the defendants herein, to conclusively determine, as against each, two questions in which there is a community of interest among all of the defendants, namely, the amount of the plaintiff's loss and the amount of his valid insurance upon the property lost or damaged by fire. . . . A verdict or decision on the question as to the amount of the loss and the total amount of the insurance necessarily affects and binds all parties to the action, and they have a community of interest therein. . . . If a separate action against each defendant be his only remedy, he must bring six actions instead of one, in each of which the same evidence on the two essential questions must be gone over, and the law applicable thereto determined, with the not improbable result that the amount of his loss and the amount of his valid insurance will be fixed at a different amount in each case. . . . It is clear upon principle and authority that equity has undoubted jurisdiction to prevent the necessity for such a multiplicity of actions and to afford the plaintiff a certain and adequate remedy."

And to like effect is the older and leading case of Fuller *v.* Detroit Fire and Marine Ins. Co. (1888) 36 Fed. 469.

Nor is the rule different in code states where distinctions between law and equity have been abolished and where it is expressly provided that separate causes of action on contract can be joined only where they all affect every party to the action. For such code provision is merely declaratory of previously existing rules and does not establish any new principles. Mahler *v.* Schmidt, 43 Hun. 512. And furthermore each cause of action does affect every defendant, and the several companies by stipulating to apportion the loss may well be said to have to that extent united and consolidated all the policies into one contract. Such was the holding in Pretzfelder *v.* Ins. Cos. (1895) 116 N. C. 491, based upon section 267 of the North Carolina Code, which is substantially the same as section 484 of the New York Code of Civil Procedure as to joinder of causes of action.

It may be urged, however, that the several causes of action cannot be said to affect or interest all of the defendants where the loss is so far in excess of the whole insurance that each company must pay the face of its policy if its liability be shown at all. That might be true if it could appear on the face of the complaint that no question could possibly arise in the trial as to the amount of all the insurance or the amount of the loss. But such a situation is not conceivable, for in every instance it must be open to one or more of the insurers to call in question the amount of the loss, and in no instance can this question be finally and conclusively settled as against the insurers until its final determination by trial and judgment of the court, long after the preliminary question of proper or improper joinder of causes of action or of parties has been fixed and settled.

The language of the several forms of policies varies slightly as to the pro rata clause, and this should be remembered in considering the decisions above quoted. But no stress is laid upon this feature in the cases, and it can have no effect upon the question of joinder. For if the clause provides for pro rating with the "valid insurance" or with the "whole insurance" on the property, then every company is interested in and may be affected by the question of what is *valid* insurance or what is the *whole* insurance; and if the clause refers, as in the New York Standard Form policy, to the whole amount of insurance "whether valid or not," there is still the open question whether any particular policy or "binder" was in existence as insurance of any kind at the time of the fire either valid or invalid. An example of this is seen where the

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defense is raised that the policy had been cancelled or that there had been no delivery of the policy or meeting of minds upon the contract in the first place, as in the case of Partridge *v.* Milwaukee Mechanics Ins. Co. (1897) 13 App. Div. (N. Y.) 519. Moreover, no matter what form the pro rata clause takes, it still makes all the insurers interested in and affected by the question of the amount of the loss; and makes it proper in equity and justice that one question should be settled once and for all in a single action, lest several juries differ as to the amount of loss and the plaintiff thereby in his many actions fail to get complete indemnity.

The true principle, aside from statutory provisions, upon which joinder of the several causes of action should be allowed in these cases is equitable, as is indicated in most of the authorities cited above, and the relief should of course be sought in the equity courts. The Texas decision, however, which is cited above (Hartford Fire Insurance Co. *v.* Post) appears to have been an action at law, and that may well be the explanation of the court's refusal to allow the joinder in that instance. For where chancery procedure is still distinct from the law procedure as it is in Texas, any litigation in which relief is based upon the avoidance of multiplicity of suits and the inadequacy of the remedy at law, can obviously be brought only on the chancery side. This point does not seem to have been raised in that case but would have been clearly sufficient to explain and justify the decision, if the court had only considered it and made the decision merely one on the technical point of practice. In jurisdictions where the forms of procedure in law and equity have been merged, and where there is express statutory provision for joinder of causes of action on contract that affect every party to the proceeding, two courses seem to be open to reach the same result. The plaintiff may set up the several causes of action at law and join them in a single complaint relying upon the statutory provisions. That was the course pursued and held to be proper in Pretzfelder *v.* Insurance Companies (supra) based on the provisions in the North Carolina Code. Or on the other hand he may elect to disregard the statutory provision for joinder and proceed in equity upon the theory that he has only a single right or cause of action in equity, even though it may involve the adjustment of questions between the plaintiff and different defendants on separate contracts. In the latter method the form of pleading will no doubt be legal rather than equitable, because the distinctions between the forms of action at law and in equity have been abolished, but the basis of the case and the relief asked for will be equitable. Equity in that sense has not been abolished by any statutory provisions and cannot be, for the distinction between legal and equitable actions is as fundamental as that between actions *ex contractu* and *ex delicto*, and no legislative fiat can wipe it out. Gould *v.* Cayuga Bank, 88 N Y. 83. The latter method was the one approved by the decision in Fegelson *v.* Niagara Fire Insurance Co. *et al.*, the Minnesota case cited above. The statutory provisions in that state are practically the same as those of the North Carolina Code and New York Code both as to abolishing distinctions between law and equity, and also as to joinder of causes of action on contract, and yet the court did not take up the statutory provisions but took jurisdiction upon the equitable doctrines of avoidance of multiplicity of suits and because of the inadequacy of the remedy by several actions at law.

It seems clear, therefore, upon well-recognized principles of equity, and in some states under statutory provisions also, that when several companies are liable upon a single loss under separate policies each containing a pro rata clause, it is entirely proper practice for the assured in suing them to bring one single suit against them all.

New York, N. Y., June, 1906.

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THE SOUL OF THE PROFESSION

By Charles F. Chamberlayne

At irregular intervals, now rapidly lessening in length, a note of warning comes to us from some admittedly authoritative source, that the client's money too largely dominates professional *morale;* that rising tides of commercialism stifle the cry of its outraged conscience. With suggestions of this kind coming from other quarters the profession is entirely familiar. To them, indeed, it is fairly wonted, if not absolutely hardened. There has not been with these estimates sufficient appreciation of actual conditions to make unfavorable criticism of any value. The profession, therefore, has not been greatly affected, beyond the point of mirth, by English or other satirists who, in very unjudicial perturbation of mind, have sought to revenge the unpleasant enforcement of pleasantly incurred debts by taunting the venality and greed of their persecutors. The wit has been enjoyed, the bitterness pardoned. There has been no sting, for the sting of satire lies in its truth. Allowance, under such conditions, is easily made for ignorance and prejudice. Mentally self-conscious of its rectitude the profession has serenely gone its way.

But a change has occurred both in the source of criticism and the vehemence of its insistence. Eminent and well-esteemed counsel, like Edmund Wetmore, of New York, Alfred Hemenway, of Boston, or Henry St. George Tucker, of Virginia, suitably equipped by study, experience, and familiarity with the subject, addressing professional brethren under full sense of responsibility, unhesitatingly point out certain prevailing tendencies which they regard as detrimental. Hon. John F. Dillon, with all the force attendant upon his distinguished position, reiterates the statement. A conscientious President of the United States, addressing the alumni of his alma mater and of her law school association, finds no topic more pressing in its claims upon his attention, or more appropriate to such an occasion, than that of the necessity for a radical change in the attitude of legal advisers toward clients seeking to violate or circumvent the law of the land. No enemy hath done this. It is our own familiar friend, the man who has at heart the honor, worth, and dignity which we ourselves are bound to cherish.

Ample reason exists why lawyers who seek to do their whole duty should consider with care whither we are drifting. Signs are not lacking if one will but watch the bank. A single issue of a New York daily narrates the proceedings against a metropolitan lawyer of national reputation for subornation of perjury; against a judge of a prominent city court for levying blackmail; against local attorneys for the purchase of claims against public service corporations. Other pages tell of several personal injury actions against such corporations, attorneys promoting the litigation upon contingent fees, aided by medical experts also financially interested in the result. As an offset, with some faint color of justification in the need for self-protection, a prominent street railway company interposes the professional "jury fixer" between itself and what an eager public, outraged by its monopoly and extortion under perfectly devised legal forms, is anxious to mete out to it in verdicts.

Would these were temporary and exceptional happenings! They are constant and symptomatic. Is, then, the profession dropping into a business? Is a lawyer merely a useful tool of organized capital or the brains of assaults upon it? Is it indeed proper or permissible that he sell anything he has at any lucrative offer, with as little compunction as a merchant would sell his goods, careless of the purpose? Has the situation here hinted a cause? If so, has it a remedy, and how best may such a remedy be reached and applied?

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Much would depend, as to the answer, on the view-point. To the man of a certain type of religious feeling it may well seem that these things necessarily follow the doctrinal doubt and scepticism which he so greatly deplores. The ultimate sanction of all morality, as he understands it, is religious. He sees that belief in future physical punishment for wrongs done in the body no longer controls, so generally, human conduct. In the reaction against the old teaching he has seen nothing arise to take its place. Such an one does not fail to notice, moreover, that as the power of the inhibition weakens, the temptation increases in attractiveness with corresponding steadiness and in larger measure. Prizes for success are vastly enhanced in money value; increasing luxury insistently demands more lavish expenditure. A professional man feels obliged to keep step with the march of the time.

Another standpoint brings a somewhat different aspect. To the moralist, the trail of commercialism is over it all. He feels that commerce has succeeded in imposing her own standards of worth, success, and respectability. He suggests that as this touchstone of the dollar is more rigorously applied and indifference to the ethical quality of any successful method for meeting it deepens, the attendant growth in population, *pari passu* eliminates the restraining influence of public opinion. When a community grows so large that a man may choose his own congenial circle and be practically unknown beyond it, his conduct, provided only it complies with legal standards, is really condoned in advance.

The matter presents itself to the average professional observer in yet another of its phases. He finds sufficient explanation for everything in the changed conditions under which legal business is now conducted. With rare exceptions, in America at least, the typical old-fashioned law office is a thing of the past. It can never return. The needs of the present, the prospects of the future, exclude the hope by its warmest admirer. Close personal relations, mutual interest and friendliness between the lawyer and his younger associates are relegated to the back of the scene or crowded entirely off the stage. System has replaced society. The object of the entire arrangement is evidently, even ostentatiously, that of securing a money-making mechanism, inelastic, rigorous, unsympathetic; into which the young man, just from his studies, fits, among its bureaus and departments, each with trained clerical and supervisory force, like a fresh, adjusted cog into a well-oiled machine. At best, the head of such an establishment is a well-read lawyer with but little time for present reading or the personal preparation of cases. Quite as often, however, the manifested ability lies rather in capacity for procuring business and handling it, when gained, in a manner satisfactory to the methods of a mercantile community. The forte lies in "hustling," "getting there," to use the current complimentary phrases. Our professional observer notices that the rights of parties are, almost necessarily, judged under such a system not so much on their merits as on their money-winning capacity; that the mill should be made constantly to grind out dollars regardless of the quality of the grist. "Good" clients, seeking to evade inconvenient legislation, will not be allowed to carry business to the similar legal "shop across the way." Meritorious cases are crowded out or given scant attention in return for an extortionate mortgage on the future verdict. "But really," the office very practically comforts itself by saying, "We cannot afford to consume, on any contingent payment, time which can be readily sold for cash in meeting the wishes of clients with money, even *prava jubentium*. Charity is charity; business is business." The kindly, conscientious advice of the old practitioner is as much a bygone thing as is the cut of the ancient worthy's clothes, or the stage coach in which he travelled to court.

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Present conditions, then, are permanent; at least, in the sense that no reversion to earlier conditions is probable. Were the obvious causes, as they appear from the religious, moral, or professional standpoint real and efficient ones, ample reason for alarm would be furnished. The fundamental difficulty, however, lies deeper, and has a remedy. In moral matters the control of evil is not gained by eliminating but by overcoming with higher and therefore more dominant forces. Evil is to be frankly accepted as a certain, inevitable part of the discipline of life. This is no secret. Every wise parent or teacher sees that the child of his love or interest is best prepared for a career of honorable success among moral pitfalls, not by removing him from temptation, but by fortifying him with a moral armor against which temptation shatters or from which it is deflected. It is hopeless to expect that the evil incident to the gains of advancing civilization can be eliminated or concealed. All that can be affected are the elements of character to which this evil appeals, that in which it finds its response. The basic evil of commercialism lies in the low ideals for which it stands. Let but the actual ideals of a man be normally high and business methods are powerless to lower the ethical quality of professional achievement. They can but heighten and perfect. May we not reasonably conclude that the man who mourns the absence of religious sanctions, he who laments the growth of mercenary motive, and he who desires to revive old customs, while entirely right from their several points of view and though each evil as indicated has its appropriate effect upon the complicated result, are dealing rather with the symptoms than with the causes of the disease, and that no remedy along such lines can be other than palliative? The most careful, painstaking work of bar associations, grievance committees, or other corrective or purgative agencies in removing gross offenders is as powerless to prevent professional degeneration as our criminal codes prove to be in eradicating crime. Something deeper, earlier, more fundamental is needed.

It has been foreshadowed. Proper ideals must be created at the start and steadily maintained. In professional relations, the only safe ideal is one so high that it can never fully be realized; so attractive that the struggle to reach it can never be abandoned. Ideals, real ideals, constitute, as it were, the mould into which a developing, plastic character forms itself. Such seems to be the law of all growth in nature, physical, mental, moral. Back of the ideal, within its form, grows the actual. "As a man thinketh in his heart, so is he."

Now it is, unfortunately, not difficult to recognize the ideal in which a fair proportion of the fresh accessions to the bar, including many of those of this and every graduation year, place their real hopes of professional success,—smartness. By "smartness" the young man reasonably understands keen intellectual appreciation of the possibilities of an immediate situation coupled with greater or less indifference to details in the selection or manipulation of means for making it serve the ends the person in question has in view. In the far too frequent opinion, it is the primary duty of a lawyer to be "smart." As he stands on the threshold of his career, at the parting of the ways there is slight matter for wonder that he should think as he does. He has very probably been selected and set apart by his parents, to his own knowledge and with the family approval, for the legal profession for the sole, precise, and to all concerned sufficient, reason that he was believed to be "smart." As he has grown up to youth and young manhood each act of shrewdness, nebulous unveracity, or self-regarding intellectual acumen, has been hailed, by common consent, as the earnest and augury of professional success. At his law school it is more than probable that he found things to be very much the same as at home. The standard of success, as he sees it, is a purely

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intellectual one. In matching himself with his fellows the gauge still has been solely as to the extent of his knowledge, how readily it is available to his use and his own subjective capacity to handle it. His mind is carefully trained in subtlety of distinction, and he finds that his mental powers are valuable to himself and others almost in direct proportion as that faculty is more fully developed. He is perfected in the morally perilous arts of advocacy; and taught, without hint of higher duty, as to the wisdom of leaving one's antagonist to supply qualifications on statements, which, left without modification, are practically false and misleading. His mental eye, unguided by experience, is attracted to salient points in the exceptionally brilliant careers of present or past practitioners. Evasion of a plain provision, surmounting an apparently insuperable legal obstacle, hoodwinking a mystified or over-credulous jury — such are the seasoning and spice of his mental pabulum. Moral indigestion is unknown to him. These men were "smart"; they succeeded because they were smart. He also will be smart, famous, successful. Such is the logic.

This enthusiasm for intellectual subtlety receives, for obvious reasons, confirmation in the average large law office with which our typical student may chance to connect himself. He observes, with self-congratulation, that his standards are general and with what success they are being applied by those after whom he daily is taught to model his conduct. He notices how old time scruples are treated by "practical" people in a sensible age; he sees the plots, the expedients; the self-reflection embodied in what it is reasonably anticipated "the other side" will do. He learns, in undertones blending awe and emulation, the "smart" incidents, long to be cherished among office traditions, which have made the heads of the establishment the famous people they seem to him to be. What more natural than that the real ideal toward which the young man turns his face is this greatly to be desired quality of "smartness"?

No one feels himself in any degree responsible that the counterbalancing truth should be heard at all. Once the office chief would have felt called upon to see to it. This, however, was long ago. To-day, he is very apt to regard it as being none of his business. Let him find it out. What he himself wants is some one who can write up at short notice a satisfactory brief on which a man with the facts can safely go to trial. No one, therefore, just now, in this transition period, feels moved to address our typical aspirant for legal honors somewhat as follows: "My young friend, you are entirely wrong about this matter of smartness. Knowledge and intellectual brilliancy have legitimate fields for exercise. They are splendid powers, indifferently adapted for good or evil. Their value in use you will find to depend upon this question of purpose. To avoid misunderstanding, let us agree that knowledge has a certain limited moral aspect; in that it is usually only when the lion's skin falls short that it is felt to be necessary to piece it out with the fox's. Adequate knowledge removes one class of temptation from the young lawyer. But, generally, and in the long run, success at the bar is dependent not so much upon what a man knows as upon what he *is*. The crucial test for success is character. You are wrong, therefore, in assuming that the prizes of the profession go to the "smart" man. The rule is otherwise. They go rather to men of sound learning and high character. Law presents an instance of the spiritual principle that he who loses life for something higher than life shall find life itself. The great professional rewards are, as a rule, reserved for men who regard themselves as serving the community in a calling whose objects are vastly more important to them than any returns which it can directly bring them. This is, in fact, inevitable. It results from the essential nature of the legal

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profession itself and the fundamental function it is privileged to perform in the life of the community. Silent, subtle, almost irresistible forces, so created, block the path to success for him who is merely smart. You may not recognize them. Nevertheless they are there. Let me tell you some of them.

"The characteristic infirmity of smartness is that it is shortsighted. Otherwise, it would surely perceive how impossible it is, under conditions such as attend the performance of legal duties, to refrain indefinitely from showing what is the true ideal that dominates conduct. Acting in unexpected emergencies, swayed by strong and conflicting emotion, given little time for reflection, intellectual foresight cannot anticipate even the legitimate effects of a given act. What the lawyer does must, in large measure, be intuitively done. This means that the actual man, exactly as he is, the subconscious self, will stand revealed. Pretence, assumption of high ideals not sincerely followed, shrivel under tests like these. Intellectual power is not unlike the sails of a vessel. They show and occasionally shine. They are a valuable part of the propelling force. Character more nearly resembles its ballast. In stress of weather, the supreme importance of the ballast is shown; when all depends upon its unostentatious, automatic action. However carefully the sails may have been trimmed, times must come when this hidden, unseen force, tugging always for equilibrium and safety, alone determines whether the voyage shall end in the harbor or on the reef. And the vessel, my friend, or the legal practitioner, gets rating principally in accordance with performance under such conditions.

"To advance, moreover, to high prizes of one's calling confidence of the court and of professional brethren is essential. However otherwise it may at times appear, most lawyers cherish the ideals of the profession. In attempting to dispense even-handed justice between man and man, regardless of conditions, society reaches its highest moral level. It is seeking to discharge a Godlike function. When the professional indorsement of men with these ideals goes out, it can only go to the man who has sought to make the administration of law efficient in the attainment of justice, to him who, as an officer of the court, has regarded himself as sharing with the judge the responsibilities, honors, and privileges of a ministrant at the shrine of justice, and who has not smirched the white robe of his office. All this is not quite on the surface. 'Smartness' readily may overlook it.

"Then, again, in order to be thoroughly successful, the confidence of the community is required. Society intuitively recognizes that loyal obedience to the expressed will of the law-making power is the absolutely indispensable cement which alone, under a democratic form of government, holds together the social fabric. While it lays its grateful honors at the feet of him who promotes just administration of law, it very properly recognizes that whoever, under any pretext whatever, seeks to prevent the plain operation of a plain law and lends intellectual skill and acquired learning to the task, not only debases noble powers, but strikes at that foundation of mutual confidence and concession on which society and all its institutions, including his own profession, ultimately rests. All sane men feel that, by comparison with such an anarchist, the Russian type is a friend of the social order.

"But the apple of Sodom that smartness is apt to bring you may have a yet more startling property. You think to retain, in any event, the confidence of those to whom you are selling. You feel that there may be risk in other respects. But you know that your clients, at least, will trust and respect you. It is a natural thought. Once more, you are mistaken. Loyalty, zeal, sagacity, or the like, all men respect. But the lawyer who ventures to sell these to perverted uses will be apt to find, as the last drop in the dregs of a cup of bitterness, the indifference

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or even the contempt of those whom he seeks to please. Confessedly, it is a remarkable characteristic of human nature that one should urge another to surrenders which he will despise him for making. But the seducer is not at all the only man (if man he may be called) who scorns his victim for the very sacrifice which he himself demanded. Honor among thieves is a myth."

Facts like these, thus shortly and broadly stated, are among the essential qualifications on any reliance upon intellect and knowledge; admirable and necessary as the latter are — in themselves considered. Such information, in sufficient detail to cover the necessary relations of an attorney to the court, to his prospective clients, and to the community at large, must clearly come, if it is to be regarded, from a professional source. The difficulties and dangers of a legal career are so unique, the ideals properly attendant upon the administration of justice are so exceptional, that usually accepted rules of conduct need recasting in important particulars. In other words, the general precepts of religion or morality are not sufficiently specific.

That professional source of information and instruction can be only the law school. The modern law office demands for its purposes a finished product. It becomes then the duty of the law school to furnish it. All preliminary matters must be relegated to its widening domain. It has taken over, in discharge of this duty, local pleading and practice. It must also teach the student the moral side of his profession. With good reason have repeated committees of the American Bar Association recommended that legal ethics be made part of each law school curriculum. The duty seems fairly plain. To no other agency can the work be delegated; none is so well fitted for it. The law school cannot possibly remain neutral. The non-moral curriculum is an immoral one. Silence on this subject is of itself eloquent.

It is not doubtful that there are practical difficulties in making up a course on legal ethics. Adequately to handle such a topic, requires the services of an active practitioner of prominence, character, and special qualifications. The topic itself lies just beyond the work of the regular professorship. But the difficulties are merely those of administration. Competent men, in all sections of the country, it may safely be assumed, will gladly find time, from even the most exacting engagements, at any reasonable sacrifice, to do their share toward maintaining the high and formative ideals of a fundamentally ethical calling. For to all right-minded lawyers, it need not be said, whether engaged in active practice or devoted to the work of the law school, inexpressibly prized and precious, above all brilliancy of intellect or profundity of learning, transcendent in its importance, is the soul of the profession.

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MARRIAGE IN OLD ROME

By R. Vashon Rogers, K. C.

AMONG the early Romans, as with the Hindoos and Greeks, marriage was a religious duty which a man owed alike to his ancestors and to himself. Believing that the happiness of the dead in the world beyond the Styx depended upon their proper burial here and on the periodical renewal by their descendants of prayers and feasts and offerings for the repose of their souls, it was incumbent upon a man above all things to perpetuate his race and keep alive his family cult. Marriage was not so much to provide an heir to property as to provide one who could carry on the domestic religion.

They considered that if the funeral repast ceased to be offered the dead immediately left their tombs and became wandering shades revisiting the glimpses of the moon, making night hideous with their moanings, disturbing the living with their reproaches, and calling down diseases on men and barrenness on the land with their curses. So soon as the proper relative or descendant renewed the sacrifice, the feast, and the libation, they crept back to their tomb, at rest once more, their divine attributes restored, at peace with man again.

In the house of every Roman, as well as in the home of every Greek, stood an altar bearing a few ashes and some glowing coals from which to kindle the fire in honor of the ancestor (the worship of the dead was the worship of ancestors). It was the imperative duty of the master of the house to keep up this sacred flame. An extinguished one was an extinguished family. The Roman law sought to prevent any family becoming extinct. In Rome, in Greece, in India, it was the son's duty to pour out the libations on this altar, to offer there sacrifices to the manes of his father and his other ancestors; to neglect this was parricide, and the parricide was multiplied as many fold as there were forefathers in the family. Only the nearest relative could perform the funeral obsequies; the funeral meal, spread at stated intervals, could be shared by no stranger to the blood.

Hence the intense longing for a son. Manu, the Indian law-giver, wrote, "By a son a man gains heaven: by the son of a son he obtains immortality: by the son of a son of a son, he rises to dwell in the Sun." Any son would not do to fitly perform the functions and mysteries of the family religion, he had to be a son born in lawful wedlock. (*The Ancient City*, F. de Coulanges, B. II, c. III.)

Every Roman thought he was bound to marry. "On your word of honor have you a wife?" was the question put by the Censors to each Roman citizen. If he answered "Nay," the Censors weighed the circumstances of his case and if they deemed the man negligent of his duty they imposed a fine upon him called *uxorium*. "The ancient law compelled all adults to marry," says Dionysius; and Cicero in his treatise "*De Legibus*," had a law forbidding celibacy.

In Rome there were three classes of women: the citizen, the alien, the slave. A Roman citizen could marry only the daughter of a Roman citizen; marriage with any other was deemed impossible in the good old days. "*Si qua voles apte nubere, nube pari*," said Ovid. The very object of matrimony was to produce a race of citizens; therefore both father and mother had to belong to that class. Hence the great care taken of the purity of the Roman women, and the broad distinction between the conduct of the man and the matron. Marriage between Roman citizens and women of foreign birth with whom they had not what was called the *connubium* (the right of intermarriage) became in time not uncommon: yet such unions were not *justae*

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nuptiae (marriages of the highest kind) and the wife was not *justa uxor* nor did the father have full authority over the children. As the offspring of a citizen and a foreigner, or a slave, did not become a citizen, both the State and society were indifferent as to what relations might exist between a Roman and an alien woman or a slave. Yet these unions with foreigners could not be completely ignored, so by "the laws of nations" they were treated as marriages: the wife could bring an action for her dower when she left her husband, and he could take proceedings for adultery if she proved unfaithful; and he was bound to support the children.

The female slave was treated simply as a cow or a sheep; if she produced healthy children it was so much gain to the master; in such case he cared little who was the father, — all the offspring were his property. Sometimes slaves were allowed, sometimes even compelled, to live together; but such a union was not marriage, only concubinage; nor had they any rights in their children. In olden days the slave woman who bore three children was freed from hard work. If she had more she sometimes obtained her freedom.

The Roman family in its early history was an association hallowed by religion, and held together not by might merely but by conjugal affection, parental piety, and filial reverence. "*Prima societas in ipso conjugio est*," Cicero said; and Justinian defined marriage as "the joining together of a man and a woman, carrying with it a mode of life in which they are inseparable. This life implying a community of rank and position, of sacred and human law, but not necessarily of property." By this union the wife was said to pass into or under the hands of her husband; leaving her old home she renounced her rights and privileges as a member of her father's family; but it was only that she might enter her husband's family in a lifelong partnership with him and be associated with him in all his family interests whether religious or temporal, sacred and profane. The husband was the priest in his house, but his wife and children alike had sacred duties to perform, attended and assisted in the family prayers and took part in the sacrifices to the lares and penates of the household. In the old Vedic times in India, the wife had charge of the sacred vessels, prepared the sacrifice, and even sometimes composed the hymn. As the old Jewish Rabbi called his wife, "Home," and as the Greek usually called his spouse the "House-mistress" (*despoira*), so did the Roman citizen speak of his wife as his ."Mater-familias," "house-mother." The wife was treated as her husband's equal, socially.

In the regal period with the patrician, at least, this union could only be made with the divine approval which was ascertained by the flight of birds and other omens. (The Siamese, Hindoos, and other nations also tried to find out the pleasure of the gods in this important matter by omens and auguries.) The world was not all before him whence to choose his partner, his choice was limited to a woman with whom he had "connubium," and this the State settled; and, in the days of the kings, Roman citizens could have it outside their own bounds, only with members of those countries with whom they were in alliance and with whom they were connected by a bond of common religious observances. A patrician, therefore, if his marriage was to be reckoned lawful (*justae nuptiae*), had to wed either a fellow patrician or a woman who was a member of an allied community.

The attendant ceremony for the confarreate marriage was a complex one, much was of a religious nature and conducted by the high priest. After the haruspices or augurs had announced that the omens were favorable, the wedding began. The *pronuba* (a matron living with her first husband) brought the bride and groom together, joining their right hands, in the presence of ten witnesses (representing the ten *curiae*

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of the husband's tribe, according to most guessers — the ten *curiae* of the wife's family, says Von Ihering), then the bride gave her consent according to the old formula, "*Quando tu Gaius, ego Gaia.*" (It mattered not what the real names were. Gaius and Gaia, like the M and N of the Anglican prayer-book, did duty for every one.) Then the two took their places side by side to the left of the family altar, facing it on stools covered with the pelts of the sheep slain to assist the forecasts of the haruspices. A bloodless offering was made to Jupiter consisting of a cake of spelt (*farreum libum*), the high priest and the flamen officiating, the latter reciting a prayer to Juno, the goddess who presided over the marriage couch, and to the gods of the earth and its fruits. Then came the congratulations of the friends, and the wedding feast which ended with the distribution of pieces of wedding cake (*mustaceum*). The banqueting lasted until evening; so extravagant did these become that Augustus proposed a law limiting their cost to one thousand *sesterces* ($50).

After this came three distinct acts — all highly symbolical. First, the bride quitted her paternal hearth, where she had been wont to worship her ancestors under her father's leadership and under his rule and authority; the father alone could separate her from it. Next, veiled and covered she was led to her husband's house; one bearing a nuptial torch preceded the wedding party; those around the bride, guests and rabble, sang an ancient religious hymn, the refrain of which, "Talassie, Talassie," remained the same as centuries rolled on, although even in the days of Horace the Romans had forgotten what it meant. In front of her new home the bride was presented with fire and water by her husband, emblems of the domestic gods and lustral water; then the groom, with a pretence of force, took her in his arms and carried her over the threshold, without allowing her feet to touch it. Again she uttered the words, "*Ubi tu Gaius, ibi ego Gaia,*" to her husband; the door was shut against the crowd, and only invited guests entered. (Von Ihering translates these mystic words thus: "Where thou ploughest, I will plough," a reminiscence, he says, of the old days when husband and wife yoked together pulled the primitive plough; the word *conjux* coming from *jugum*, a yoke, and *conjugium*, meaning sharing the yoke, that is, marriage.)

Lastly, the bride was led before the hearth, where the penates and the images of her husband's ancestors surrounded wood ready for the fire. She kindled this with the nuptial torch, which she then threw away, and the guests scrambled for it, as moderns do for a bride's bouquet. The twain offered up a sacrifice, poured out a libation, said prayers, received from the hands of the priest a broken piece of cake of wheaten flour, and then were left alone, more feasting being reserved for the coming day.

Henceforward they are associated in the same worship. The wife has the same gods, the same rites, the same prayers, the same festivals, as the husband; she worships the dead, but his dead; from her own she is completely separated. As Ruth to Naomi, so the Roman bride could say to her husband, "Whither thou goest, I will go; and where thou lodgest, I will lodge. Thy people shall be my people, and thy god, my god."

Marriage was to her a second birth; she is henceforth the daughter of her husband, "*filiae loco*," says the jurists. By this rite the wife passed into the husband's hand or power (*in manum conventio*), if he was himself the head of a family, a *pater familias*; if he was not, then, though nominally in his hand, she was, like him, subject to his family head, and the children as they were born fell under the authority of that head — the paternal grandfather — who was entitled to exercise over his daughters-in-law and their children the same rights he had over his own sons and unmarried daughters. (*Enc. Brit.* XX, p. 67; *The Ancient City*,

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Book II, ch. II; Johnston, *The Private Life of the Romans*, ch. III.)

As Roman citizenship spread so did the right to intermarry. In the early days a patrician could not marry a plebeian; the children of such a union were only plebeian and were not under the power of the father; but after various struggles this wall of partition was broken down, and the *Lex Canuleia* in 442 B.C. conferred the *connubium* on the plebeians. There was a further extension of this right to intermarry when a century later Rome admitted the Latin cities, which it had subdued, among its citizens. Still later, citizenship and the *connubium* were given to freedmen. In 80 B.C. the Italians generally received the right of intermarriage by the *Lex Julia et Plautia;* this made the marriages of Roman citizens and foreigners of those places lawful in each country, but it gave the husband no power over the wife. She did not become a Roman citizen because he was one. She remained a *peregrina*, and was only naturally, not civilly, a member of his family. During the later days of the Republic and in the time of the Empire citizenship was conferred upon men in various parts of the world. Soldiers who had served for a certain time and had allied themselves to foreign women had their union converted into legitimate marriages, and at length, in A.D. 212, Caracalla bestowed the once rare privilege of citizenship on all the inhabitants of the Roman empire, and with it the *connubium;* after this any man might marry any woman, unless special rules prevented. Augustus, by his *Lex Julia de maritandis ordinibus*, forbade senators to marry freedwomen, but all other citizens were allowed to marry them (owing to the scarcity of women) unless they were prostitutes, procuresses, condemned criminals, or actresses.

In the discussions on the law introduced by the Tribune C. Canuleius, in the year of the City 309, to allow of the intermarriage of patricians and plebeians, the patrician orators chose to decry plebeian unions as something not deserving the name of *nuptiae* and as being mere *matrimonia* (relationships entered into by men and women for the sake of making the latter mothers, but no better than the mating of the beasts of the field and involving none of those features that characterized the patrician marriage). Having no domestic altars they did not worship ancestors, so they could have no sacred union before the hearth. That there was laxity among many of the plebeians in their marital relations is extremely probable; the ceremony of confarreation was forbidden them; most likely coemption was not at that time introduced or even thought of, so that there was no way for them to contract a marriage save by the simple interchange of consent and the living together as man and wife for at least a year; this coming together was doubtless accompanied by customary social observances as has been well nigh universal. But no formal ceremony, religious or civil, took place. This union, called *usus*, did not give the husbands the power called *manus*, nor even grant to the father the despotic authority and control named *patria potestas*. Livy says, "*Patricii qui patrem cire possunt*," men who knew their own fathers, men called father's sons; for plebeians unadmitted into citizenship were only reckoned as mother's sons. (*Enc. Brit.* s. v. *Roman Law*, Vol. XX, p. 674; *The Ancient City*, F. de Coulanges, B. IV, ch. II.)

The aristocratic objection to the plebeian alliances that they not being citizens had not the right of *connubium* — the first essential to *justae nuptiae* — was removed by their admission into the ordinary rights of citizenship by Servius: the other objection, that not being patricians they could not marry by the only ceremony known to them, was gotten over by the introduction of the civil ceremony of coemption. In the time of Servius there was introduced a new way of acquiring ownership or authority over movable things, called "mancipation." In the presence of a certain number of witnesses

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and of an official holding a pair of copper scales (*libripens*), the purchaser with one hand on the thing to be transferred, with certain fit words, declared he purchased it with the coin he held in his hand and which after striking the scales with it he gave to the person parting with the article as a symbol of the purchase money. The purchaser thus acquired authority (*manus*) over the movable. The idea came to some bright son of the people that as he now possessed the right to intermarry (*connubium*) with his plebeian love, the authority over her and her belongings might be obtained by this act of mancipation, and that his marriage would be as effectual and binding as that of his patrician neighbor. He tried, and the plan was recognized as legal; so it grew rapidly in favor. The scales, the official who weighed the money of the purchaser for the seller, and the five witnesses were all there, but as no real price was to be paid by the intending groom in his capacity of purchaser the only coin needed was a single randasculum.

Unfortunately the words used in this ceremony are lost. They probably differed from those used in an ordinary transfer of goods and chattels. According to many ancient authors, and as the word *coemptio* seems to some to suggest, each party bought the other; the man asked for and acquired a *mater familias* who would bear his children and preserve his family; while the woman sought and obtained a *pater familias* who supported her while the union lasted and in whose property she shared if death made her a widow. The ceremony had other observances, such as the joining of hands, and the uttering of the words of consent about Gaius and Gaia, but these were not demanded by law but rather by use and fashion; and there often were private religious rites as well. Some see in this custom a relic of the old system of purchasing wives.

Coemption is commonly called a form of marriage, but such language is not quite correct. The marriage was completed simply by the interchange of mutual consent, and was quite distinct from the coemption which was strictly the acquisition by the husband of authority, or *manus*, over the wife; although originally generally contemporaneous with the marriage, yet in later days (according to Gaius) the coemption might follow the marriage at any distance of time. If the marriage was dissolved by divorce the *manus* still remained until put an end to by remancipation, on which a divorced wife was entitled to insist.

Consent was ever the essence of a Roman marriage. No woman could be compelled to marry; it is true that girls frequently married when they were very young, often when only fourteen or fifteen years old, and probably then the influence of the father was predominant. But even in such cases the girl had to give her consent.

That a marriage might be lawful it was necessary, (1) that the consent of the parties was fully manifested; (2) that they were of proper age, the man at least fourteen, the woman at least twelve; (3) they must have the legal power of contracting marriage, that is, they must be citizens, must not be within the prohibited degrees of relationship, and if they were under the authority of any one they must have that person's consent — the absence of such consent made the union absolutely void so that even a subsequent approval did not ratify it.

Gaius, in writing for the Romans in the second century of our era, says, "We must bear in mind that we may not marry any woman we please, for there are some from marrying whom we must refrain." He then proceeds to say that those who stand in the relation to one another of ascendants or descendants cannot contract marriage; nor is there connubium between them; nor can they marry even if the relation is only one of adoption. Marriage between brother and sister was prohibited, and if they were so by adoption they could not marry unless the adoption was dissolved. A man could

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marry his brother's daughter (the Emperor Claudius did), but not his sister's. He could not marry his aunt, nor mother-in-law, nor daughter-in-law, nor step-daughter, nor his step-mother. Gaius goes on to tell us, "If any man has contracted an unholy or incestuous marriage he is considered as having neither wife nor children. For the offspring of such cohabitation are regarded as having a mother indeed but no father at all; and hence they are not in his power (*potestas*), but are as those whom a mother has conceived out of wedlock." (*Com. of Gaius*, I, 58–64.) This writer gives, with great particularity, the consequences of a marriage between a Roman and a foreigner, a Roman and a slave woman, a Roman matron and a slave, upon the children and the parents as far as concerned citizenship and parental authority.

A free woman who had unlawful connection with her slave was, according to the law of Constantine, to be put to death, the slave to be burnt alive. Constantine also prohibited the union of a freeman and a slave under the penalty of exile and the confiscation of goods as far as the man was concerned, and servitude in the mines for the woman. Justinian mitigated the punishment as far as the freeman and the slave woman, but not in regard to the former offence.

A law of Claudius condemned a free woman who married a slave to servitude; by Justinian this was tempered to a sentence of separation.

Christianity long recognized in the East the distinction between the marriage of a freeman and the concubinage of the slave. This latter union was not blessed by the Church until Basil the Macedonian (A.D. 867–886) enacted that the priestly benediction should hallow it; but the deep-rooted prejudices of centuries still opposed the law of the emperor. Later laws, however, improved matters by providing that the marriage of slaves should be celebrated in the church, that slaves and freemen should receive the same nuptial benediction, but that such acts should not confer freedom on the slave. (Milman, *Latin Christianity*, B. III, ch. V.)

As Milman puts it, "The Roman law extended its prohibitions to connections formed by affinity or adoption. Connections by marriage were as sacred as those of natural kindred, and an union with an adopted brother or sister was as inflexibly forbidden as in the case of blood. The Roman Christian, when he came, had no necessity to recur to the books of Moses — the old law was sufficiently rigorous. It forbade the union of a guardian, or the son of a guardian, and his ward. Justinian considered that sponsorship in baptism implied an affection so tender and parental as to render a marriage between parties so spiritually related unholy and so forbade it." (*Latin Christianity*, Book III, ch. V.)

Valentinian and Marcian forbade marriage with a slave or the daughter of a slave, with a freed woman or her daughter, with a tavern-keeper or her daughter, or with the daughter of a procurer, a gladiator, or a huckster. If a senator or the son of a senator married one of these prohibited ones the children followed the position of the mother, and indeed it was considered no marriage. If a man was married to such and became a senator, his marriage was *ipso facto* dissolved.

The *Lex Julia Papia et Papia Poppaea* (can one imagine a sweeter name for a law anent the fair sex?) declared the marriageable age for males to be between twenty and sixty, and for women between twenty and fifty, and whoever was unmarried between those ages was subjected to a tax and could not be an heir, except to near relatives, and could not receive legacies. Under this law any woman who had three children obtained special privileges; having four children released a freedwoman from the guardianship of her patron, and three children put a free patroness on an equality with a patron.

The XII Tables, passed in 450 B.C., did

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not greatly change the law as to husband and wife, except by recognizing as valid marriages entered into without any solemnity, and holding that such did not involve the subjection of the wife to the husband, as in the confarreation of the patrician or the coemption of the pleb. The plebeians were apparently satisfied with a very loose matrimonial noose — either because the women disliked to renounce their independence and desired to keep control over their own property and earnings; or, more probably, because before coemption had been introduced as a way of making her his lawful wife the man could only take her merely as the mother of his children (*matrimonium*), and so the woman had been accustomed to this simple matrimonial union by consent. An idea, too, was abroad that as a man might become the owner of a thing — to which his legal title was defective — by prolonged possession of it, so he might acquire *manus*, with all its consequences, over the woman with whom he had thus been informally united by prolonged cohabitation with her as his wife (*usus*). This had become customary law. The Tables accepted it, and defined conditions under which *manus* arose and the wife became converted from a doubtful *uxor* into a lawful *mater familias*, by providing that if a woman, married neither by confarreation nor coemption, desired to retain her independence, she must periodically absent herself for three nights from her husband's home; twelve months uninterrupted cohabitation gave him that power over her which would have been created instantly had the marriage been by the breaking of bread or the copper coin and the scales (*Enc. Brit. ib.* 688).

So far as marriage was concerned in the last centuries of the Republic, woman was practically on an equality with man. Some curious combinations arose in married life; the most singular recorded is that of Hortensius, as told us by Plutarch. Hortensius, the great Roman orator, was anxious to be connected with Cicero, the champion of Roman liberty, and to marry Cato's daughter. There was one difficulty in the way. The daughter, Porcia by name, was already wedded to one Bibulus; but from the point of view of Hortensius this was not a serious obstacle; so he called on Bibulus, told him his desire, and begged him to dissolve his marriage with Porcia and allow him an opportunity of having her as a wife. He stated that after she had borne him two children he would be willing to relinquish all his marital claims to the lady and she might remarry Bibulus. Cato, the father of the charmer, was consulted and refused his consent, but as he wished to oblige his friend, the orator, he suggested a solution of the difficulty. He would sacrifice himself on the altar of friendship and give up his own old wife Marcia, provided her father Philip did not object. The old gentleman consented on condition that Cato would attend the wedding. Cato had no scruples on this score, so Marcia and Hortensius were married. Hortensius dying, Marcia became a widow; Cato visited her, courted her successfully, and she married him a second time, bringing with her to his home (her old one) the fortune of Hortensius. Everything about this transaction was voluntary and legal. Marriage existed so long only as both parties were agreeable and fully agreed, and the only obstacle to a dissolution was the necessity of carrying it out in a strictly legal way, and the duty of consulting near relations. We understand that there was an idea that Cato was influenced by financial cons derations.

There had arisen a great and general indisposition towards marriage. Metellus Numidicus, who fought so bravely against Jugurtha, spoke thus on one occasion against this growing evil. "If, Romans, we could live without wives, we should all keep free from that source of trouble; but since nature has ordained that men can neither live sufficiently agreeably with wives, nor at all without them, let us think rather of

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the continuance of our race than of our brief enjoyment." Augustus, too, tried to arrest this movement by rewards and punishments. He passed the *Lex Julia et Papia Poppaea*, a voluminous matrimonial code which for two or three centuries exercised such an influence as to be regarded as one of the sources of Roman law almost as much as the XII Tables, or Julian's consolidated Edict. It was sometimes called the *Lex Caducaria*, because one of its most remarkable provisions was that unmarried persons (within certain ages and under certain qualifications) should entirely forfeit, on account of their celibacy, anything to which they were entitled under a will, and that married but childless persons should forfeit one-half; the part forfeited (the lapsed provision, *caduca*) going to other persons named in the will who were qualified under the law, and if there was none such then to the fisc. Other important provisions of the law were intended to prevent misalliances — marriages between men of rank and women of low degree, or immoral character (concubinage, however, being expressly sanctioned); to reward fruitful marriages, by relieving women who had borne a certain number of children from the tutorship of their agnates, and conceding various privileges alike to fathers and mothers of children born in wedlock; and to regulate divorce by requiring express and formal repudiation, and fixing by statute the consequences of it so far as the interests of the parties in the nuptial provisions were concerned.

However well intended this law was, some remarks by Juvenal and others suggest doubts as to whether it did not really do more harm than good. The portion of the law referring to improper marriages was repealed by the emperor Justin because his nephew Justinian was anxious to marry Theodora, a lady of very doubtful virtue, "whom after she had ministered to the licentious pleasures of the populace as a courtesan, and as an actress in the most immodest exhibitions, in defiance of decency, of honor, of the remonstrance of friends, and of all religion," the long-renowned legislator made the partner of his throne. (Milman's *Latin Christianity*, Vol. I, p. 420.)

Justinian, by the way, was a curious mixture of vices; as Milman puts it, he united in himself insatiable rapacity and lavish prodigality, intense pride and contemptible weakness, unmeasured ambition and dastardly cowardice. The uxorious slave of his empress, yet he aspired to be the legislator of the world, and his name as the centuries roll on is still associated with a vast system of jurisprudence which bids fair to exercise an unrepealed authority to the latest ages.

The upper classes did not approve of the efforts of Augustus to encourage matrimony.

Deliberate interchange of nuptial consent was still the only thing necessary to make husband and wife, although for a few purposes the bride's home-coming to the husband's house was regarded as the criterion of completed marriage. *Manus* was become unfashionable. So repugnant was such subjection to patrician ladies that they declined to submit to the ceremony of confarreate nuptials; and consequently the persons qualified by confarreate birth to fill the higher offices of the priesthood became so few that early in the days of the empire it was decreed that that form of marriage should be productive of *manus*, only so far as to entitle the offspring to hold these sacred offices, and should not make the wife a member of the husband's family. *Manus* by a year's uninterrupted cohabitation was already out of date in the time of Gaius, and although that by coemption was still in use in his days it was probably quite unknown by the time of Diocletian.

Under the Christian emperors this power of the husband over the wife and her belongings (*manus*) was a thing of the past; man and woman stood on an equal footing

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before the law; if there was any difference, at least with reference to the Justinian legislation, the wife was the more privileged of the two in respect both of the protection and indulgence accorded her. *Manus* having ceased, marriage by confarreation and coemption also came to an end, and the simple interchange of consent made lawful wedlock, except between persons of rank, or when the intention was to legitimatize children already born; in this latter case a written marriage settlement was required, and in the former either such a settlement or a marriage in church before the bishop, or at least three clerical witnesses who granted and signed a certificate of the completed union. (*Enc. Brit. ib.* pp. 707, 712.)

The practical effect of the general adoption of marriage by mere consent was the absolute legal independence of the wife. With the exception of her dowry she held her property in her own right, she inherited her share of her father's property and kept it in her own hands. A very considerable portion of the riches of Rome passed into the uncontrolled possession of women.

The purpose of the *Lex Papia Poppaea* being to discourage celibacy and encourage fruitful marriages, naturally these provisions were abolished, under the Christian emperors, when celibacy had come to be inculcated as a virtue and as the peculiar characteristic of a holy life.

Lecky points out that there is probably no period in which examples of conjugal heroism and fidelity appear more frequently than in the age when marriage was most free and in which corruption was so general. Much simplicity of manners continued to exist with the excesses of an almost unbridled luxury. He refers to Cornelia, the brilliant, devoted wife of Pompey; Marcia, the friend of Helvia, the mother and Pauline, the wife, of Seneca; the modest Mallonia; the tender and heroic Porcia; the brave Arria, the wife of Paetus, and her daughter, the wife of Thrasea; and asserts that such instances of devotion were not uncommon and that in Roman epitaphs no feature is more remarkable than the deep and passionate expressions of conjugal love that continually occur.

The elder Cato said, "A man who beats his wife or his children lays impious hands on that which is most holy and most sacred in the world."

The Romans with all their licentiousness and laxity of morals never sanctioned polygamy, except, indeed, for a short time in the reign of Valentinian the First, who wishing to marry a second wife himself made the right to do so general. But the old laws were soon revived by Justinian. In fact, monogamy was from the earliest time strictly enjoined; and one of the greatest benefits that have resulted from the expansion of the Roman power is that it made monogamy the dominant rule in Europe. (Lecky, *His. of European Morals*, Vol. II, ch. V.) His religion taught the Roman that the conjugal union was something more than the relation of sexes and a fleeting affection, and it united man and wife by the powerful bond of the same worship and the same belief. The marriage ceremony (in confarreation), too, was so solemn and produced effects so grave, that it is not surprising that these men did not think it permitted or possible to have more than one wife in each house.

Principal Donaldson says, "Examining history, then, I think that we must come to the conclusion that the Roman ideas of marriage had not a bad effect either on the happiness or morals of women." (The Position of Women in Ancient Rome, *Cont. Review*, 1888, vol. II.)

Concubinage was recognized and regulated by law; it was a permanent cohabitation between parties to whose marriage there was no legal objection, although such a union had not the sanction of matrimony. Wherever a legal obstacle to marriage existed, the law inflicted punishment upon the parties if they lived in concubinage, unless the obstacle was one founded merely on

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public policy, such as the law which forbade the governor of a province marrying a native of the province. Under the later Empire concubinage was so restricted that a man could not have at the same time a wife and a concubine, nor even two concubines, and the children could be legitimatized and so placed on an equality with the offspring of a legal marriage.

Between concubinage and regular marriage there seems to have been no difference except what rested in the intention of the parties; if there was no *affectio maritalis*, no intention to treat the woman as a wife, she was not a wife but a concubine. Of course the question of intention was seldom, if ever, left doubtful. Generally speaking, an instrument fixing the amount settled respectively by the husband and the wife was drawn up, and the consent was publicly given in the presence of friends. And as concubinage was a dishonorable state, the presumption in favor of marriage, when the woman was of honest parentage and of good character, was very strong. To concubinage none of the incidents of marriage attached; no *dos* could be asked for, and no donation was made by the man, and the children were not in the power of the father. (Sander's *Justinian*, Lib. 1, Tit. X Sec. 12.)

Even a widow was not a free and independent woman. If she had been under the authority of her husband at his death, her sons, or perhaps her step-sons, acted for her, they being her nearest *agnates* (kinsmen subject to the same *patria potestas*). If she had no son or step-son, then the next nearest *agnate* became her guardian, and failing any such connection the *gens* (family) to which the desolate widow belonged appointed the tutor. (Muirhead, p. 124.)

For a long time in Rome the widows who did not marry were particularly honored. The widower was expected to marry again immediately after his wife's death; widows, on the contrary, were forbidden to take to themselves a fresh consort until the former one had been with the shades for at least six months, and this period was in later days extended to a year; if she did not thus wait, the father who made the marriage, the husband who took the widow, and even the widow herself, were deemed infamous By degrees, however, the laws improved in this matter, and the *Lex Julia et Papia Poppaea* encouraged second marriages, and even enjoined them upon widows under fifty; and the Institutes ordained that when the widow was poor and without dowry she could inherit from her husband one-fourth of his estate (if there were three children), and a full masculine share if there were none; this provision of course assisted her matrimonial chances. But when Christianity triumphed in the Empire there was a retrograde movement; second marriages were frowned upon; Constantine returned to the old ideas of primitive Rome, and Theodosius and his successors went so far as to punish widows marrying a second time by making them forfeit all the *lucra nuptialia* of the first marriage, which had to be paid over to her children by the first husband. (Letourneau, *Evolution of Marriage*, p. 261.)

By the laws of Valentinian and Gratian, widows under twenty-five could not marry again without their parents' consent.

As to widowers, Charondas, of Sicily, ordained that those who cared so little for the happiness of their children as to place a step-mother over them, should be excluded from the councils of the State.

One of the latest Roman poets said, "To love a wife when living is a pleasure; to love her when dead is an act of religion."

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

CURRENT LEGAL LITERATURE

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

ADMIRALTY. James D. Dewell, Jr., in the June *Yale Law Journal* (V. xv, p. 394) writes of "Partition of a Vessel in Admiralty." He calls attention to the fact that "admiralty will not take jurisdiction for the partition and licitation of a vessel unless there are equal part owners who cannot agree and their differences are irreconcilable, because if the owners are not equal the majority rules." He then proceeds to show that in such a case a claimant can probably give a bond and obtain a release of the vessel, though there is little on it in the books. He further contends that though admiralty will not take jurisdiction of mere matters of account it will as incidental to the sale and partition.

BIOGRAPHY. Judge Dillon's speech at the dinner of the Iowa Society of New York entitled "Early Iowa Judges and Lawyers" which is printed in the May *American Law Review* (V. xl, p. 377), consists of brief sketches of Chief Justice Mason, Chief Justice Wright, Judge Miller, and Judge Love.

BIOGRAPHY (Benjamin). An address by Burton Hanson before the Wisconsin Bar Association on Judah Phillip Benjamin is printed in the May *American Law Review* (V. xl, p. 331). It contains an interesting summary of his brilliant legal career both in this country before the war and in England when at the age of fifty and in the face of great adversity he began a new career which ended with a remarkable recognition of his ability by our English brethren. As the author says, "Benjamin's mind was always completely in domination of his life. He was essentially an intellect."

BIOGRAPHY (Moran). "Our District Attorney," by Vere Goldthwaite, *New England Magazine* (V. xxxiv, p. 450).

CHATTEL MORTGAGES (see Sales).

CONFLICT OF LAWS (see Constitutional Law, Divorce, Insurance).

CONSTITUTIONAL LAW. "The Legal Status of the Indians in the United States," by Clinton R. Flynn, *Central Law Journal* (V. lxii, p. 399).

CONSTITUTIONAL LAW. "The Next Constitutional Convention of the United States," by Mr. Justice Clark, *Albany Law Journal* (V. lxviii, p. 145).

CONSTITUTIONAL LAW. "Special Legislation as Defined in the Illinois Cases," by Albert M. Kales, *Illinois Law Review* (V. i, p. 63).

CONSTITUTIONAL LAW. "The Great Usurpation" is the title of an article by William Trickett in the May *American Law Review* (V. xl, p. 356), which argues that the assumption by the judges of the right to declare statutes unconstitutional was contrary to the real intention of the framers of the Constitution who expressly rejected such a provision, and that it is no more right for the judiciary which is but part of the executive

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branch to do this than it would be for the executive itself. The author also contends that the assumption of this right is unfortunate since it compels citizens to act under legislation which may later be declared unconstitutional, nor does he believe that in the long run the judges are any more likely to interpret the Constitution correctly than are the legislators.

CONSTITUTIONAL LAW (Due Process). In the June *Columbia Law Review* (V. vi, p. 423) William Cullen Dennis writes of "Jury Trial and the Federal Constitution." After briefly summarizing the cases that show that "in no case does the Federal Constitution secure to any man a trial in a state court," he shows that "anything enacted by the legislature or established by judicial decision which is not so unreasonable as to convince the court that it is outrageous is 'due process of law.'

"The 'equal protection of the laws' does not mean that all shall be treated alike; it does not forbid reasonable classification but forbids arbitrary discrimination."

A state may regulate trial by jury so long as the regulations are not outrageous and do not unduly discriminate between persons and classes. The fourteenth amendment applies to state action, not to individual action, but it applies to state action in any form, executive and judicial as well as legislative. As an illustration of this he refers to the remarkable case of Caleb Powers of Kentucky who has contended that by the exclusion from juries of members of his own political party he had been convicted without due process of law.

"Of course if the state law as construed or administered by the state courts results in a situation which amounts in itself to a denial of 'due process' or 'equal protection' the Supreme Court will reverse the decision even though it be of the opinion that the state court erred in construing the local law, and that, if properly construed, it would have violated no federal right."

In the decision in the Powers case the author finds coupled with a reiteration of the orthodox statement that error in construing the state law cannot avail the objector, a statement in which there may perhaps lurk the suggestion that an outrageously wrong decision departing from the settled law of the state might be such an unexplained discrimination as would amount to a denial of the equal protection of the laws even though the new rule itself were not outrageous. The author submits that due process of law is a question of degree and that if the ruling of the state court be outrageous federal courts have jurisdiction to review it under the fourteenth amendment even as to interlocutory questions of fact.

CONSTITUTIONAL LAW (Interstate Judgments, Divorce). Joseph H. Beale, Jr., sharply criticises the recent decision of the Supreme Court in Haddock *v.* Haddock in an article in the June *Harvard Law Review* (V. xix, p. 586) entitled "Constitutional Protection for Divorce." He summarizes the reasoning of the court as follows:

"It is now time to examine in detail the reasoning of the court. This may be summarized thus: For a valid divorce it is necessary that the libellant should be domiciled in the state which grants the divorce; it is also necessary that there should be personal jurisdiction over the libellee in order that it should be enforceable under the 'full faith and credit' clause of the Constitution; but if there is no such jurisdiction over the libellee, the divorce will be valid where granted. I propose to show that either the first or the third proposition is absolutely inconsistent with the second, and with the decision of the court."

The author shows that the admitted requirement of domicile of the libellant is proof that a proceeding for divorce is *in rem*. The *res* is intangible just as in the case of an administration of an estate.

"Jurisdiction does not involve the power of continuing rights in existence, but of creating rights; its operation is positive, not negative. Both New York and Connecticut, having jurisdiction over the status of marriage, can affect it by dissolving it; but once it has been dissolved nothing is left for either to affect. The same criticism might be brought against allowing the status of a woman in New York to be affected by a marriage in Connecticut."

"It has been heretofore believed that the full faith and credit clause required a state to

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give credit to every judgment which was valid in another state, where it was rendered. If because of lack of jurisdiction of the court the judgment was not binding in another state, it was equally void where it was rendered; for no court can create obligations by acting outside its jurisdiction."

"If Mr. Justice White is right in requiring domicile of the libellant for jurisdiction, he is wrong in regarding jurisdiction over the libellee as essential. If he is right in saying the decree is valid in Connecticut, he is wrong in saying it is not binding in New York. His reasoning is certainly novel, and it is certainly wrong; can his conclusion nevertheless be supported? Is the decision right, that some jurisdiction over the person of the libellee is requisite?"

"The object of the majority was a praiseworthy one: to make objectionable divorces less easy to obtain. But in pursuit of that object they have made a decision which will have an opposite effect. For it gives an easy road to divorce where the parties are agreed in desiring it, since the libellee by appearing and suffering default can render the proceedings valid, and it thus assists collusive divorces. On the other hand, it makes it impossible to secure a divorce that will everywhere be recognized in the one case where all persons admit that a divorce should be granted, that is, where the wife elopes with an adulterer. For if she goes to another state, and the injured husband obtains a divorce in her absence, the state of her new domicile need give no credit to the divorce unless it finds that the fault is with her; and as her husband is not present, and she therefore has the entire control over the evidence, she will be able to convince the court of her own innocence and her husband's fault.

"The decision then is opposed to reason, to authority, and to morality; but it will stand until the question is raised again. As Mr. Justice Holmes said in his dissenting opinion, civilization will not come to an end meanwhile."

CONSTITUTIONAL LAW (Juries). "The Right of Jury Trial in the Dependencies," by James Wilford Garner in the May *American Law Review* (V. xl, p. 340), discusses a series of recent cases involving questions of due process of law in the outlying possessions of the United States which have held that trial by jury in criminal cases according to the principles of the common law is not a fundamental right but a matter which concerns merely a method of procedure. The author regards this as a change of front and believes that in a line of decisions running through a period of fifty years, the Supreme Court had sustained the applicability of the jury causes to the dependencies and had recognized no distinction between fully organized territories and those under the direct government of Congress.

CONSTITUTIONAL LAW (Jurisprudence). In the *Central Law Journal* (V. lxii, p. 377), under the title of "The Individualism of the Constitution," Andrew Alexander Bruce calls attention to an important phase of constitutional law which has but recently begun to be appreciated. He shows that the history of English and American law has been a conflict between the right of the individual to do as he pleases with property and opportunity and the right of society as an organization. The individualism of the Anglo-Saxon as of the modern commercialist was not the non-resistance of the anarchist but a self-assertive, acquisitive kind. The individualism of Bentham was ethical and aimed at the removal of restrictions on free action of the individual when not necessary for procuring like freedom on the part of his neighbors. The modern collectivism recognizes that the individual often needs legislative help to enable him to compete on terms of even seeming equality with others. In dealing with constitutional questions some of the most important of which depend upon the court's conception of these economic principles he believes that our American judges have failed to live up to the modern accepted economic theory.

"They have as a rule hesitated and have refused their sanction merely because they have clung to the belief in the actual existence of an equality of contractual ability and opportunity in the industrial world, and have, therefore, not seen the necessity for legislative interference. Thus far it would seem the majority of the American courts have evinced a

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willingness to go, and thus far alone should they go. In this they have no doubt evinced a willingness to go a step beyond the individualism of Bentham. But in doing so they have, perhaps, merely asserted another and higher individualism, the individualism of the state itself. Bentham's idea was that the individual should have complete freedom of action in all things where restraint was not necessary for securing a like freedom on the part of his neighbor. The modern enlightened collectivist idea is that the strength of a nation or of a state depends upon the strength and manliness and intelligence of its individual citizens, and that the preservation of these virtues is essentially a matter of governmental concern.

In this connection he criticises the recent decision in the case of People *v.* Lochner.

" There has for a long time been, and perhaps always will be, a conflict in the several states over the respective provinces of the courts and the legislatures in the matter of police legislation. That is to say, over the question as to whether it is for the courts or for the legislatures to determine upon the necessity or the exigency of any particular piece of legislation. The Lochner case, however, goes further. It not merely overrules the legislative discretion of the New York legislature, but the judgment of the New York courts.

" The Supreme Court of the United States can hardly, while maintaining, except where interstate commerce is directly affected, a strictly *laissez faire* attitude in relation to state vices, as in the case of cigarettes and intoxicating liquors, and in relation to state food supplies, as in the case of oleomargarine, and after going to the almost absurd length of ' the grandfather cases,' afford top reserve any other attitude in the great conflict between capital and labor."

The author believes that all this tends to increase an unwholesome distrust of the judiciary on the part of workingmen.

CONSTITUTIONAL LAW (Privilege, Searches and Seizures). In the June *Columbia Law Review* (V. vi, p. 375) Henry W. Taft gives a narrative of the scope of " The Tobacco Trust Decision," which sets at rest three interesting and important constitutional questions never before presented to the Supreme Court of the United States. First, that a grand jury may indict upon knowledge acquired either by the observations of its members or the evidence of witnesses, even though a specific charge against a particular person has not been previously before it.

" The second point decided by the court is that an officer of a corporation may not, in its behalf, plead a privilege under the Fifth Amendment upon the ground that his answers may tend to incriminate the corporation. This conclusion is based upon the view that the constitutional privilege against self-incrimination is personal to the witness and may not be asserted in behalf of another. It was also decided that the Immunity Act of 1903 applied to a proceeding before a grand jury, and prevented a witness from asserting the privilege of the amendment in his own behalf, the act affording him full protection from prosecution on account of anything that he should testify to.

"The remaining point settled by the decisions is that the production by an officer of a corporation, under a subpœna *duces tecum*, of documentary evidence belonging to the corporation, may not be objected to, except in case of an abuse of the writ, either on the ground that under the Fifth Amendment such evidence would tend to incriminate the corporation, or that under the Fourth Amendment such compulsory production would constitute an unreasonable search and seizure of the effects of the corporation. It was said in support of this conclusion that there is a reserved right in the government to require a corporation to disclose whether it has abused its privileges and franchises enjoyed in connection with commerce among the several states.

" The court said that it did not intend to intimate that the general government ' has a general visitatorial power over state corporations,' but added that it did not wish to be understood ' as holding that an examination of the books of a corporation, if duly authorized by act of Congress, would constitute an unreasonable search and seizure within the Fourth Amendment.'

"Mr. Justice Harlan and Mr. Justice McKenna

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concurred in the opinion of the majority of the court, but held that the protection of the Fourth Amendment did not extend to corporations in any case and also expressed somewhat different views of the question whether the subpœna *duces tecum* in the Hale case was too broad and indefinite.

"Mr. Justice Brewer wrote a dissenting opinion in which the Chief Justice concurred. These justices held that the immunities and protection of Articles Fourth, Fifth, and Fourteenth of the amendments of the Federal Constitution are available to a corporation 'so far as in the nature of things they are applicable,' although they agreed with the majority of the court that the protection accorded by the Fifth Amendment is personal to the individual and does not extend 'to an agent of an individual or justify such agent in refusing to give testimony incriminating his principal.'

"The court has never before had occasion to express its opinion upon the question thus decided. It has always been supposed that Congress could, under the commerce clause of the Constitution, require corporations to comply with statutory regulations as conditions precedent to their engaging in interstate trade, as, for instance, that they should subject their books and papers relative to interstate trade to examination by an administrative officer of the government. But it has never before been decided that the fact, that a corporation has without an express franchise from the national government engaged in trade among the States, imposes upon it an obligation in a judicial proceeding different from that resting upon an individual in similar circumstances to disclose its affairs. The importance and far-reaching effect of the decision cannot be overestimated, and it must inevitably result in making the subjection of state corporations engaged in interstate trade to the authority of the national government much more complete than it has hitherto been."

CONSTITUTIONAL LAW (Rate Regulation). In the *Central Law Journal* (V. lxii, p. 458) Andrew Alexander Bruce collects and discusses the cases on "State Regulation of Railroad Rates and Charges."

CONSTITUTIONAL LAW (see Municipal Corporations).

COPYRIGHT. "Literary and Artistic Copyright in the Commonwealth," by Acland Giles, *The Commonwealth Law Review* (V. iii, p. 145).

DIPLOMACY. "Early Diplomatic Negotiations of the United States with Russia," by John C. Hilat, The Johns Hopkins Press, Baltimore, Md., 1906.

DIVORCE. "Antenuptial Agreement Restricting Right to Divorce," *Law Notes* (V. x, p. 47).

DIVORCE. Two articles descriptive of the recent divorce congress appear in the June *Yale Law Journal*, "The Recent Conference on Divorce," by Talcott H. Russell (V. xv, p. 401), and "The Divorce Congress and Suggested Improvements in the Statutory Law Relating to Divorce," by C. La Rue Munson (V. xv, p. 405). The latter gives in full the recommendations of the Congress.

DIVORCE. Clarence D. Ashley in the June *Yale Law Journal* (V. xv, p. 387) writes on "Conflict of Laws upon the Subject of Marriage and Divorce." He discusses briefly the possible unfortunate complications that may arise both under European laws and under the laws of the United States with especial reference to the case of Haddock *vs.* Haddock. He fears that even if there were uniform state legislation it would be varied by differences of interpretation such as have arisen under the negotiable instrument law. He urges as a solution of the problem the abandonment of the notion that citizenship or residence must play some part in the question of jurisdiction. He would let each state decide for itself upon what terms divorce should be granted, but that personal jurisdiction of both parties be required. He dismisses the unfortunate situations that would arise from desertion with the remark that "all these unfortunates would in that case have to endure their marriage bonds for the general good of the community."

DIVORCE (see Constitutional Law).

EQUITY (Trade-Marks). "A Digest of the Law of Trade-Marks and Unfair Trade."

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By Norman F. Hesseltine. Boston: Little, Brown & Co. 1906. pp. xvliii. 390, 8vo.

This is properly entitled a digest; it does not purport to be anything else than a useful manual for the practitioner. As the author says in his preface of it: "This book states concisely the principles of the law of trade-marks and unfair trade for ready application by the lawyer. The legal professor now wants the law and cases, not pages of text-book discussion." It must be admitted that the work that the author has set out to do he has done excellently. The judges are allowed to speak for themselves, extracts being made from all the cases of any importance. These extracts are arranged by topics and subtopics; and the divisional headings are elaborate black letter sentences and phrases, so that despite himself the author does some good treatise work. There are but few branches of the commercial law which need working out into detail so much as this most important question of the limits of fair trade. A much advertised trade-mark or catch word, a name long before the public or a package to which purchasers are used — these are of such value in the selling of goods that there will always be those who will attempt to get the good will of a competitor by unfair means. But the law to-day seems to be adequate to deal with this as with other industrial wrongs. B. W.

EQUITY (see Insurance).

HISTORY. "The Earliest Courts of the Illinois Country," by George A. Dupuy, *Illinois Law Review* (V. i, p. 81).

HISTORY (Mass.). Brief accounts of eminent Massachusetts lawyers, including Chief Justices Shaw, Gray, Holmes; Judge Curtis, and the Dred Scott case; Richard H. Dana's fight over a fugitive slave; John A. Andrew and the impeachment of Judge Loring; Judge Aldrich and the duty of a Christian; and some old-time district attorneys, in a brief article by Stephen O. Sherman and Weston F. Hutchins, entitled, "The Massachusetts Bench and Bar," appears in the June *New England Magazine* (V. xxxiv, p. 433).

HISTORY (Philadelphia). "Centennial Volume." Addresses delivered March 13, 1902, and papers prepared or republished to commemorate the centennial celebration of the Law Association of Philadelphia, contains many interesting biographical sketches and excellent engravings of the early leaders of the Philadelphia Bar. The edition is limited.

INSURANCE (Equity, Contracts). In the *Central Law Journal* (V. 62, p. 417) M. C. Freerks discusses "The Right of an Injured Employee to Enforce Collection of a Judgment for Damage for Personal Injury against an Insolvent Employer in an Action against an Insurance Company, which has Insured the Employer against Claims of this Character under what is Known as Employer's Liability Insurance." The author believes that in equity even under the severer terms of the most recent form of liability policy the employee can reach this asset of a bankrupt employer, on the ground that the employee is a beneficiary. He also cites the analogy of policies of reinsurance.

INSURANCE (Foreign Corporations). "Rights and Liabilities of Foreign Insurance Companies in Canada," by E. Lafleur, K. C., *Canadian Law Review* (V. v, p. 249).

INTERNATIONAL LAW. "International Law with Illustrative Cases," by Edwin Maxey, M. Dip., D.C.L., LL.D., Professor of Constitutional and International Law, Law Department West Virginia University. The F. H. Thomas Law Book Co., 1906.

Professor Maxey graduated at the Chicago Law School ten years ago, and within four years had been so fortunate as to obtain two masters' degrees and two doctorates. For the past three years he has been a professor of law at the University of West Virginia.

The present is a work of about eight hundred pages in ordinary law book size and binding, which is the result of Professor Maxey's experience in teaching international law. It aims to combine a statement of the leading cases with an ample text upon the subject in the belief that such a work will meet the need of law students better than any work on the subject previously extant.

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The attempt is interesting, and Professor Maxey brings to it an unusual equipment, but in the nature of things an ample text and a full collection of cases cannot be included in a single volume of moderate size. Two collections of cases on international law are widely known in the law schools of this country: that of the late Dr. Freeman Snow of Harvard, published in 1893, and that of Dr. James Brown Scott, now solicitor of the State Department, published in 1902, the latter being based upon the former. The cases listed in Dr. Snow's "Table of Cases," number 240, in Dr. Scott's 965, in Professor Maxey's 68.

Professor Maxey, doubtless to economize space, omits the dissenting opinions which Dr. Scott sometimes in part includes, as in the case of The Queen *v.* Keyn (p. 243). They are often of high value. In the case last mentioned, the dissenting opinion, very ably maintained by the minority of one, in favor of national jurisdiction over littoral waters, was declared to be the law by act of Parliament and has stood as such in England ever since. Considering the breadth of reading and scope of knowledge shown, it is to be regretted that so often cases are referred to or facts or opinions mentioned without any reference to page or book to support them. The more laborious and precise practice in this respect of almost all our eminent text writers on international law cannot be abandoned without loss. Professor Maxey has purposely thrown the emphasis upon the rules of peace and neutrality rather than of war "because of the conviction that the real interests of nations are in peace rather than war, and that time can be more profitably spent in the study of the means of avoiding strife than in elaborating the rules for regulating it." However, it must be remembered that by far the most important and complex part of the law of war is as Professor Holland has pointed out in his valuable "Studies in International Law," that which governs the relations of the belligerents to neutrals. On page 242 the statement is made that "The chief countries in which consular jurisdiction is still maintained are China, Egypt, and Persia." Perhaps this ought to be modified. The Christian powers gave up much of their consular jurisdiction in Egypt some thirty years ago (1876), and by arrangements with the Ottoman and Egyptian governments courts were then created for the trial of civil causes arising between persons of different foreign nationalities and suits of foreigners against natives, the Egyptian government, and members of the Khedival family. These mixed tribunals, in civil matters within their exclusive jurisdiction, superseded the consular courts. The foreign judges are appointed by the Khedive on the recommendation of the great powers, each of which is represented by from one to three judges. At least three of these judges have been nominated by the United States.

The writer has certainly found Professor Maxey's book full of interest and wide acquaintance with the authorities, written entertainingly and with much facility. The defects which have been mentioned spring mainly from the limitation of space.

Charles Noble Gregory.

INTERNATIONAL LAW. In the May *American Law Review* (V. xl, p. 402), Dr. Hannis Taylor gives an outline of the problems arising from the use of "Neutral Territorial Waters as a Naval Base," which ought to be considered and determined by the next Hague conference. He illustrates this by an account of the Alabama episode and the incidents of the eastern cruise of the Baltic Squadron.

JUDICIARY (U. S. Supreme Court). In the July *Appleton's Magazine* appears a striking article by Frederic Trevor Hill entitled "The Supreme Court and Coming Events." It opens with some account of the character of the early occupants of that Bench and their conception of its functions. It shows its power as a conservative force, and suggests, as does the article by Mr. Bruce elsewhere discussed, that it is entering upon a period of great danger in dealing with too great conservatism with the industrial problems that press for solution. The author believes that the future work of this court will be vastly more important to the nation than even that of the age of Marshall.

JURISPRUDENCE. "The Growth of Mohammedan Jurisprudence," by Abdur Rahim, *Calcutta Law Journal* (V. iii, p. 67[n]).

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JURISPRUDENCE. In the May *American Law Review* (V. xl, p. 384) F. Beecher writes of "Existing Economic Evils, How to Remedy." He pleads for a principle of fundamental law whereby the principles of association and of competition may be held in check so that one cannot assert itself over the other and so as to bring about a more equitable distribution of wealth and to create equal chances for all.

JURISPRUDENCE (Stare Decisis). "Conformity of Legal Decisions to Ethical Standards of Right," by Alva Grover Tibbetts in the May *American Law Review* (V. xl, p. 391), contends that a decision which is inconsistent with morals should be disregarded if possible, and that while generally ethics are not sufficient to enable a court to overturn a well-established precedent it may do so where the precedent is clearly unreasonable even though of long standing.

JURISPRUDENCE (see Constitutional Law).

LEGAL ETHICS. "The Legitimacy of 'Business Methods' in the Law," by Raymond D. Thurber, *Bench and Bar* (V. v, p. 51).

LEGAL ETHICS. In the June *American Lawyer* (V. xiv, p. 244), under the title of "The Lawyer's Conscience," T. H. Marshall contends that the change in the nature of the lawyer's work from an advocate remedying the mistakes of his client to the adviser planning his course in advance necessitates a change in our code of morals. We have, he says, "been trained in that school of morals which teaches that the lawyer is but a blind instrument of fate; that he is but the sword wielded by the hand of justice; that in and of himself he is nothing; that there is no personal responsibility resting upon him if he can appear with clean hands in a court of justice and keep the solemn vows of his admission to the Bar. They do not hesitate to defend criminals, and believe that in defending one accused of crime they only discharge a duty, and that upon them rests no share of the responsibility of either punishment or acquittal. So ingrained has become the idea of lack of personal responsibility of the lawyer in the discharge of his duties to his client, so long as he keeps his personal attitude toward court, toward client, and toward opposing counsel clean, unspotted, and blameless, that a note of warning ought to be sounded to members of the profession in view of the changed condition of affairs brought about by the business age in which we live.

"This is a marvelous condition of the lawyer's conscience. Only centuries of breeding which have instilled into him the idea that he is separate and apart from the cause which he represents could thus induce men of such splendid morals to prostitute the finer sensibilities of their nature to the service of their clients. It seems to me that it but needs the bare suggestion that when the lawyer turns himself into the scrivener he is himself as much responsible as his client for any trickery, knavery, dishonesty, or sharp practice that may enter into the contract."

LEGAL ETHICS. "The Lawyer," Anon. *Oklahoma Law Journal* (V. iv, p. 368).

LEGAL ETHICS. "Legal Ethics and Suggestions for Young Counsel," by Henry W. Williams, late justice of the Supreme Court of Pennsylvania. George T. Bisel Company, Philadelphia, 1906.

This book was apparently written some time ago and is more applicable to the situation of the country lawyer than of the modern city attorney. Amid much that is obvious and elementary it contains much sound sense and solid morality, and will be an aid to the beginner in applying to the difficult questions of practice the simple moral principles which should be our guide.

LITERATURE. "The Law of the Vagabonds," by Joseph M. Sullivan, *Canadian Law Review* (V. v, p. 259).

MORTGAGES (see Sales).

MUNICIPAL CORPORATIONS (Constitutional Law). "Validity of Municipal Ordinances Regulating the Inspection and Sale of Milk and Cream," by Eugene McQuillin, *Central Law Journal* (V. 62, p. 439).

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PRACTICE. "Finality of the Award — and of the Decree Passed upon the Award," by D. C. Banerjie, *Allahabad Law Journal* (V. iii, p. 131).

PRACTICE. "Practice in the Municipal Court of Chicago," by Hiram T. Gilbert, *Illinois Law Review* (V. i, p. 94).

PROPERTY. "Third Parties Consent in the Law of Alienation of Property in India," by S. Varadachariar, *Madras Law Journal* (V. xvi, p. 83).

PROPERTY (Restraints on Alienation). "Vested Gifts to a Class and the Rule against Perpetuities," by Albert Martin Kales, in the June *Harvard Law Review* (V. xix, p. 598), is an analysis of a problem put by Professor Gray in the second edition of his Rule against Perpetuities, where he supposes an immediate vested bequest to the grandchildren of a living person to be paid to them at twenty-five. In England such restraints on alienation are invalid.

"The result reached by the English cases is simply the establishment of a special rule — entirely distinct from the Rule against Perpetuities — limiting the extent to which restraints on alienation, usually valid, may be created. In the same way, when you come to an American jurisdiction where Claflin *v.* Claflin is law, it becomes absolutely necessary to put some limits upon the length of time that the trust of an absolute indefeasible equitable interest may be made indestructible. The direct authority of the English cases which have dealt with the restraints on anticipation attached to a married woman's estate, and the suggestion of the courts of Massachusetts, Illinois, and Pennsylvania, all indicate that the rule will probably be well settled here that language which, if carried out as expressed, may possibly cause the trust of an absolute indefeasible equitable interest to be or remain indestructible at a time beyond the period of a life or lives in being and twenty-one years, will be unenforceable. It cannot of course be too emphatically stated that this is not the Rule against Perpetuities, but a new rule limiting the time that the trust of an absolute indefeasible equitable interest may be made indestructible."

The interest in the article is enhanced by a delightfully amusing commentary in a note by Professor Gray.

PROPERTY (Torrens Law). An interesting account of the operation of the Torrens law for "Land Registration in the Territory of Hawaii," by Philip L. Weaver, appears in the May *American Law Review* (V. xl, p. 321). He concludes that, —

"The system of land registration has proved itself a practical working success, well adapted to the needs of a rough country, poorly surveyed, where titles are often difficult to ascertain.

"The lawyers are its greatest advocates, and bankers, incorporated estates, and home owners are registering their titles, as they acquire new lands."

PUBLIC POLICY. "Judge-Made Ignorance in Pennsylvania," by Florence Kelley, *Charities and the Commons* (V. xvi, p. 189).

RAILWAYS. American Street Railway Reports (Annotated). Vol. iii. Edited by Frank B. Gilbert, of Albany Bar. Published Albany, N. Y. Matthew Bender & Co. 1906.

The introduction of electricity as a motor power into street cars has not only revolutionized street transportation, but it has diversified the practice of law by developing a new line of decisions applicable to the new circumstances and conditions; so that now in the case of street railways, as in other branches of industrial and commercial enterprise, like admiralty and insurance, there is a specialized body of law which defines the legal status of street railway companies in relation to the public in the use of streets above and below ground and to passengers, employees, travellers, municipalities, and others throughout the gamut of street railwaydom.

Is is always to the inestimable advantage of the practising lawyer to have at hand recent decisions in his own and other jurisdictions with which he has to deal; and in view of the great number of decisions made each year relating to street railways, it is very difficult to discover and keep at hand such cases as will be of service. By this system of reports the editor of Street Railway Reports has minimized this difficulty.

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Vol. III, reporting the electric and street railway decisions in the state and federal courts of the United States, in furtherance of the common plan of the series, collects the law decided since the publication of Vol. II concerning the whole question and arranges it by states, reporting at length all the more important decisions and giving a digest of those of lesser importance, with full footnotes in juxtaposition summarizing the holdings in other jurisdictions, together with references to similar cases in the present and two preceding volumes. Vol. III, like Vols. I and II, contains a workable index, and with the system of cross-references and footnotes will be found an encyclopedia for the occasional practitioner in street railway law and a necessity for the regular one.

Charles M. Davenport.

RAILWAYS (see Constitutional Law).

SALES (Chattel Mortgages). Samuel Williston in the June *Harvard Law Review* (V. xix, p. 557) analyzes the cases relating to "Transfers of After Acquired Personal Property." The old English doctrine abolished by the Sale of Goods act that such a transfer gives a legal title good against all the world to the property when it comes into existence has been followed to its logical limits in few of our states but except against purchasers for value an agreement to mortgage such property is generally held to be enforceable. The grounds for the doctrine are not clearly stated, but it is generally regarded as dependent on rules of equity such as specific performance. It should be noted, however, that under the doctrine of appropriation it is perfectly easy to draw an agreement so that the legal title to future chattel property will pass except so far as invalidated by the recording acts. The author submits that the only question regarding the propriety of the equitable relief is whether public policy should set any limits to the power of a man to bargain away not only all that he has but all that he ever may have.

There are, however, several doctrines which may be infringed by the allowance of these equitable liens.

"1. Recording acts require chattel mortgages to be recorded or the possession of the chattels to be transferred.

"2. Chattel property which is transferred but of which possession is retained by the seller, in many jurisdictions even apart from the provisions of recording acts, may be seized by the seller's creditors.

"3. It is often held to make a mortgage fraudulent, if the mortgagor is allowed by the terms of the mortgage or by the agreement of the parties to withdraw from the mortgage the property covered by it, at his pleasure, and sell the property as his own.

"4. The Bankruptcy Act forbids preferences, and the policy of the act is to secure equality of distribution among the bankrupt's creditors."

The author then shows how the enforcement of the doctrine may conflict with these. It is the law of bankruptcy, however, which he believes most clearly shows the error of basing an equitable lien on the insolvency of the vendor. Insolvency is the very circumstance which makes it impossible for the seller to carry out his contract.

"Every creditor of a bankrupt estate has parted with his money in return for a promise which has not been kept. All are alike in suffering this injustice, and the fact that what one creditor gave or was to receive is capable of identification seems no reason in natural justice why he should be preferred over others whose money has gone perhaps to swell the estate but who cannot trace what they gave or identify what they were promised in return.

"The whole subject is in so confused a state upon the authorities and its proper solution depends so much on rules of policy that a statute regulating the rights of the parties offers the best solution of the difficulties. If a uniform law could be passed in a number of states the gain would be greater."

STATUTES. "A Point in the Interpretation of Statutes," by H. B. Higgins, *The Commonwealth Law Review* (V. iii, p. 155).

TORTS. "Statutory Torts in Massachusetts," by Waterman L. Williams, 2d edition, $3 net. Little, Brown & Co., Boston. 1906.

This work is devoted chiefly to the liability of cities and towns, etc., under the highway

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acts and to actions under the employer's liability act, but these two statutes have been involved in most of our recent tort litigation. It does not purport to give an exhaustive citation of cases analyzed in accordance with the facts of each, in the manner of many modern books on negligence, but it analyzes clearly such principles as are involved in these cases, especially questions of interpretation, and cites the most recent cases. The book contains much matter not in the first edition and many recent cases not formerly cited. The typographical arrangement is a great aid to clearness. The work maintains the well-known standard of the first edition and will be very useful to Massachusetts lawyers in clarifying the confusion of principle that is resulting from the multiplication of modern tort decisions.

TORTS (Privacy). An anonymous article on the "Right of Privacy," suggested by a recent Georgia decision *contra* to the famous New York case, which refused to recognize any such right, appears in the June *Virginia Law Register* (V. xii, p. 91).

TRADE UNIONS (see **Equity**).

TRUSTS. "Precatory Trusts," by F. P. Betts, *Canada Law Journal* (V. xlii, p. 369).

WITNESSES. "Examination of Witnesses," by Dr. Hans Gross, *Criminal Law Journal of India* (V. iii, p. 133).

WITNESSES (Medical Privilege). "An Abused Privilege," by W. A. Purrington, in the June *Columbia Law Review* (V. vi, p. 388), criticises especially the New York rule making privileged the testimony of medical witnesses as to information acquired in a professional capacity. He contrasts it with the French law forbidding the disclosure of such confidences outside of court as well as inside.

"There can be no doubt among honorable men that one of a physician's highest duties is to keep sacred not only the intimate knowledge of his patient's physical condition and affairs acquired in the professional relation, but especially all that he learned by communications or observation under the seal of confidence; but it is not his highest duty nor could the law safely allow it to be so considered to abstain from testifying whenever in his judgment an answer would involve a breach of professional confidence. The popular idea that physicians are bound absolutely to keep secret their knowledge of a patient's condition is mistaken: were it true, the obligation would be broken daily."

The New York statute has been construed strictly and results in many anomalies. It does not protect the confidences which most deserve to be guarded. One finds few reported cases where the privilege is claimed to cover a secret, but it is usually invoked to win a case and is a conspicuous abuse in personal injury litigation. It has been "suggested that the effort to suppress such evidence would defeat its own purpose by prejudicing jurors. Unfortunately the event does not seem to have borne out the prophecy; for although it has been held that the jury may draw inferences from the failure to produce the attending physician or to exclude his testimony, yet they seem, as a rule, little disposed to do so, entering into the spirit of the game and appreciating the technical success of the advocate who excludes the testimony. The burden of proof seems to be upon those who support a rule designed to suppress the truth that the court is seeking. That burden can only be sustained by showing that in a jurisdiction where the rule does not obtain the relation between patient and physician is less regarded, that greater injustice prevails in this respect, and that confidence is more often disclosed. For the confusion in judicial opinions the fault lies not with the courts so much as with the statute. Judges have taken the law as they found it. They have been dominated by the idea that they were really protecting the innocent secrets of the sick. The fact seems to have been otherwise. It certainly seems desirable that if these statutes be not repealed altogether they should be modified so as not to enable the unscrupulous to suppress in evidence what is no secret outside the court room."

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NOTES OF THE MOST IMPORTANT RECENT CASES COMPILED BY THE EDITORS OF THE NATIONAL REPORTER SYSTEM AND ANNOTATED BY SPECIALISTS IN THE SEVERAL SUBJECTS

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

ASSUMPSIT. (Duress.) Conn. — A union composed of bricklayers and plasterers, and organized to promote the welfare of its members, voted to refuse to handle brick from any manufacturer delivering brick to boss masons employing non-union men, and notice of this resolution was served on the manufacturers. Subsequently a manufacturer sold brick to a boss mason employing non-union men. Learning of this the union voted to place damages at $100 against the manufacturer. Afterwards the manufacturer began to deliver brick to a boss mason employing union men. The union demanded payment of the $100 under threat that unless the same was paid the men employed by the boss mason would refuse to handle the brick, and payment was made. In March *v.* Bricklayers and Plasterers Union No. 1, 63 Atlantic Reporter, 291, it is held that this payment was extorted by means of threats in violation of a statute of Connecticut, punishing any person who shall threaten to compel another against his will to do an act which such person has a legal right to do, and consequently that the manufacturer was entitled to recover the money. The action of the union in extorting the payment is held not to be justifiable, either on the ground that its members had a right to decline to handle the manufacturer's brick and also had the right to waive the exercise of that right on such conditions as they might impose or on the ground that the action of the union merely amounted to an exercise of the right of fair trade competition.

CONSTITUTIONAL LAW. (Civil Rights — "Jim-Crow Cars.") Fla. — Three related and entirely consistent cases recently decided by the Supreme Court of Florida throw considerable light upon the constitutional requirement as to legislation relative to the separation of the races in public conveyances. In State *v.* Patterson, 39 Southern Reporter, 398, the court had under consideration a statute requiring street car companies to provide separate compartments in their cars for the Caucasian and African races and prohibiting persons of either race from occupying the compartment of the car set apart for the other race, but containing a provision that the act should not apply to colored nurses having the care of white children or sick white persons. This act was held to be in conflict with the 14th Amendment to the Federal Constitution, because giving to the white race the privilege of being accompanied by negro nurses while denying to negroes the privilege of being accompanied by white nurses; or, as the court puts it, it gives to the African nurse the right to space in either part of the car and withholds from the Caucasian nurse the same privilege, thereby discriminating between the races in favor of the African nurse as against the Caucasian person of the same occupation. In view, very probably, of this holding, the city council of Pensacola passed an ordinance also requiring separate compartments for the two races, but providing in general terms that it should not be construed to apply to nurses attending children or invalids of the other race. This ordinance is held in Crooms *v.* Schad, 40 Southern Reporter, 497, to be free from the vice of the statute and, with respect to the exception of nurses, it is declared that such exception was a proper and reasonable classification and did not render the ordinance invalid, unjustly discriminative, or unreasonable. An ordinance of much the same nature enacted by the city of Jacksonville, but containing no provision at all as to nurses, was upheld as against an attack on the ground that it was unreasonable, the court holding that a passenger on a street car has no right to any particular seat nor to a seat in any particular end of the car and that a regulation of a street car company, acting pursuant to the ordinance, by which seats in the rear end of its cars were assigned to the use of colored passengers and seats in the front end to white passengers, was not an unreasonable regulation nor an unlawful discrimination between the races. Patterson *v.* Taylor, 40 Southern Reporter, 493.

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CONSTITUTIONAL LAW. (Due Process — Game Laws.) **N. Y.** A decision which while doubtless correct under the statute, nevertheless goes beyond the object sought to be accomplished by game laws, is contained in People *ex rel* Hill *v.* Hesterberg, 76 Northeastern Reporter, 1032. The case holds in common with a number of other cases that a statute prohibiting possession of game during the closed season, even though the game comes from without the state, is not unconstitutional as depriving a person of property without due process of law. Act Congress, May 25, 1900, providing that all dead game, whether animals or birds, the importation of which is prohibited, or any dead game carried into a state or territory for use, sale, or storage there, shall at its arrival be subject to the operation of the laws of such state, enacted in the exercise of the police powers, to the same extent as if such game had been produced in the state and shall not be exempt therefrom by reason of being introduced in original packages, is construed as conferring on any state the right to enact laws prohibiting the possession of dead game within certain periods, whether taken within or without the state. The final holding in the case, while perhaps a necessary consequence of the ones just mentioned, seems to carry the effect of the state laws much beyond the object sought to be accomplished, which is merely the effective protection of game within the state. This holding is that where the warrant for the arrest of a defendant for violating the game laws was based on an affidavit that he had in his possession within the prohibited time certain dead game birds, "namely an imported golden plover and an imported grouse," the further statement that such birds were different varieties of game birds from the game birds known as plover and grouse in the state of New York, and from any birds native of America, cannot be urged as a defence. This holding is made all the more striking by the fact that the birds in question were imported from England and Russia.

CONSTITUTIONAL LAW. (Election Laws.) **Ill.** — In people *v.* Board of Commissioners of Chicago, 77 Northeastern Reporter, 321, the Illinois primary election law is held unconstitutional on a number of different grounds, most of which are fairly obvious; for instance, the law provides that in senatorial districts consisting of two counties, not more than two persons of the same political party, that is one candidate for senator and one for representative, shall be nominated from any one county. It is reasonably clear that this provision is in conflict with the provision of Illinois Constitution, Art. iv, sec. 3, fixing the eligibility for the office of senator or representative by requiring that he shall reside in the senatorial district for two years next preceding his election. It is also held that the provision of the law that in Cook County no party shall hold a primary election unless it cast twenty per cent of the vote at the last election for president, while outside of that county a political party which cast ten per cent of the total vote at the last presidential election may hold a primary election, is special legislation and invalid, and is also objectionable as an interference with the equality of rights and freedom of voters in the different counties. The law provides that voters in the state at large outside of Cook County may vote at primary elections by stating their present party affiliations, while a voter in Cook County is denied the right to vote, if he has voted at the primary election of another party within two years. This provision is deemed invalid on much the same ground as that on which the preceding one was found objectionable, and with respect to both of these it is held that the differing conditions in the state at large and in Cook County do not furnish any reasonable basis of classification justifying the special regulations with respect to Cook County.

In addition to those above mentioned, the court states some other grounds of constitutional objection to the Illinois primary election law of 1905, one of which deserves special notice. The opinion says: This act provides that the county central committee of each political party shall determine whether the county officers shall be nominated at the primary election by the voters or by delegates chosen at such election, and also whether the candidates shall be nominated by a majority or plurality vote. If a committee decides that a majority shall be necessary, this is to be the law; but if they decide that a plurality shall elect, the candidate is to be chosen by a plurality vote. The provision amounts to a delegation of legislative authority to county central committees to determine what the substantial features of the law shall be, and it is therefore void.

This holding presents an entirely new point in the law of primary elections. The provision that the party is to determine whether candidates are to be nominated by delegate conventions or by direct primary election, which the court does not condemn specifically, is found in the laws of many other states; and unless the party is to be deprived of the power of prescribing rules of procedure for its conventions, it will also decide ultimately whether a majority or a plurality shall elect. The provision condemned by the court was therefore no more than a recognition of party autonomy along

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traditional lines. While the validity of primary election laws was formerly questioned on the ground that they unduly impaired the freedom of party action, it might be fairly asked in view of this new ruling to what extent the law, if it meddles with the matter at all, may leave the regulation of primary elections to the party management. The application of the doctrine of non-delegatability of legislative powers carries a new element of doubt into primary election legislation.

Since the decision in the above case, the legislature of Illinois, convened by Governor Deneen in special session for this purpose, has enacted a new primary law, which is supposed to have eliminated the defects in the former law pointed out by the Supreme Court.

E. F.

CORPORATIONS. (Foreign, Practice.) Mo. — The attempt of the state of Missouri to obtain sufficient information as to the methods of the Standard Oil Company on which to found a prosecution for violation of the anti-trust act of that state has given rise to a decision as to the validity of a portion of the statute which it seems has not been passed upon before. State *v.* Standard Oil Company of Indiana, 91 Southwestern Reporter, 1062. That part of the statute which provides that when the attorney-general in proceedings against a corporation under the anti-trust law files in court a statement giving the names of the non-resident officers of the corporation whose testimony he desires, the court shall issue a notice to the attorney of record for the corporation notifying him that the testimony of the persons named is desired and requiring him to have them present at the time and place fixed for their examination, is construed as merely providing a means of notifying a defendant through its attorney and declaring that notice to an attorney of record shall be notice to the client and is held to be valid. Foreign corporations doing business in the state are to be regarded as being bound by the provisions of this statute on the principle that a state may prescribe the conditions on which a foreign corporation may do business therein, and that where a foreign corporation comes into the state for business purposes pursuant to the terms prescribed by the legislature a contract binding the corporation to obey existing laws is implied, and that therefore with respect to this particular statute, foreign corporations must be regarded as having agreed that notice to their attorneys under the statute shall be notice to them.

DESCENT AND DISTRIBUTION. (Legislative Power.) Kans. — A case the reasoning in which seems to be somewhat in conflict with analogous cases from other jurisdictions, is that of McAllister *v.* Fair, 84 Pacific Reporter, 112. The decision here is that the power to declare the rule for the descent of property is vested absolutely in the legislature, and that where it has provided in plain and peremptory language that a husband shall inherit from his deceased wife and made no exception on account of criminal conduct, the court is not justified in reading into the statute a clause disinheriting a husband because he feloniously killed his intestate wife for the purpose of acquiring her property. In answer to the natural argument that a literal interpretation of the statute might operate in some instances to encourage crime and contravene public policy, the court says that that is no reason why a plain, statutory provision should be disregarded nor why the court should attempt to determine the policy of the state on the question. The whole opinion proceeds practically upon this ground, the substance of the court's argument being contained in the statement that the right to determine what is the best policy of the people is in the legislature, and that courts cannot assume that they have a wisdom superior to that of the legislature and proceed to inject into a statute a clause which in their opinion would be more in consonance with good morals or accomplish better justice than the rule declared by the legislature.

In holding that the legal title passes to the murderer in such cases, so that an innocent purchaser from him will take superior to the claims of those who would take next after the murderer, this case would seem to be sound in principle and in accord with the weight of authority. The descent of the legal title is fixed by the statute, and the courts have no power of amending it. The true solution of such cases was pointed out long ago in a note in 4 Harv. Law Rev. 394. Granting that the legal title has passed, equity might still hold the murderer as constructive trustee and require him to surrender his ill-gotten title. The overlooking of the equitable solution of these cases and criticism of cases passing upon the legal title only as out of line with good morals is a striking instance of what I have ventured to call the decadence of equity (5 Columbia Law Review, 20).

R. P.

The principal case was a proceeding begun in the Probate Court to obtain a distribution of the murdered wife's personal estate. The husband, who was under life sentence for the murder of his wife, assigned his interest as sole distributee of her estate to the attorney who defended him. Considering that under the Kansas statutes a person sentenced to confinement for life "shall thereafter be deemed civilly dead" (General Stats.

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Kans. 1901, § 2301) and that the Kansas statute which gives to persons confined in the Penitentiary for less than life the right to contract about their real and personal property (Laws of Kans. 1905, p. 214) by implication denies such rights to life convicts, it seems strange that the validity of the assignment was not questioned. That it was open to attack is apparent from Williams v. Shackleford, 97 Mo. 322, where, under a statute like that in Kansas, a mortgage by a convict whose civil rights were suspended was held void. As civil death will prevent a man from inheriting property (Estate of Donnelly, 125 Cal. 417), so it should prevent him from assigning his rights in property.

On the point considered by the court, the case would seem to cite all the authorities and to lay down the right rule. While, however, as a matter of law an estate is distributable to the distributee who murders the intestate for gain, a court of equity should deprive him of the benefit of his crime by holding him as trustee for those who would take if he did not exist. The reason why the murderer is allowed to take title is that innocent purchasers for value from him may be protected. But for them the courts would doubtless have no more difficulty in going against the express words of the statute of Descents and Distributions than the California court had in Estate of Donnelly supra or than a court of equity experiences with reference to the Statute of Frauds. The fact that the assignee was not innocent and that his assignee would necessarily take subject to equities would seem to be the real justification for the doctrine laid down in New York Mut. Life Ins. Co. v. Armstrong, 117 U. S. 591, that the assignee of a life insurance policy cannot recover on it where he deliberately murders the insured; and the doctrine that equity should make the murderer a trustee where he does get anything is supported by the fact that in at least one insurance case, where the beneficiary could not recover because she murdered the assured, it was determined that the company should hold the insurance money for the assured's representative (Schmidt & Northern Life Assoc. 112 Iowa, 41).

The doctrine that a court of equity will hold the murderer as trustee was laid down in cases where a testator was murdered by a devisee (see Ellerson v. Westcott, 148 N. Y. 149, 154), but applies with equal force to the cases of an heir and of a distributee. It is called for by sound public policy.

Geo. P. Costigan, Jr.

The writer does not concur in the statement that this case is "somewhat in conflict with analogous cases from other jurisdictions." Similar questions have arisen frequently, and the decisions have been almost uniformly in accordance with the doctrine of the Kansas Court. (See 14 CYC 62. Also in re Kuhn, 125 Iowa, 449.) Indeed, about the only thing left open to comment on the subject is the failure of the legislatures, after so many warnings, to amend existing statutes in such manner as to remove the incentive to murder an ancestor or testator for the purpose of anticipating an inheritance or devise. It would be well for the bar associations of many states to press the matter upon the attention of their legislators.

F. I.

DIVORCE. (Desertion — Domicile.) **Mass.** In Franklin *v.* Franklin, 77 Northeastern Reporter, 48, the Supreme Judicial Court of Massachusetts holds that where a resident of a foreign country emigrates to America to better his condition, the action of his wife in refusing to accompany or follow him without other excuse than disinclination to leave her native land, is desertion, entitling the husband to divorce. The court concedes that the right of the husband as head of the family to select a domicile is not absolute, but must be exercised with some reference to the welfare of the wife. In spite of this, the determination of the matter must, it is held, be left in the first instance and ordinarily to the husband, upon whom rests the legal duty of providing for his family as well as himself; and in view of the fact that the change of domicile desired by the husband in this case would have involved no change of race or language, and since a denial of the husband's right to change his location in order to better the interests of himself and his family would result in impeding social progress and individual advancement, it is held that the wife was not justified in refusing to come to this country upon the husband's request.

DIVORCE. (Vagrancy.) **Mo. Ct. of App.** — The St. Louis Court of Appeals delivers a very comforting decision in Gallemore *v.* Gallemore, 91 Southwestern Reporter, 406. A provision of the Missouri statutes, declaring that every able-bodied man who shall neglect or refuse to support his family, shall be deemed a vagrant, and that when the husband shall be guilty of such conduct as to constitute him a vagrant, the wife shall be entitled to a divorce, is construed and it is held that where a physician of good habits endeavored to establish a practice, maintained an office where he waited for patients, and attended to such calls as he had, contributing his entire income from his practice to the support of his wife and himself, he was not a vagrant within the meaning of the statute, though he did not succeed in earning enough to support his wife and himself, and she was compelled to contribute to their support from her separate means.

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EVIDENCE. (Experiments — Insurance.) Ia. — An exceedingly interesting holding on the question of admissibility of evidence of experiments is contained in Tackman *v.* Brotherhood of American Yeomen, 106 Northwestern Reporter, 350. The action was on a mutual benefit certificate, and the association defended on the ground that insured had committed suicide. The only facts that appeared were that deceased went to his barn to get his team and about an hour afterward was found dead, suspended by the neck from a tie strap attached to a bridle hanging on a peg where deceased usually kept his harness. At trial a witness testified that he had hung a bridle with a tie strap attached on the peg, throwing the tie strap over the peg so as to leave it hanging down, and by a series of experiments had discovered that if he walked towards the bridle and stumbled and fell with his head in the loop formed by the strap, it was drawn around his neck in such a way that it caught or drew over itself, and would have choked him to death had he not gained his balance. The witness was a man of about the same height and weight as deceased, and a number of experiments showed that the result mentioned ensued about three times out of four. This evidence it was held was admissible as throwing light upon the manner in which the death might have occurred, the court observing that while an accident of that nature might be exceedingly rare and possibly might never have occurred before, that did not furnish a sufficient reason for saying that it did not happen, since the novel, unexpected, and unforeseen against which no man may safely calculate transpires every day. Considering the presumption against suicide arising from love of life as evidence in the case, the court regards the inference that death might have resulted in the manner shown by the experiments as quite as probable as the inference that deceased committed suicide.

In the recent notorious Tucker murder case (Commonwealth v. Tucker, 189 Mass. 457) the trial court had occasion to consider an almost similar question, excluded the evidence of experiments and was sustained by the higher court. The question arose whether the azygous vein of the victim was severed by the stab in the back. Each side called experts, of whom the court satirically commented, "Each taking the view favorable to the side by which he was called." One of the defendant's experts having expressed his opinion was asked if he had made any experiments for the purpose of "ascertaining that opinion," and in reply said he had. The defendant then asked him what experiments he had made. This, upon objection, was excluded, the court ruling that it was incompetent and immaterial to show the nature of the experiment. The Supreme Judicial Court in part said:

"Whether the details of an experiment not otherwise material may be shown as having some bearing as substantive evidence upon a question on trial depends upon the nature of the question and that of the experiment. If, for instance, the question be with reference to the operation, chemical or otherwise, of some natural force which acts uniformly under any given conditions, and the conditions under which the experiment is made are shown to be so similar to those which existed in the case on trial that the court can see that the experiment may be really of assistance to the jury, the details of the experiment may be put in as independent evidence. The true ground of admitting the details and result of such an experiment is that it may be of assistance, but the question whether it may be or whether it may or may not lead to too many collateral questions is largely within the discretion of the court. It is manifest that in view of the nature of the question in dispute, namely, whether the azygous vein was cut by the stab in the back, taken in connection with the difference necessarily existing between the conditions in the case on trial and those under which the experiment was performed and the obvious difficulty, if not impossibility, of ascertaining whether such difference had any material effect upon the result, the court was fully justified in excluding the experiment or any inquiry into its nature."

Lee M. Friedman.

INSURANCE. (Benefit Certificate.) Kans. — A strict construction of a by-law of a fraternal insurance society comes from Kansas in Taylor *v.* Modern Woodmen of America, 83 Pacific Reporter, 1099, where it is declared that a by-law which provides that if any member shall become intemperate in the use of drugs the benefit certificate held by such member shall become absolutely null and void as to benefits, and all payments previously made thereon forfeited, does not apply to the case of a member who, prior to the enactment of such by-law, had become intemperate in the use of drugs and continued so thereafter.

INSURANCE. (Construction — Forfeiture.) Kans. — Garner *v.* Milwaukee Mechanics' Insurance Company, 84 Pacific Reporter, 717, lays down a doctrine as to which it may at least be said that there are many opposing cases. It is here declared that the word "interest" in a forfeiture clause of an insurance policy, which provides that the policy shall become void if any change shall take place in the interest, title, or

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possession of the subject of insurance, has application only where the insured owns and insures an interest less than title, and has no application where the insured owns the title; consequently, where the insured owned the title of the subject of insurance and after the execution of the policy made an executory contract to convey the property, under which the consideration was fully paid but no transfer either of title or possession had been actually made, there had been no change in interest, title, or possession within the meaning of the forfeiture clause quoted.

MONOPOLIES. (**Express Companies — Exclusive Contracts.**) **Tex. Sup. Ct.** — The anti-trust statute of Texas has recently received a construction which has a tendency to somewhat broaden the scope of the statute and give it application to agreements not previously held to be within its provisions.

The statute requires every railroad to furnish reasonable and equal facilities, upon reasonable and equal rates, to all corporations engaged in the express business. Another statute defines a trust as a combination of capital, skill, or acts of two or more persons to create or carry out restrictions in the free pursuit of any business authorized by the laws of the state or to prevent or lessen competition in the transportation of merchandise, and makes a trust unlawful.

Under this statute, it is held in State *v.* M., K. & T. R. Co., 91 Southwestern Reporter, 214, that a contract between a railroad company and an express company whereby the latter was given exclusive privileges and the former bound itself not to contract with others to do an express business on the road, and agreed that in case privileges should be accorded others by legislation or judicial proceedings, the express company in question should have credit for the sums paid by other companies, was violative of the anti-trust statute.

MUNICIPAL CORPORATIONS. (**Bonds.**) **Colo.** — In view of the apparently growing inclination of cities to give municipal aid to the erection of structures designed for auditorium purposes, we call attention to the recent holding of the Supreme Court of Colorado in City and County of Denver *v.* Hallett, 83 Pacific Reporter, 1066. The court there declares that Colorado Constitution, 120, granting home rule to the city of Denver and providing that the people in the city shall always have the exclusive power of making, altering, revising, or amending their charter, bestowed upon the people all the power possessed by the legislature, so that they were authorized to provide by charter for the erection of an auditorium, to purchase a site therefor, and to issue bonds to discharge the indebtedness arising from its construction.

MUNICIPAL CORPORATIONS. (**Franchises.**) **U. S. S. C.** — A number of related points determining the charter rights of street railways in the city of Chicago are contained in Blair *v.* Chicago, 26 Supreme Court Reporter, 427. The right of the city to fix the term during which street railway companies may occupy the streets is declared by the holding that the authority given to the city under acts, February 14, 1859, and February 21, 1861, to fix the terms and conditions upon which the street railway companies chartered by these acts with a corporate life of twenty-five years should occupy its streets, includes the power to fix the term of such occupation. Probably the decision of paramount importance is to the effect that the right to use the streets of Chicago for street railroads was not extended to ninety-nine years without reference to any limitation of time fixed by the municipality by the amendatory act of February 6, 1865, which extended from twenty-five to ninety-nine years, the corporate life of the companies created by the acts formerly referred to, and also gave the right to construct and maintain street railways on streets designated by the common council upon terms and conditions approved by such council. It is held that the right to operate the street railways until the city should exercise its reserved right to purchase them is confined to the streets designated in the original ordinances and such later ordinances as indicate a purpose to preserve the permission of the original ordinance, and does not, by reason of the fact that the street railway system has become a unity, extend to the rights of occupancy acquired in other streets so as to continue such right until the purchase of the entire system.

MUNICIPAL CORPORATIONS. (**Ordinances — Billboards.**) **N. J.** — The popular movement looking towards the abolition or at least regulation of billboards receives a setback in the case of City of Passaic *v.* Patterson Bill Posting, Advertising, and Sign Painting Company, 62 Atlantic Reporter, 267. An ordinance requiring that signboards should be constructed not less than ten feet from the street line and that no sign or billboard shall be at any point more than eight feet above the surface of the ground, is held to be a regulation not reasonably necessary for the public safety and not justified as an exercise of the police power. It is pointed out that in all cities fences and buildings are erected on street lines, involving the same or even greater possibility of

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danger from severe storms or natural decay, and that it would hardly be contended that a municipality would be authorized by the legislature to compel the owners of buildings already erected to take them down and move them ten feet back from the street line. Yet the danger to the public from bricks or slates, ice and snow falling from the building is much greater than any possible danger from a billboard. In determining whether a regulation is reasonably necessary to secure the public safety, and therefore within the police power, existing habits and customs are of great weight, and the universal custom of building upon the street line is evidence that the public safety does not require that structures like billboards should be set back from the line. The very fact that the ordinance is directed against sign and billboards only and not against fences, indicates that some consideration other than the public safety led to its passage. It is probable that the enactment of the ordinance was due rather to æsthetic considerations than to considerations of public safety. A man may not be deprived of his property because his tastes are not those of his neighbors. Æsthetic considerations are a matter of luxury and indulgence rather than necessity, and it is the right of all which justifies the exercise of police power to take private property without compensation.

This decision is in entire accord with a recent well-considered case on the same subject in Massachusetts.

Commonwealth v. Boston Advertising Co., 188 Mass. 348. In that case a statute (Statutes 1903, C 158) authorized the Metropolitan Park Commission, and the officers having charge of public parks and parkways, to "make such reasonable rules and regulations respecting the display of signs, posters, or advertisements in or near to, and visible from public parks and parkways entrusted to their care, as they may deem necessary for preserving the objects for which such parks and parkways are established and maintained." Under this authority a regulation was established forbidding the erection, maintaining, or displaying a sign visible to the eye within the park or parkway without written permission of the Commission, and the defendent was prosecuted for so doing without such permission. This rule was held a taking of property, and as no compensation was provided it was held invalid. But the court added: "We do not hold that no valid rules as to signs, posters, or advertisements on land near to public parks or parkways can be made under Statutes 1903, C 158. Rules intended to prohibit advertisements of indecent or immoral tendencies, or signs dangerous to the physical safety of the public, no doubt would be reasonable within the meaning of the statute and invalid."

Lee M. Friedman.

This is but one of a long line of decisions which deal with the right of the individual to the acquisition of property and to manage and enjoy the same. It is in line with the so-called "spite fence" cases, the building line cases, and with cases which pass upon the right of the municipality to refuse a building permit when the building sought to be constructed is not in harmony with others in its vicinity or with plans which the authorities approve. In by far the larger number of the adjudicated cases the courts have asserted as a principle of the common law that the right of the owner to use his real estate as he pleases is practically unlimited provided that there arises from such use no actual physical detriment or danger to others or an annoyance so tangible or physical as to amount to a nuisance, and that the motive which inspires the particular use cannot be inquired into. See exhaustive brief in L.R.A. Vol. 40, p. 177. Although they have, where the legislatures have seen fit to extend the common law, sustained statutes whose aim has been to restrain and prohibit uses of private property which are palpably malicious and useless in their nature and where no benefit or advantage save that of the gratification of hatred and spite has been reasonably inferable or reasonably possible (see Rideout v. Knox, 148 Mass. 368, Brief L.R.A. Vol. 40, p. 181), they have in the absence of statute, and this even in the case of spite fences, steadily denied the existence of a common law right to light, air, or view which the parties injured by such structures may invoke. See Litts v. Kessler, 54 Ohio. St. 73, 40 L.R.A. 175 and brief L.R.A. Vol. 40, p. 177. They have refused to recognize injuries which cannot be definitely measured and whose existence or non-existence must depend upon the degree of cultivation or taste possessed by each particular judge, jury, commissioner, or community, and concerning which there can be no uniformity of opinion. They have steadily refused to recognize the existence of any aesthetic property rights in such cases either in the owners of adjacent property or in the public at large, and have refused to adopt the idea now so prevalent upon the continent of Europe and which in the past has done so much to beautify and refine the old world, that the cultivation and the preservation of the aesthetic is essentially a governmental function. Though they have been willing to sustain building line and other building restrictions when inserted in the deed and consented to by the parties, and have been willing to look upon such as covenants running with the land, they have

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refused to sanction the enforcement of building line regulations which have been imposed by the public or the municipality when such have been prompted by aesthetic motives merely and have not been grounded upon considerations of public health or safety. City of St. Louis v. Hill, 116 Mo. 527; Bostwick v. Sams, 95 Md. 400. The case abstracted above therefore expresses no new principle of law. It is to be noted also that it does not merely hold that "a man may not be deprived of his property because his tastes are not those of his neighbors," but goes still farther and holds that the collective public even has no right to set up a standard for him. **A. A. B.**

NEGLIGENCE. (**Evidence — Res ipsa loquitur.**) **Md.** — Strasburger *v.* Vogel, 63 Atlantic Reporter, 202, contains a good illustration of the limitations of the doctrine of *res ipsa loquitur*. The action was for injuries to a pedestrian who was struck by a brick falling from the chimney of defendant's house. There was no evidence that the chimney was out of repair, and it was shown that certain persons were on the roof of the house and leaned on the chimney at the time the brick fell. These persons were there without defendant's knowledge, and did not get on the roof through his premises. The court declares that an inference of negligence may be deduced from all the circumstances attendant on and surrounding an accident, if the injuries result from an event not only in its very nature destructive of the safety of persons or property, but also so wrongful in its quality as to permit no inference except that of negligence, but holds that the evidence in this case did not justify a charge authorizing a verdict for plaintiff, unless defendant should show that the falling of the brick was not caused by his negligence.

NEGLIGENCE. (**Evidence — Res ipsa loquitur.**) **N. Y.** — Another decision as to the limitation of the *res ipsa loquitur* rule comes from New York in the case of Duhme *v.* Hamburg-American Packing Company, 77 Northeastern Reporter, 386. The facts in this case were that the plaintiff, who was an infant, was standing with his mother on a pier awaiting the arrival of a transatlantic steamship, and was struck in the face by a steel hawser with which the steamship was being warped to the pier, the accident being caused by the breaking of an iron shackle with which the hawser was fastened to a mooring post. There was no evidence of negligence on the part of defendant except that arising from the sudden breaking of the shackle, and defendant showed that the pier was safe had plaintiff and his mother kept within the shelter thereof as they were warned to do by the defendant's servants, and that the breaking of the shackle was not due to any negligence in handling the hawser or any defect in the material. The court announces that the rule of *res ipsa loquitur*, where the relations between the parties are not of a contractual character, can only operate where there are actually shown such facts and circumstances in the nature of defendant's undertaking and of the accident itself from which the jury are able, if not compelled, to draw the inference of negligence, citing Griffen *v.* Menice, 166 N. Y. 188, 59 N. E. Rep. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630. If the plaintiff were a passenger, that relation would require the exercise of the highest degree of care, and would render the defendant liable for the slightest neglect against which human prudence and foresight might have guarded. This plaintiff, however, is held not to be so circumstanced towards the defendant as that the mere fact of the accident furnished a reason for the inference of negligence, or exempted him from the general rule that negligence must be established, actually or inferentially, from facts proved when charged as a cause of action.

NUISANCE. (**Injunction.**) **U. S. S. C.** — The Chicago Drainage Case, officially known as State of Missouri *v.* State of Illinois, which was decided on demurrer in 21 Supreme Court Reporter, 331, has reached a final decision which is reported in 26 Supreme Court Reporter, 268. It is there held that the discharge into the Mississippi River from an artificial drainage canal of the sewage of Chicago mixed with a large amount of pure water from Lake Michigan, will not be enjoined at the instance of the State of Missouri on the ground that the sewage poisons the water supply, where the evidence tending to show such infection, though disclosing an increase in the deaths from typhoid fever in St. Louis, nevertheless left it doubtful whether the typhoid bacilius can and does survive the journey and reach the intake of St. Louis in the Mississippi, and affirmatively showed other possible sources of infection in the discharge of sewage above the St. Louis intake from other towns and cities, some of which were situated in Missouri.

PROPERTY (**Literary Production.**) **Neb.** — A rather unusual case involving questions of literary property has arisen in Nebraska in a suit by the State *v.* State Journal Company, 106 Northwestern Reporter, 434. It appears that the state entered into a contract with the State Journal Company for the publication of a number of volumes of the Nebraska official reports,

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the contract requiring the printing of a certain number of copies of each report and the delivery of the stereotype plates to the state after these copies were printed. The publishing company, however, secretly and clandestinely printed a large number of extra copies which it sold on its own account, realizing a large profit therefrom, and the state sued to enjoin the defendant from selling any such copies and to require it to deliver to the proper officer of the state all copies so unlawfully printed and for an accounting of the profits. All of these various forms of relief were denied, and the court held that the unauthorized use of the literary production of another furnishes no ground for recovering damages except through the Federal Copyright Laws.

The only relief which the state can hope to obtain is that foreshadowed in the holding that if the defendant in printing the reports for its own benefit unlawfully used manuscripts and other property entrusted to its care to enable it to perform its contract for the manufacture of the specified volumes for the state, the state might recover the value of the use of the state's property and any damage that might have been done to the property in so using it, or if the use amounted to a conversion it might recover the value of the property; but this would not give the state title to the books so unlawfully produced so as to enable it by injunction to prevent the defendant from disposing of the books or entitle it to an accounting of the proceeds of the sales.

TORTS. (Libel — publication.) **La.** — A very remarkable determination as to what constitutes a libellous publication is contained in Martin *v.* Picayune, 40 Southern Reporter, 376. Plaintiff was a physician apparently of high standing in his profession and was a member of a medical society, the members of which were opposed to advertising by physicians and had passed resolutions denouncing that practice. Defendant newspaper learned of a remarkable cure effected by the professional skill of plaintiff, and published a rather glowing account of the case, stating that other physicians had treated the patient without effect, and containing various other laudatory remarks. Plaintiff alleged that this publication, which, though true and obtained from the father of the patient, was not authorized by plaintiff, had a tendency to lead the public and his brother practitioners to believe that he was advertising, and thereby caused them to class him in the category of quacks, who alone, it is alleged, resorted to advertising. Reversing a holding of the lower court that this petition stated no cause of action, the Supreme Court declares that it shows an actionable libel.

This decision is important in that it extends the action for defamation to include cases where damages have been intentionally caused by laudatory or commendatory language. The rule as generally stated is, that in order to recover damages arising from defamation the language complained of must be defamatory in its nature. This is made necessary by the general principle that a defendant is liable only for such damage as is the natural and proximate result of his act. The plaintiff in an action for defamation must, as in any other action of tort, prove that the act of the defendant caused him damage in a direct, natural, and proximate way. He may be aided in such proof by certain presumptions which the law will make, as, for example, where the words are said to be actionable per se. If, however, the words are not actionable per se, he must prove that they caused him "special damage." Special damage is such as naturally and proximately follows from the language published. It is only when words are defamatory in their nature that they can be said to cause damage in a natural and proximate way. If the words are not in their nature defamatory, they cannot as a natural consequence cause loss, and the plaintiff cannot prove the necessary special damage. While it is true that laudatory language does not naturally or usually produce damage, and while in most instances damages resulting from such language would be unnatural and too remote, still it is incorrect to say that commendatory language cannot produce damage. If a plaintiff can prove that laudatory language uttered concerning him has actually caused him damage, in a proximate way, and that the defendant intended such result to follow, it would seem that he ought to be allowed to recover, if not in an action for defamation, then in an action on the case. This is the principle of the above decision. It appears that the defendant knew that publishing the account of the plaintiff's skill in effecting a wonderful cure would create an impression that he was advertising himself, and therefore bring him into hatred, ridicule, and contempt with his fellow physicians, to his damage. Knowing this, the court said it is possible to impute to the defendant an intention or purpose to produce this result, and if he had such intention, he is liable, although he produced the result by publishing commendatory language. The proposition of the case seems to be this: The intentional causing of damage to another by the publication of laudatory language will sustain an action, presumably, for defamation.

E. A. Gilmore.

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THE LIGHTER SIDE

Expert Testimony. — One R—— had procured a liquor license from a Montana county treasurer, without the petition required by law to be filed for licenses of this sort in small mining camps. Under an application for a writ of certiorari the action of the treasurer, in issuing the license, was declared illegal, by the District Court. A petition was made to the Supreme Court for a writ, reviewing the action of the District Court, but the writ was denied.

R—— continued to sell liquor, acting under advice of counsel that the judgment of the District Court was not regular. An information was filed against him in the Justice Court, charging him with selling liquor without a license. In the course of his defense, R——'s attorney put on the stand another attorney who qualified as an expert by testifying that he had *farmed* and practiced law for twenty-five years and was well versed in the law. He was then shown the judgment of the District Court, and asked his opinion as to whether or not it was the proper judgment to render in the case and expressed the opinion that it was not. The jury were evidently impressed, for they found the defendant not guilty, although he admitted the sale of liquor, and the judgment annulling the license was proved.

As an original and simple method of overruling a superior court, this use of *expert* testimony should appeal to those lawyers who frequently find cases *contra* to their theory of a case. It is particularly recommended for use in justice's courts.

One Juror. — " Some years ago while I was residing at Visalia," remarked Attorney William H. Alford, " I was called to Hanford to defend a petty offender in a Justice's Court. The defendant had demanded a jury trial, and we put in half a day trying to get a jury, only to find out at the end of that time that we had one lone juror in the jury box.

" ' Well, I'm willing to try the case with one juror,' said the attorney for the prosecution.

" ' So am I,' I declared.

" And we proceeded with the trial. The arguments were howlingly funny, for the reason that the attorney for the prosecution persisted in addressing the lone juror as ' gentlemen of the jury,' and I succeeded in swelling the jury with a feeling of pride and satisfaction by some timely comment on the self-evident honesty, intelligence, and integrity of the body. I really thought I had that lone juror won. Then the constable led him out to the jury room where he might deliberate with himself. In twenty minutes the jury returned with the announcement that no agreement could be reached.

" ' What! ' thundered the justice of the peace. ' You get back there again and reach a verdict.'

" The jury was out twenty minutes more.

" ' The jury disagrees,' was the announcement when the court asked the lone juryman if he had arrived at a verdict. ' You see, it's like this,' he went on to explain. ' When I consider the testimony of one side I want to find the defendant guilty, and when I consider the testimony of the other witnesses I want to discharge him. I can't agree with myself.'

" And the jury was discharged." — *San Francisco Chronicle.*

Delay Appeared Dangerous. — The most amusing incident that " Ike " Glidden had in his early experiences as a lawyer was when a man from Centreville returned a letter unopened. " Ike " had a store bill against this individual for collection, and wrote him such a letter as lawyers usually send out, demanding immediate payment, and the letter was inclosed in an envelope with the customary printing on the envelope, " If not delivered within ten days return to Isaac Glidden, Blueberry Falls, Me."

The man had not been accustomed to receive much mail matter, and the fact of a lawyer's letter coming to his address almost caused him an attack of nervous prostration, and he was afraid to open it, because it had not reached him within ten days of the date of the postmark.

He hurriedly carried it back to " Ike " unopened, as if there might be a penalty for the delay in not returning it within the ten days.

When he entered the office he said: " Yer honor, I've been in the woods, bark-peeling

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logs, and didn't git yer letter within the ten days, but I came to return it just as soon as I got it."

The lawyer broke open the envelope, read the letter, and asked if he was prepared to pay the bill, and was informed that he would be unable to pay it until the berry season opened. "Ike" was so much impressed with the man's willingness to do right that he told him he would wait for him. — *Boston Herald.*

Could Not Make Him Remember. — At a session of the Superior Court held in Worcester in 1889, the case of Goguen *v.* Ryan was being tried. Ryan's counsel, James A. Stiles, of Gardner, was examining Dennis J. Moran, a painter and paper hanger of Gardner, later of West Fitchburg, regarding a conversation he had with Goguen while doing some whitewashing in the house in controversy.

Moran had evidently made some statements regarding this conversation to Stiles or others that it was desired to have him repeat under oath for the enlightenment of the court and jury. After the preliminary questions Stiles asked the witness if he had a conversation with Goguen on a certain date.

Moran replied, "Yis, sor."

Counsel. — Now, Mr. Moran, will you tell the court and jury what that conversation was?

Moran. — I don't know as I justly remimber.

Counsel. — We don't expect you to repeat exact words.

Moran. — I don't know as I justly remimber.

Counsel. — Tell us the substance of it.

Moran. — I don't know as I justly remimber.

The question was put in several other forms, and elicited the same answer.

The judge, thinking to straighten out matters, took a hand in the questioning, and said, "Mr. Moran, you have said you had a conversation with this man Goguen."

Moran. — Yis, yer honor.

Judge. — Now if you had a conversation with him there must have been something said. Tell us the first thing you remember was said.

Moran looked up at the judge with a smile that was "childlike and bland" and replied, "Well, yer honor, I don't know as I justly remimber the first thing I do remimber was said."

The judge, tired of the proceeding, looked down at Mr. Stiles and said: "Mr. Attorney, if this witness doesn't remember the first thing he does remember was said, its useless to take up the time of the court. Call another witness." — *Boston Herald.*

From the Canada Border. — We submit the following petition for a road, made, signed, and delivered to the selectmen in a Maine plantation next the boundary, not as a precedent to follow, however. It is presumed to mean that the inhabitants were thereby "calling" for the finishing and turnpiking of a certain piece of road, but you can translate it to your own taste.

Here it is:

"Corner (Connor) Platation,"
"Dist. No. 4,
"Feb. 12, 1906.

"The road started from Joseph B. Damboise and Paul Soucie to the other road are call by the habiten to be finish and townparking."

Damages. — A good story is told of a 'Frisco claim agent. An old colored aunty boarded a passenger train out of Jonesboro, Ark., with a ticket for a small flag station down the road, riding in the rear coach. The conductor overlooked her destination; and as the train was running through her station, aunty, discovering it, grabbed her bundle, ran to the rear platform and jumped from the train, alighting squarely on her head. Before the train could be stopped and backed to the place of her fall, aunty had reversed her position and hastened away to her cabin.

The alert and genial claim agent was notified, and at once sought out aunty in order to adjust matters before some rustling lawyer could see her. As he walked into her cabin, he smilingly said: "Aunty, are you much hurt?" "Now, you go long, boss! Dis nigger haint hurt any, but she's powerful 'barrassed," was the reply.

"Well, what damages do you want?" was the query. "Now, see he'ar, massa," said aunty, "Haint I been damaged 'nuff? What yo' want to damage this nigger mo' fur?"

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Sheepskin v. Lion Skin. — A lawyer and a lay friend were discussing a certain local politician who, by grace of his diploma, was also a lawyer; the lawyer expressed an opinion not altogether flattering, saying among other things that "he found no good in him save that he was a slick politician."

"However that may be," said the friend, "he must be a bright fellow; he has the sheepskin of a lawyer."

"Not at all, not at all," said the lawyer; "his sheepskin has no more changed his brains, than the lion's skin of Æsop's fables changed the brays of that other Ass."

THE STATE v. LINKHAW. (69 N. C. 214.)

By Albert W. Gaines

"For disturbance of the public worship,"
So the indictment read,
"Against the peace and dignity
Of the state," it further said.
To which indictment there was filed
Defendant's plea, to wit:
That said Linkhaw had broke no law,
And he should go acquit.

The crime so charged was that the accused,
Lacking musical education,
Sang psalm and hymn with such a vim
He disturbed the congregation.
That when the choir and others all
('Twas one of the devil's wiles)
Had ceased to sing, still Linkhaw's voice
Went sounding down the aisles.

And it was charged and duly proved,
That when Linkhaw elected
To sing at all, the people all
Were curiously affected.
The frivolous folk thought it a joke,
And laughed and were quite gay,
While the devout were so put out
And mad — they could not pray.
The parson, it was duly proved,
Would not give out the hymn,
For fear 'twould draw from Bill Linkhaw
The horrid voice of him.
The presiding elder, too, 'twas said,
Most positively refused
To come, for fear that he would hear
The voice of the accused.

The defendant proved himself devout,
And that, though sinful clay,
Himself he found in conscience bound,
To sing as well as pray;
Moreover, the constitution,
Aside from moral qualms,
Did guarantee his worship free
In singing hymns and psalms.

The jury found against the accused,
That he, in his devotions,
Lest he disturb, must gently curb
His musical emotions;
That he his worship could maintain,
But, like the curfew's ring,
Though he could shout and be devout,
That *Linkhaw must not sing.*

But 'twas held by the court of last resort,
To which the case then went,
That in Linkhaw the judges saw
No criminal intent;
And that, although the proof did show
That Linkhaw's voice was awful,
The judges found no valid ground
For holding it unlawful.

And so in North Carolina now,
Regardless of church or creed,
The right inalienable to sing
Is fully guaranteed;
And from the Smokies to the sea,
Wherever the church bells chime,
The people cling to the right to sing,
Without committing a crime.

Chattanooga, Tenn.

An Amateur. — The Chicago drummer who was arrested for assaulting the landlord of a South Dakota hotel found that there was only one lawyer in the village, and that he had already been retained by the plaintiff. In this emergency he demurred to being tried, as he was not lawyer enough to plead his own case, but the justice of the peace calmly replied:

"This court will see that you have all your rights. Anybody seen Jim Peters around here?"

"He's outdoors," answered someone.

"Then call him in."

Jim turned out to be a long and lathy farmer's hired man, and not at all bright

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looking, and as he entered the room his Honor queried:

" Jim, which end of the cow gets up first? "

" The hinder end, sir."

" And a horse? "

" The fronter end."

" All right. This drummer has given Joe Harris a black eye and wants a lawyer to prove that Joe ran ag'in the door casing and blacked it himself. I'll app'int you as his counsel."

" But I'm no lawyer."

" But you've got common sense, as you've just proved, and that's better yet. Go right ahead."

Jim went ahead, and in ten minutes he had the other side so tangled up that his Honor laid his spectacles aside and said:

" No use to go any further. There may have been a row, and probably there was a row, but Jim is getting ready to prove that the landlord was out in the barn and the drummer across the street, and there's no use taking up the time of this court. I'll divide the costs, and the parties had better shake hands, while, as for Jim Peters, he's a rising star that will continue to rise until it won't be considered no crime around here to jump another man's claim." — *Fargo Forum.*

Poetic Justice. — The validity of a will of an estate involving several hundred thousand dollars was submitted to a Federal jury in Boston not long since, and after a long trial a disagreement was reported. One juror had stood out. There was no doubt that it was a case of conscience, for he prayed in the jury-room for divine assistance, but his German mind was unalterably fixed. Some light on the occurrence may be shed by the following verses composed by him to give vent to his feelings.

He called them " The Swan Song of the Jury ":

Our task is done —
We chiselled our names (in frailty of natural men with good intentions)
Upon the fortunes of warm beating hearts;
We blighted hopes, we crippled desire,
From slough we raised despair to faith in justice.
In God we trust. He may forgive our errors
And count to our merits our watch of truth.

Shake hands, my friends — colleagues of fray and combat.
Blacked veil, the fates; and curtains sable cover their mirrors,
But dim visions still we snatch of mysteries unclouded.
We may — may not, meet in this world again;
If meet we do, let's meet as men with conscience free and heads erect,
And not in fear of judge or jury in the world of heaven.

Limit to his Jurisdiction. — Judge Johnson, a retired judge of the District Court at Blackstone, was elected selectman of the town. The town appropriated money each year for concreting a certain amount of sidewalks, the abutters to pay half the cost of the work.

One day the judge became involved in an argument with one of the abutters, and losing his temper, told him to " go to h—l."

" Say, judge, ain't you going out of your jurisdiction? I thought Worcester was as far as you could send any one," the abutter replied. — *Boston Herald.*

Golf Suits. — While playing golf an Edinburgh gentleman was struck on the head by a ball driven by a perfect stranger. Having recovered, and lost sight of the million or so stars which appeared before him at the moment, he haled the furious driver before the sheriff. The latter, however, dismissed the action. As far as we can see, the sufferer's only remedy is to wait till the other is holing out just in front of him, and then, with a cheery cry of " Fore! " pick him off. Little differences like this should be adjusted on the links, not in the law courts. — *London Globe.*

Fined the Dead Man. — The judge's decision in a case settled a few years ago in Millinocket, Me., probably will not serve as a precedent, but no exception to it was reported.

An Italian laborer was killed while at work on a dam at the pulp mills. At the hearing

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before the local justice there was found in a pocket a roll of bills containing $25, and hidden in one of the boot legs was found a dirk knife.

As there was no probate court within many miles of the town, the judge was at a loss to know what disposal should be made of the money. Finally he hit upon the solution. The court took charge of the money and fined the corpse $25 for carrying concealed weapons. — *Boston Herald.*

A Tough New Hampshire Juror. — Possibly the civic conscience was less sensitive in times past than it is to-day, in spite of frenzied statements to the contrary. At any rate, the following story is told of a tough old citizen of Lee, N. H., who was drawn on the jury some decades ago. The case was a capital one, and when it became time for the jury to decide the old man was much puzzled.

" Vote," exclaimed he, in great excitement, " why, I don't know how to vote! Who picked me, who picked me, anyway? Which side shall I vote for? " — *Boston Herald.*

Curiosities of Law. — An Australian detective died in April, dividing a $35,000 property into six shares. These divisions were specified in writings, placed in sealed envelopes, the six heirs drawing them with no clew to the contents.

Baron Rothschild was named sole beneficiary under the will of a Nice miser, Abraham Fidler, who left him $550,000 on the principle that " money must seek money." The baron hunted up the relatives of the departed and gave each an equal share.

" This, the last will and testament of me, John Thomas," read a certain document in Montreal, last July. " I give all my things to my relations to be divided among them the best way possible. N. B. — If anybody kicks up a row he isn't to have anything."

In a lawsuit at Aberdeen, Wash., over a horse whose death the owner attributed to a man who had hired it, the court decided the animal had committed suicide.

Traced by the impression of his teeth in a half-eaten apple, left in a house at Basle, Switzerland, a burglar has confessed and been sentenced.

In May the famous Stevens *vs.* Smith " Cow Case " was closed in Colorado, with a total of $2500 attorneys' fees, plus court charges. The cow, worth only $30 in the first place, has been dead fifteen years.

Rudolph Maher, a New York civil engineer, was uncivil enough to hug Miss Gladys Chapman, overlooking the fact that he did not know the lady. The magistrate thought the embrace worth six months " on the island."

Because a revolver, which he had purchased to kill himself, missed fire, Paul Schlardum of San Bernardino brought suit against the hardware company for the price of the weapon.

Dying in poverty in a San Francisco hospital, Luscomb Seares received word that the British government had just allowed his claim of $5,000,000 arising from losses during the Boer war.

In October, Mrs. Ella Goltz of Portsmouth, O., swore out a warrant for a circus elephant which had eaten her gold watch and smashed in a brand new Paris hat.

A Cologne dairymaid was arrested for bathing herself daily in the milk she later sold.

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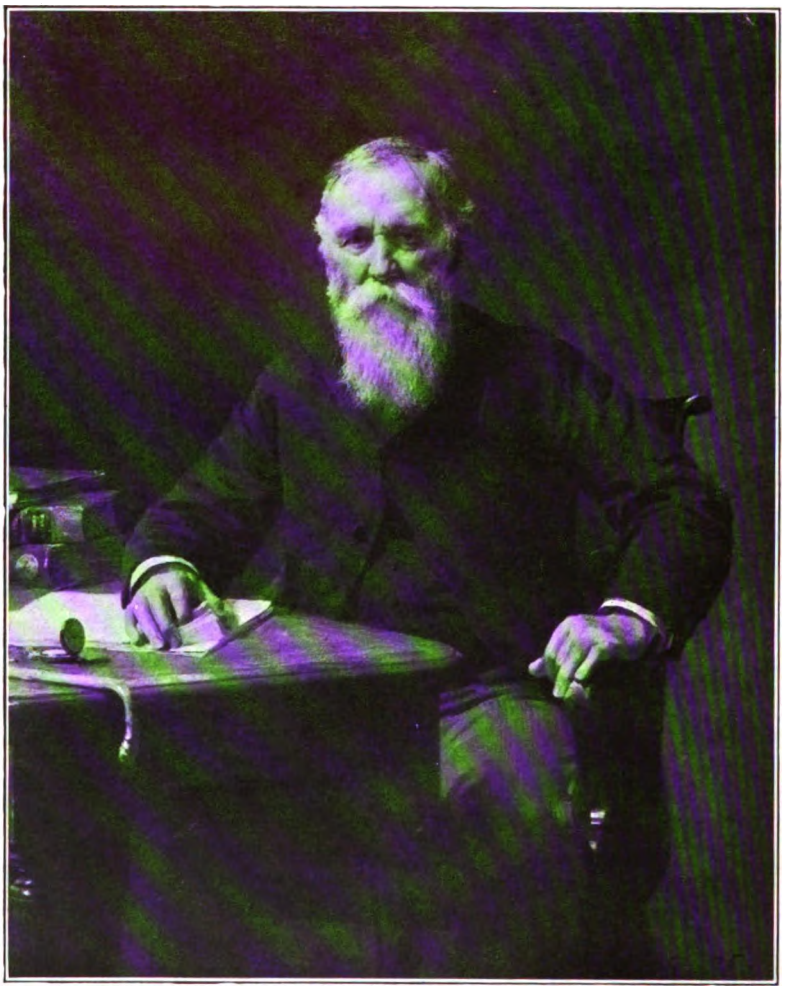

C. C. Langdell

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The Green Bag

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CHRISTOPHER C. LANGDELL

By Samuel F. Batchelder

At the Harvard Law School in the late sixties things were going pretty comfortably. That great triumvirate, Parker, Parsons and Washburn, were still the instructors. One of them lectured for a couple of hours every day. The list of text-books they covered each half-year — some twenty-five or thirty in each course — was rather appalling to a conscientious student who tried to read them all. Very few tried, and fewer succeeded. The lectures were quite enough. Such of the students as attended them and did not read a newspaper meanwhile might hear in a pleasant, informal way the rule of law on almost any given point. Such of them as attended, or at any rate paid their term-bills, for eighteen months, received the LL. B. as a sort of reward of constancy. To an occasionally expressed doubt of the actual legal ability represented by such a degree the answer was ready: "Can't you take the word of a gentleman that he has learned the law?" To the same effect was the weight of authority and respectable antiquity. There had been no advance since the sapient Dr. Johnson, a hundred years before, observed, "that academical honors, or any others, should be conferred with exact proportion to merit, is more than human judgment or human integrity have given reason to expect. Perhaps degrees in universities cannot be better adjusted by any general rule than by the length of time passed in the public profession of learning."[1] What matter if to the bulk of the legal profession these "graduates" were known as "Law School Pills"? What matter if the number of students, though fluctuating, had long averaged about one hundred and forty only? What if many of them were mere raw boys, with no college or other proper training for their work? What if the grotesque remains of the law library were little more than an open quarry whence any visitor might purloin any volume he chose — provided he could find it? What if the new president's first visit to Dane Hall in 1869 was a nine days' wonder, almost an intrusion? Did not the fame of Story, Kent, and Greenleaf still give the School a national reputation? Had not Parsons also, and Washburn, made brilliant names as writers of text-books — those foundations of all law? Were not the lean years of the School during the war safely passed? All in all, things were going pretty comfortably.

But comfortable days are fleeting, even in a law school. At the end of the decade Parsons, graceful lecturer, polished litterateur, full of years and honors, resigned. The chair founded forty years before by old Nathan Dane, whose desire for "the scientific study of the law" had been so well forgotten, now stood vacant. What distinguished jurist could worthily fill it? Curiosity battled with astonishment when it was announced that on Jan. 6, 1870, the Corporation of the University, at the instance of President Eliot, had appointed Christopher C. Langdell Dane Professor of Law.

Who was he? Few could remember even the name. A searching of old college catalogues revealed it among the undergraduates in the sophomore class of 1848 and the junior class of 1849. Also he appeared to have been for three successive years, 1851–

[1] A Journey to the Western Islands of Scotland, p. 24.

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54, in the senior class of the Law School and its librarian. He had not received the A. B., but an LL. B in 1853. He was unknown to the Boston bar, though it was understood he had practised in New York City. He had held no public station. He had made few friends in Cambridge. And he had published no text-books!

His mates in the class which entered Phillips Exeter in 1845, however, could tell of him. He was then a robust lad of eighteen. His home was in the low one-storied house of a small farm on the poorest soil of the town of New Boston, just west of Manchester, New Hampshire. From his father, John Langdell, he could trace through three generations of hard times on that farm back to a great-grandfather who came to Beverly, Massachusetts, from the old country, bringing with him a bride from Londonderry. His mother, Lydia Beard, was of the canny, hardy Scotch-Irish stock that bred our best New England blood. Young Christopher, one of a small family, had smaller advantages. He got what early local schooling he could and entered Exeter rather older than most. He was a typical farmer's boy, bashful, awkward, sturdy, but already wearing strong spectacles. Plainly too he was very poor. He lived with two chums in the humblest room to be found. He swept the Academy floors, and like Jared Sparks before him he rang the Academy bell. He obtained help from a scholarship, or "went on the foundation." The masters liked him, for when the spirit of mischief was abroad he stood for the honor and good name of the school. So did the boys, for he had a keen sense of fun and a big, rousing laugh. He was elected a member of the famous old literary and debating society, the Golden Branch. Though a hard student he was not a brilliant one. He possessed, as he afterwards said of himself, "the virtues of a slow mind." Yet in three years he had not only fitted for college but anticipated the studies of freshman year.

Entering Harvard, therefore, as a "fresh soph," with studious habits, bad eyesight, and slender means, he was little known in the class of '51. Green, its marshal when it took part in the great parade to celebrate the "turning on" of Cochituate water in Boston, noticed Langdell's absence from the march, and next day took him to task. "I preferred to study," was the simple reply. A few, older than their years, appreciated his intellectual gifts and his personality, so charming when once his reserve was broken through. They used to engage him in long expositions and discussions, memorable in after years. For the most part, however, he lived alone, perfecting his reasoning powers as quietly and as patiently as the diamond-cutter perfects one by one the facets on the gem that, completed, will dazzle the world.

He did not return for his senior year nor for graduation, being compelled to replenish his resources by a year of teaching. Already he had decided to study law, and again he had anticipated the elementary work; for in November, 1851, he entered the Law School in the senior class. Parker, Parsons, and Greenleaf, then all recent appointees, were his professors. Again he worked his own way. He obtained the position of student librarian by virtue of which he lodged in one of the small rooms on the upper floor of Dane Hall. He assisted Parsons to collect the material for his great work on contracts. Did he then plan, we may wonder, a greater work on contracts, by himself? Could he have foreseen that he should one day take the chair of his instructor? Was it from pondering the wish of the founder of that chair that he became convinced that the law is a science?

That was the conviction, at all events, that gradually took possession of the shy young law student — the pivot on which a whole system of legal instruction was later to be swung aside into limbo. To his cronies he would dilate on this conviction with all the strength and fascination of his budding powers. Law was a science — a branch of human reasoning co-ordinated, arranged, and systematized — not a kind of mental

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handicraft. Only as a science did it deserve a place in the curriculum of a university, as had always been recognized on the continent; and only as a science could it be properly taught. At least one of his listeners has told how, standing before the fireplace at dusk, young Langdell would expound the scientific basis of law, totally forgetting in his intellectual enthusiasm the frugal bowl of bread and milk he had prepared for his physical supper. His little clique of admirers told each other that here was a genius. And for once a little clique of admirers was right.

He took his LL. B. in 1853, but continued another year at the School, a sort of graduate student and assistant to Parsons. Still he lived in the library by day, and still by night his lamp burned till near the dawning. He was indeed "seeking the fountains" of the law. He browsed among the reports as a hungry colt browses among the clover. The year-books in particular enthralled him. A fellow-student in the library recalls his sudden fervent ejaculation, smiting his knee, "If I had only lived in the days of the Plantagenets!"

In 1854 he received the usual honorary A. M., and having saved enough for a start into practice, he determined to enter the field in New York City. But the sensitive, spectacled student found at the very outset of court work that the acutest legal mind, unsupported by practical legal experience, is no match for the tricks of the legal sharper. A quick succession of discomfitures from such gentry was too much for his pride. He flatly and finally withdrew from the court-house and gave himself up to office work and research. Constantly in the law library he there made the acquaintance of members of the bar, who, though acknowledged leaders, were not quite at home on various theoretic or historic points they happened to stand in need of. Quickly they recognized his profound acquaintance with the reports, his unerring application of legal principles and his almost startling foresight. As quickly they began to employ him for the preparation of briefs, opinions and pleadings. He worked largely for the Hon. Charles O'Connor. He was unheard of by the rank and file of the bar, but when the triumphant advance of opposing counsel was turned to a rout by a sudden pitfall in the pleadings or an unexpected ambush in the argument, the well-informed would mutter, "D—n it, Langdell's at the bottom of this somewhere!"

Later he formed a partnership, largely for commercial law, with William Stanley and Addison Brown, afterwards United States District Judge, with counsel of Hon. Edwards Pierrepont, afterward attorney-general of the United States and minister to England. Langdell was only the modest, quiet student, always in his office, always at work, living frugally, and outside his immediate professional circle unknown.

But when the Dane professorship at Harvard became vacant the great head of the University, who had known and appreciated Langdell in undergraduate days, sought him out for the chair. Himself a scientific man, he was ready to subscribe to the proposition that the law is a science. He accepted, too, the corrollaries — that law must be studied from the original sources, namely, the reports, and must be taught by men who have so studied it, irrespective of their practice of it — as geology is better studied on the hillside than in the parlor, and better taught by a geologist than by a stone-mason.

So Langdell came to teach at the Law School as a king comes into his own. His first term, the spring term of 1870, was not memorable. He lectured on Partnership and on Negotiable Paper. But he was busily collecting his cases on contracts, and in the autumn had the first advance sheets ready for his course. Their publication, and an inkling of what they implied, fell on the legal community like a bolt from the blue. Teach law by cases? Preposterous; also unheard-of! Some folks might practice law that way; no one could teach it! Besides, it would never do to bring the methods of the office into the lecture room. More-

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over, the cases were obscured by countless extraneous facts and confusing details. The law, pure and undefiled, was not in them. Now Co. Litt., or Justinian, if you liked. . .

Simultaneously with the publication of "Cases on Contracts" two other bombs fell into the ranks of the old guard. The scientific man at the head of the University put this scientific man at the head of the Law School, creating for him the position of dean! And both these scientific men, exact investigators, proposed that the attainments of all students should be exactly investigated before being certified by a degree! The prospectus of the school for 1870–71 contained for the first time the strangely disquieting announcement that "examinations, of a thorough and searching character" would be held at the close of that year. "Each instructor," further said the prospectus, "will adopt such mode of teaching the subjects of which he has charge as in his judgment will best advance the pupil in his course." Thus was the new system officially baptized and received into the university fold.

The day came for its first trial. The class gathered in the old amphitheatre of Dane Hall — the one lecture room of the School — and opened their strange new pamphlets, reports bereft of their only useful part, the head-notes! The lecturer opened his.

"Mr. Fox, will you state the facts in the case of Payne *v.* Cave?"

Mr. Fox did his best with the facts of the case.

"Mr. Rawle, will you give the plaintiff's argument?"

Mr. Rawle gave what he could of the plaintiff's argument.

"Mr. Adams, do you agree with that?"

And the case-system of teaching law had begun.

Consider the man's courage. What would be said to-day if some obscure lawyer from a distant city, without even his college degree, should arrive at the school and to its distinguished staff say in effect, "Your teaching is all wrong — inefficient, second hand, obsolete. I have a new method that in the course of a generation or so will put your lectures about on a par with those of the University of Pekin!" Moreover, a change of instruction at the Harvard Law School to-day would be backed with ample funds, aided with every modern device, received with the open mind of the truth-seeker, and tried by a phenomenally able corps of teachers on a picked body of students whose intellectual average probably exceeds that of any other body of students in the world. Langdell had none of these advantages. He was experimenting in darkness absolute save for his own mental illumination. He had no prestige, no assistants, no precedents, the slenderest of apparatus, and for the most part an unpromising *corpus vile*. He was the David facing a complacent Goliath of unshaken legal tradition reinforced by social and literary prejudice. His attempts were met with the open hostility, if not of the other instructors, certainly of the bulk of the students. His first lectures were followed by impromptu indignation meetings. — "What do we care whether Myers agrees with the case, or what Fessenden thinks of the dissenting opinion? What we want to know is: What's the *Law?*"

Did the new lecturer himself know the law? He apparently took back in one lecture what he had said in the last. Young Warner, a keen logician (and one of the first converts to the new system) cornered him squarely one day, amidst a hurricane of derisive clapping and stamping. Would it be believed, "the old crank" went back to the same point next day and worked it out all over again! Most of the class could see nothing in his system but mental confusion and social humiliation. They began to drop away fast.

A little group, the ablest men of the class (most of the names have been mentioned above), — "Kit's freshmen" they were dubbed — discerned there was something here better than the text-book lectures,

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and stuck to the ship. They were finding out how the law was made, and the reasons for it, and how it was applied in actual practice. The lecturer was working it out for himself with them. Every step of the reasoning was scrutinized and tested and re-examined till proved right or wrong. The law was being taught as a science, not as a rag-bag of rules and exceptions. In the happy phrase of Professor Gray, the language of the law was being taught, not from the artificial grammar, but from the natural translation. The rest of the class were apparently hoping for a quick arrival of the millennium, when "the law," being fully "known," there would be no need of cases in the courts to decide it.

Then came the new and dreadful ordeal of the examinations. Better than pages of description, the questions on the papers show the difference between the systems. The old professors called wholly for definitions and rules:—"When and by what statute were lands made alienable in England after the conquest?"—"What is the difference between an action of trespass and an action of trespass upon the case?" The new Dean presented actual problems for solution:—"If A contract with B to serve him one year at so much per month, and at the end of six months' service he dies, will his representatives be entitled to recover against B for the six months' service; and if so, how much and upon what principle?"—"If a debtor tender to his creditor the amount of the debt on the day it becomes due, and the creditor refuse to receive it, and afterwards sue the debtor, how should the latter defend himself?"

Dismay filled the School. What chance now of learning what the law was? The number of students began to diminish. Undeterred, Langdell took his next step in the development of the system, and carried the appointment of one of its earliest graduates, J. B. Ames, LL. B, 1872, as Assistant Professor of Law, in 1873. Here truly was fresh fuel! How was a young man, without the least practical experience, to teach the law? Dark predictions were in the air. Lawyers of high rank and unquestioned discernment said openly that the School was being ruined. A large and prosperous school was opened in Boston, its instructors chosen from the ablest practitioners of the day, with the avowed purpose of continuing the old, safe-and-sane text-book method. Professor Washburn, a man of great reputation and influence, universally beloved, resigned in 1876 — the last survivor of the old corps.

Keenly as Langdell's nature suffered under each new blast of discouragement his invincible perseverance, which alone had carried him through his student days, carried him through these as well. Sensitive but undeviating as the compass-needle amidst impending shipwreck, he went straight forward. He knew he was on the right track. And a few others knew it, among them the illustrious band of new teachers he had gathered around him. The brave, sagacious president of the University knew it, and steadfastly upheld the hands of this new prophet. The case system, far from being abandoned, was improved and extended. For a time, recent graduates of the School had been employed as private tutors to tide over the laggards from the old channels to the new. The prospectus for 1878 announced that the regular course would thereafter require three full years. The library, meantime, as the source of all law, was jealously fostered. A skilled and enthusiastic librarian had already been appointed. Langdell himself, like Story of old time, deposited his own rare collections there. The administration of the School became a marvel of economy, foresight, and judgment. Not in vain had its Dean early learned the lessons of thrift and method. The average ability of the student body was vastly increased by the requirement that either a college degree or a special examination should be necessary for entrance. The graduates of the new system began to take high rank in the profession, as their numbers grew and time gave them opportunity.

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Through the generosity of Edwin Austin, the second father of the school, a stately and commodious building arose to receive its growing numbers. The staff of instructors was augmented — men of the highest attainments, who refined upon the system to a point undreamed of. Case book after case book appeared, not mere manuals of sailing directions for the voyager on the ocean of the law, but the buoys and beacons themselves, by which he may pick his way through the tortuous channels to a definite anchorage.

The case system, at first a local matter, assumed national and even international legal importance. The reviews teemed with articles attacking and defending it. Law schools based upon it arose throughout the country. It was advocated by zealous supporters among the bar and the universities of England. Its enthusiastic graduates, at a memorable gathering in 1886, organized the Harvard Law School Association. The *Harvard Law Review*, its "official organ," came to the front rank among legal periodicals. The School, in spite of a constantly rising standard, has already completely outgrown its new quarters. And long before the founder of the system retired, in 1900, from active participation in it, it stood an assured, approved success.

Prof. Langdell's failing sight prevented him from much extension of his own teaching work. The courses on contracts and on sales, based on his "Selection of Cases" for each, published during the first years of his connection with the School, he entrusted later to other members of the faculty. The subject of equity — jurisdiction, pleading, and practice — had a special fascination for his profoundly analytical and logical mind. He continued to give two courses, based on his "Cases in Equity Pleading" and "Summary of Equity Pleading," till the close of his work. His "Brief Survey of Equity Jurisdiction," published the year before his death, perhaps comes nearer the ideal of a scientific legal work than any other. His last contribution to the *Law Review* was published only a few months before his death — an article on Dicey's "Law and Public Opinion." This kindly and judicious criticism, actually involving great labor, called forth from the distinguished jurist the warmest expressions of appreciation. Langdell's legal style indeed was admirable, comprehensive yet condensed, minute yet clear, vital and characteristic as the spoken word.

His private life was as serene as the steps of his own logic. He was a regular attendant at Old Christ Church, hard by the school, and had a steady, unobtrusive interest in parish affairs. His tastes were simple and fine. He was singularly free from cant and catchwords. He was a keen judge of men. His friends once made were always kept. For them was reserved the play of his delightful wit and the affection of his tender almost feminine nature. He was devotedly fond of children. He enjoyed the society of ladies, though never a "ladies' man." September 22, 1880, he married Margaret Ellen Huson, the beautiful and spirited daughter of a deceased clergyman, at Coldwater, Michigan. He first met her while she and her mother were visiting in Cambridge the previous year. Mrs. Huson made her home with them, and a more lovely and tranquil household would be far to seek.

It may be doubted, indeed, whether his last years were not his happiest. Though the light of the body was failing him, the brilliancy of his wonderful mind seemed only to increase. Always full of intellectual interests he now had leisure to speculate on the deepest legal questions and systematize them to his satisfaction. True friends cheered him. Ardent admirers sat at his feet. The University heaped its honors upon him. His A. B. had long ago been given him, as of the class of 1851. He was simultaneously honored with the LL. D. by both Harvard and Beloit. He was created emeritus professor upon his retirement in 1900. Three years later the Langdell Pro-

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fessorship of Law was endowed — the only chair named from a member of the University while still living. The new building of the school now rising is already named Langdell Hall.

And quietly as he had lived he passed away, his great work done, and Harvard lost one of the most potent and picturesque leaders of its history.

BOSTON, MASS., July, 1906.

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A PHILADELPHIA LAWYER IN THE LONDON COURTS

IN THREE PARTS, ILLUSTRATED BY THE AUTHOR

By Thomas Leaming

PART I

ACTORS on a holiday go to the theatre. The London bus driver, when he gets a day off, will pay his fare to see another fellow drive. So, an American lawyer on his holiday abroad is apt to gravitate to the London Law Courts and there be tempted to investigate the almost unknown life of his English brethren.

Professional life in England is highly specialized and governed by many peculiar customs and an elaborate etiquette. An outsider can hardly hope to master the subject. He can only record his observations.

The Law Courts.

Leaving the busy Strand at Temple Bar and entering the Law Courts Building one plunges into that vast establishment where the disputes of millions of British subjects are settled by law, for here the whole Kingdom begins and ends its legal battles — except some cases tried on circuit and those minor matters which go to the County Courts or the very few which reach the House of Lords.

The visitor, strolling through the lofty gothic hall and ascending one of the staircases, finds himself in a long vaulted corridor — sombre and quiet — which runs around the building. There are no idle crowds and no smoking, but, curiously enough, frequent refreshments bars occupy corners where drink as well as food is dispensed by vivacious barmaids. Here and there a uniformed officer guards a curtained door, through which may be had a glimpse of a court room, but no sound escapes, for there is a second glass door and curtains. Groups of litigants and witnesses await their turns, or emerge with flushed faces and discuss their recent experiences before returning to the roar of London. Barristers pace up and down in wig and gown, or retire to a window seat for consultation with the solicitor retaining them.

A mere sight-seer, having thus visited the Courts, passes on, but as the administration of law, from the Lord Chancellor to the "bobby," is the thing best done in England and commands the admiration and imitation of the world, the courts deserve more than a casual visit.

Passing one of the officers and the double curtained doors, one enters a rather small court room, quite lofty, with gray stone walls paneled in oak, subdued in color and well lighted from above.

The judge's bewigged head, as he sits behind his desk, is about twelve feet from the floor. At his left stands the witness at the same level, having reached the witness-box by a little stairway. At the judge's right are the jury, seated in a box of either two rows of six or three rows of four, the back row being nearly on a level with the judge. In front of the judge, but so much lower as to be obliged to stand on his chair to whisper to his lordship, sits his "associate," in wig and gown, whom we would designate as Clerk of the Court.

In front of the Associate, at the floor level, is the "solicitor's well," where sit on the front row of benches the solicitors, in street dress — usually in frock coats, and carrying top hats and little satchels of papers — with their backs to the barristers, requiring a somewhat awkward turning for consultation.

Then come the barristers — all in wig and gown — seated on wooden benches, each row with a narrow desk constituting the back of the seat in front, for the benches slope steeply. The desks are supplied with ink wells and the inevitable quill pen. The barristers keep their places until their cases

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are reached and try them from the same seats, so that there is always a considerable professional audience. The public have little accommodation — usually a few benches back of the barristers and a gallery.

A Jury Trial

At a jury trial the solicitor, whose client is the plaintiff or defendant, sits on the front bench in the solicitor's well. He has prepared the case and knows its ins and outs, as well as the personal peculiarities of the parties and witnesses who will be called. But he is unable to take any part in the trial and can only communicate an occasional suggestion to the bewigged barristers he has retained, by craning his head backward to the leader behind him. This leader is a newcomer into the case. He is a K. C. (King's Counsel) who was retained by the solicitor upon payment of a guinea followed by a large "agreed fee." He leaves the "opening of the pleadings" to the junior immediately behind him again. This junior has handed over the preparation to his "devil" who is seated beside him.

Thus the four men engaged on a side, instead of being grouped around counsel table, as they are in America, are seated, one in front of the other, at different levels, rendering impossible a general consultation upon some unexpected situation suddenly arising. Two men engaged in the case who know much about it have no voice in it, for the devil is necessarily as mum as the solicitor, nor does his name even appear in the report of the trial. How this comes about requires some acquaintance with the definitions of the fields of activity of the barristers and solicitors engaged in the cause.

Barristers and Solicitors

The line which separates solicitors from the Bar — the barristers — is difficult for an American to fully appreciate, for in his country it does not exist. The solicitor or attorney is the family or corporation man of law business. To him the party contemplating litigation must first go. The solicitor guides his conduct by advice in the preliminary stages, or, occasionally, retains a barrister for an opinion upon a concrete question of law. The solicitor conducts all the negotiations or threats which usually precede a lawsuit. If compromise is impossible he brings suit and retains a junior barrister; the amount of the fee being stated on the back of the brief and the brief consisting of a written narrative of the controversy, with copies of all papers and correspondence — in short the facts of the case prepared. It is engrossed or typewritten on large sized paper with very broad margins for notes and is folded once only and lengthwise so as to make a packet fifteen by four inches.

The junior barrister usually has a "devil," and generally the same one, if he is making over £1000 a year. The devil is also a barrister, a young one in wig and gown, who serves without compensation and without fame — for his name does not appear — often for from five to seven years. He studies the case, sees the witnesses, looks up the law, and generally masters all the details, so as to supply the junior with ammunition.

Before the trial the junior has one or more "conferences" (all paid for at so many guineas) with the solicitor, occasionally even sees the party he is to represent, and, more rarely, an important witness or two. The devil sometimes is present, although his existence is in general decorously concealed from the solicitor.

If the solicitor, or the litigating party, grows nervous, or hears of the other side's having taken in more distinguished counsel, the solicitor retains a K. C. as leader. Then a "consultation" ensues at the leaders' chambers between leader, junior, solicitor, and, sometimes, devil.

At the trial the junior merely "opens the pleadings" by stating, in the fewest possi-

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ble words, what the case is about — that it is an action for breach of promise of marriage between Smith and Jones, or to recover upon an insurance policy for a loss by fire — and resumes his seat. Then the leader — the great K. C. — really opens the case, at much length and with more detail and argument than would be good form in an American Court. He states his side's contention with particularity, reads

make the closing speech to the jury. In this way a busy leader may have several trials going on at once.

The junior then proceeds to examine the witnesses with the help of an occasional whispered suggestion from the solicitor who is more than ever isolated by the departure of the leader. And the devil is proud when the junior audibly refers to him for some detail.

CORRIDOR, LONDON COURTS

documents and correspondence (none of which have to be proved unless their authenticity is disputed, which the solicitors have long ago threshed out between themselves) and even indicates the position of the other side while arguing its fallacy. Having done this, he lets the junior call the witnesses — more often he leaves the court room to take the same part in another case, and returns only to cross-examine an important witness for the other side, or to

If the leader is absent, which frequently happens, notwithstanding his fee has been paid, the junior takes his place — as no case is deferred by reason of counsel's absence — while the solicitor grumbles and more devolves upon the devil.

Occasionally, indeed, both leader and junior may be elsewhere and then is the glorious opportunity of the poor devil who hungers for such accident; for he may open and examine and cross-examine, and, if

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neither his junior or his august leader appear, he may even close to the jury. The solicitor will be white with rage and chagrin, wondering how he shall explain to the litigant the absence of the counsel whose fees he has paid, but the devil may win and so please the solicitor that next time he may himself be briefed as junior. This is one of the things he has read of in the lives of the Lord Chancellors.

The devil is in no sense an employee or personal associate of the junior — which might look like partnership, a thing so abhorrent as not to be permitted. On the contrary, he often has his own chambers and may always himself at any time be retained as a junior, in which event his business takes precedence of his duties as a devil. He then describes himself as being "on his own."

Therefore a solicitor's clients are the actual litigants while a barrister's are exclusively solicitors. They are not his colleagues. When he speaks of his clients, he means solicitors only. He can never be consulted nor retained by the litigants themselves. He never goes beyond his dingy chambers in the Inns of Court, where, guarded by his faithful clerk, he either wearily waits for solicitors with their briefs and fees, or, more likely, gives it up and goes fishing, shooting, or hunting. And this furnishes the market for the alluring placards one sees in the Inns of Court; "Name up and letters forwarded for £5 per annum." But if success awaits him, then there lies before him great pecuniary rewards, fame, and perhaps a judgeship, or possibly an attorney-generalship, both of which, unlike their prototypes in America, mean very high compensation, to say nothing of the honor and usually accompanying title. Ordinary judges are paid £5000, the Lords of Appeal £6000, the Chief Justice £8000, and the Lord Chancellor £10,000. The Solicitor General's salary is £6000 with fees amounting to about £4000, while the Attorney General has a salary of £7000 and fees of about £6000.

The solicitor, on the contrary, is a business man, not thinking of fame nor worrying because he cannot become Attorney General or a Judge. His mind is intent upon the pounds, shillings, and pence of his calling. He may seek business, which the barrister cannot do. He is something of a banker and often a promoter. Some solicitors, especially at Liverpool, are admiralty men, others are adepts in corporation organization and litigation and there are many other specialties; some are of the highest grade — particularly those employed by big companies or by families with large estates. The great solicitors of London are capital lawyers, have enormous businesses, requiring a staff like a modern bank, and enjoy handsome incomes, besides being men of much importance. Other solicitors are of a much lower class and seek business of a more or less disreputable character by devious methods. All, however, are educated as lawyers, have passed strict examinations, and are amenable to a severe discipline for questionable practices.

Solicitors often becomes barristers — sometimes eminent ones, for they have had an opportunity to study other barristers' methods and have acquired a knowledge of affairs. Of course they must first retire as solicitors and enter one of the Inns for study. The late Lord Chief Justice of England began his career as an Irish Solicitor. And it is quite usual, as part of the training of a young barrister, to put him in a solicitor's office for a year.

But the old, broad lines persist; gentlemen's sons enter the Army, Navy, Church, or Bar — *i.e.*, become barristers — and this does not include becoming solicitors.

It would be a mistake, however, to conclude that the Bar is an aristocratic body. On the contrary, some of its greatest ornaments are self-made men of the humblest origin. The best names of England are to be found, side by side, with quite unknown ones, and with East Indians, South Africans, Hebrews, Dutchmen, and what not — all on

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an equality. It is a republic where brains and character count. And, as an evidence of this catholicity, the fact may be noted that an eminent member of one of the Inns, who has for some years been in active practice as a barrister, is an American citizen.

THE CHANCERY AND COMMON-LAW BARS

The Bar is divided into two great hemispheres — the Common-law and Chancery Bars — for a barrister does not try both kinds of cases as in America. The solicitor knows whether he has a law or equity case in hand and takes it to the appropriate barrister. Common-law barristers have their chambers chiefly in the Temple, chancery men in Lincoln's Inn, and the two kinds of barristers know little of, and seem even to have a kind of contempt for, each other. So, a common-law barrister passes his life in jury trials and appeals; whereas a chancery man knows nothing but courts of Equity, unless he follows a will case into a jury trial as colleague of a common-law man to determine an issue of *devisavit vel non*. And there are further specializations — although the division is not so marked into probate, divorce — or admiralty men. Then, too, there is what is known as the Parliamentary Bar, practising entirely before Parliamentary committees, boards, and commissions. It is curious, however, that in England no apparent distinction exists between criminal and civil practice, and common-law barristers take ordinary civil cases and criminal ones indiscriminately.

At the Chancery Bar there is another peculiar subdivision. Having reached a certain degree of success a barrister may "take his seat" in a particular court by appointment as a "Leader" and can then never go into another, except as a "Special," which will be referred to presently. At any law stationer's one can buy for threepence a list of the leaders in the six Chancery Courts, varying in number from four to eight and aggregating twenty-eight and if a solicitor wants a leader for his junior he must retain one of the limited list available in the particular court. Hence these gentlemen sit like boys in school at their desks and try the cases in which they have been retained as they are reached in rotation.

But even to a leader at the Chancery Bar, one more step is possible, which he may take or not as he pleases, and that is: he may "go special." This means that he surrenders his seat as a leader in a particular court and is open to accept retainers in any Chancery Court; but his retainer must be at least fifty guineas or multiples of that sum, besides the regular brief fee, and his subsequent fees in like proportions. The printed list also shows the names of these "Specials," at present only four in number. The last list of leaders and specials reads as in the table on page opposite.

A common-law man, likewise, may "take silk" *i.e.*, become a K. C. or King's Counsel, which is done voluntarily by the barrister applying to the Lord Chancellor who grants the distinction. The phrase is derived from the fact that the K. C.'s gown is made of silk instead of stuff or cotton. It has also a broad collar, whereas the stuff gown is suspended from shoulder to shoulder.

Whether or not to become a leader or to "take silk" (*i.e.*, to become a K. C.) is a critical question in any successful chancery or common-law barrister's career. As a junior he has acquired a paying practice. His fee is always two thirds that of the leader. He has also a comfortable chamber practice in giving opinions, drawing pleadings, etc., but all this must be abandoned — because the etiquette of the Bar does not permit a leader or K. C. to do a junior's work — and abandoned for the fitful fancy of solicitors when searching for a winner in an important cause. Thus some men have taken silk to their sorrow, and many strong men remain juniors all their lives trying cases with leaders much younger than themselves.

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A LIST OF HIS MAJESTY'S COUNSEL

USUALLY PRACTICING IN THE CHANCERY DIVISION OF THE HIGH COURT OF JUSTICE

The following counsel are not attached to any court and require a special fee:—

MR. WARMINGTON | MR. NEVILLE | MR. HALDANE[1] | MR. LEVETT

Counsel who have attached themselves to particular Courts arranged in the order in which they are entitled to move:

Mr. Justice Kekewich, Chancery Court 1	Date of Appointment
Mr. P. O. Lawrence	1896
Mr. J. Mulligan	1897
Mr. Ingpen	1900
Mr. Dudley Stewart-Smith	1902

Mr. Justice Farwell, Lord Chancellor's Court	Date of Appointment
Mr. Bramwell Davis	1895
Mr. J. G. Butcher	1897
Mr. W. H. Upjohn	1897
Mr. C. E. E. Jenkins	1897

Mr. Justice Buckley, Chancery Court 2	Date of Appointment
Mr. Birrell[1]	1894
Mr. Astbury[1]	1895
Mr. Buckmaster	1902

Mr. Justice Warmington	Date of Appointment
Mr. Latham	1886
Mr. Alexander	1892
Mr. Henry Terrell	1897
Mr. A. W. Rowden	1899
Mr. R. F. Norton	1900
Mr. T. H. Carson	1901
Mr. George Cave	1904

Mr. Justice Joyce, Chancery Court 3	Date of Appointment
Mr. T. R. Hughes	1898
Mr. I. Badcock	1899
Mr. R. Younger	1900
Mr. W. F. Hamilton[1]	1900

Mr. Justice Swinfen Eady, Chancery Court 4	Date of Appointment
Mr. Vernon Smith	1894
Mr. Eve	1895
Mr. W. D. Rawlins	1896
Mr. E. C. MacNaughton	1897
Mr. H. S. Theobald	1899
Mr. N. Micklen	1900

NOTE. — Counsel attached to the above Courts usually also practise before the Judge to whom the Companies winding-up matters are attached.

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Hilary Sittings, 1905

[1] NOTE BY THE AUTHOR. — Since this was issued (a new issue being expected when the long looked for "new silks" shall be announced) the writer understands that the following changes have taken place: Mr. Haldane and Mr. Birrell, having become Cabinet Ministers, are not practicing; Mr. Astbury has "gone special"; Mr. Hamilton has moved to Mr. Justice Buckley's Court.

They tell this story in London — a certain Scotch law reporter (recently dead), noted for his shrewd good judgment, having been consulted by a barrister whether to "apply," — *i.e.*, "apply for silk" — advised him in the negative but declined to go into particulars. The barrister renewed his inquiry more than once, finally demanding the Scot's reason for his advice. The latter reluctantly explained that the barrister had a good living practice which he would be foolish to abandon. Being further pressed,

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he finally said: "In many years' observation of the Bar I have learned that success is only possible with one or more of three qualifications, viz.: a commanding person, a fine voice, or great ability, and I rate their importance in the order named. Now, with your wretched physique, penny trumpet voice, and mediocre capacity, I think you would surely starve to death." The barrister did not "apply," but never spoke to the Scotchman again.

The anecdote illustrates the crucial nature of the step taken by any barrister, either on the common-law or equity side, in taking silk or "going special." And even if these steps be taken with success, yet there are waves of popularity affecting a leader's vogue. Solicitors get vague notions that the sun of a given K. C. is rising or setting — that the judges are looking at him more kindly or less so. Wherefore leaders and K. C.'s may sometimes be seen on the front row with few briefs, who were overwhelmed with business a few years since.

A successful K. C. leads a strenuous life, as may well be appreciated if he be so good as to take his American friend about with him in his daily work, seating him with the barristers while he is actually engaged. One very eminent K. C. who is also in Parliament, rises in term time at 4 A.M., and reads his briefs for the day's work until 9, when he breakfasts and drives to chambers. Slipping on wig and gown at chambers and crossing the Strand, or arraying himself in the robing room of the Law Courts, he enters court, at 10.30, takes part in the trial or argument of various cases until 4 o'clock — and often has two or three going on at once, requiring him to step from court to court to open, cross-examine, or close, relying upon the juniors and solicitors in each case to keep it going and tell him the situation when he enters to take a hand. From 4 to 6.30 he has consultation at his chambers at intervals of fifteen minutes, after which he drives to the House of Commons, where he sits until dinner time arrives at 8.30. If there is an important debate on, he returns to the House but tries to retire by midnight for four hours' sleep. Naturally the long vacation alone makes such a life possible for even the strongest man.

PHILADELPHIA, PA., June, 1906.

The author's notes upon trials and appeals, with some information as to how legal business comes and what are its rewards, with remarks as to the cohesion of the profession, etc., must be reserved for the two following numbers. — EDITOR.

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THE LAWYER

By Shearon Bonner

Of all the men by whom mankind are blest,
Methinks an honest lawyer is the best.
Whether he's counsel, or as judge he sit,
He's man's best friend all men of sense admit;
He's bulwark of our glorious government,
And for humanity's good makes argument.
Whenever quarrels come, with tale of woe
You straightway to some lawyer's office go,
Knowing that he can make of foe a friend,
And by his counsel ancient difference end.
Even the criminal who makes for strife
Looks to his attorney for his life:
The lawyer sees the motive in men's deeds,
And holds a heart throb higher than all creeds.
Does he do wrong to plead the criminal's cause?
Which are the higher, man's or Heaven's laws?

The lawyer's brain is a land of dreams on earth
Wherein great enterprises have their birth;
And when his schemes at last are brought to light
Prosperity begins and sloth takes flight.
In politics he is conservative,
And more offence will take than he will give.
But still a nation or an empire stands
Or falls upon the lawyers it commands.

The lawyer is in kind a social fellow:
With jest and rare experience he is mellow;
Laughs at a quip, and likewise loves to tell
Some funny story that to him befell.
But when he is in love he's near a fool:
He speaks by precedent and courts by rule;
And when he's married to a maid for life,
May Heaven pity him — I mean his wife.
He has indeed a many mooded mind;
Is smiling one and grave another time;
To him to grant the talent none refuse,
To amuse the court and also court the muse.
The most love music, biographers aver:
Both Moore and Bacon good musicians were;
And he who in sweet sounds doth most delight,
Is of all men most apt to do the right.
The lawyer's dress is measured by his purse,
Though oft 'tis hard to tell which is the worse;
Yet if he sometimes wear a rough outside,
Beneath do sincere sympathies abide:
His enemy his last cent he will lend,
Or spend before he makes to help a friend.

And yet of men the lawyer's most maligned;
A butt he is for jokes of every kind.
Two fine young wits together walked one day;
Their ambles by a cemetery lay;
And on a grave this line they chanced to scan:
"Here lies a lawyer and an honest man."
"Yes, still he lies, even after he is dead,"
With jesting merriment the first wit said;
Replied his friend, likewise to puns a slave,
"Strange! Here are two men buried in one grave."
True, all that poets and cynics say of him
Appears to the well informed the merest whim;
But ignorant persons these few fragments catch,
And think all lawyers liars by the watch.
Instead, the lawyer sets the moral tone
Of each community where he has a home:
You'll find it true, though go you near or far,
A town's no better than its lawyers are.

Unless you chance to know him at close range,
A lawyer's conduct seems at times most strange:
In trials at court his opponent need beware
(His reputation hangs but by a hair);
But when the suit is ended and decreed,
The two clasp hands again like friends agreed.
His client his highest skill always receives;
And shrewd he is as any man who breathes:
With book and paper slow to court he goes,
And never tells a jury all he knows.

The lawyer's and doctor's work stand side by side;
Both to divinity's are close allied:
'Tis by men's sins that preachers earn their bread,
And their disease by which the doctor's fed;
The lawyer, likewise, lives upon their strife; —
And thus the three together go through life.
But here the analogy ceases to exist —
Their methods of quite different ways consist:

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Two preachers on one doctrine can't decide;
And doctors into many "paths" divide;
But you have never heard of lawyers splitting,
Or differences in rules of law admitting.

Take all the preachers from the world and men
Would have sweet ease of consciences then;
Remove the doctors and disease would die —
Mankind would even death itself defy;
But kill the lawyers? What would life be worth?
'Twould be, I know, a very hell on earth!
Of men, the lawyer, minister aside,
Works least for gold and most from honest pride.

True, lawyers rob their clients now and then;
But I am speaking here of honest men.
Thrice blest the man — whatever be his fame —
Who lives for truth, and bears a blameless name!
Thrice blest the lawyer who, true to his kind,
Keeps ever pure in heart and clean in mind!
He labors hard, lives well, at last dies poor,
And when he's dead men hear of him no more.
But of mankind he's happiest and best.
All other men — well Heav'n defend the rest!

DALLAS, TEXAS, July, 1906.

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THE GILHOOLEY CASE

By Frederick L. Fake, Jr.

FREDERICK L. MECKEL for many years has been a carriage and wagon manufacturer in Chicago, as was his father before him. In his father's time the question of union or non-union labor did not enter into the employment of a man, and the son believing that to be good doctrine endeavored to secure capable workmen without regard to their affiliation with organized labor.

About April 1, 1905, Mr. Meckel had in his employ between fifty-five and sixty men, including blacksmiths, painters, body-workers, truck-workers, etc., necessary to the conduct of his business. A number of these men belonged to labor unions, several of them being members of what was known as Carriage and Wagonmakers' Union Local No. 4, among the latter being one Christ. J. Carlstrom, a blacksmith, who for eight years had been in Mr. Meckel's employ.

The Carriage and Wagonworkers' Union Local No. 4, on April 3, 1905, declared a general strike against all the wagon manufacturers in Chicago who operated "open shops," which included Meckel's plant. Three of his employees responded to this call. The balance, over fifty in number, refused to leave their employer, among them being the said Carlstrom. During the next succeeding days, following the commencement of the strike, Meckel's plant as well as the shops of the other manufacturers were watched and picketed and efforts made by the union members to induce the men employed to quit work and join the strikers, but to no avail. Among the most active of the union pickets at Meckel's factory were Charles Casey, business agent of Union Local No. 4, and Henry J. Newman, its financial secretary.

On Thursday, April 13, 1905, about five o'clock P.M., some ladies living near Thirty-second Street and Princeton Avenue saw a big man locate himself on a fence surrounding a corner yard in that vicinity, where he was soon after joined by a shorter and lighter man. They talked to each other but a short time when Christ. Carlstrom was seen coming from the north, walking toward his home, which was a short distance south of Thirty-second Street, on Princeton Avenue. He carried a tin dinner pail in his hand and his face was lit by a smile. The two men were seen to approach Carlstrom, one of them seeming to say something to him, to which he made reply, whereupon the larger of the two men hit him a powerful blow in the face, which was followed by several more blows inflicted both by the large man (over 6 feet in height and weighing considerably over 200 pounds) and his less sturdy but no less active companion. Carlstrom was felled to the ground and while prone was repeatedly kicked by both of his assailants, the larger man even turning for a last kick after having for an instant indicated that he was about to withdraw from the scene. A lady from the opposite side of the street having seen the difficulty called to the two men, saying, "My God, don't kill that man," to which the larger man replied, "Never mind, lady, he is only a G— d— scab." The two men then started north through a vacant lot to an alley, where they were joined by a third man, younger and lighter than the two before mentioned, and all three disappeared in the alley running north. Carlstrom was seen gradually to regain consciousness. He picked himself up, climbed the fence to secure his hat and dinner pail, which had been thrown or knocked into the yard, and with his face covered with blood made his way towards the south, where he was met by his wife, and with her assistance and his arm around her shoulder he finally reached his home. Doctors were called who found

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his lower jaw fractured, a contusion of the skin of the face, and indications of great pain in the region of his back. He was removed to the Washington Park Hospital that night, and though he indicated that the pain continued and was excessive, he seemed nevertheless to be gaining, until about ten days later, when pneumonia set in, and he died on the 27th day of April, just two weeks after the assault. An autopsy was first conducted by the coroner's physician of Cook County and revealed the broken jaw, but no other mark or disfiguration to indicate violence and the pneumonia. A second post mortem examination was deemed advisable and three weeks after his burial Carlstrom's body was exhumed from Oakwoods Cemetery and taken to the county morgue for a most minute examination. This autopsy was conducted by an eminent pathologist, Ludwig Hektoen, assisted by Doctors Harold Moyer, Harlow S. Roby, Carl Young, and by Doctors Lewke and Rheinhardt of the coronor's staff of physicians. Very little in addition to the discoveries made at the first post mortem were found except that an extravasation of blood was noticed at the base of and inside of the spinal column, which by the physicians was said to be attributable to violence.

On the night Carlstrom was assaulted Mr. Meckel was notified of the crime and at once communicated with Inspector P. J. Lavin, of the Police Department, who together with Captain John Mahoney, Officers Thomas Sheehan, Guy Biddinger, John Howe, and Thomas Kane immediately started to find the guilty party. On May 8, 1905, on information obtained by the police, Charles Gilhooley, Marcus Looney, and Edward Feeley were arrested and locked up at the Thirty-fifth Street Station. On May 13th, just one month after the assault upon Carlstrom, Henry Newman, George Miller, and Charles Casey were arrested and taken to the Harrison Street Police Station. Within ten minutes after his incarceration Henry Newman, Financial Secretary of Local No. 4, asked to see Inspector Lavin, which permission was granted him, and to the inspector in the presence of Mr. Meckel, Attorney Louis Heile, of the Manufacturers' Association, Officers Sheehan and Biddinger, he told in substance the following story: "On the afternoon of April 7, 1905, Charles Casey, business agent of Union Local No. 4, was standing at Twentieth Street and Wabash Avenue where a strike was in progress in connection with the Woods Motor Vehicle Company, when he was approached by Charles Gilhooley and Marcus Looney, who said that they wanted work, that they had done work for the Woodworkers' Union, and that they knew that Casey and other members of the Carriage and Wagonmakers' Union Local No. 4 were known to the manufacturers and that they would be arrested for making any assaults or interfering with the men at work, while they (Gilhooley and Looney) could whip a man and get away and not be caught. Casey replied that he had no power to hire the men, but that if they would report at union headquarters on that night he would take the matter up with the executive committee and see what could be done. On that night Casey and I (Newman) attended the executive-committee meeting of Local No. 4, where were present George Meller, president of the union, Edward Shields, secretary of the executive committee, Charles Deusch, George Mullen, John Heiden, and Frank Novak, members of the executive committee. Casey there reported that he had a committee outside who were willing to do some slugging for the union, that they had done some work for the Woodworkers and could do as much for them. A motion was then made, seconded, and carried, to appropriate $50 to pay the committee for its work and a list of eight names was made out of the men the committee were to get, the first name on the list being that of Carlstrom. After the executive committee had appropriated

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the money I put down the list of the eight men to be slugged in a book, and later Casey and I saw the committee downstairs, and I told them to come around in the morning and I would give them the list of the names of the men to be taken care of, that I couldn't give it to them that night, as a lodge meeting was being held in the headquarters hall at the time, and I couldn't get my books to secure the addresses, and they said they were broke and Casey told me to give them $2 for carfare, which I did. The next day we met Gilhooley and Looney and I gave them the names and addresses of the men. A day or two after the slugging of Carlstrom, Casey and I met Gilhooley, Looney, and Feeley in a saloon on South Clark Street, and Gilhooley said that they got that fellow at Thirty-second Street and Princeton Avenue all right, that he put up a fight and kicked him (Gilhooley) in the shins. Looney said he was a tough bastard and showed fight. Casey told me to give Gilhooley $8 in addition to the $2 already given him, and Gilhooley said they always received $15 for a job like that as they had to split it three ways. In all we paid $47 to these men."

After Newman had made this statement to the inspector and Mr. Meckel, Casey was called in and at first denied any part in the transaction, but Newman interrupting him said that he had told the whole truth. Thereupon Casey said that "seeing Brother Newman has told all about it, I will too," and he there related in substance the same story that Newman had previously told, though at greater length and more in detail. George Miller was then called in to the inspector's office and interrogated alone, Newman and Casey both having previously stated that he (Miller) was an innocent party to the affair, but that he had carried an envelope from Newman to Gilhooley containing $15. Miller first denied having carried the envelope from Newman to Gilhooley, but afterwards stated that he had and had given it to him in a saloon at Twenty and State Streets called the "Coney Island Saloon." Early on the day following the arrest of Newman, Miller, and Casey, John Heiden and Frank Novak were arrested and both made statements to the inspector and to lawyer Heile, which in Novak's case was not all at incriminatory and Heiden's but partially so. Some weeks later Charles Deutsch and George Meller were arrested and each man on different occasions told his story which to a degree accorded at least somewhat with the statements of Newman and Casey. Shields was later located in Colorado where he had gone to avoid arrest, but refused to make a statement. Mullen is still a fugitive from justice.

The doctors conducting the autopsy upon Carlstrom having reported that the assault upon Carlstrom was too remote to permit of the state bringing a charge of murder against these men, therefore an indictment charging them with conspiracy to assault was returned by the May Grand Jury, 1905. On September 11, 1905, the case was called for trial before His Honor Judge Arthur H. Chetlain. Attorney William S. Elliott represented Charles Gilhooley, Marcus Looney, and Edward Feeley, the latter said to have been the "trailer" used to locate the men to be slugged. Attorney Frank Bowen represented George Meller, president of the union; Attorney Samuel H. Trude represented Henry Newman; Attorneys Haynie R. Pearson and William Jackson represented Frank Novak, and Attorneys Seymour Steadman, Charles Soelke, George Remus, and Frank Winston represented the balance of the defendants. The state was represented by Assistant State Attorney Frederick L. Fake, Jr.

Motions to quash the indictments and for a bill of particulars were overruled and the selection of the jury was begun. One thousand nine hundred and thirty jurymen were examined, weeks and weeks being exhausted in the selection of the twelve good men and true, a great number of the prospective jurors stating that they

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could not be fair to the state or the defense because of their prejudices for or against labor unions, some going so far as to say that under no circumstances, whatever might be the evidence, would they convict, and some that they believed the men guilty before evidence of any kind was introduced and that nothing could change their minds. On the second or third day of the trial, George Meller, president of the union, withdrew his plea of not guilty and entered a plea of guilty to the indictment. On the nineteenth day of the trial a petition for a change of venue was filed in behalf of the defendant, Newman alleging that a fair trial could not be had in Cook County because of the prejudice of the inhabitants thereof, which petition was denied by the court. Previous to the trial and during the same all of the arrested defendants were admitted to bail with the exception of Gilhooley, Looney, and Feeley. After weeks of alternate patient and impatient toil a jury was finally selected of twelve men, each of whom was committed to the following propositions: *First.* That they had no prejudices against either organized labor or capital. *Second.* That they believed in the right of the laboring man to strike when it was necessary to do so to obtain their end. *Third.* That the members of a union or others acting for them had the right to picket a struck house providing only peaceable measures were employed. *Fourth.* That business agents, executive committees, and other officers of the union were to be as fairly tried as any other members of the community. *Fifth.* That unless the defendants were shown to be guilty by evidence satisfying the minds of the jurors beyond any reasonable doubt and to a moral certainty that they would acquit the defendants. *Sixth.* That they would fairly view the testimony of an accomplice, and if they believed it to be true, they would act upon it as being true, even though they might view the testimony of such an one with suspicion.

On the day that the last juror was chosen there was great rejoicing in the court room, particularly in the jury box, as the selected jurymen were not permitted to separate nor communicate with any person other than a fellow-juror, outside of the presence and hearing of a sworn officer. Some of the jurors had at that time been for weeks confined in a nearby hotel, save for the time that they were in the court room, and patience had long ceased to be a virtue, and here let me say that sacrifices such as were made in this case by these men who believed that they owed it to their country, their families, and themselves to serve as jurymen, even under such conditions, should be met with the praise it deserves, more particularly when it early in the selection of the jury appeared that a great number of the prospective jurors had stretched the truth beyond all bounds in their efforts to be excused from service. However, the jury being complete, the state fired its first gun by calling as a witness the union's president, George Meller, who on the second or third day of the trial had entered a plea of guilty. He told of the calling of the strike by the union against the manufacturers of the city, of the meeting of the executive committee on April 7th at the union's headquarters, of the report of Casey, the union's business agent, of the voting of the $50 by the executive committee, to be paid to the slugging committee, of the general discussion by the different members of the committee as to how they were to know that the men were slugged, and the like, of how he (Meller) O.K.'d a voucher for $15 for Newman and Casey and saw Casey give the money to Gilhooley, Looney, and Feeley in a saloon on the West Side; how at the time he had heard Gilhooley say that he got that fellow, Carlstrom, that he hit him in the jaw and kicked him, and that the only thing they didn't do to him was to leave him hanging on the fence, how Looney said that he (Carlstrom) was a tough bastard, that when he kicked him he must have broke his ribs, as he damn near broke his toe; how

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when Carlstrom was reported dead that there was a general scurrying for corners, and how he (Meller) had hid in a feed store for three weeks, and when arrested was shot at six times by the police, one bullet passing through the sleeve of his coat; that when he had entered his plea of guilty on the second day of the trial he at once placed himself in the hands of the police for protection from possible molestation and had voluntarily sought their guardianship until the day he was called to the witness stand. The defense tried on cross-examination to weaken his testimony by insinuating that he had been promised immunity by the state, or that his story was manufactured, and the like, but the attack was unsuccessful. Policemen, lawyers, and laymen were placed upon the stand and testified to the confessions and statements of Newman, Casey, Heiden, Novak, Miller, and Deutsch; that these statements were truly and accurately reported by competent stenographers and were freely and voluntarily made, and there was more evidence on the part of the state. Guns of all caliber from the great thirteen-inch type to those of the very small pop variety were aimed at these witnesses with a view to making it appear that the confessions were made either through fear, hope, or promise, but again the attack was unsuccessful. While Mr. Meckel was upon the stand it developed that he had previously stated to one of the defendants, Newman, "that one of his men had been killed and that he would leave no stone unturned to find the guilty party," and this by the defendant was argued as grevious error and most damaging as showing excessive interest, but still the state's structure held: for days was it builded and for as many days did the defense endeavor to tear it down and destroy it.

And then came the defense: First, that on April 7, 1905, twenty men from the Woods Motor Vehicle Co. had attended the executive committee meeting of Local No. 4, and that *during* the time they were there no one conspired to slug or beat any one. Next that Novak was not a member of the executive committee until a week later, and that on April 7th he was at home; next that Heiden was drunk when he was at the police station and had no knowledge of what was said or done there, at the time he was said to have made a statement as to his part in the affair; next that certain questions asked of Casey, Newman, and others of the defendants by the prosecuting officer were in the nature of threats or promises and that Deutsch's statement was either inaccurately reported by the stenographer or that he had no recollection of having answered as the statement set forth that he did; that the identification of Gilhooley and Looney by the ladies who claimed to have witnessed the assault upon Carlstrom was vague, hazy, uncertain, and untrue; that Shields instead of going to Colorado to escape punishment had ridden for hundreds of miles on the trucks of a railroad train, walked some hundreds of additional miles, and finally landed in Colorado simply to find work, though he did say further that he went there also because he saw his name mixed up in the trouble and not having friends to furnish $15,000 bail he thought he had best leave town; and then there were constitutional questions raised and objections and technicalities by the score to overcome. The case as to Feeley was taken by the judge from the jury, but finally the evidence of both sides was in, and after days of argument the jury retired to deliberate, and seven hours later returned into court with the following verdicts:

Charles Gilhooley, guilty of conspiracy in manner and form, as charged in the indictment, punishment fixed at imprisonment in the penitentiary and a $2,000 fine.

Marcus Looney, Charles Casey, Henry Newman, Edward Shields, John Heiden, and Charles Deutsch, all guilty of conspiracy as charged, and punishment fixed at imprisonment in the penitentiary.

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Frank Novak was found not guilty.

Motions for a new trial were entered as to each, which motions were argued on the 27th day of March, 1906, all being overruled, and the Gilhooley Case at present stands on a motion in arrest of judgment in order to give the defendants time to prepare a bill of exceptions for the Appellate Court to review.

Whatever may be our opinions as to the relative rights of labor or capital, and however much one may sympathize with the honest laboring man struggling honorably and peacably for advancement, no law-abiding man can say that the hand of the law should be lifted from the slugger or the men who hire him, and all must pray, as does the writer of this chronicle, that the trial which lasted for one hundred and three days was a fair one, that the verdict was a just one, and that the judgment must endure.

CHICAGO, ILL., April, 1906.

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SQUIRE ATTOM'S DECISIONS

UNDER THE TWELVE OR FOURTEEN MAXIMS OF EQUITY

AS SPECIALLY EDITED BY HERBERT J. ADAMS

Introduction

At the time of the culmination of Mr. Attom's wonderful success in the organization of the Hobby Club, and when he was compelled to buy a new fountain pen for autographs, and had to sit in all sorts of pleasant positions for photographs with which to supply his friends and the press; a time when he was so much in the public eye, — "a mere mote," as he would modestly put it — he fell a victim to flattery.

He was inadvertently led by this approved method into uncovering a highly commendable — though by stagy, legal critics held judicially questionable — phase of his practice as justice of the peace, a position he held a few years since.

Being at this time induced by the wiles of a newspaper friend who had sought him out for a professional interview, to casually refer to his penchant for making matter of record all sorts of things that foolish people think they can afford to forget, Mr. Attom had been coaxed into turning over a large mass of opinions covering a variety of cases before him while "on the Bench."

"Mr. Attom," said this friend, "you cannot deny that you have become quite a public character; and I consider it almost your duty to publish your decisions."

The ex-justice did not want to bother with it, really, but said: — "We'll sign an agreement, by which you get the material just as I have it, and you are bound to print it without trouble or bother — either one, mind you — or expense, to me."

The agreement drawn up and signed, Mr. Attom produced the goods.

"The material" was all in short-hand notes, and the ex-squire refused to extend them.

But the other party, being a real newspaper man, set to work and took a course in stenography, which enabled him to read, though haltingly, almost every character. For his trouble, and very much to Mr. Attom's chagrin, he appropriated the entire batch to his own use.

As the cases which came before him are all docketed as law cases, only those are "principal" in these decisions which, under the Squire's regime, seem to have had an equitable side, those specially selected being such as broadly emphasize the maxims.

The "reports" of these cases correspond as nearly as may be to the plan in vogue with other courts of last resort.

A maxim is "the embodiment of a general truth."

Equity is defined by Grotius to be: "The correction of that wherein the law (by reason of its universality) is deficient."

Maxim I

Equity will not suffer a right to be without a remedy.

Snodgrass *v.* Wicks.

Brought over on change of Venue from Squire Higgin's Court.

Head-note. — (*The equity of the case.*)

Where two persons cannot agree it is proper, especially on securing costs, to appeal to Courts of Justice; and since equity will not suffer a right to be without a remedy, it is held, in the language so well adapted to some young lawyers that *in fictione juris semper subsistit æquitas.*

Statement of the Case:

Suit to recover the possession, if not eaten, or the price if eaten, of two hams, together with damages for loss of sleep sustained by the plaintiff. Snodgrass claims to have been awakened by a noise about the middle of one moonless night, and rushing out of

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doors, found the hams alleged missing. He also alleges that he found any trace of the intruder also missing; but alleges suspicions so strong as to amount to absolute conviction.

T. Barrymore Swingle, Attorney for Plaintiff.

Col. Scapegrace, Attorney for Defendant.

Opinion by Attom, J. P: — The court will say at the outset that the allegations of the plaintiff were not long ago the basis of a criminal prosecution against the defendant. The court was in hopes Wicks would be convicted; because, when the theft, if such it was, was first reported, the court was compelled to instruct its wife not to buy anymore ham until the matter blew over; thus avoiding possibility of being pinched for receiving stolen goods; for she could not take refuge under the maxim controlling in this case, by reason of one of the numerous exceptions, that the right claimed must be one of which the municipal law can take cognizance.

II. Plainly, according to the maxim in question, the plaintiff ought to have a remedy for the loss of his hams, if they were good hams. How are we to know that? He has brought no ham for this court to test. He only has testified to the value. Wicks has not.

III. Another exception to the maxim is that equity will not afford relief where there has always been a full, adequate, and complete remedy at law. Therefore it is, that in all other courts of equity except this, if a law court has had a chance at a case, equity can only sit by and smile regardless of which side wins. In the case at bar, however, though the court has already decided on the judgment that ought to be rendered and docketed, the facts in the case are such that, notwithstanding, howsomever. But.

IV. It is undisputed that the plaintiff and defendant have lived for some time in comparative neighborly peace, partially due to the fact that there is a one hundred foot deep ravine between their respective houses; and that if this ravine is not removed they ought to continue such relations. As for the loss of sleep, Wicks seems to have gone out of his way in attempting to pile up unnecessary witness fees, expecting Snodgrass will have to pay them, and which are of no benefit to thisc ourt, in getting the neighbors to testify against him, which witnesses also testify to great loss of sleep. By these Wicks has more than proved that Snodgrass must have awakened himself by his own snoring.

V. Snodgrass has proved nothing by the testimony that the smoke-house is on Wicks's side of his place, in plain sight. Moreover, Snodgrass had the power of selection of location when he built the smoke-house. And further, plaintiff's own testimony shows the fact that if he had any hams left in the morning, it was due alone to his having locked the door after, and only after, he missed the hams in question. But Wicks has gained nothing by his lampoons on the plaintiff because of a weakness the latter has probably enjoyed from his mother's womb.

VI. However, while the law must have its way, equity, in this case also has a way. Though this court would otherwise render judgment for the fuil claim of $28.02, hams and sleep, it is the opinion of this court that before it is entered, plaintiff should reduce his claim to less than the minimum amount appealable. If he remits all but $24.99 the defendant cannot appeal. A judgment for $24.99 against Wicks is just as good as one for a larger amount, and won't hurt the latter a cent's worth. Too, by this judgment there will be a judicial understanding as to where the hams went, and the lesion in the ham market just at this time when eggs are so cheap will be cured. And the court believes the sun will continue to rise and set on the plaintiff and the defendant, Snodgrass and Wicks, as it has arisen and sat on them in the past, and to the same extent that it has always done on everybody else.

Change of venue sustained.

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Maxim II

Equity Follows the Law

Editor's Note: — The short-hand notes reporting the following case have given some trouble. A part of the opinion has been purposely omitted. There are references to the Constitution and the Flag, — or the Flag and the Constitution, which indicate that the case was contemporaneous with the strife over the question whether the latter followed the former, or the former led the latter, or *vice versa*. At no time were the two abreast.

Happily the flag finally stayed long enough in one place for the Constitution to find it; so that, another time when one starts off without the other, alert people who have jobs in Washington will be able to keep better track of their relative positions.

At any rate, if the Flag and Constitution episode was intended to illustrate how equity follows the law, it should have been printed out; for many of the notes are positively illegible, and the editor can make nothing more than a hodge-podge out of them. Overton *v.* Drinkwater.

Sent up on writ of error, then sent down for trial on the merits.

Head note: — *The equity of the case.*

Where a demurrer is interposed to a pleading, and there is nothing on its face to warrant the overruling thereof, *held*, that equity in this court may take a glance at the face of the pleading party, or his attorney, and therein often find plenty of reasons for its action.

Where it is found that equity will not follow the law, *held*, that the law should be repealed.

Statement of the Case

This is an action on a written contract to buy and pay for one share of corporate stock at the agreed price of $200. Memoranda on the instrument showed that several of these dollars had been paid by Drinkwater, the defendant and vendee of the stock. There was nothing on the paper to show why he should not pay the balance. Suit was brought based largely on this hiatus. The suit was brought for the sum of $99.99 with prayer for costs. The plaintiff, without formal pleading, simply asked judgment for the amount claimed; and the defendant answered orally, denying the claim, and setting up a counterclaim in the sum of $100, which included amount paid on the stock on account of misrepresentation, and damages for that the plaintiff had attacked his good name, and had called him, Drinkwater, a deadbeat and a toper. To the answer the plaintiff demurred on jurisdictional grounds, claiming that the counterclaim was one cent in excess of the court's jurisdiction. The demurrer was overruled with remarks that were lost amidst the noise of the court room, the constable being occupied in the back room investigating a pump the plaintiff intended to introduce in evidence. The plaintiff stood on his demurrer; and after the court's ruling was sustained on writ of error to the Circuit Court, the case was with difficulty attempted to be tried to a jury, and was given up after more difficulty.

A judgment was rendered.

Nuttyton R. Bowles, *Attorney for Plaintiff.*

Sempronius Simpson, *Attorney for Defendant.*

Opinion by Attom, J. P., on behalf of the court: — I. The court has been impressed with the candor with which counsel for the plaintiff has referred in his arguments to the court, and to the erstwhile jury to the face, figure, character, name, and reputation of the defendant. It has only been equaled by the suavity of his deportment towards his opposing counsel and his loyalty to his own client. The defendant will no doubt carry away with him fond memories of his day in a court of justice. Twice during Bowles' harangue to this court, and when he

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momentarily turned towards the defendant, equity had hold of the ink well on the court's desk, and all but let him have. But it is well that equity follows the law.

II. Too, it may be remembered that the defendant's counsel has given unexampled attention to his side of the case, never once forgetting that there was a counterclaim before the court for slandering his client. And only once did he accentuate his pronunciation of the first name of his opposing counsel syllable by syllable, by pausing unduly between them, viz., NUT–TY—TON.

III. So, that, with the exception of certain conduct of the jury, or a part thereof at least, — which will be discussed later herein, — the maxim involved in this case had never a better chance to demonstrate the nature of equity as a follower of the law.

IV. The maxim does not mean, however, that equity goes on behind the law, — tags it. It means that equity is not a law unto itself, whether or no (and no thanks to the law either). In the first stages of the case at bar the defendant moved for a continuance on account of the absence of an important witness. His motion was not properly stated; but it seemed to this court that he was entitled to that witness. While overruling the motion because the law demanded it, the equity of this court followed the tactics of the plaintiff with an eagle eye. The court takes the view that if the maxim has any application at all to the above situation in the proceeding, it is fully sustained by the case of Ruse *v.* Aquaton, 19 The Great Wall of China, 121.

V. And when the demurrer came up on behalf of the plaintiff, equity was still on the watch. While this court might have sustained the demurrer, and compelled the defendant to reduce his $100 counterclaim at least one cent, to come within the jurisdiction, or appeal, which this court did not think would be done, equity was satisfied that the two hundred pounds of averdupois of counsel for plaintiff would appeal, and thus give the defendant time to get his witness.

VI. It was unfortunate that the litigants in this case were not able to keep the nature of the business out of which the stock transaction grew in the background until the personnel of the court as a full and complete court had become too fatigued to take any lively interest in the proceeding. If plaintiff's counsel had not been laboring under the inconvenience of a bad cold, there is no knowing what might have happened. But fearing that he had no voice at all, to speak of save to whisper of, he whispered in a manner that could be heard a half a mile. And it was while whispering about the value of the pumps the corporation had been making, that the constable inadvertently stole into the judges' chambers with the pump marked "Exhibit B." Bowles aspirated the statement that there were a million of those pumps in constant use all day and until the quiet hours of the morning between Davenport, state of Iowa, and Milwaukee, state of Wisconsin, inclusive, and that several went to New England.

VII. Drinkwater's evidence tended to rebut this, and his counsel retorted to Mr. Bowles that two bullfrogs in a 3 by 6 pond always sounded like a million, and called attention to the fact that the plaintiff had failed to produce evidence that there had been any such number sold; that while there had been the aggregate sum of two shipped to the state of Maine, they had been returned as unmarketable because of the name stamped just below the pressure indicator.

VIII. But this court does not intend to be led away by interest in the details of the evidence and arguments with reference to the working and usefulness of the pump as a basis for claiming a value to the stock. And in adverting to the misrepresentations claimed by defendant, Drinkwater, to avoid the element of mutuality in the contract, the court will venture a definition of equity

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that it has been waiting these ten years to announce, to wit: —

IX. This court looks upon equity as merely a special allowance of the manifestation, applied to remedies only, of the good conscience of the generally good and convenient law; or, that polity and its resultant practice in jurisprudence which may be resorted to to interfere with the necessarily general course of the law, where, without its own faults its operation or want of operation, under the particular circumstances of a case, may be repugnant to its basic reason. Just so. And this is mentioned here because the maxim which seems to be involved in the case at bar is one which particularly invites discussion of the relation of equity to law. Now, it amounts to the same in the end whether the misrepresentation is simply treated as a circumstance showing failure of contract, or that this court applies "good conscience" to the case, — which latter would only be necessary in case the solemnity of the written agreement should be held to overbalance the oral evidence of fraud.

X. (In the short-hand notes under this number twenty-two (22) different words ranging from five (5) to eight(8) syllables in length each are used. The words "flag" is used seventeen (17) times and the word "constitution" nine (9) times. And the editor, instead of bringing it out here has about made up his mind to send it to some Illinois or New York state commercial house of enterprise to be rebussed so far as "flag" is concerned, colored up and worked into a "patriotic" advertisement, for distribution everywhere, maybe, except in Nebraska.)

XI. It is seldom that an instrument pertaining to the subject matter of a suit at law or in equity has seemed to threaten the proper poise of a court, as has the identical pump that has figured in the case at bar. If it were a pump designed to be used in such a receptacle or depositary of water as a well or cistern, or the hold of a vessel, or perchance the human stomach, all might have gone well, and at least a half a day of the valuable time of this court, — to say nothing of noise and confusion averted from interfering with the solemn and weighty view with which the equity, the law, and the facts are in all cases entitled to be scanned, — saved. The curiosity of the constable might have been overlooked owing to the nature of the pump which, be it repeated, was not designed to draw up for man the sparkling beverage that in an early day this court was wont to drink from the old oaken bucket. Nor was it designed to use in connection with an artificial receptacle for water in capacity usually measured by the token of many barrels, in many cases even to an hundred or more, — in short, a rain-water cistern. All this interest and fuss has been occasioned by a mechanical product in the pump line adapted only to use in extracting liquid from so small a confinement as one single barrel, or possibly "half," a keg, or an "eighth."

XII. This court would not mind the noise of counsel, nor care whether they used the pumps in Maine, or used troughs in that distant land, nor whether in Milwaukee they drank theirs out of fire plugs, supposing they there used that kind of liquid for all purposes instead of water; but it is casting a frightful burden on the equity side of this court to have the law so far lapse as that there should be failure to secure consideration of this case by a jury. It will be admitted by the court that the first panel of the jury was secured with difficulty, the six peers all knowing something about the contentions as to the merits. But when Juror Pepper did not appear after the noon hour, and was later tracked by this court's vigilant and curious constable from one to another of ten "places" that he had visited in making a comprehensive inspection of the workings of that implement, often and often studying the matter through large sized glasses; and when again, after exhausting large venires in this court in the effort to fill his place, it was given up as impossible to find another man in town but knew altogether too much

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about the Automatic Electric Beer pump, the court was satisfied the case was won.

XIII. It is fair to say that early in the trial this court was convinced of the uselessness of any jury white or black, while at the same time it was looking for a chance to throw its good conscience and equity into the breach. And perhaps unconsciously the court's attitude had something to do with bringing about failure to procure a jury; for equity has quite a range of resources within its limitations not to break through a rule of law. Therefore, being now fully in the hands of the court, subject only to appeal (in the way of which stands a large bill of costs, not only in this court, but for a deposition or two, added to necessary traveling expenses of the plantiff who has hailed from a distant city, not only for himself but for counsel who has hailed from a distant village in the county) it is giving both the law and equity full play, the one followed by the other and the other following the one, in the manner so lucidly indicated by the maxim *Æquitas sequitur legem*, and will give judgment to defendant against the plaintiff for the difference between their respective claims, to wit: one (1) cent, and will tax the costs in favor of the victorious party. And the constable will proceed to collect.

Order of Circuit Court on writ of error *affirmed*.

DAVENPORT, IOWA, July, 1906.

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THE RISE AND FALL OF THE GREEN BAG

By Donald R. Richberg.

DESTINY appears to cherish and uphold a certain sacred principle, to wit: origins shall be obscure. The only well-authenticated account of the origin of the world places the time of the occurrence several thousand years subsequent to the days when human beings were erecting scientific memoranda of their existence and works for the edification of posterity. So it is with the Green Bag. One searches in vain through dusty shelves and yellow pages to discover a record of its first appearance. The lawyers of the world have apparently devoted all their energies to piling up the regiments of sheep-bound volumes wherein transcribed by the judge we read the joint product of the learned counsel for the plaintiff and the defendant. As a result, they have left few records of the manners and customs of their generation. Take it all in all we may lay to our souls the flattering unction that, however we may act as individuals, as a class we are not self-advertisers.

In individual self-advertisement, however, the green bag has played a long and conspicuous part in legal circles. In the few articles bearing on this subject one remark is always found. In deference to precedent it will now be quoted: "On the stages of the Caroline theatres the lawyer is found with a green bag in his hand." Indeed it would seem that this custom was as prevalent among lawyers in the seventeenth century as the use of the union button among artisans to-day. In a dictionary published in 1700 is found the following definition: "Green Bag, a Lawyer." (Dict. Cant. Crew.) Of an earlier date (1677) is the oft-quoted remark of the Widow Blackacre to the barrister who refuses to urge her cause: "Impertinent again, and ignorant to me! Gadsboddikins! you puny upstart in the law, to use me so, you green-bag carrier, you murderer of unfortunate causes, the clerk's ink is scarce off of your fingers." (Wycherley's *Plain Dealer*.) There is much use made of the green bag in this play where "Wycherley indicates the Widow Blackacre's quarrelsome disposition by decorating her with an enormous green reticule and makes her son, the law-student, stagger about the stage in a gown, and under a heavy burden of green bags."

The foregoing quotation is from "A Book about Lawyers," by John Cordy Jeaffreson, barrister at law, a work written some time about 1865, and containing among other interesting matter more about the use of green bags than could be discovered from any other of the various writings investigated in pursuit of the present subject.

In Queen Anne's time the phrase of the day to indicate the adoption of the law as a profession was: "He intends to carry a green bag." An example of this usage is found in Dr. Arbuthnot's "History of John Bull" (1712), from which the following quotation is taken:

"I am told, Cousin Diego, you are one of those that have undertaken to manage me, and that you have said you will carry a green bag yourself, rather than we shall make an end of our lawsuit." In the London *Spy* is also found (in reference to the character of a pettifogger): "His learning is commonly as little as his honesty and his conscience much larger than his green bag."

At this period green bags were used by solicitors, attorneys, and members of the bar. Various distinctions began to spring up, however, and restrictions on the use of the green bag and various changes in its color came to pass. The suggestion has been made that green bags became so offensive to the public after the trial of Queen Caroline that a change to red resulted therefrom. Jeaffreson, however, asserts that red bags were carried by leaders of the bar some time before that famous trial.

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Be that as it may, a change gradually took place whereby the use of bags became restricted to the more distinguished members of the profession. Illustrative of this is an interesting incident connected with the common-law Bar of England, which occurred in 1780, when Edward Law joined the northern circuit. He received numerous briefs, and Wallace, complimenting him on his success, presented him with a bag. "Lord Campbell asserts that no case had ever before occurred where a junior had won the distinction of a bag during the course of his first circuit."

The same usage appears to have continued for some thirty years or more, for, one signing himself "Caucidicus" writes: "When I entered the profession (about 1810) no junior barrister presumed to carry a bag in the Court of Chancery, unless one had been presented to him by a King's Counsel; who, when a junior was advancing in practice took an opportunity of complimenting him on his increase of business and giving him his own bag to carry home his papers. It was then a distinction to carry a bag and a proof that a junior was rising in his profession. I do not know whether the custom prevailed in other courts."

This absolute barrier, however, was gradually broken down and left only distinctions as to the color of the bag. Blue bags and at times purple bags were carried generally by the humbler "Chancery jurors," while the leading chancery practitioners were alone permitted to carry red bags.

Probably the last prominent appearance of the green bag in history to date was in so-called Green Bag Inquiry. "A green bag full of documents said to be seditious was laid before Parliament by Lord Sidmouth in 1817. An 'inquiry' was made into these documents and it was deemed advisable to suspend the *Habeas Corpus* Act."

The downfall of the green bag was very rapid after this discreditable affair, and at the present time its use as a mark of distinction seems confined to a few university towns where it is still faithfully carried by the proud law student and the humble laundryman. Now and then a writer in some legal periodical, perhaps yearning for some badge which shall distinguish him from the "unusually intelligent" juryman, voices a call for a revival of green bag carrying. Such an article appeared in the *Albany Law Journal* of 1872 (V. v., p. 225) and was quoted in the *Pittsburg Law Journal* of a later date by another enthusiast, who urged "that the lawyers while in professional attendance on behalf of their clients at any one of the aforenamed and mentioned courts, shall carry their green bags, or blue, red, or purple bags and wear silk or stuff gowns according to seniority and ability," and to quote the language of that *Albany Journal*, "as becoming the dignity, solemnity, authority, and learning of the Bench and Bar."

The article was apparently serious, and should not be handled with irreverent fingers. Yet fancy takes the wayward mind into the crowded court room of to-day filled with silk and stuff gowns concealing the slender or rotund outlines of our legal brethren, each noble counsellor carrying a gay colored bag, classified (by a committee of the Bar Association supposedly!) according to seniority and *ability*. With apologies to Mark Twain one might phrase it thus:

Watch, O clients, how you pay,
For the scale of charges runs this way:
A green bag man,
Hundred dollars a day,
A blue bag man,
Eighty dollars a day,
A red bag man,
Fifty dollars a day,
Charge, ye lawyers, charge this way,
Charge for the brown hair less than gray,
A purple bag means little pay,
But a green bag charges what he may,
Charge, ye lawyers, charge this way.

No, despite the plea of "Fritz," of Pittsburg, the green bag has been relegated to the things that were. Even its traditions are so mixed as to be incapable of amalga-

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mation into one solid, consistent custom. It has departed, not because there is less pretense and sham in our profession, but because the spirit of the times is intolerant of the use of anything so plainly expressive of vanity and love of distinction. To-day the lawyer carries his green bag in his countenance. There many a client may see in the deep lines and ridges worn by "seniority and ability" the little graves of buried ideals of fairness, devotion to justice, and sincerity. If just laws are essential to good government, the hope of the republic lies in an increasing army of lawyers who will neither carry the green bag in the hand nor wear the "green bag" face.

AUTHOR'S NOTE. — Notwithstanding the concluding diatribe it must at once appeal to the intelligent reader that to *read and understand* THE GREEN BAG will do much to promote "fairness, devotion to justice and sincerity."

CHICAGO, ILL., July, 1906.

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The Green Bag

PUBLISHED MONTHLY AT $4.00 PER ANNUM. SINGLE NUMBERS 50 CENTS.

Communications in regard to the contents of the Magazine should be addressed to the Editor, S. R. WRIGHTINGTON, 31 State Street, Boston, Mass.

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

THE twenty-ninth annual meeting of the American Bar Association will be held this year at St. Paul, Minnesota, on August 29, 30, and 31. Immediately preceding these meetings will be held the Sixteenth Conference of Commissioners on Uniform State Laws and the meetings of the Association of American Law Schools. All meetings will be held at the state capitol. The headquarters of the association will be at the Hotel Ryan. Requests for assignments of rooms should be addressed to Charles W. Farnum, 518 German-American Bank Building, St. Paul, Minnesota.

The annual address of the president, George R. Peck, on the most noteworthy changes in statute law during the year will be delivered on Wednesday morning, August 29. The annual address will be delivered by Alton B. Parker, of New York, on Thursday morning. At the evening sessions papers will be read by Roscoe Pound, of Lincoln, Nebraska, John J. Jenkins, chairman of the Judiciary Committee of the National House of Representatives, Thomas J. Kernan, of Baton Rouge, La., and Gen. George B. Davis, Judge Advocate of the United States Army.

The names of these men is sufficient guarantee that the high standards of the past will be maintained at this meeting. The American Bar Association is the only national organization of our profession and the only means by which its opinions can be expressed with authority. It should be needless to impress upon our readers the importance of making these opinions truly representative of the best intellect of the Bar. It is inevitable that some of the energy of these meetings should be wasted, since discussions such as those held at its meetings afford an opportunity for some more enthusiastic than able to deliver themselves of their ideas upon topics of public importance, but this is inevitable and, indeed, only one evidence of vigor. Despite all criticism, however, we think it must be conceded that in the main this association in the past has stood for the highest ideals of the profession in America, and we believe that it is the duty of every lawyer who cherishes any ideals for his profession superior to the ethics of business to give his active support and encouragement to those who keep alive the sacred fires.

Since the custom was established of holding the meetings of this association beyond the Mississippi the interest of the lawyers in that part of our country has been attracted to this organization, and the men who in the next generation are most likely to determine the course and the progress of our economic development which must necessarily be settled in the litigation of the middle west, are becoming the most interested as well as the most interesting members of this association. At this latest meeting in the northwest it is expected that many more recruits from this region will be enlisted, and it is hoped that eastern lawyers as well as those from beyond the Rockies will appreciate the opportunities to meet and know these professional brethren and will make whatever sacrifice of time may be needed to show their loyalty to the profession by attending these meetings. A recent example in Boston of professional devotion was shown in the attendance at the meetings of the American Medical Association, which may well shame us for our own neglect of our similar opportunities. The doctors came to Boston, not to see the sights of that historic place, but to hear and take part in the discussions of their specialties with an absorption of interest which commanded the admiration of all observers. We trust that the lawyers will exhibit an equal interest in the meetings of their national association.

We desire to take this opportunity to call to the attention of the Bar an opportunity for an exhibition of professional courtesy which we

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believe will appeal to their sympathy. Shortly after the recent great conflagration in San Francisco, the Association of the Bar of New York City, in sympathy with their brethren of the Bar Association of San Francisco, offered assistance in the form of a large cash donation for reëstablishing the library of the San Francisco Bar Association. The trustees of the latter association at a meeting subsequently held decided that, having their library partly covered by insurance, they did not feel justified in accepting the cash donation so generously offered by the New York Association, but would be glad to receive and preserve, as a memorial of the kindly feeling displayed, a copy of such reports, codes, and statutes of the state of New York as might be available.

The New York Association thereupon shipped to the San Francisco Association a substantially complete set of New York books, reports, statutes, codes, digests, encyclopædias, and text-books, comprising about fourteen hundred volumes. This donation has been appropriately labeled so as to show the source from which it was received. The bar associations of some other cities have indicated a desire to furnish, as a like memorial, sets of their respective state reports and statutes. Using these donations as a nucleus, the San Francisco Bar Association has already commenced the rehabilitation of its library. The collection of law books belonging to this association and destroyed by the fire consisted of more than twelve thousand volumes.

The developments of the libraries of the smaller bar associations of the country have in a measure solved one of the great problems of modern practice resulting from the tremendous increase of printed decisions. We observe with pleasure that a concerted effort is now to be made to guide the development of these very important institutions.

Pursuant to a call in which twenty-four law libraries joined, there was formed at the conference of the American Library Association at Narragansett Pier, June 29 to July 6, 1906, the "American Association of Law Libraries." The purpose of this new organization is to develop and increase the usefulness and efficiency of the law libraries of the United States and Canada.

Those interested, to all of whom the membership is open, are invited to assist in the work by sending their names and addresses to the secretary-treasurer. It is proposed to hold meetings each year at the same time and place as the conferences of the American Library Association. Printed circulars outlining the program for the coming year will be issued shortly and forwarded to any address, upon application.

The officers are:

President, A. J. Small, Iowa State Law Library, Des Moines, Iowa.

Vice-President, Andrew H. Mettee, Library Company of the Baltimore Bar.

Secretary-Treasurer, Franklin O. Poole, Association of the Bar,
42 West 44th St., New York City.

Executive Committee:
President, *ex-officio.*
Vice-President, *ex officio.*
Secretary-Treasurer, *ex-officio.*
Frank E. Gilbert.
G. E. Wire.
Frederick W. Schenk.

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CURRENT LEGAL LITERATURE

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

BIOGRAPHY. "Jeremy Bentham," by N. W. Hoyles, *Canadian Law Review* (V. v, p. 289).

BIOGRAPHY. In the *Journal of the Society of Comparative Legislation* (New Series, No. 15, p. 9) is a brief sketch of Judge "David Josiah Brewer," by R. Newton Crane, Esq.

BIOGRAPHY. "Lord Erskine," by "Lex," *Bombay Law Reporter* (V. viii, p. 129).

CONSTITUTIONAL LAW (Taxation). "Limitations of the Taxing Power including Limitations upon Public Indebtedness, a Treatise upon the Constitutional Law Governing Taxation and the Incurrence of Public Debt in the United States, in the Several States, and in the Territories," by James M. Gray, San Francisco, Bancroft Whitney Company, 1906.

This is a volume of some thirteen hundred pages on a subject of much present importance affecting a great variety of interests. It is the constitutional limitation upon the taxing powers otherwise unlimited, which gives rise to the greatest number of questions with regard to the validity and the meaning of laws concerning taxes. The underlying principle, the author insists, of all the constitutional limitations upon the taxing power is equality. It is this principle that requires that taxes shall be levied only for public purposes and that special assessments shall not exceed the benefits. It is the principle of equality that forbids the enactment of special and local laws for the assessment and collection of taxes and it is the principle as between the present and the future that underlies the provisions limiting the amount of debt which communities may incur. The thought of equality, he says, is manifest also in the constitutional limitations which determine the relations between the state and the Federal governments and in the requirements that duties, imposts, and excises shall be uniform throughout the United States. The author calls attention to the fact "that in those parts of our constitutional system where equality is least clearly manifest, there is most confusion of thought and conflict of decision and that in those parts where the principle of equality is most clearly defined, harmony of decision is the rule." Equality of course is not equality of contribution, and there are differences of opinion based on different economic theories, whether the true basis of equality is that of benefit according to the older economists or that of sacrifice according to the view of the modern school, but these questions the courts are not called upon to decide except when the power to impose the tax is involved, and in judicial decisions the weight of precedent gives undue force to earlier economic theories.

In a short discussion of the definitions and the scope of the taxing power, the author makes an analysis and classification of franchise and a distinction between privilege taxes and taxes on property. Following this are chapters on territorial jurisdiction for taxing purposes over persons and property; the purposes of taxation; the delegation of the taxing powers; local self government; the Federal taxing power; state taxation of Federal agencies; state taxes interfering with commerce; state taxes impairing contracts; tax laws in contravention of treaties; inheritance taxes; the fourteenth amendment and due process of law. There are several chapters on equality and uniformity in general, with a discussion of the subject of double taxation and of the police power and of license, privilege, and occupation taxes. The constitutions of the several states are examined in detail with respect to equality and uniformity, and in view of the decisions of the courts in every state. There are chapters on retrospective laws, on local assessments, and on the limitations on the rate of taxation, and the last one hundred pages are devoted to a discussion of the limitations of the debt-contracting power. The author has done well to quote the provisions of the constitutions and statutes that are the subject of discussion and also the

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language of the courts in important decisions. He has not merely collated the cases, but has also considered and discussed the leading questions in the light of legal principles and has stated his own conclusions. The scope of the work differs from Mr. Judson's book on taxation, in that it deals with the limitations imposed by the various state constitutions as well as that of the United States.

E. Q. K.

CONTRACTS. "Part Payment of Claim as Accord and Satisfaction," by Raymond D. Thurber, *Bench and Bar* (V. v, p. 90).

CORPORATIONS (Contracts). "The Validity of Contracts between Corporations having Common Directors" is the title of an article by Harold M. Bowman, in the June *Michigan Law Review* (V. iv, p. 577). The author says, "The contract between corporations having common directors is common in business at the present time. It is oftentimes useful and valuable to all concerned. But it offers peculiar opportunities for fraud and oppression. It is an open gateway through which unscrupulous interests can pass to dishonest advantage, and through which the weaker can often be turned to their ruin."

After summarizing and classifying the decisions, some of which hold such contracts *prima facie* valid though subject to strict scrutiny, others of which hold the contract voidable though for a variety of reasons and with a rather indefinite analysis of the method and consequences of avoidance, still another class of which hold the contracts invalid, and after a special analysis of the New York decisions, which in the earlier cases condemn such contracts, and then after a number of cases relaxing the severity of the original doctrine seem to have resumed approximately the original position, the author gives his conclusions as follows.

"A rule which exacts of the court anything less than rigid scrutiny of these contracts seems dangerous. Perhaps there are no circumstances which will justify immunity, the presumption that such contracts are *prima facie* fair and valid. If anywhere it would be where the boards of directors are identical and include all the stockholders, or where the majority of the stockholders, both in number and in interest, ratify. Even then slight evidence of oppression of the minority should be sufficient fully to overcome such presumption.

On the other hand a rule that all such contracts are absolutely void would be unnecessarily rigorous. The decisions show that there is no danger of general adoption of such a doctrine, therefore slight consideration need be given to it. The acceptable rule would seem to be that which declares the contract voidable whether it be executed or executory. The utmost good faith should be demanded on the part of those who make such contracts. And therefore to protect fully the interests of the minority, and of the individual, does it not seem necessary that the individual stockholder should be given power to institute proceedings which would lead to avoidance of the contract if any unfair advantage had been taken of him or other stockholders? A mere showing that the two corporations between which the contract is made have common directors should be sufficient to constrain the court to take jurisdiction. Capable and adventurous officers and directors otherwise will not be sufficiently deterred from making such contracts in their own peculiar interest.

The mere fact that the contract has been executed should be of no force if the stockholders have not been duly apprised of the making and execution of the contract, and given a sufficient time in which to have it set aside. Ratification of a fair and reasonable contract by a majority of the stockholders should be conclusive, but they should have complete information and due notice when they act. Mere failure to act, their information being insufficient or misleading, should have no effect on their right of avoidance, no matter how long continued.

Rules such as these and legal relations of allied significance will do more than much legislation to establish a satisfactory basis for business negotiation and agreement, and do away with its besetting evils. For much of this disease is hidden. It lurks in the secret places of the law, places with which only the lawyer or astute financier can be familiar. It is all the more invidious in its secrecy. The cool precision of the judge can do more than

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is generally imagined to probe these dark places, and cut away this disease, and we should ask of him more than we have in the past."

CRIMINAL LAW. The recent English decision, that obtaining a passport for an alien under a false name is an indictable misdemeanor at common law, previously referred to in these columns, is the subject of an article entitled, "The Passport System," by N. M. Sibley, in the *Journal of the Society of Comparative Legislation* (New Series, V. xv, p. 26).

CONSTITUTIONAL LAW. An article similar to that by William Trickett, on "The Great Usurpation," in the May *American Law Review*, reviewed in this department in our June number, appears in the June *Michigan Law Review* (V. iv, p. 616) entitled, "The Supreme Court and Unconstitutional Acts of Congress," by Edward S. Corwin. The author examines the evidence afforded by the debates in the constitutional convention and the discussions immediately following, especially those in the Federalist, and concludes that the framers of the constitution not only did not confer in express terms upon the Supreme Court power to declare acts of a coördinate legislature unconstitutional, but they at least were in doubt as to whether the judiciary would have this power simply by virtue of its position in relation to the other departments of government. He believes that the right finally assumed by the court was not a necessary consequence of that position. He submits that this interpretation of the constitution is not the meaning of the constitution itself necessarily, but is merely the opinion of a body of men, as to that meaning, and that that opinion is necessarily affected by personal bias. In conclusion he says:

"The right of the judiciary to pass upon the validity of legislation, tentatively broached in an insignificant commonwealth case, in 1782, by way of pure *obiter dictum*, became the foundation rule of American constitutional law and the characteristic function of American courts, whether state or national, in little more than two decades. This may have been a fortunate development, but it is also inevitable whether or not fortunate that aggressive popular statesmen should never willingly give over to juristic hands the entire keeping of the keys of constitutional truth."

CONSTITUTIONAL LAW (England). "Imperial Conference or Council," by Sir Thomas Raleigh. *The Journal of the Society of Comparative Legislation* (New Series, No. 15, p. 12).

DIVORCE. A short article on divorce and public order in Italy by Torquato C. Giannini appears in the *Journal of the Society of Comparative Legislation* (New Series, No. 15, p. 42).

EDUCATION. "Legal Training," by A. H. C. Hamilton, *Allahabad Law Journal* (V. iii, p. 163).

EVIDENCE. "Promotion of Hearsay Evidence," by Charles C. Moore, Law Notes (V. x, p. 64).

INSURANCE. "Warranties and Representations in Insurance Policies," by George W. Payne, *Central Law Journal* (V. lxii, p. 479).

JURISPRUDENCE. "Legal Conceptions from a Practical Point of View," by J. E. Hogg, *Canadian Law Review* (V. v, p. 306).

JURISPRUDENCE (Roman — Dutch). The system of law governing British subjects in Britain, South Africa, British Guiana, and Ceylon is discussed in an article entitled "Roman Dutch Law," by Frederick Mackarness in the *Journal of the Society of Comparative Legislation* (New Series, No. 15, p. 34).

JURISPRUDENCE. "English and Ontario Law," by N. W. Hoyles, *Canadian Law Times* (V. xxvi, p. 469).

JURISPRUDENCE. "The Separation of Executive and Judicial Functions in India," by Arthur James Hughes, *Bombay Law Reporter* (V. viii, p. 34).

JURISPRUDENCE (Turkish). A new text book on Turkish law, by George Young, secretary of the English Embassy, written in French,

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is reviewed in the *Journal of the Society of Comparative Legislation* (New Series, No. 15, p. 16) in an article entitled, "Corps de Droit Ottoman," by Sir Roland Wilson.

LEGISLATION. The usual review of legislation for the year 1904 covering all English-speaking countries, appears in the *Journal of the Society of Comparative Legislation* (New Series, No. 15, p. 49).

LITERATURE. "The Lawyers of Dickens," by A. M. Donovan, *Canadian Law Review* (V. v, p. 296).

LITERATURE. "Foibles of the Bench," by Henry S. Wilcox. An amusing satire on judicial opinions. Legal Literature Company, Chicago, Ill. Price $1.00.

MUNICIPAL CORPORATIONS. "The Rights of Creditors of a Municipal Corporation when the State has passed a Law to Abolish or Alter it," by Richard W. Flournoy, Jr., *Virginia Law Register* (V. xii, p. 175).

PRACTICE. "Some Observations Concerning Cautionary Instructions to Juries," by Eugene McQuillin, *Central Law Journal* (V. lxiii, p. 5).

PRACTICE. "Res Judicata," by Janardan Damodar Dikslut, *Bombay Law Reporter* (V. viii, p. 140).

PRACTICE (Law's Delay.) An interesting address before the Maryland State Bar Association by John Donaldson, entitled, "The Law's Delay, Some of its Reasons and Some Suggested Remedies," is printed in the *Baltimore Daily Record* of July 12, 1906, in which the author says, "It does not seem necessary to burden you with statistics as to the dockets of the common law courts in the city of Baltimore. Those who wish them may find them in the number of THE GREEN BAG for May, 1905, for a reference to which I am indebted to Judge Stockbridge. In this number are other papers as to conditions in other States, and also conditions in England."

PROCEDURE. "The New Act Concerning Demurrers to Evidence," by Archer A. Phlegar, *Virginia Law Register* (V. xii, p. 195).

PROPERTY. "Immovable Property: Standing Timber," by Haribaus Sahai, *Allahabad Law Journal* (V. iii, p. 147).

PROPERTY (Conveyancing). "Is One Claiming Title under a Quit-Claim Deed a *Bona Fide* Purchaser?" This question is considered by L. W. Carr, in the June *Michigan Law Review* (V. iv, p. 602). Some jurisdictions have held that the simple quit-claim deed is in effect notice to purchasers of possible defects in the title. This, however, has frequently been changed by statute. The cases are collected in the above-mentioned article.

PUBLIC POLICY. An address on a political subject from a legal standpoint by Judge R. M. Benjamin, entitled, "The Evolution and Prevention of Trusts and Monopolies," is printed in the *Bloomington Daily Bulletin* of June 25, 1906.

TORTS (Negligence). "Presumptions in Actions for Injuries by Undue Action of Inanimate Things through Causes Unknown," by M. C. Freerks, *Central Law Journal* (V. lxiii, p. 27).

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NOTES OF THE MOST IMPORTANT RECENT CASES COMPILED BY THE EDITORS OF THE NATIONAL REPORTER SYSTEM AND ANNOTATED BY SPECIALISTS IN THE SEVERAL SUBJECTS

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

ATTORNEY AND CLIENT. (Champerty.) **N. Y.** — Undue and misdirected zeal in the acquisition of business is held to be champertous conduct in the case *In re* Clark, 77 N.E. 1. New York Code of Civil Procedure prohibits attorneys from procuring retainers by offering or giving any valuable consideration therefor, and declares that every attorney who shall violate its provisions shall be deemed guilty of a misdemeanor and removed from office.

This provision is held to prohibit an attorney from agreeing to pay an agent out of the profits of cases for his services in inducing persons to place their claims in the attorney's hands for collection and settlement. The respondent attorney in this case employed an agent to visit persons throughout the state having claims against telephone companies because of the erection of poles, and induce them to place the claims in respondent's hands for collection. By this means respondent obtained some thousands of such claims, and then arranged with the telephone companies to assign the contracts to the companies and to assist in every possible way in effecting amicable settlements of the claims. This conduct was held to be malpractice within the provisions of the Code of Civil Procedure that any attorney guilty of malpractice shall be disbarred.

CARRIERS. (Rules — Reasonableness.) **Ala.** — That a rule of a sleeping-car company excluding from its cars insane persons and persons infected with contagious or infectious diseases is reasonable, is held in Alabama in Pullman Company *v.* Krauss, 40 So. 398.

The rule in question would seem, says the court, "to have been adopted for the safety and comfort of defendant's patrons or passengers, and whether the defendant is to be treated as a common carrier or otherwise, the rule is a wise and salutary one, and we have no difficulty in reaching the conclusion that it is a reasonable one." No authorities are cited by the court in support of its holding, and in fact it would seem that none are needed.

A connected point of some interest is involved in the declaration that whether the rule is or is not reasonable is a question for the court. Upon this question it is suggested that if it were left to the jury one rule might be applied at one time and another on a different occasion, so that the company might be held liable in one case and not liable in another presenting the same question.

CONFLICT OF LAWS. (Comity.) **Wis.** — A holding defining and limiting the rights extended to aliens by our courts on principles of comity is contained in Disconto Gesellschaft *v.* Terlinden, 106 N.W. 821. It is there held that where a corporation of Germany obtained a judgment in the courts of Wisconsin against a non-resident alien debtor on a cause of action accruing in Germany, the corporation having agreed with the trustee in bankruptcy of the debtor appointed in Germany that all moneys recovered should form a part of the bankrupt's estate, the corporation could not by ancillary remedies in Wisconsin impound property of the debtor there as against a creditor who was a citizen in Wisconsin, though his cause of action accrued subsequent to the corporation's cause of action and his proceedings to impound the property were subsequent to those of the corporation.

CONSTITUTIONAL LAW. (Carriers — Ticket Brokers.) **Ore.** — Almost every constitutional objection which could reasonably be raised against a law intended to prohibit the business of ticket brokerage is overruled in State *v.* Thompson, 84 Pac. 476. A recently enacted statute of Oregon requires railroads to provide agents authorized to sell tickets and armed with a certificate of authority, and makes it unlawful for a person not possessed of such certificate to sell tickets or operate a ticket office. The obvious effect of this statute is to prohibit the ticket brokerage business and restrict the sale of railroad tickets to the duly constituted agents of the railroads issuing the same. This statute was attacked on the ground that it deprived the holders of tickets of their property without due process of law; that it impaired the

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obligation of the contract; that it violated the provisions of the 14th amendment as to the equal protection of the laws; that it interfered with the regulation of commerce, and that it was an unconstitutional prohibition of a lawful calling. None of these objections was regarded as well founded, and with respect to the one last mentioned the statute is held to be a lawful exercise of the police power, enacted in order to protect travelers from fraud, in support of which holding the court cites quite a number of similar decisions from other jurisdictions. Fry *v.* State, 63 Ind. 552, 30 Am. Rep. 238; Burdick *v.* People, 149 Ill. 600, 36 N.E. 948, 24 L. R. A. 152, 41 Am. St. Rep. 329; State *v.* Corbett, 57 Minn. 345, 59 N. W. 317, 24 L. R. A. 498; Commonwealth *v.* Keary, 198 Pa. St. 500, 48 Atl. 472; Jannin *v.* State, 42 Tex. Cr. R. 631, 51 S.W. 1126, 96 Am. St. Rep. 821; State *v.* Bernheim, 19 Mont. 512, 49 Pac. 441; *In re* O'Neill (Wash., Dec. 27, 1905) 83 Pac. 104.

A somewhat similar statute to that declared constitutional in Oregon was declared to be unconstitutional by the Court of Appeals in New York in 1898, in the case of People ex rel Tyroler v. Warden of the City Prison, 157 N. Y. 116, 51 N. E. 1006, where the court decided four to three, Chief Justice Parker writing the majority opinion that the statute violated the provisions of the state constitution in that it deprived a person of liberty without due process of law, and that it was not a valid exercise of the police power. The Oregon court distinguishes the New York decision on the ground that the New York statute authorized the agents appointed by one railroad to sell tickets of other railroads while the Oregon statute restricted the agency to dealing in tickets of the railroad making the appointment. The courts of Texas have also declared such a statute unconstitutional. Jannin v. State, 51 S. W. Rep. 1126. Where a ticket is issued by a railroad stipulating that it is non-transferable, and not to be used by any person other than the purchaser from the railroad, irrespective of statutes, some of the courts have issued an injunction restraining ticket brokers from dealing in unused portions of such tickets. A case involving the power of the court to grant such an injunction is now before the Supreme Court of the United States for its consideration. L. & N. R. R. Co. v. Bitterman, a case which first arose in the Circuit Court for the Eastern District of Louisiana, and is reported 128 Fed. 176.

Lee M. Friedman.

CONSTITUTIONAL LAW. (Due Process — Railroads.) U. S. S. C. — Where proceedings by State Drainage Commissioners for widening and deepening the channel of a creek require the removal and rebuilding of a railroad bridge and culvert, the imposition upon the railroad company of the entire cost of rebuilding the bridge and culvert is held in Chicago, Burlington & Quincy Railway Company *v.* Illinois, 26 Sup. Ct. 341, not to constitute a taking of property without due process of law.

It is, however, declared that the expense of removing the soil attendant upon the widening and deepening of the channel across the right of way cannot be imposed upon the railroad company without a denial of due process of law.

CONSTITUTIONAL LAW. (Foreign Corporations.) U. S. S. C. — Security Mutual Life Ins. Co. *v.* Prewitt, 26 Sup. Ct. Rep. 619, is a holding which seems to be a necessary corollary of a proposition which has been decided so often that it is certainly by this time incontestable. Hooper *v.* California, 15 Sup. Ct. 207; Allgeyer *v.* Louisiana, 17 Sup. Ct. 427; Orient Ins. Co. *v.* Daggs, 19 Sup. Ct. 281; Waters-Pierce Oil Co. *v.* Texas, 20 Sup. Ct. 518, and a number of other cases both earlier and later have established the principle that a state has the right to prohibit a foreign corporation from doing business within its borders unless such prohibition is so conditioned as to violate some provision of the federal constitution. Based upon this broad principle the court declares in the case being reviewed that a state statute may properly provide that if a foreign insurance company shall remove to a federal court a case which has been commenced in the state court, the license of the company to do business within the state shall thereupon be revoked. The case of Home Insurance Co. *v.* Morse, 20 Wall. 445, is considered in connection with Doyle *v.* Continental Ins. Co., 94 U. S. 535, and it is pointed out that there is no inconsistency in the decision in these two cases inasmuch as the holding in the Morse case that a statutory provision purporting to prevent foreign insurance companies from removing causes to federal courts was void, did not cover the issue presented in the Doyle case, nor in the case under review. The case of Barron *v.* Burnside, 7 Sup. Ct. 931, is referred to and the contention that it overruled the Doyle case is negatived.

CONSTITUTIONAL LAW. (Increasing compensation of Judges.) Conn. — In McGovern *v.* Mitchell, 63 Atl. 433, the Supreme Court of Errors of Connecticut is called upon to discharge the embarrassing duty of passing on the validity of a statute increasing the salaries of its members. The Connecticut constitution contains an amendment providing that neither the general assembly

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nor any county, city, etc., shall have power to pay or grant any extra compensation to any public officer, employee, agent, or servant, or increase the compensation of any such person to take effect during the continuance in office of any person whose salary might be increased thereby. The question was whether under this amendment a statute which increased the salaries of the justices of the Supreme Court of Errors and the Superior Court, to take effect from the passage of the act, was valid. The statute was upheld on the ground that the constitutional amendment did not prohibit an increase in the compensation of officers by legislation, but only by grant other than legislation. In reaching this conclusion the conditions which gave rise to the constitutional amendment are adverted to and it is shown that the evil which that amendment sought to remedy was the making of grants, or in effect the giving of gratuities to public officers in addition to their salaries.

CONSTITUTIONAL LAW. (Physicians — Regulation.) Ark. — In Thompson *v.* Van Lear, 92 S.W. 773, the Supreme Court of Arkansas holds that a statute forbidding physicians and surgeons to solicit patients through paid agents is a valid police regulation. It is pointed out that the business of a physician directly affects public health, and that it does not follow that because the merchant, the manufacturer, and others may solicit trade through hired agents that a physician may do the same thing. Attention is called to the fact that many persons who do not need a physician's services are nevertheless prone to solicit medical advice, and that, while a conscientious physician would doubtless advise such a patient that no treatment was needed, a physician who had secured a patient by means of a hired agent and paid out a certain sum to obtain the patient would be under a strong temptation to put him through a course of treatment whether he needed it or not, in order to get his money back and make a profit on his investment.

CONSTITUTIONAL LAW. (Regulation of Plumbing.) Wash. — The Supreme Court of Washington, in State *v.* Smith, takes issue with the Supreme Court of New York, which in People *v.* Warden, 144 N. Y. 529, 39 N. E. 686, upheld the validity of a statute providing for the licensing of plumbers. The statutes are almost identical, and provide for the creation of a board of plumbing examiners, who are empowered to examine all persons desiring to carry on the business of plumbing, and issue licenses to such as they may deem qualified. The statute made it a crime to carry on the business of plumbing without obtaining a license, but stated none of the details of the examination to be required, and provided that two master plumbers and one journeyman plumber should constitute the board of examiners.

A number of cases, including Singer *v.* State, 19 Atl. 1044, State *v.* Gardner, 51 N. E. 136, State *v.* Benzenberg, 76 N. W. 124, are referred to as upholding the New York decision, but based very largely upon the views of Mr. Justice Peckham who dissented in the New York case and wrote the opinion in Lochner *v.* New York, 198 U. S. 45, 25 Sup. Ct. 539. The court concludes that the act in question is not a health or police regulation, but is invalid as affecting the privileges and immunities of citizens. A comparatively recent holding that courts will not pretend to be more ignorant than the ordinary citizen seems to be embodied in the concluding paragraph where the court says, "We are not permitted to inquire into the motive of the legislature, and yet why should a court blindly declare that the public health is involved, when all the rest of mankind know full well that the control of the plumbing business by the board and its licensees is the sole end in view."

CONTEMPT. (Criminal Liability — Truth as Defense.) Colo. — A case of paramount interest in Colorado, and which is of no little importance elsewhere, is that of People *v.* News-Times Publishing Company, 84 Pac. 912. The proceeding was one to punish respondents for criminal constructive contempt in publishing, pending the rehearing of a cause, charges that the Supreme Court was influenced by corrupt motives in making its decision.

It is first declared that while causes are before the Supreme Court on petitions for rehearing, they are so far as the law of contempt is concerned, pending causes. Two related holdings which are apparently correct, immediately follow the proposition just announced, and are to the effect that a publication charging the Supreme Court and certain of its judges with having been influenced by corrupt motives in their rulings in causes still pending for rehearing and that they would be so influenced in their final disposition of them and of a cause not yet heard, constitutes criminal constructive contempt, and that the intent of the publisher of such charge is no defense to a proceeding against him for contempt.

The most important and far-reaching point decided in the case is that the truth of the charges is no defense to the contempt proceedings.

Mr. Justice Steele dissents in a very able opinion in which he lays special stress upon the unsoundness of the last point mentioned as being made by the majority, closing as follows:

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"The court made a mistake in instituting the proceeding; a mistake in holding that an affidavit is not essential to its jurisdiction; a mistake in holding that the acts of the respondent constituted contempt. But infinitely greater than these was the mistake it made in holding the truth to be immaterial; for, aside from the fact that it denied to the respondent important constitutional rights, in the very nature of things, those who before believed the charges to be true are now confirmed in their belief, and those who did not believe them now have their confidence in the court shaken solely because of the action of the court in refusing the respondent a hearing, and denying him the right to offer proof in support of the charges, and in holding that it is entirely immaterial whether the matter published is true or false."

CRIMINAL LAW. (Attempts.) **N. Y.** — The question whether a conviction for an attempt to commit a crime can be had where the actual commission of the crime is impossible under the circumstances, is answered in the affirmative in New York, by People *v.* Jaffe, 98 N. Y. S. 486. The court there declares that whether an attempt to commit a crime has been made is determinable solely by the condition of the actor's mind and his conduct in the attempted consummation of his designs, and the fact that the crime attempted could not be committed, is immaterial. The Statutes of New York relative to receiving stolen property and to the punishment of attempts, are not materially different from the laws of most of the other states, so that the decision, while apparently based on certain New York statutes, is really of very general application. The prosecution was for attempting to receive stolen goods, and it was shown that a clerk stole goods from his employer, attempting to sell them to accused, but subsequently confessed, so that the employer recovered the goods. The latter redelivered them to the clerk under an agreement that he should sell them to accused. There was sufficient evidence to justify the jury in finding that accused on receiving the goods believed that they were stolen. Under these circumstances it was held that accused could not be convicted of receiving stolen property, but could be found guilty of an attempt to commit that offense. A number of other New York cases, somewhat similar in facts, are cited with approval, People *v.* Sullivan, 173 N. Y. 122, 65 N. E. 989; People *v.* Mills, 178 N. Y. 274, 70 N. E. 786; People *v.* Conrad, 92 N. Y. S. 606; People *v.* DuVeau, 94 N. Y. S. 225, being among the number.

CRIMINAL LAW. (Larceny — Public Officers.) **Ill.** — A conviction for larceny committed by obtaining possession of goods by legal process wrongfully issued is sustained in Luddy *v.* People, 76 N. E. 581. There a constable, in conspiracy with a justice of the peace and a collection agent, seized goods on a writ issued on a judgment for claims which had been paid, as shown by receipts filed with the justice but destroyed by him. The constable took the goods away and concealed himself so as to prevent the retaking of the goods, which were afterwards found where they were concealed by the constable and the justice after a pretended sale. Under these circumstances the constable was held guilty of larceny. The court says that there can be no doubt but that a constable acting in good faith under a writ regular upon its face will be protected in a reasonable and lawful performance of his duties. But it is declared that the fact that a man is an officer and holds a writ regular on its face does not authorize him to do illegal and unlawful acts under the cloak of such authority.

EQUITY. (Complainant must have Clean Hands.) **U. S. C. C. A. 6th Circ.** — A pleasing exposition of the ancient maxim that the hands raised in supplication by a suitor in equity must be unsullied is contained in Toledo Computing Scale Company *v.* Computing Scale Company, 142 Fed. 919.

Complainant made and sold a "butcher's computing scale" which it stated in its circulars to the trade would make a dealer a profit of three per cent if he sold his meat at the same price per pound he paid for it. This was done by so constructing the computing mechanism that the price shown by the scale for the draft weighed was that for the next even numbered ounce above the actual weight. The evidence showed that sixty thousand of these scales have been sold.

Complainant openly advertised this principle of its scales and sought custom expressly upon the ground that the scales were constructed on this dishonest principle. In view of its business methods, the court holds that complainant had no standing in a court of equity to restrain a competitor from calling the attention of purchasers and the public to the fraudulent and dishonest character of complainant's scale.

INJUNCTION. (Violation — Labor Unions.) **Ill.** — The Supreme Court has in Franklin Union No. 4 *v.* People, 77 N. E. 176, made a further contribution to the growing volume of decisions relative to the rights and duties of labor unions engaged in strike.

A preliminary contention of some importance is disposed of in a holding that where a court has before it a party complainant asking for an injunc-

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tion and the party against whom the injunction is asked, upon a bill stating a case within its general equitable jurisdiction, the court has authority to decide whether an injunction should issue and the character of such injunction, and any error on its part in improperly issuing the injunction or in issuing an injunction broader than is justified by the bill, is merely ground for reversal on appeal or writ of error, and is not available to defeat contempt proceedings for a violation of the injunction as issued.

On the merits it is declared that a labor union which ordered a strike and which through its officers and members engaged in picketing and intimidating and threatening non-union employees, assaulting some and frightening others, was properly adjudged guilty of contempt in violating an injunction restraining it from interfering with the business of their former employers, and from intimidating other employees from doing their work or accepting employment.

In support of the holding the court cites Doremus *v.* Hennessy, 176 Ill. 608, 52 N. E. 924, 54 N. E. 524; Beck *v.* Railway Teamsters' Protective Union, 118 Mich. 497, 77 N. W. 13; Vegelahn *v.* Guntner, 167 Mass. 92, 44 N. E. 1077.

INJUNCTION. (Violation — Persons Liable.) **U. S. C. C. N. D. Ill.** — In Employers' Teaming Company *v.* Teamsters' Joint Council, 141 Fed. 679, a person not a party to an injunction suit is held liable to punishment for contempt for violation of the injunction. An order was issued in a suit of equity against a labor union for an injunction restraining defendants, their agents or servants, and all other persons aiding, abetting, or acting in concert with them or having knowledge of the order, from interfering with or in any manner injuring, obstructing, or stopping the business of complainant, which was a teaming company.

The order was widely published, copies were posted in public places and placed on each side of all of complainant's wagons, which also bore large signs calling attention thereto. The wagons were also operated under armed guards.

In proceedings for contempt for violation of the order, it was shown that respondent who was not a party to the suit was one of the most active in a mob which attacked one of complainant's wagons so placarded and guarded, and that he incited others to violence and himself threw stones at the teamsters and guards, and assaulted one of the guards while the latter was in charge of the police.

The court holds on these facts that respondent must be deemed to have had knowledge of the order, notwithstanding the fact that he filed a sworn general denial of all the allegations of the petition, and it is further held that he was guilty of contempt in aiding and abetting the defendants in the cause in violating the order of the court and willfully obstructing its process.

INSURANCE. (Forfeiture.) **Ky.** — The right of a life insurance company to summarily enforce a forfeiture through the mediumship of an assignment of the policy as security for a loan is denied in Mutual Life Ins. Co. of Kentucky *v.* Twyman, 92 S. W. 335. The insured in a paid-up policy borrowed money from the company and assigned the policy as collateral by an assignment authorizing the company on the non-payment of the debt to cancel the policy. Under this contract the company is denied the right, on the failure of insured to pay the note, to enforce its interest in the policy as collateral, by summarily canceling it. It is held that the company must resort to equity to enforce its rights based on the surrender of the policy, determined in the manner provided by the statutes of Kentucky, and that on the court finding that such value exceeded the debt, the sum left over should be ordered to be paid to insured or used for the purchase of paid-up insurance as the insured might elect.

INSURANCE. (Liability.) **Ohio.** — A rather peculiar variety of contract is held not to constitute an insurance policy, in State *v.* Laylin, 76 N. E. 567. A corporation was chartered to defend physicians and surgeons against civil prosecution for malpractice, and in prosecution of its business issued and sold to members of the medical profession a contract whereby it agreed to defend the holder of the contract against any suit for malpractice that might be brought against him during the term specified in the contract, but did not assume or agree to assume or pay any judgment that might be rendered against the insured in the suit. Such a corporation, it is held, is not engaged in the business of insurance, nor is the contract an insurance contract. Irrespective of the question thus decided as to form of contract, it is declared that a corporation created for the purpose of engaging in and carrying on such a business is not entitled to receive from the Secretary of State a certificate authorizing it to transact its business, for the reason that the business is professional business, which the statutes of Ohio expressly prohibit corporations from carrying on.

INTOXICATING LIQUOR. (Medicinal preparations.) **Ark.** — Not every universal panacea can be retailed with impunity in Arkansas. Stelle *v.* State, 92 S. W. 530. There the court has sustained a conviction for selling intoxicating liquors with-

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out a license on evidence showing defendant disposed of a bottle of Peruna. There was also evidence establishing, as the court says, "beyond dispute," that Peruna is intoxicating, and was used as a beverage. This is sufficient, says the court, to sustain a conviction, and it was no defense that the liquor was sold as a medicine. The seller is charged with the duty of acquainting himself with the contents of the preparations he is selling, and if they contain the elements necessary to constitute an intoxicating liquid in such form that they may be used as beverages, it is unlawful to sell them, even though the seller in doing so believes that they are to be used as a medicine.

LIMITATIONS. (**Real Actions — Accruing Interests.**) **Australia.** — Although there is no statute in force in New South Wales giving a person title by prescription, there is in operation the English Real Property Suits Limitation Act of 1833, which came into effect in the colony, by adoption, in 1837. By it a person claiming land under a common law title can bring an action against another in adverse possession within twenty years only after such time as the right accrued to him. The man in possession during that time can claim the land against all but the true owner, and after the lapse of the specified time, he can hold against the world and convey his title accordingly. What his position meantime was, so far as the value of his possession was concerned, has been undefined until the recent case of Clissold *v.* Perry, Commonwealth Law Reports, 363. The plaintiff was in possession of lands, without a documentary title, for ten years, when part of the land was resumed by the government under the Public Works Act, 1900, secs. 95 and 96. Upon making the usual claim for compensation, the defendant, who was the minister administering the act, refused to make assessment on the ground that the plaintiff, not having a title documentary or possessory under the Limitation Act, was not entitled to receive any compensation. The state court upheld this contention from which the plaintiff appealed to the high court of Australia. This court decided that, as the act under which the resumption was made did not specifically bar such interests as were possessed by the plaintiff, and it was obviously the intention of the act not to interfere with vested interests, Clissold was entitled to have the value of his possession assessed as compensation. He was in possession of the land for ten years, which was a substantial interest, as it brought him nearer the twenty years under the act necessary to protect him against an action of ejectment. Possession being good against the world, save the true owner, is a salable and devisable interest, so that if the government were not made to pay for the land resumed, it would be confiscating part of a man's property. Further, the act gave an indefeasible title to the government on such resumption, the title of the holder of the resumed land being converted into a claim for compensation. The court could not permit the ten years' title of the plaintiff to be swallowed up — to do so would in effect be giving judgment in ejectment to the real unknown owner — and the claim for compensation by the holder would be illusory. Judgment went in favor of Clissold that an assessment be made and the amount determined to be paid into court to await the expiration of the twenty years under the act, then — should the true owner meanwhile not turn up — it should be paid to the plaintiff or his representatives. This judgment was subsequently up-held by the Privy Council on appeal by permission from the high court.

The act limiting real actions can be made, in New South Wales, to have the effect of the Prescription Act, as by it indirectly an indefeasible title can be obtained. Under the Torrens System which that obtains, upon the twenty years' possession being clearly proved, a certificate of title will issue, and be registered in favor of the holder of the land upon which the common law documentary title of all others to the same land is extinguished, and all claims are barred against the holder of the certificate. The important point in this case under notice is that by the Limitation Act, immediately upon a person going into possession adverse to the true owner, he begins to establish a material interest accruing from day to day, the actual value of which he can handle only when the limit of twenty years' possession has been reached under the act.

NEGLIGENCE. (**Telegraphs.**) **U. S. C. C. A. 8th Circ.** — The duties of telegraph companies are further elucidated in Bank of Havelock *v.* Western Union Telegraph Co., 141 Fed. 523, where it is held that in the absence of notice of facts or circumstances which would awaken inquiry or arouse suspicion in the mind of a person of ordinary prudence and intelligence in a like situation, regarding the authority of a person who presents a message for transmission, the exercise by a telegraph company and its operators of reasonable care to receive and transmit genuine and authorized messages only, does not require them to investigate or ascertain the identity or authority of the person who tenders a message for transmission, whether that message is in writing, or is spoken directly to the operator, or is communicated to him by telephone. It is, however, declared that when such facts or circumstances come to the

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notice of the company or of its acting operator, the exercise of reasonable care to transmit genuine and authorized messages only, requires the party who receives the notice to investigate and ascertain the authority of the sender before transmitting the message, or to communicate the facts and circumstances and the inquiry or suspicion to the addressee at or before its delivery.

PRACTICE. (Examination of Jurors — Personal Injury Litigation.) Minn. — With reference to the propriety of interrogating jurors in a personal injury case as to their connection with employers' indemnity insurance companies, the Minnesota court takes issue with some of the other states by holding that such questions are entirely proper, and that conduct of counsel having a tendency to impress the jurors with a belief that the action is being defended by an insurance company is not prejudicial. In Antletz *v.* Smith, 106 N.W. 517, counsel for plaintiff not only asked each of the first three jurors "whether he was in any way interested in an accident insurance company," but on the calling of the fourth juror turned to defendant's attorney and said, "What is the name of the insurance company defending this case?" Some question as to the identity of the real defendant was further interjected by remarks with reference to the right of the defendant's attorney to appear for the defense. Objections to these remarks as well as to the question of defendant's counsel was sustained, and the court holds that under the circumstances, and in view of the prior holding in Spoonick *v.* Backus-Brooks Co., 94 N. W. 1079, neither the questions to the jurors nor the remarks of plaintiff's counsel were cause for reversal.

PROPERTY. (Prescription — Easements.) Australia. — The case of Delohery *v.* Permanent Trustee Co. of New South Wales, 1 Common wealth Law Reports, 283, decided, as regards three of the states, *viz.* Victoria, Queensland, and New South Wales, that prescription at common law, as it affects ancient lights, has been applicable in Australia since the beginning of settlement. It has also kept alive the weatherbeaten legal fiction of "lost grant," to sustain individual claims based upon inaction by the other party, a rather too technical device to meet difficulties caused by modern conditions. The plaintiff sought to restrain the defendant from building, so as to obstruct the light enjoyed by the premises of the former, on the ground that the English law of ancient lights, based upon long uses or prescriptions, was in force in New South Wales, although the English Statute, 2 and 3 Wm. IV, chap. 7, had not been adopted nor copied in the state. This, the English Prescriptions Act, was passed in 1832, four years after New South Wales had been given power to legislate for her needs, and so was not in force in the colony. By 9 Geo. IV, chap. 83, passed in 1828, giving this power to the colony, it was declared that the common law of England should be in force in the colony, and not a little of the time of Australian judges has since been spent in the endeavor to decide what parts of the English common law have been applicable to the conditions of the new world. This act made clear the doctrine that colonists take with them on settling in a new country the laws of the motherland. Although the conditions in Australia on settlement were not similar to those in England at the same date, the high court held that the right of a person to the enjoyment of light which had come uninterruptedly to his building for the space of twenty years was a right universally sound in principle, and not based merely on local conditions where declared. The term of twenty years upon which to establish the right of "ancient lights" had been determined by the common law of England by 1828, and so it must be taken to be in force in that part of Australia which formed New South Wales at that date. The present states of Queensland, New South Wales, and Victoria have been carved from the original colony of the New South Wales of eighty years ago. In the court of first instance, from which appeal has been had to the high court, the learned judge held that the doctrine of "lost grant" would not be beneficial in Australia, and that in consequence the law of "ancient lights" was not now applicable in New South Wales. *A fortiori*, such a doctrine could not by any stretch of the imagination have been in force in Australia or applicable on settlement by the first colonists. A legal fiction assuming such a condition of things as could sustain a grant of easements for twenty years would be an absurdity in an uncivilized country on the day on which it was taken possession of by England. But as the high court apparently considered that a title by user for twenty years a universal right of property based upon primary principles, it reversed the decision of the court below. Yet while it so decided it declared that "the foundation, however, of the plaintiff's right being a grant or agreement on the part of the owner of the adjoining land, using those terms in the sense, not of an actual document which has been lost, but in the sense of a contractual obligation which is implied by law from admitted facts, it is of course still open to the defendants to show such a state of facts as will exclude the implication."

The doctrine that first colonists take with them the common law of the motherland, applicable to the conditions of the new country settled by them, is qualified by the judgment of the high court

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when dealing with the argument that the law of prescription cannot be universally applicable in new countries: "We cannot see that there would be any difficulty in administering the law of prescription, so far as it regards ancient lights, in a new country, so soon as occupation has proceeded to such an extent as to allow of a continued enjoyment for twenty years. . . . We are of opinion that the law of prescription as to ancient lights was a law which could be applied in New South Wales within the meaning of the statute 9 Geo. IV, chap. 83, and therefore because part of the law of the colony at that time, even if it had not been brought in with them by the first colonists." So opposed to this decision were the people of the state, as an instance of law establishing a state of property inconsistent with modern conditions and with the bright climate of Australia, that the state parliament passed a statute which provides: —

"SECTION 1. From and after the commencement of this act no right to the access or use of light to or for any building shall be deemed to exist or to be capable of coming into existence by reason only of the enjoyment of such access or use for any period or of any presumption of a lost grant based upon such enjoyment."

There is also a clause saving the rights of parties under decisions already given, or to proceedings pending. This settles the law of "ancient lights" in New South Wales, but as the reasoning of the high court applies to the acquisition of other easements it may be that by the strength of the unexplained enjoyment for a period of twenty years or upwards a right of way, for instance, may be acquired in the state.

PROPERTY (see Limitations).

RELIGIOUS SOCIETIES. (Membership.) **Wash.** — Hendryx *v.* People's United Church of Spokane, 84 Pac. 1123, marks an exception to the well-recognized rule relative to the extent to which courts will interfere with the affairs of religious corporations. There are many adjudications mostly based, as the court says, upon Shannon *v.* Frost, 3 B. Mon. 253, Waston *v.* Jones, 13 Wall. 679, and Nance *v.* Busby, 18 S. W. 874, which held that where a religious organization has adopted a creed and made provisions for church government which authorize the expulsion of members, the action of the church in that regard is final, and courts will only inquire whether the organization in question is a church, and whether the tribunal which has imposed the sentence of expulsion is the one endowed by the church laws with power in the premises.

Admitting this to be the general rule, the court holds in the case under consideration that where members of a church are expelled in pursuance of a fraudulent scheme to obtain control of the property of the church and divert it from its original purpose to the use and benefit of the perpetrators of the scheme, the expulsion is void and the members so expelled have a right to maintain an action for the protection of the church property.

STATUTE. (Interpretation — Anti-Cigarette Law.) **Ind.** — In connection with the Nebraska case found elsewhere in this number and interpreting the anti-cigarette bill of that state, it is not amiss to call attention to the case of State *v.* Lowry, 77 N. E. 728, where somewhat different questions are raised concerning the scope and application of the Indiana statute. As a basis for the more important decision as to the precise application of the statute it is first declared that the importation of cigarettes in original packages for personal consumption is a transaction involving interstate commerce and is not within the anti-cigarette act, and as such importation is protected by the interstate commerce law, cigarettes so imported for the personal consumption of the importer do not become subject to state regulation on the termination of the transportation, nor while they are in the importer's possession for personal consumption. The statute, which is very broad in its terms, prohibits the manufacture, sale, keeping for sale, owning, or giving away of cigarettes, and provides penalties for violation thereof, and declares that it shall be unlawful for any person, directly or indirectly, to sell, dispose of, or give away, keep, own, or be concerned in owning or keeping any cigarettes, must be construed, says the court, in view of its title, namely, "An Act to regulate the manufacture, sale, and giving away of cigarettes." It is held that the act should not be construed as intended to prohibit the act of smoking cigarettes or keeping them in possession for the sole purpose of smoking.

STATUTE. (Interpretation — Cigarettes.) **Neb.** — In a rather brief opinion the Supreme Court of Nebraska construes of a statute making it unlawful to manufacture, sell, or give away cigarettes, and holds that the rolling of a cigarette by hand for the maker's own consumption, and from materials owned by the maker, is not a manufacture within the meaning of the statute. It is pointed out that the statute intentionally avoids forbidding the use of cigarettes by individuals, and argues from this that the manufacturing prohibited was a manufacturing for traffic, while the act of rolling cigarettes from one's own materials and for one's own use is so connected with the use as to be a part of it. Dempsey *v.* Stout, 107 N. W. 235.

SURETYSHIP. (Release of Surety.) **Colo.** — A holding for which no direct precedent has been found and which was apparently decided upon the authority of analogous cases, is delivered in A. S.

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Ripley Building Company *v.* Coors, 84 Pac. 817. It is there declared that a surety on bond for faithful performance of a building contract is not released by the fact that he was induced to execute the bond by fraudulent representations of the principal, and gave the obligee notice of intention to withdraw from the bond before anything had been done under the contract, the faithful performance of which the bond was given to secure.

Cases cited in favor of the proposition that the surety's liability was terminated under the circumstances mentioned are distinguished from the case at bar by the fact that they related to continuing contracts of guaranty.

TORTS. (Libel — Post Cards — Injunction.) Eng. — The case of Corelli *v.* Wall (Times Reports, May 11, 1906), which not only on account of the position of the plaintiff, Miss Marie Corelli, the well-known authoress, but by reason of the new questions involved in it, has attracted considerable attention, has just been decided in a considered judgment by Mr. Justice Swinfen Eady in the Chancery Court. The plaintiff sought to continue till the trial an interim injunction obtained by her in the Easter vacation, restraining the defendant from publishing or offering for sale certain picture post cards purporting to depict scenes in the private or home life of the plaintiff, or any picture post cards which will expose the plaintiff to ridicule or contempt. The judge said: "Two of these post cards represent the plaintiff in the public street with a pair of ponies, the third represents her on the river Avon in a gondola, the fourth in the act of presenting a cup to the Stratford-on-Avon Boat Club, and the fifth post card shows the plaintiff in a garden which exists only in the imagination of the artist. These drawings were made without the knowledge of the plaintiff and without any communication being made to her, and a large quantity were printed and prepared for sale. I am quite satisfied upon the evidence that the defendants had no desire to respect or regard the feelings or wishes of the plaintiff with respect to the cards, but intended from the first to dispose of them for their own profit as a commercial venture, regardless of any objection the plaintiff might make. The question, however, which I have to consider is whether the plaintiff has made out such a case of legal injury as to require the court to intervene by injunction at the present stage of the action. The real ground of the plaintiff's motion is that the cards constitute a libel upon her and that their sale ought to be restrained on that ground. Although it is well settled that a person may be defamed as well by a picture or effigy as by written or spoken words, I am not satisfied that the cards are libellous; and in any event the case is not so clear as to justify the court in intervening before the fact of the libel has been established. The case of "Bonnard *v.* Perryman" (7 The Times Law Reports, 453; 1891, 2 Ch., 269) shows how careful the court should be in granting interlocutory injunctions in cases of alleged libel. It was also urged that the plaintiff as a private person was entitled to restrain the publication of a portrait of herself which had been made without her authority and which, although professing to be her portrait, was totally unlike her. No authority in support of this proposition was cited. The present Master of the Rolls referred to this question in "Monson *v.* Tussauds (Limited)" (10 The Times Law Reports, at p. 203; 1894, 1 Q.B., at p. 679), but refused then to express any opinion upon it, as it was not necessary for the decision of that case. The plaintiff has not established, for the purpose of this motion, that she has any such right. Under these circumstances I do not see my way to grant any interlocutory injunction."

TRADE UNIONS. (Contracts — Validity.) La. — In Schneider *v.* Local Union No. 60, United Assn. Journeymen Plumbers, Gas Fitters, Steam Fitters, and Steam Fitters' Helpers of the United States and Canada, 40 South. 700, the court holds that the obligation or pledge which a member of a labor union is required to take on joining is to be construed with reference to the declared purposes of the organization and is binding only in so far as those purposes are lawful and are to be attained by lawful means. When such union attempts the accomplishment of an object which is foreign to the purposes for which it is organized or attempts the accomplishment of those purposes by unlawful means, the member cannot be regarded as bound by his contract with the union to participate in its action. The facts which give rise to this deliverance were as follows. The labor union of which the plaintiffs were members recommended another member for an office, the appointment to which rested with a board of public officers. Plaintiffs were members of this board and refused to vote for the candidate recommended by their union. In this situation the court held that plaintiffs' obligations to their union and the public being distinct from each other, and the latter being paramount, plaintiff's failure to vote for the union candidate was no reason why the union should fine and suspend them, and such action having been taken by the union, the plaintiffs were regarded as being entitled to relief by injunction and by a judgment remitting the fine imposed, reinstating them in the union, and condemning the union and its officers and members who participated in its action, to the payment of damages, actual and exemplary.

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THE LIGHTER SIDE

Indeed! — The following insult received by the editor in his private capacity was promptly rejected as fatally defective for want of proper release of dower. The careless scrivener has offered to remedy the defect by having the said wives present for personal livery of seisin. The grantees as confirmed bachelors have been somewhat puzzled as to the appropriate reply.

Know all Men [and Aunt Susan] *by these Presentiments*, That we, the underdone, Lennox Hubbardsquash Lindsay of Concord Grape in the County of Malesex, farmer, and William L'ambert Barnard of Hang'em-over-the-Bay, on a count o' yer Plymouth Gin, mariner, boat in the Commonwealth of Massachusetts, being of sound mind and dispossessing memory and in consideration of five dollars to us to be paid by William H——! Vincent of Winthrop-on-loop in the County of Moran, runner, and Susan Receiver Wrightington late of Full River in the County of Bristle, spinster, both of the Commonwealth allfoursaid, the receipt whereof will be duly acknowledged, do hereby give, Grant a bargain sale and congame unto the said Vincent and Wrightington the following described promises, to wit, viz, *vide licet*, all our right, title, and interest in and to an undivided one-half (½) interest in an uncertain tennis court, with the privilege of passing and repassing around the net at the end of each set in order to continue trying to beat us.

This indeed is given to correct a mistake in a former deed done by us to the gruntees aforesaid, whereby they acquired the idea that they could claim a tennis victory by, through, or under us, and realizing that they have from thence until now been afraid to play against us again for a gain. Therefore, we waive our prescriptions and grant them the right to trespass on our clothes if they dare to play us.

To have and *Two Holes* to the said crawlees, their airs and assigns disjointly and not dischivalry to their own use and behave forever or longer with all the rites and protuberances thereto belonging.

And we do hereby for ourselves and our hairs, executioners, and administers covenant with said gruntees and their hairs and designs that we are lawfully seized with the desire to lick the stuffing out of them, that there are no unsurmountable difficulties in the way, and that we have the right and sufficient ability to do the same as we have before; and that we will and our hairs, executioners, and admissions shall *warrant* to clean up the ground with said gruntees and their hairs and designs forever and any time in spite of the entreaties and prayers of all persons.

In witness whereof the said Lennox H. Lindsay and William L. Barnard, being both married and proud of it hereunder set their welcome soap and sealskin coats this skidoo day of May (the Lord help Vincent and Wrightington) in the year nineteen six -- 23.

LENNOX H. LINDSAY.
WILLIAM LAMBERT BARNARD.

Commonwealth of Massachusetts.
MORAN, SS. *May* 23, 1906.

Then personally appeared the above named Lennox H. Lindsay and William L. Barnard to me known and known to me to be able to make good and acknowledged Vincent and Wrightington to be their free act and dead.

Before me
Harold W. Mason.
Not any public.

One Good Ear was Enough. — Judge Wilbur, who retired from the Rhode Island bench last June, when the new court and practice act went into effect, had for many years previous handled the criminal business of the state. He was perfectly familiar with the wiles and excuses of men who sought to evade jury duty, and showed them little consideration.

A venire-man gave as his reason for desiring to get out of grand jury service physical disability.

"What is the nature of your infirmity?" asked the judge.

"I am deaf in one ear, your honor," replied the man.

"You'll do," said the judge. "Don't you know you only have to hear one side of a case in the grand jury room?"

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Marston on Judge Doe's Law. — Gen. Gilman Marston of Exeter, N. H., who has been the subject of many stories in the Herald, had no very exalted opinion of the law as it was sometimes expounded by the court. The late Chief Justice Charles Doe once ruled adversely upon a point that the general had made, and Gen. Marston retaliated as follows:

"Your Honor's law reminds me of the definition of law given by an old darky. He said: 'De law, my frens, am like a ground glass window. It may afford a little light to guide us trew de dark and uncertain ways of dis life, but de very devil hisself couldn't see trew it.'" — *Boston Herald.*

The "Donkey." — Prisoner accused of murder alleged to have been committed between contending factions struggling for right of way; one party having arrived on donkey or small engine, and other from opposite direction on electric car.

Prosecuting Attorney to Witness! — Describe to us, if you please, the distance between the donkey and the electric car at the time the first stone was thrown?

Witness pointing to Judge! — Well if that fellow was the donkey ——

On the Evidence. — Murray F. Tuley, who died on Christmas, after twenty-five years of continuous service as judge of the Circuit Court in Chicago, was noted for the strict impartiality with which he rendered decisions, even when his personal bias was strongly the other way.

On one occasion, having heard a certain famous suit, he found himself impelled to hand down a decision repugnant to his own inclination.

"Do you mean you think the defendant was not at heart a swindler?" demanded an intimate friend, who dared complain of the finding.

"Billy," said Judge Tuley, solemnly, "I took that evidence to Arkansas with me and studied it two weeks. Then I brought it home and spent ten days more on it. Then I said in my decision:

"'So far as the evidence shows, the defendant is an upright and honorable Christian gentleman.'

"'So far as the evidence shows,'" repeated the jurist, slowly and with emphasis. Then he leaned forward in his chair, placed a hand on the other's knee, and exclaimed, with an air of vindication: "But, Billy, I didn't say I believed it!" — *Youth's Companion.*

A Hornless Cow. — In a certain country town in northern Minnesota is a young lawyer who is somewhat noted for the facility with which he will lead the unwatchful witness into making the most damaging and ofttimes ridiculous statements. His ability along this line was very happily illustrated in a recent case involving the ownership and possession of a certain *muley* cow which was alleged to have strayed from the plaintiff's premises. The plaintiff, an Irishman, was, during the course of the trial subjected to a very harassing cross-examination as to the identity of this same *muley*. The plaintiff lost the suit, and very naturally attributes such outcome to the trickery of defendant's attorney. But his view of the matter is best told in his own words:

"Sure an Haley's lawyer was the very divil himself. I was on me guaard all the whiles, an how he did the divil knows, but jist before he tould me I might come down from the staand, be the Houly Saints, if he didn't have me stretchin' me haands to me aarms' length, and explainin' to the jury how long the blissed cow's horns were."

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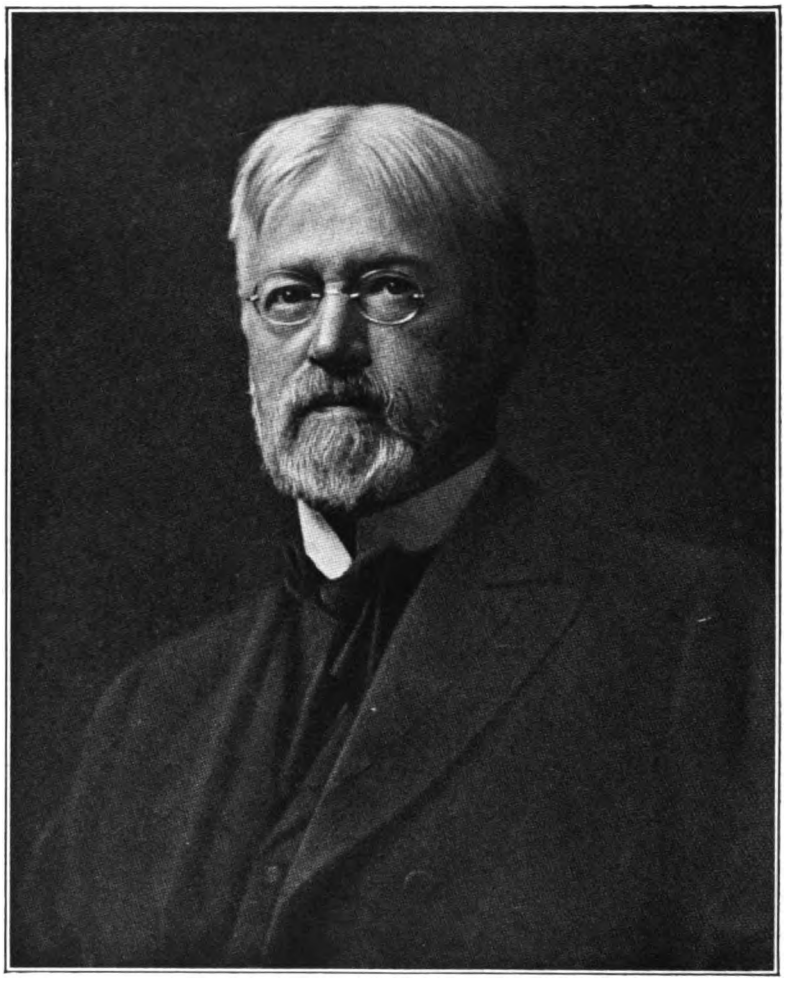

James M. Woolworth

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The Green Bag

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IN MEMORIAM: JAMES M. WOOLWORTH

By Hon. John Lee Webster

JAMES M. WOOLWORTH during his life spanned the period of time from 1829 to 1906. Those seventy-seven years witnessed the discoveries and improvements and developments that have marked the progress of peoples during the most interesting period of the world's history. When he was born the United States was young in years, small in population, and a great part of its present area unexplored and uninhabited, and much of it not then acquired. In that early day there was no West as we now speak of it, and the East was content to travel by stage coach, and to do without the things they knew not of — the railroads, the telegraphs, the telephone, and hundreds of present-day necessary appliances that best denote the great transition from that early period until now.

But in the East in that early day there were schools and colleges and universities. James M. Woolworth could take just pride in the fact that his grandfather was a graduate from Yale College and also was honored with the degree of D.D. from Princeton. His father, as an educator, had acquired a reputation that caused to be conferred upon him as a reward of merit the degree of LL.D. The subject of this sketch having descended from such a learned and distinguished ancestry, became equally devoted to education and learning. He received his degree from Hamilton College, and for two years he personally acted as a teacher of Latin and Greek and English in Cortland Academy. This classical learning of boyhood days was but the beginning of a life of study. Amidst the trials and excitement of a busy professional life he found hours of pleasure in re-reading the ancient classics in their original languages.

Somehow, whether as a matter of choice, or from deliberation, or by an impulse, or by intuition, we know not, he elected to enter the profession of the law, and in 1854 he quitted the Albany Law School with credit to himself and in possession of his graduation diploma.

From 1829 to 1856 the tide of American life was rapidly passing westward across the vast prairies. The great discussions that had gone on among the giants in those early days, who held seats in the United States Senate, the Websters and Bentons and Clays, had called the attention of the youth of the country to the fact that the United States had a West that would play a great part in its future history. Lincoln and Douglas in their debates on the hustings were soon to draw attention to the fact that there was in the West an undeveloped country that would in time be created into new states and become a part and parcel of the American nation, where freedom was to prevail and where intelligence and culture would build a new commonwealth.

Perhaps inspired by such thoughts as filled the minds of ingenious and ambitious youths, James M. Woolworth took his departure from his early home in New York state and moved west to cast his lot among the strong and daring and courageous men who were to begin the building of a new state that was thereafter to remain his adopted home. Nebraska has just cause to feel proud of the good and sturdy and strong young men who began life with her beginning, and who have achieved fame as the

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state has grown to power and prosperity and industrial strength, and among these men we have great reason to mention James M. Woolworth.

The fifty years that have rolled by since he came to Nebraska have been the busiest and most progressive years in United States history. They have been years that have given to the mentally vigorous much food for thought. Things moved at a pace that stimulated the mental energies. For a time it was a controversy over state sovereignty and human freedom. Then came the years of the civil war that stirred the depths of human emotion. Then came the period when the nationhood of the government began to take form. Still later the great prominence and strength of the Union, as it slowly and surely took its place at the head of the industrial and commercial countries of the world, and began to make its full influence felt in the accomplishment of its destiny as the controlling power in the western hemisphere. The man of keen intellect, who found pleasure in his books and pride in his professional calling, derived from all these conditions and considerations incentives to action and a stimulus to ambition. It was an age to produce great men, if they possessed the essential qualities of sterling manhood and the mental capacity to rise to the demands of the occasion.

James M. Woolworth was more than an observer of these exciting times and sweeping changes and progressive movements. Trained from early boyhood as a student, he became a thinker. His mind grew and expanded in harmony with the events we have mentioned. His mental powers, naturally keen and well cultured, became a power when concentrated upon any particular subject which appealed to his taste or his judgment. The law being his chosen profession, it was in that field of engagement that he developed his strongest energy and employed his closest application. Before he had rounded out his life he had achieved a reputation that made him well known to the eminent lawyers and the prominent judges of the highest courts within the land.

James M. Woolworth enjoyed another advantage which may have had much to do in advancing him to the high place which he held in the front ranks of the American Bar, and that arose from frequent association with men in high station, who were charged with great responsibilities, and who sustained themselves by their great intelligence. In 1862 when but thirty-three years of age he appeared in argument before the Supreme Court of the United States, then presided over by Roger P. Taney as chief Justice, and who had among his associates such celebrated jurists as John McClean, Samuel Nelson, Robert C. Grier, and Nathan Clifford.

If it needed something more to stimulate the energies of the young man to reach the highest possible attainment in his profession, we find it presented, when in 1871 he again appeared before the Supreme Court of the United States, with Lyman Trumbull, then holding the office of United States Senator, and a record as one of the greatest lawyers in the country, as his adversary. At that time the great Salmon Portland Chase was the chief justice, and on the Bench, among others, there sat Stephen J. Field, Joseph P. Bradley, and another personally known to almost every western lawyer, the great Samuel F. Miller.

At the same sitting of the court Mr. Woolworth again appeared in another case when Mr. Lyman Trumbull again appeared as his adversary. Mr. Woolworth had associated with himself another member of the Omaha Bar who achieved a great reputation, Hon. A. J. Poppleton. He had associated with him another who in that day stood at the forefront of the American Bar and who also occupied a high place in the national councils as a United States Senator, Hon. Matt. H. Carpenter.

I might continue this line of association with great men, but it would serve no valu-

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able purpose save to impress a thought. In the early life of James M. Woolworth these were incentives and inspirations to his own personal ambition. They were encouragements to silent hopes resting in his own breast, that he might acquire a legal education and knowledge equal to those of his associates.

But I pass these over to refer to another list of associates later in life of a similar character. It was but a few years ago when he appeared before that august tribunal in the Nebraska maximum freight rate cases, when he had as his associate James C. Carter, of New York, who then stood confessedly as the head and forefront of American lawyers, and whose reputation was not even limited to the English-speaking race. The court as then constituted has among its membership judicial intellects that might be classed as giants of the times and not surpassed by any of their predecessors.

His friendship and associations extended to all the great judges before whom he appeared. But it was not confined to these. He availed himself of every desirable opportunity to cultivate the acquaintance and friendship of great men in whatever calling, either in public, official, or private life. He gathered knowledge from their conversation and wisdom from their example and teaching. What he once learned he utilized to greater advantage, as men enhance the values of precious metals by refinements and application to new uses.

Mr. Woolworth was particularly a chancery lawyer. He did not possess that kind of oratory by which he might be put in comparison with men who became known as celebrated advocates. He did not possess the qualities that make the distinguished jury lawyer. It was not his custom to endeavor to play with the passions or the prejudices of the people in the court room. He had a higher conception of his duty as a lawyer.

It has been said that in these modern times the law has become a series of petrified precedents, but with Mr. Woolworth the law was a science made up of legal principles. He learned the law at a time when the great lawyers were men that were schooled in its fundamental philosophy. During his whole life in the discussion of cases, his chief delight was in the presentation and elucidation of principles as he applied them to the ascertained facts which were before the court.

His mental temperament was judicial. If he had been a member of the Supreme Court of the United States he would have been recognized as a great judge, and history would have placed his name upon an equal elevation with the great men who have graced that tribunal during the nation's history of more than one hundred years.

Mr. Woolworth recognized the great truth which I wish all young lawyers would understand, that the only way to success in the law is a hard and laborious road to travel. The careless and indifferent may at times achieve temporary notoriety, or local prominence, arising out of some wave of popular commotion or temporary excitement, but the lawyer that achieves a lasting and permanent place in the front ranks of the profession must be one who forsakes the wasting of time in idle amusements and give his days, weeks, months, and years to the constant accumulation of that storehouse of knowledge, which in this modern progressive age must be gathered from many sources.

The great lawyer must not only have his mind filled with legal principles, but must have a varied experience in their application to present conditions. He must have breadth of thought, as well as a cultivated intellect. The whole range of human learning should be his. It should include science and literature and philosophy and history. It should embrace a knowledge of governments and policies by which the civilized life of the world moves onward to the accomplishment of great results. Mr. Woolworth had this high and exalted conception

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of the requirements of his profession, and of the attainments necessary to grace and adorn the great lawyer.

Men of such characters may be retired, and in a degree removed from the association of men and women at large, but if so, it is because the whole force of their intellect is so frequently concentrated upon the weighty subjects with which they have to deal, and in which their whole mental powers may be absorbed. It has been said of many of the great men of the country whose names I might mention (but that would not serve any valuable purpose) that they are cold and reserved and distant. Nevertheless, such men, because they are great in intellect because they have the powers of concentration that make them strong and useful, are apt to be all the more congenial with those whose companionship they seek in their hours of leisure. So James M. Woolworth with his friends possessed all the refinements of social life and the elegant qualities that made him a congenial and charming companion. There was something about him by which he impressed us as having a combination of New England tastes with metropolitan accomplishments, and the vigor and earnestness of expression, that is the result of western associations. Taking him all in all he was a magnificent type of a refined, educated, dignified, and scholarly American citizen.

OMAHA, NEB., July, 1906.

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A GOVERNMENT OF LAW AS DISTINGUISHED FROM A GOVERNMENT OF FUNCTIONARIES

By Hon. Hannis Taylor, Ph.D.

FRANCIS LIEBER has told us, in his "Civil Liberty and Self-Government," p. 108, that the "guarantee of the supremacy of the law leads to a principle which, so far as I know, it has never been attempted to transplant from the soil inhabited by Anglican people, and which, nevertheless, has been, in our system of liberty, the natural production of a thorough government of law as distinguished from a government of functionaries. It is so natural in the Anglican race that few think of it as essentially important to civil liberty, and it is of such vital importance that none who have studied the acts of government elsewhere can help recognizing it as an indispensable element of civil liberty." In giving expansion to the same thought at a later time Mr. Dicey, who fills the chair of Blackstone at Oxford, has said: "In England the idea of legal equality, or of the universal subjection of all classes, to one law administered by the ordinary courts, has been pushed to its utmost limit. With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the courts and made, in their personal capacity, liable to punishment or to the payment of damages for acts done in their official character but in excess of their lawful authority. A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their superiors, are as responsible for any act which the law does not authorize as is any private and unofficial person." Under the Anglican system of civil liberty any man may at his peril resist any act which he considers unlawful, and then have the question of legality passed upon in the ordinary courts under the law of the land. Anglican law knows no special or official tribunals in which or special rules under which acts performed by officials claiming to have legal authority can be tested. In countries not governed by Anglican law obedience to the officer is, as a general rule, demanded, and redress can only take place after previous obedience. In France, for instance, no matter whether the government be Royal, Imperial, or Republican, the doctrine has always prevailed that the government, as representing the state, possesses rights and powers as against individuals superior to and independent of the ordinary laws of the land. That theory, so hard for us to understand, is the real basis of a *droit administratif* under which officials, that is all persons employed in the service of the state, are, in their official capacity, protected from the ordinary law of the land, exempted from the jurisdiction of the ordinary tribunals, and subject in many respects to official law administered by official bodies. For this *droit administratif*, which under one name or another prevails in most of the continental states, there is in English phraseology no proper equivalent for the good and sufficient reason that the thing itself does not exist. The absence of any such branch of law in the jurisprudence of the United States at once attracted de Tocqueville's attention; and in 1831 he wrote to a judge in his own country asking not only for an explanation of this contrast between French and American institutions, but for an exposition of the general ideas (*notions generales*) governing the *droit administratif* of his own country.[1] If, under the French

[1] Law of the Constitution, p. 183.

[1] *Œuvres Completes*, vii. p. 66.

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system, any official, no matter whether a minister, a prefect, or a policeman, commits any official act in excess of his legal authority, the rights of the individual aggrieved and the mode in which these rights are to be determined are questions of *droit administratif* which is administered by administrative courts (*tribunaux administratifs*) at the head of which stands the Council of State. To illustrate from recent events in France growing out of the conflicts between church and state: Suppose a policeman acting under the orders of his superiors, breaks into a monastery and, after seizing the property of its inmates, expels them from the house. When he is charged with acts which in English law would be called trespass and assault, he pleads that he is acting under government orders in execution of a decree dissolving certain religious societies. When the policeman in question is brought before an ordinary civil court and threatened with the ordinary law of the land, as he would be in any country subject to Anglican law, an objection is raised at once that the civil courts have no jurisdiction of such a case. The "conflict" which thus arises is not determinable however by the ordinary judges because in that event they would be allowed to pronounce a final judgment on the limits of their own authority in defiance of that principle of French law which declares that "administrative bodies must never be troubled in the exercise of their functions by any act whatever of the judicial power." To meet such contingencies there exists in France a *Tribunal des Conflits*, a court for the settlement of conflicts of jurisdiction, whose special function is to determine finally whether in a given case, say an action against a policeman for such a trespass and assault as has been described, comes within the jurisdiction of the civil courts, or of the administrative courts. If within the jurisdiction of the latter then the administrative law, unknown to Anglican countries, at once supersedes what we call the law of the land.

In the light of the foregoing contrast it will be easier to comprehend, I trust, Lieber's declaration that the "guarantee of the supremacy of the law leads to a principle which, so far as I know, it has never been attempted to transplant from the soil inhabited by Anglican people, and which nevertheless has been in our system of liberty the natural production of a thorough government of law, as distinguished from a government of functionaries." Let us glance for a moment at the historical origin of this supremacy of the law as embodied in what we call the law of the land to which the high and low are subject in the ordinary tribunals. Upon that rock has been built the constitutional church in England and the United States. The group of Low Dutch tribes from the neck of the Danish peninsula, out of whose union arose the English people, transferred to Britain that rough yet vigorous system of political, judicial, and military organization which everywhere prevailed among the Teutonic tribes of the fatherland.

Whenever a district of country was won from the native race, the conquerors encamped upon the soil; and then, after dividing the land upon the basis of that peculiar system that rested at once on military and tribal divisions, they organized self-governing communities which became nurseries of English customary law. Just as the English language is the outcome of the fusion of the dialects spoken in those local communities, so English customary law, as a distinct and entire code, is the outcome of the fusion of the customary or popular law developed therein. The primitive system of law which thus matured in the provincial courts of the English people, like all archaic law, took on an iron rigorism of form which rendered it unelastic. Its entire inadequacy to the wants of a progressive society never became apparent, however, until the Norman Conquest drew England into the march of continental nations. The most important single outcome of that event was the centralization of justice through the establishment of

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a great court at Westminster by whose agency a new system of royal law, which formed its source in the person of the king, was brought in to remedy the defects of the old, unelastic system of customary law prevailing in the provincial courts of the people. This new system of royal law was sent down to the popular courts existing in the shires by the hands of the itinerant justices who there represented the crown first for fiscal then for judicial purposes. During the reigns of the four Norman kings the English and Norman races became fused together into one nation scarcely conscious yet of its own unity. As soon as that condition of things was reached in which it was difficult to distinguish an Englishman from a Norman, all legal distinctions in favor of one race as against the other necessarily passed out of view. The substructure of the new political and legal fabric which thus arose out of the amalgamation of races was English, the superstructure was Norman. The welding together of the two systems received a temporary check during the period of disorganization known as the reign of Stephen, a period during which the royal authority which Henry I had done so much to consolidate came to an end, while England, for the first and last time in her history, sank into that state of feudal anarchy which the Conqueror by his far-sighted policy had striven to prevent. For a time the land lay helpless in the hands of the barons, who entrenched themselves in their unlicensed castles and arrogated to themselves all the rights of petty despots. The great mission of Henry II, Henry of Anjou, was to reestablish order and with it the reign of equal law. The full scope of Henry's policy was not only to establish the reign of law, but to reduce all orders of men to a state of equality under the same system of law; in other words, to establish the supremacy of the law as afterwards understood. The most formidable obstacles which stood in the way of the complete execution of that design were the baronage on the one hand, with their private jurisdictions, and the clergy on the other, with their far-reaching claims of exemption from the ordinary process of the temporal tribunals. When Henry II passed away, the prodigal knight errant who succeeded him, Richard I, impressed upon the nation, then marshaled in the ranks of the three estates, the necessity for concert of action against a central despotism capable of oppressing every class by the imposition of inordinate taxation. The hope that the accession of John would relieve that condition was quickly disappointed. His needs proved as great as Richard's, and the money he obtained was used for purposes that appealed to no one but himself. The excessive exactions demanded both in money and service, coupled to the unpopular uses to which these were put, form the keynote of the whole reign; they form the background of Magna Charta. When viewed in the light of the circumstances attending its execution, the fact clearly appears that while that great instrument was issued in the form of a royal grant, it was really a constitutional compact entered into by the royal authority on the one hand and the nation marshaled in the ranks of the three estates on the other. There is nothing in the provisions of the charter to recall obsolete distinctions of English and Norman blood; there is nothing to suggest differences of English and Norman law. The very absence of such provisions clearly shows that such distinctions had passed forever away. The winning of the Great Charter was the final consummation of the work of union, and this first great act of the united nation was not in the path of political experiment. The provisions of the charter embody no abstract theory of government; they consist simply of a summing up of the traditional liberties of the English nation, with such modifications as those liberties had suffered through the results of the Norman Conquest. The royal pretentions born of that event reached the limit of their growth when both Richard and John, accepting the imperialist theories of

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Glanvill, held that the will of the prince was the law of the land. The reckless attempts made by John to enforce that theory finally brought about the armed conflict between the nation and the king. Upon the part of the nation it was claimed that the law of the land was not the will of the prince, but the immemorial laws of the English Kingdom, with such modifications and amendments as those laws had suffered in the process of Norman centralization. After the coming of the Conqueror, the Old-English system of customary law was generally appealed to as "the laws of good King Edward," while the changes which it suffered through the result of the Conquest were generally described as the amendments made by King William. There is no attempt in the Charter to wipe out the irrevocable effects of the Conquest; the new system of central administration and the system of feudal tenures are both recognized as abiding elements in the constitution. The effort is to fix the limits of innovation, to define the extent to which the centralizing and feudalizing process to which the Conquest gave birth shall be permitted to abridge the immemorial freedom in the time to come.

Only in the light of such an historical preface is it possible to expound the judicial clauses of the Great Charter in which its framers, after making provisions touching the character and appointment of judicial officers, announced a series of practical rules, both general and special, for the government of all courts in the administration of justice. First among those general rules stands the famous declaration that "no freeman shall be arrested or detained in prison, or deprived of his freehold, or outlawed, or banished, or in any way molested; and we will not set forth against him, nor send against him, unless by the lawful judgment of his peers and by the law of the land." The technical student of English law expounds the phrase *per judicium parium*, in the light of recent research, does not find in it a guarantee of trial by jury, which had not then come into existence. He finds that the phrase "the lawful judgment of his peers" was only intended to guarantee to the accused a trial by his "equals." That right was not originally a class privilege of the aristocracy but a right shared by all grades of freeholders; whatever their rank they could not be tried by their inferiors. In that respect English custom did not differ from the procedure prescribed by the feudal usage on the continent. In England the "peers" of a crown tenant were his fellow crown tenants, who would normally deliver judgment in the *Curia Regis;* while the "peers" of a tenant of a mesne lord were the other freeholding tenants assembled in the court baron of the manor. A further illustration of the meanings conveyed by the word "peers" to a medieval mind together with the nature of *judicium parium* may be drawn from that provision in John's charter of April 10, 1201, which provides that "if a Christian bring a complaint against a Jew, let it be adjudged by his peers of the Jews." When the twin phrase *per legem terræ* is interpreted by like standards it appears that originally it "simply required judicial proceedings, according to the nature of the case; the duel, ordeal, or compurgation, in criminal cases, the duel, witnesses, charters, or recognition in property cases."[1] The words appear at least twice in Glanvill, each time apparently in the technical sense. And yet it is equally clear that this older and technical signification of the phrase, *per legem terræ*, was gradually forgotten as the term "law of the land" ripened into the wider meaning expressed by it in the popular speech of to-day. The wider meaning clearly appears in the statutes reaffirming, expanding, or explaining the Great Charter. The important series of such statutes passed in the reigns of Edward III and Richard II illustrate how the *per legem terræ* of 1215 was read in the fourteenth century as equivalent to the wider phrase "by due process of law."

[1] Bigelow, "History of Procedure," 155*n*.

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When we remember that, by that time, the jury system, grand and petit, had developed, it is not strange that the act of 1352, for example, after reciting the charter provision in question, insisted on the necessity of "indictment or presentment of good and lawful people of the same neighborhood where such deeds be done." Evidently founding his exposition on these fourteenth century statutes Coke[1] makes "*per legem terræ*" of the Charter equivalent to "by due process of law," and that again to "by indictment or presentment of good and lawful men." Thus by a *nunc pro tunc* process of statutory interpretation Magna Charta was made to enshrine the jury system which did not exist at the time of its execution. A master of the subject has told us that "The Framers of the Petition of Right read the same words (*per legem terræ*) as a prohibition, not only of imprisonment 'without any cause showed' but also of proceedings under martial law, thus interpreting the aims of King John's opponents in the light of the misdeeds of King Charles, and applying to the rude system established by Henry of Anjou reforms more appropriate to the highly developed administration of the Tudors."[2] By such a process of statutory and popular interpretation the Charter provision in question was widened until it became usual to read it as containing an original promise of trial by jury to all Englishmen; as absolutely prohibiting arbitrary commitment; and as undertaking solemnly to dispense a full, free, speedy, and equal justice to all. To state the final outcome of such a method of interpretation in the words of Hallam: "It protected every individual of the nation in the free enjoyment of his life, his liberty, and his property, unless declared to be forfeited by the judgment of his peers or the law of the land."[3] Or, if we adopt the words of Creasy: "The ultimate effect of this charter was to give and guarantee full protection for person and property to every human being that breathes English air."[1] Such was the process of evolution through which came into being the popular and traditional construction of that clause in the Great Charter which, in the widest terms, is taken as a promise of law and liberty, and good government to every one; a promise upon which rests the supremacy of the law over the functionary which no one has ever attempted to transplant from the soil inhabited by Anglican peoples.

When the English colonies in America were formed English law was made the basis of Colonial rights. In the famous charter granted by James I, in 1666, it was expressly provided "that all and every the persons, being our subjects which shall go and inhabit within the said colony and plantation, and every their children and posterity, which shall happen to be born within the limits thereof, shall have and enjoy all liberties, franchises, and immunities of free denizens and natural subjects within any of our other dominions, to all intents and purposes as if they had been abiding and born within this our realm of England, or in any other of our dominions."[2] When the tie which bound the colonies to the mother country was severed they rapidly developed into a group of independent commonwealths in which each individual member was, in its organic structure, a substantial reproduction of the English kingdom. The foundation of the entire fabric was English law; the provisions of the Great Charter became the substructure of every state constitution. When the first ten amendments were added as a Bill of Rights to our federal constitution, in the fifth was embodied the traditional construction of that part of the Great Charter which guarantees the supremacy of the law, or, as we usually express it, due process of

[1] Second Institute, p. 46.
[2] McKechnie, Magna Charta, p. 442.
[3] Middle Ages, II, p. 448.

[1] Eng. Const., p. 151*n*.
[2] Charters and Consts., part ii, p. 1891.

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law. In a line of cases extending from United States *v.* Peters, 5 Cranch 115, the Supreme Court has given a most elaborate exposition of the doctrine which declares that here, as in the mother country, every official, from the President of the United States down to a tax collector, is under the same responsibility for every act done without legal justification as any other citizen; and that the legality of any such act when assailed may be tested in the ordinary tribunals under the law of the land. The most notable, however, of all of these cases is that of United States *v.* Lee, 106 U. S. p. 169, in which Mr. Justice Miller, — in my humble judgment the greatest expounder of the Constitution since Chief Justice Marshall, — in speaking for the Court said: "In such cases there is no safety for the citizen, except in the protection of the judicial tribunals, for rights which have been invaded by officers of the government professing to act in its name. . . . What is that right as established by the verdict of the jury in this case? It is the right to the possession of the homestead of plaintiff. A right to recover that which has been taken from him by force and violence, and detained by the strong hand. This right being clearly established, we are told that the court can proceed no further because it appears that certain military officers, acting under the orders of the President, have seized this estate and converted one part of it into a military fort and another into a cemetery. It is not pretended, as the case now stands, that the President had any lawful authority to do this, or that the legislative body could give him any such authority except upon payment of just compensation. The defense stands here solely upon the absolute immunity from judicial inquiry of every one who *asserts* authority from the executive branch of the government, however clear it may be made that the executive possessed no such power. Not only no such power is given, but it is absolutely prohibited, both to the executive and the legislative, to deprive any one of life, liberty, or property without due process of law, or to take private property without just compensation. . . . No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives." I can not doubt that these golden sentences, whose lightest words are weighty, will stand forth for all time as the profoundest expression ever made of the basic principle of the supremacy of the law peculiar to lands inhabited by Anglican peoples. When we consider that the subject-matter of the suit in question was the ancestral estate of the vanquished chief of a fallen cause, an estate which for years had been held by the government of the victors as a resting-place for its dead, it is impossible to over estimate the moral grandeur of the judgment which gave it back with the ashes of the dead because, in the midst of civil war, it had not been taken away according to the law of the land. Is it going too far to say that the five who joined in that judgment — Miller, Field, Harlan, Matthews, and Blatchford — are entitled to be ranked among the ideal jurists of the world? The four who dissented from that judgment recorded, in clear and emphatic terms, their willingness to establish here the principle of the *droit administratif* as it exists in the continental nations. As stated heretofore, the essence of that administrative law is the right of the official, when the legality of his act is challenged in a civil tribunal under the ordinary law of the land, to deny its jurisdiction upon the ground that the validity of such acts can not be tested in that manner. In the case in question the Attorney-General made that

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special plea in a suggestion, "respectfully insisting that the court has no jurisdiction of the subject in controversy," and the minority held that "the court having no authority to proceed with the suit, the judgment afterwards rendered for the plaintiff was erroneous." Let us not exaggerate the apparent danger that existed when we remember that the alien principle set up by the minority failed to triumph by only a single vote. If that vote had been forthcoming and a contrary doctrine had been announced in that particular case it would have lived only for a moment. Such an exotic, so contrary to the spirit of our institutions, could never have taken root in a land dominated by Anglican law whose basic principles have been slowly maturing during a period of a thousand years.

WASHINGTON, D.C., June, 1906.

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A PHILADELPHIA LAWYER IN THE LONDON COURTS

IN THREE PARTS, ILLUSTRATED BY THE AUTHOR

By Thomas Leaming

PART II

Court Notes

A jury trial strikes one as more cut and dried in an English than in an American court. Apparently so much has transpired beforehand in the exchange of copies of documents and is known to opposing counsel, solicitors, and judge, that the element of surprise is largely eliminated. If all litigants were honest and law were an exact science, this might conduce to a deliberate consideration of the questions involved, but what American advocate, having experienced the effect of confronting a disingenous plaintiff or defendant with his own forgotten letter, utterly at variance with his previous testimony, would be prepared to say justice would have been advanced if he had been apprised of the fact that the letter would be produced and thus have had a chance to regulate his testimony accordingly? And what American lawyer would not feel that half the fun of life were gone?

During the examination of witnesses, notwithstanding rapidity of articulation, the American ear is struck by the great deliberation and long intervals between questions, affording too much time for reflection — especially to a dishonest witness under cross-examination — and by a certain lack of snap. This impression may be due to difference in national temperament and the examination may even seem rapid to an English witness. A kind of confidence in the veracity of witnesses appears to pervade the court and they are indeed, as a rule, uncommonly frank, but perhaps the chief cause of the hesitancy is the fact that the examiner has obtained his information at second hand, from his client the solicitor, or his junior or devil, and has to feel his way.

English barristers do not know their cases as well as American lawyers, for they have not conducted the preliminaries, nor become acquainted with and advised the parties they are to represent — in other words, they have not "grown up with" the case, which is more like an abstract proposition placed in their hands to be advocated shortly before trial. It is not unusual to see, when some unexpected situation arises during trial, evidence of a want of thorough familiarity with the whole surrounding circumstances, requiring instant reference to the solicitor.

The judge takes more hand in the trial than in most American courts — a thing much to be commended, which is increasing on this side of the water. An American lawyer will say: "I tried a case before Judge So and So." — An English barrister says: "I conducted a case which Lord So and So tried." He decidedly restrains counsel, often examines the witnesses, and his influence is quite openly exerted to guide the jury and cause them to avoid absurdities and extremes. Yet the crucial questions of fact really to be determined — of which there are usually but one or two — are left absolutely to the jury's unfettered decision.

Objections to questions by opposing counsel, which cut so large a figure in an American trial, are rarely made. One is told that the barristers know the rules of evidence too well to ask improper questions, and have too much respect for the court to hazard a rebuke. This is a very pretty explanation but hardly satisfactory. Observation of many trials rather conveys the impression, first that great laxity prevails as to what is a proper question; and second, that the party aggrieved by an objectionable one prefers to rely upon the reaction in his favor produced in the judge's mind which

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will be reflected in the weight of his influence when it comes to be cast with the jury.

That this laxity prevails, the least observation will show. Leading questions upon direct examination pass unnoticed, which in America would bring a storm of objection, and even hearsay evidence is not unknown. The absence of the element of surprise in trials, already alluded to, may make those concerned more tolerant of counsel leading in a story all know beforehand. The occasional element of hearsay is more difficult to explain unless, indeed, the French view gains in England, which justifies the admission of hearsay upon the ground that in the most important questions in life — for example, the reputation of a man whom one contemplates trusting, or of a woman one thinks of marrying — men act exclusively upon hearsay, and never upon direct evidence. But, of course, the law of evidence in these respects remains unchanged in England.

Upon careful observation, the real cause of this tolerance will be found to be a reliance on the great influence of the judge to guide the jury, so as to eliminate from their minds the effect of evidence wrongly produced.

In England, mistress of the seas, with much the largest merchant marine in the world, and with an insular population mostly living in close touch with the sea, one finds, as might be expected, the best admiralty courts and bar in the world. They are situated on the west, or Chancery, side of the Law Courts Building. The presiding judge is assisted by two Trinity Masters — old sea-captains in full gilt buttoned uniforms. They sit at the judge's right, having each a small table with charts spread upon it, and advise his Lordship upon technicalities. Over the heads of the trio a large gilt anchor adorns the wall and indicates the subject of the deliberations.

The chart used by counsel in examining witnesses is pinned to a sloping table in the midst of the barristers' benches and facing the Court. In collision cases they employ small models of steamers and sailing vessels as well as arrows to indicate winds and tides, all of which may be placed, veered and shifted as the trial progresses by means of thumb pins projecting beneath and capable of being pressed into the chart and table. The admiralty trials are beautifully conducted and great familiarity with sea affairs is displayed by the participants.

Models are very much used in all English Courts. In land condemnation, nuisance-injunction, and accident cases one frequently sees elaborate models reproducing the locus in quo; while in actions concerning floods or other occurrences affecting considerable areas, models many square feet in size reproducing the whole locality are employed.

The Chief Justice sits at nisi prius trials more often than upon appeal. It seems odd, during the trial of an action for damages caused by a flood due to the alleged improper construction of a bridge, to see the Lord Chief Justice of England reaching far down with a long white, lath-like stick into the solicitor's well to point out some features of a model while interrogating a witness, and afterward charging the jury, stick in hand. It is still more strange to hear a judge, whose name is known the world over, gravely charging a jury as to the value, as evidence of identity, of a wart under the tail of a coster monger's donkey, the ownership of which is in dispute. Yet, like every feature of an English court, it is eminently practical and free from form or affectation.

The highly paid judges of the High Court sit in the smallest case — the idea seems to be, that if a man desires to assert his rights, however insignificant, it is the duty of the Government to afford him the opportunity. In the Divisional Court (an appeal Court of limited jurisdiction) the Lord Chief Justice of England and two famous colleagues may be found hearing an appeal the day after the trials just mentioned, in a

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case involving nominally £22.11.6, payment on account having reduced the actual amount in controversy to £2.11.6, and, as the salaries of the occupants of the Bench were not less than £20,000 a year — to say nothing of those of the Court attendants, and the barristers' and solicitors' fees on both sides — the economy of such an employment of human effort is not apparent. Someone, however, thought his rights had been invaded, which justified the waste, while the costs furnished a small stake upon the result.

Appeal Courts

In the two Courts of Appeal — the last resort except for occasional cases which reach the House of Lords and Colonial appeals which go to the Privy Council — the best work is to be seen. Here, indeed, is the most perfectly working tribunal for the adjustment of conflicting rights which the wit of man in any age has devised.

The Lord Chancellor, the Chief Justice, or the Master of the Rolls presides and two associate Lord Justices compose the court.

Printed briefs are not used — the advantage of which omission is not apparent. There is no bill of exceptions and the appeal is in name, as well as in fact, an application for judgment precisely the reverse of that rendered below or, in the alternative, for a new trial, and everything which has transpired is open to review.

Three barristers on a side are usual here — the leader, junior, and devil — together with the solicitors.

The leader for the appellant opens, stating the case with great particularity. He reads from the evidence, documents, and charge to the jury at much length, as (for no discoverable reason, but probably due to ancient custom and lack of enterprise) the material is all in manuscript, often illegible and with occasional errors in the copies of the court and respective counsel. This is tedious and prosy. The American auditor gets an unfavorable impression at this early stage of the argument, to be, however, later dispelled.

During this irksome opening, the court has been getting a grasp of the case, which becomes apparent when the argumentative stage is reached. For then there ensues a good tempered, courteous, informal debate between several gentlemen, consisting of the court and opposing counsel. There is no "orating" and no declamation. The positions of the opponents are stated rapidly and smoothly. Each is taken up by one or more members of the court, as enunciated, and distinct intimation given whether the court agrees with the speaker, in which case he may pass on; or deferential dissent warns him to strengthen his position, but a frank expression of doubt may be accompanied by a friendly invitation to the other side to contribute suggestions.

At the conclusion judgment is rendered orally in nine cases out of ten by the presiding Lord Justice, as the last speaker resumes his seat. Then follow the opinions of the associate Lord Justices concurring or dissenting, all expressed with the utmost frankness and spontaneity. These are taken down stenographically and after revision, sometimes by the judge himself, find their way into the books to become authorities. Occasionally a "considered judgment" is reserved to be delivered within two or three days.

The contrast presented by these methods (for the system is not essentially different) to the average American appeal is very great. Here only the ablest men can know by a kind of intuition upon what points their cases will turn, and one often hears a more or less stereotyped speech delivered to a court sitting like silent images, without the slightest intimation to the speaker whether he is wasting effort upon conceded points, or slighting those upon which he may discover by the written opinion — delivered months afterward — he has won or lost.

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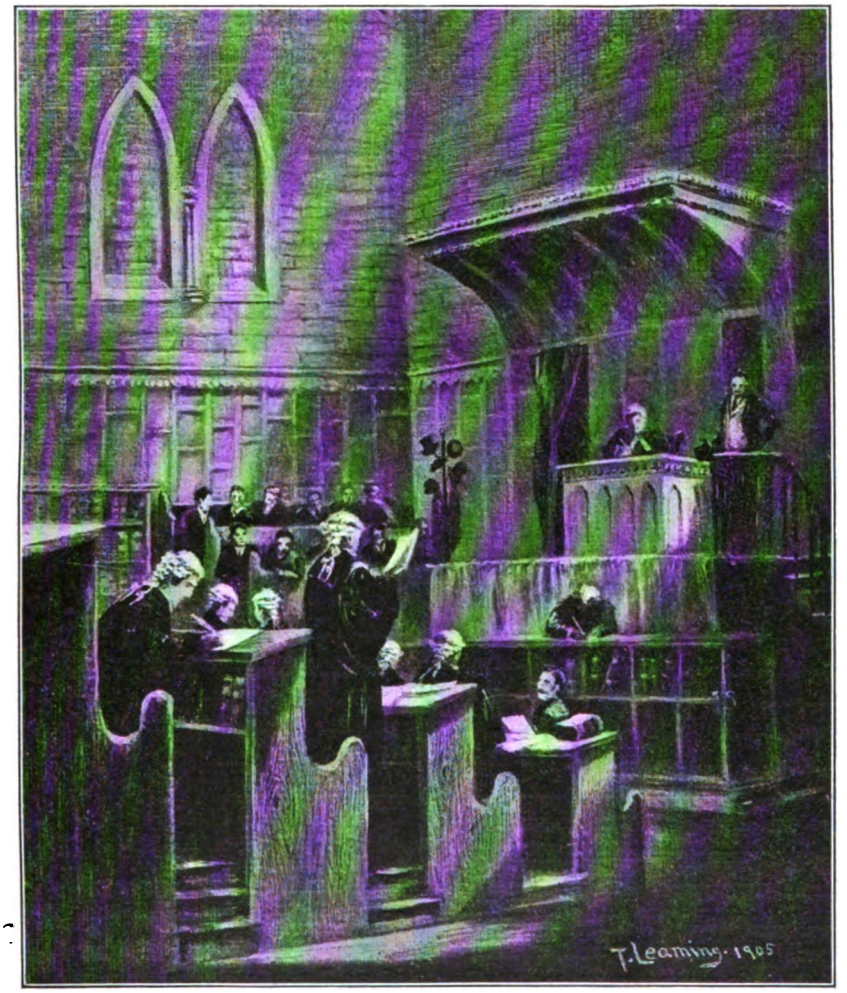
Sometimes these friendly debates in an English Court of Appeal are witty, and they are often rather amusing. In a case recently argued, the defendant appealed from a judgment for £300 against him for wrongfully evicting plaintiff and putting his sick wife and furniture out upon the sidewalk in the rain. There was not much to be said in his favor upon the merits of his act, but his counsel argued that plaintiff's advocate had used inflammatory language in his speech to the jury.

The judgment was immediately affirmed, the Lord Chancellor delivering an opinion to the effect that the control of the language used was a matter of discretion for the court below and could not be examined by the Appellate Court. Both of the associate Lord Justices concurred, but one proceeded to give quite different reasons, with the preliminary words: "Speaking only for myself, but not for his Lordship," and with a slight inclination of the head towards the Lord Chancellor, he said he was for affirming for an entirely different reason — not because he could not examine the language used below, but rather because he had done so. He then proceeded to rehearse the



A JURY TRIAL

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brutal conduct of the defendant, and wound up by declaring: "If it had been my sick wife and my furniture which had been set out in the rain under the circumstances described, I do not think the English vocabulary contains the language I should wish my counsel to use in addressing the jury." This was received, as is not uncommon in England, but unheard of in America, with frequent laughter and even subdued applause, and the London *Times*, in its regular legal column the next day, reported the opinions, indicating the "laughter" and "loud laughter" in brackets. The opinions in the books, after being toned down by the reporter, often bear but faint resemblance to the actual utterances.

In the House of Lords appeals are equally informal and colloquial, which impression is heightened by the absence of wigs and gowns, so far as the Bench is concerned, and by the very casual manner in which the half-dozen gentlemen composing the court are seated.

The House itself is a large, oblong chamber with steep tiers of seats upholstered in red leather which rise high up the side walls and upon which the peers sit when legislating, but which are, of course, now empty. At the far end is an unoccupied throne, while at the near end, raised above the floor, is a kind of box from which counsel address the court. It is much like the rear platform of one of our street-cars. The counsel, of course, are in wig and gown, and if K. C.'s, in full bottomed wigs, but one may occasionally see a litigant actually arguing his own case *in propria persona*. On either side of the counsel's box is a very narrow standing place for reporters and the public.

The Court, consisting of the Lord Chancellor and perhaps of five judges, in ordinary clothing, do not sit in a row nor behind any bench or table; on the contrary, while the presiding Lord Chancellor does sit vis-a-vis to the counsel box, the others sit where they please — sometimes on the front row of benches and sometimes on one of the higher tiers, perhaps with a foot propped up upon the bench in front and their thumbs hitched to the armholes of their waistcoats and necessarily with their sides to the speakers.

They often have portable tables in front of them piled with books and papers. During the course of an argument they constantly debate with each other across the House, or walk over to one of their colleagues with some document or a book and talk of the case audibly and perfectly freely.

One may hear one of them, in a salt and pepper suit, call across the floor to another who has interrupted a barrister's argument, "I say, can't you give the man a chance to say what he's got to say?"

These little circumstances show that judges and counsel in the Appellate Courts of England behave as natural men without the slightest restraint, formality, or self-consciousness. Arguments are delivered with surprising rapidity of utterance, in a conversational tone, and with a crispness of articulation altogether delightful to the ear. The drawling style of speech sometimes heard on the stage as typical of a certain kind of Englishman seems to have disappeared in real life — it certainly is not to be found in the Courts. An American stenographer reporting an English case, would have to increase his accustomed speed at least one-third.

Masters

The numerous motions and interlocutory applications supported by affidavits and urged by argument, which consume so much of an American Court's time, are disposed of in England by Masters, who are competent barristers paid handsome salaries.

At a certain hour the Master takes his seat at a desk with a printed list of "Applications without counsel" or "Applications with counsel" and nods to the uniformed officer at the door who admits the solicitors and barristers, according to which list may be first, one case at a time.

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They stand before the Master with a shelf upon which to rest books or papers while one side states its demand and the other its objection in the briefest and most direct manner. The Master's immediate oral decision, accompanied by imposition of the costs and a few scratches of his pen on the back of the summons, indicate to the officer the opening of the door to admit the next case.

By actual count, twenty-seven cases may thus be disposed of in one hour and thirty-two minutes — an average of a little more than three minutes each. Of course there is a right of appeal, which, however, is rarely exercised.

As the door opens two solicitors hurry in. There are no salutations nor introductory remarks but the business proceeds abruptly:

Plaintiff's solicitor: "Master, we claim £50 judgment for rent."

Master to defendant's solicitor: "Do you admit the amount?"

Defendant's solicitor: "Yes, but we claim a set-off."

Master: (Endorsing a few words on the summons.) "Judgment for rent £50 with stay of execution until counter-claim is tried."

Defendant's solicitor: "If you please, Master."

This expression is the universal vernacular with which the defeated party accepts the judgment of a master or judge in all courts. The expression is not an interrogation but is equivalent to "as you please."

Out they go and the next enter; here the defendant asks for delay, and gets seven days which is endorsed on the summons and requires a minute.

Then comes an application under Order XIV for judgment for £1000. Defendant requests four days' delay.

Master: "What is the defence?"

Defendant's solicitor: "Master, I don't know — a recent agreement has been made between the parties which I have not yet seen."

Master: "I'll give you the four days, but you must pay the costs of the adjournment; thirteen shillings and four pence."

Defendant's solicitor: "If you please, Master."

The next is a summons for judgment. As this is denied, the parties agree to try it before the Master on the following Thursday without a jury.

Then follows a summons by defendant upon plaintiff for particulars of goods sold and delivered. Both parties are dealers in Japanese bulbs, and the sale was made subject to arrival in England safe and sound. They are apt to arrive rotten. Defendant demands particulars of plaintiff as to who were his customers, etc. Plaintiff objects to disclosing his business.

The written summons containing the request for particulars is gone over rapidly by the Master, who strikes out with his pen such parts of the request as, in his opinion, ought not to have been demanded because they pry into the plaintiff's private affairs, and he signs the order, at the bottom, in an abbreviated form, imposing the costs of the summons upon the plaintiff. This means that the plaintiff is obliged to furnish the defendant in so many days with all the particulars which the Master did not strike out, and must pay to the defendant the costs of the applications.

A moment is consumed in giving judgment in an uncontested case for £1,800 with costs of £8.16.0.

Then comes a breach of promise case. Defendant asks for an order upon plaintiff for a statement of claim and discovery of correspondence which is ordered. Defendant wants to try in London as most of the witnesses are there, but plaintiff wishes to try in Manchester where the parties live. The Master thinks it is easier to bring two people up from Manchester than a dozen down from London.

The next is a "summons for directions:"

Master: "Statement of claim in 10 days?"

Plaintiff's solicitor: "Yes, Master"

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Master: "Defence in 10 days?"
Defendant's solicitor: "Yes, Master."
Master: "No counter claim?"
Defendant's solicitor: "No, master."
Master: "Documents?"
Both solicitors: "Large number."
Master: "All parties in London?"
Both solicitors: "Yes."
Master: "Any question of law?"
Both solicitors: "No."
Master: "Next case." And he at once endorses a few words on the bottom of the summons.

Then a defendant appears in person:
Master: "Do you owe the £26?"
Defendant: "Yes, sir."
Plaintiff's solicitor: "We want judgment for £21 because this morning he paid £5 on account, and he agrees to pay £3 a week, so that we will not issue execution, if he does this."

Master: "I'll give judgment generally for £21, but you write defendant a letter stating that you will not issue execution as you have just stated."

Another defendant appears in person:
Defendant: "I've got no defence, all I want is time."
Plaintiff's solicitor: "We'll do nothing until Monday as we think he means to pay."
Master: "All right, it is understood you will do nothing until Monday."

The details of practices before these Masters would be beyond the scope of the present writing, suffice it to say that rules have been promulgated from time to time, and are constantly being improved upon, having for their object the simplification of procedure, the rapid dispatch of business, and the settling of all minor questions prior to a case reaching Court for actual trial. Thus, "Order XIV" above referred to, enables a master to enter judgment when the defence averred, even if true, would not be effectual, or when the defence is obviously frivolous; although of course the rights of the plaintiff are preserved by the privilege of appeal, the judgment, meantime, binding his property. Again the "summons for directions," universally called "The omnibus summons," is for the purpose of having the master give general directions in advance as to how the parties shall proceed and the intervals of time to be allowed for exchange of copies of documents, taking foreign testimony and what not.

One of the cleverest contrivances in the "tender of damages in tort without admitting liability." A defendant may tender, say, £500. If plaintiff does not accept it, the trial ensues, the jury, of course, being in ignorance of the tender. If the judgment be for defendant, or for more than the tender, that is the end of the matter. But if the judgment be for less than the tender then a large deduction as costs is made from the judgment and inures to the defendant's benefit. This has enormously reduced the volume of tort trials and has also curbed the often wildly extravagant demands and unjust results in such actions generally recognized as an evil difficult to deal with.

In short, the system of Masters in England works admirably.

NOTE. — Lack of space necessitates reserving for the next issue the matter of costs, fees, and business, the cohesion of the profession and some general remarks by the author. — EDITOR.

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SOME QUESTIONS OF LEGAL ETHICS SUGGESTED BY THE LIFE AND CAREER OF LORD CHANCELLOR BACON, VISCOUNT ST. ALBANS

By Richard L. Ashurst

THE name of Francis Bacon, Baron Verulam, Viscount St. Albans, and Lord Chancellor of England, is illustrious in Science, Literature, and Philosophy. In his own time and the next ensuing generation, it acquired, owing to his principal scientific works having been published in Latin as well as English, even greater renown on the continent of Europe than in England. In his own country, owing to his conviction of the disgraceful offense of receiving fees from suitors while upon the wool-sack as Lord Chancellor, his sun went down in darkness; while abroad, where the doings of the English courts were little known, his honor and celebrity, based on the splendid products of his brain, published in the language of learning, continued to flourish and shine with increasing luster despite the dark clouds which shadowed his reputation in England.

For many years after his decease, in 1626, no attempt was made in English-speaking countries to redeem his reputation or rehabilitate his character, but people were satisfied to speak of him in the language of the poet as "the wisest, greatest, meanest of mankind." Within the last half of the 19th century, however, carried away by the brilliancy of his achievements in Science and Philosophy, a school of writers has been developed, who, unwilling to see anything blamable in the character or conduct of a personage whose gigantic intellect they so rightly revere and admire, have undertaken to minimize and explain away Francis Bacon's misdoings, so that he has recently been presented to us as a man of lofty principles, as well as a mighty genius; as one whose essential purposes were right and good, and whose ill deeds are to be accounted for, as due to his lack of attention to the smaller matters of law and justice while his head was absorbed in lofty speculation, and to his indulgence and affection for his friends and servants. While such a spirit of charitable judgment is to be in some respects commended, it is attended with this danger, particularly when it is a man of conspicuous greatness whose transcendent abilities have won him a distinguished position in history, whose character is discussed; that to minimize and excuse his misdeeds, which from his eminence cannot be forgotten, tends to obscure the moral judgment and blind or mislead us as to ethical principles when the example set by the great man of the past is on the wrong side. It becomes therefore necessary that from time to time some one should undertake the invidious duty of again showing that the feet of the great image, or perhaps even higher parts of the splendid figure, are of clay, and of warning his companions in life's journey not to be so misled by the glamor of splendid talents and great achievement as to overlook essential defects in character and conduct, where truth and justice have been lacking or disregarded.

In Francis Bacon's case it is especially the duty of a lawyer to perform this task, since it was in the practice of our profession, first at the Bar and afterwards on the woolsack, that he left behind him so distressing a record of misdoing, that no brilliancy of achievement in Literature, Science, or Philosophy can obliterate its darkness.

Francis Bacon, son of Sir Nicholas Bacon, Lord Keeper in the early days of Queen Elizabeth, was born, in 1561, graduated from Cambridge about 1576 and being in feeble health was sent in the suite of his father's friend, Sir Amyas Paulet, when he was Ambassador to France. The change

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of climate reëstablished the lad's health, but when his father's death called him home in 1579, he found himself very narrowly provided for, as Sir Nicholas had died without a will, so that he was dependent on his older brother Antony, who, however, treated him with uniform kindness. His uncle, Lord Burleigh, and his cousin, Robert Cecil, afterward Earl of Salisbury, were not specially kind or helpful to Francis Bacon in his younger days, and the Queen, although personally kind and pleasant to him as the son of an old friend, showed little disposition to advance him. He had attached himself, however, to Robert Devereux, Earl of Essex, then the Queen's great favorite, so that he was reckoned among the Earl's friends and followers. When Francis Bacon was about thirty and an almost briefless barrister, the Queen having refused a petition Essex had strongly urged on Bacon's behalf for the position of Solicitor General, Essex determined that if his influence, as he wrote his friend, could not give him a start in life, his own generosity should, and in 1592 he enfeoffed Francis Bacon with a valuable freehold estate on the Thames, near Twickenham Ferry. Whether it was or not the estate afterwards celebrated as Twickenham is uncertain, but it was a very valuable gift and gave Bacon a standing and position in the country as a landed proprietor which he had previously lacked. He subsequently sold this estate for £1800, a very considerable sum in those days and which may be fairly regarded as equivalent to between $30,000 and $40,000 at this day. After this start in life Bacon began to prosper. He was made Queen's Counsel, not a mere name in those days, but a position bringing with it a varying share of Crown business.

Essex was selected in 1598 to reëstablish Royal authority in Ireland. He undertook this, against the advice of Bacon, was unsuccessful and was summoned home and coldly received by the Queen. Discouraged and irritated by the Queen's neglect and her adherence to Cecil's views, Essex then undertook with the aid of his close friend, the Earl of Southampton, the insensate march through London at the head of a body of armed followers, with the alleged purpose of delivering the Queen from the influence of Cecil. This enterprise was a complete failure, and pitiably collapsed. The Earls returned to Essex's house having accomplished nothing, and their followers dispersed or surrendered. The Earls after some delay were sent to the Tower and proceedings for treason commenced against them. Bacon, of course, had nothing to do with Essex's foolish demonstration, and it may be granted to his friends, that his conduct up to this time had been entirely consistent with friendship; but from this point the question arises as to Bacon's conduct toward Essex, which has given rise to so much controversy and which seems still unsettled. As above mentioned Francis Bacon was at this time Queen's Counsel, but not yet Solicitor or Attorney General, although he earnestly aspired toward those offices, both of which he in turn filled in the succeeding reign. As Queen's Counsel he was instructed, probably through his cousin Cecil's influence, to take an active part, in the preparation of the case against the Earls of Essex and Southampton and their followers, and in conducting their ultimate trial for high treason. Counsel's duty in those days seems to have included the investigation of the facts, and examination of witnesses before trial; the examination and study of documents, and various matters now belonging to a French *juge d'instruction* and in England to attorneys or police authorities. Bacon undertook this duty, perhaps with reluctance and hesitation, but still he undertook it, and once entered fairly upon it conducted the prosecution with such skill and vigor that he obtained the conviction of his friend Essex by the House of Lords, of high treason, and ultimately brought him to the scaffold. Southampton, more fortunate, although likewise con-

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victed, escaped death by reason of the Queen's illness and death, and was released upon James I's accession. There is no real controversy about the outward and external facts. Bacon's own letters and speeches furnish all of the facts needed for our judgment, except the revelation of what were his real motives and feelings, which we can only judge of by reasoning and conjecture. Bacon undertook to defend himself against his critics at the time, who were many, by the argument, that whatever loyalty he owed Essex by reason of his grant of the Twickenham estate was subordinate to the allegiance he owed his sovereign, and that he had so told his benefactor at the time of the acceptance of the gift. The highly technical and artificial character of this defence, which is elaborately set forth in Francis Bacon's celebrated letter to the Earl of Devonshire, at once strikes the modern mind. The charge against him was not that he wisely refrained from embarking in Essex's doubtful and rash proceeding; for this no one blamed him, but that he accepted the professional task of proceeding criminally against him who had founded his fortunes, and so energetically pushed the prosecution as to bring his benefactor to the scaffold. Bacon was not at that time either Attorney or Solicitor General, and might have escaped the unhappy situation by refusing to take charge of the matter, or, if necessary, resigning his position as Queen's Counsel. It may be that this would have blighted his legal career, and such resignation or withdrawal would pretty certainly have irritated the Queen against him; but we find in the next reign Sir Henry Yelverton, when it became apparently his duty as Solicitor General to prosecute the Earl of Somerset for murder, resigning his office rather than so proceed against one from whom he had received considerable favor and patronage; and Yelverton's disinterested course won unanimous plaudits at the time, and did not prevent his ultimate professional success. Bacon in his letter to the Earl of Devonshire, further explained that he had, so long as there was possibility of success, endeavored to prevent the prosecution of Essex for treason, and to soften the Queen's heart towards him; but admitted that when he found it impossible to check the matter, he had proceeded with his best vigor and skill to attain success in the proceeding.

It would therefore seem on his own showing that Bacon did not claim to justify his course on the strong, stern, Roman ground of duty to the State; for on this ground he would have been reprehensible in the early attempts he alleges he made to have the prosecution stifled. The idea of a possible withdrawal or resignation is not alluded to in this letter to the Earl of Devonshire or elsewhere in Bacon's correspondence, and seems never to have occurred to him. Ingratitude is an offence of so hateful a nature as to necessarily estrange the guilty party from our sympathies, but on the other hand it may, and not infrequently does happen that a lawyer, as well as any other man, may be placed in a position of conflicting obligations, where he must either be seemingly ungrateful or ignore other and yet higher duties. Thus it may sometimes happen, in the complicated drama of life, that the course of action adopted by a man at certain junctures may be accounted for as proceeding from either the highest or the lowest motives. Bacon is entitled therefore to a fair examination of the whole question even if his own reasons given in justification of his conduct do not strike us as forcible. Any peril to the State from Essex, if any had ever existed, had passed away. His power had arisen more from his influence with the Queen than from any other source, and there was no scarcity of lawyers, competent and ready to take up the prosecution had Bacon withdrawn. But the general ethical question is not so easy of decision; the easiest path, even when one of self-sacrifice, is not always the path of duty. There may be and are some-

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times cases when personal abnegation may be the course dictated by timidity and not by honor. There are cases where the call to the public officer, or even the private advocate, cannot be disregarded or avoided without the forsaking of obligation. In some cases for instance, manifest wrong-doers may be so entrenched in power by wealth and influence or by the support of Public Opinion, that it may be difficult to find competent lawyers possessing both the courage and capacity to assail them successfully; in such case it may be the duty of the conscientious lawyer, and specially of the upright public officer, to stifle his private feelings and even if his heart bleeds to proceed against his friend, and firmly, calmly, and judicially to enforce the claims of Justice. On the other hand a yet more difficult case may arise where an excited public clamor, from a community inflamed by a reckless and sensational press, demands the condemnation of innocent victims. In such case it may be that the friend to whom the debt of gratitude is due, may, if the public prosecutor surrenders his office, be hounded to destruction by an unscrupulous and popularity-hunting successor. Under such circumstances it may be the duty of the public officer to use his office for the protection of the innocent and to see that the law is not strained or distorted even against the guilty.

To take however the lofty course of the fair, calm, and fearless performance of duty, between the outcry of an inflamed public opinion on the one hand, and the solicitation of personal feeling on the other, will try the strength of the stoutest mind and heart, and none should adopt it unless confident of his strength to endure obloquy and persecution, and of his skill to steer his bark safely through the conflicting currents. Yet no one can doubt in the supposable case of a public prosecutor seeing any citizen, not his friend, liable to be convicted of crime by a prosecution founded on an erroneous construction of law or supported by false testimony, that he would be bound to use all the power of his office to prevent such a miscarriage of justice. In all these cases it behooves the lawyer to strictly examine himself and see that public duty and patriotism are his real motives, unmingled with ambition, or desire of emolument, or worldly advancement. The contemporary disapproval of Bacon's course with regard to Essex was perhaps largely due to the general perception that his actions were on the lines which self-interest and the expectation of future favors from his sovereign would have dictated. Two or three circumstances tended to strengthen this view. In 1599, the year of Essex's return from the disastrous Irish campaign, Bacon had written a letter to the Queen soliciting the gift of an estate worth, he stated, £81 per year, near Gorhambury. It is also to be remembered that in 1601, after Essex's execution, but while Elizabeth still reigned, Bacon wrote and published a little book entitled "The Declaration of the Treasons of the Earl of Essex," in which he reviewed the case and sought to obtain the condemnation of that unfortunate nobleman by the Court of Public Opinion in confirmation of his conviction, which he had obtained in the House of Lords. There seemed certainly no duty laid upon him to blacken the reputation of his friend and benefactor after he had perished on the scaffold, and a man of honorable feeling would have preferred to bear any censure on his own cause rather than go outside of his professional duty to vindicate himself at the expense of his friend, whose death he had already brought about by his successful prosecution. He certainly did not help his position with regard to this book by the excuses he made with regard to it, in the letter to the Earl of Devonshire, written after the Queen's death and which has been already referred to. He claimed in this letter that the expression and tone of the book were not his own but were inspired by high authority, of which he was but the

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mouthpiece. "Never secretary," he says, "had more particular and express directions of how to guide his hand in it."

But perhaps the strongest contemporaneous piece of evidence against the righteous and honorable intentions which Bacon claimed for himself in the matter, was his course in respect to the Earl of Southampton, who had been Essex's associate in his plans, as well as in his mad ride through London, and against whom as well as against Essex Bacon had conducted the prosecution. Southampton, although like Essex he had been sentenced to death for treason, had been reprieved from time to time, so that at Elizabeth's death he was still in the Tower. He was at once pardoned and released by James I, whereupon Bacon wrote him a letter of congratulation, containing a tender of service, and declaring that there was no other change in his feeling toward this great noble, "than that he could *safely* now be to him what he *truly* was before, his humble and devoted friend." Either this letter therefore was a lying piece of flattery, or Bacon had not followed his heart and conscience in the prosecution of Essex and Southampton, but had been actuated by the baser motives of self-interest and the fear of the Queen's displeasure.

It may be, however, that the best and fairest way of judging as to what class of motives, the best or the worst, governed Francis Bacon's action will be to follow his life a little further down and examine his course as Solicitor General when, Sir Henry Yelverton having resigned, he was called on in his official capacity to take charge of the prosecution of Robert Carr, Earl of Somerset, and his Countess, the divorced wife of the young Earl of Essex, for the murder of Sir Thomas Overbury by poison.

Robert Carr, or Ker, a singularly handsome young Scotsman, had followed his royal Master to London, and soon attained the highest favor of his sovereign. James created Carr Viscount Rochester, and afterwards Earl of Somerset. Bacon does not seem to have had any such intimate relations with Carr as he afterwards had with his successor in the position of Royal Favorite, George Villiers, afterwards Duke of Buckingham, and there were no personal reasons so far as we know why he should not have simply done his professional and official duty according to law and justice. The extreme beauty of the young Viscount had captured the heart, or at least the fancy, of the young Countess of Essex. This young lady, Frances Howard, daughter of the Earl of Suffolk and niece of the Earl of Northampton, had been married while almost a child to the young Essex, apparently an ungainly and unattractive lad, who remained abroad for some years under the charge of tutors before claiming his bride. On his return to England, in 1612, he found the young Countess possessed with an intense passion for the King's favorite, Rochester, and an equal aversion for her husband, with whom she refused to hold relations. The powerful relatives of the Countess accepted her views as to the greater desirability of a marriage with Viscount Rochester, and the King also having been won over to the scheme by his favorite, young Essex was partly cajoled and partly intimidated into acquiescence. A proceeding for divorce was brought on strictly ecclesiastical grounds, viz.: for the alleged incompetency of the Earl of Essex for married life. The falsity of this charge was but thinly veiled at the time and soon afterwards was generally recognized; but it answered for the time its scandalous purpose. The divorce was granted by the ecclesiastical Court, and the fascinating Carr, now created Earl of Somerset, was with the sanction of the Church and King united in marriage to the young Countess of Essex, whose husband's place he had long usurped. In all the Jacobean Court but one voice seems to have been raised in condemnation of these nuptials, although one or two of the Bishops silently refused to take part in the judgment of divorce. This voice was

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that of a writer of some brilliancy and considerable popularity at that time, Sir Thomas Overbury, author of two books which were much admired in their day and still find readers; one a poem of some merit, called "The Wife" and the other a collection of prose essays called "Characteristics." Overbury, following the usual custom of writers of his time, had attached himself to Viscount Rochester, whom he selected as his Patron, and seems to have become warmly and sincerely attached to him. Overbury seems to have been a man of sterling integrity but of rough and arrogant temper, who would brook no restraint on his free use of tongue and pen, and had made many enemies by the bitterness of his satire. Bacon seems to have much disliked him. At this juncture Overbury set himself with all his might to prevent his patron from contracting a marriage which he regarded as both foolish and wicked, and seems for a time to have succeeded in making Somerset hesitate. This excited the intense hostility of the young Countess, who resolved to be revenged on Overbury for his attacks upon her plan. She succeeded in imbuing her lover, and her uncle, the Earl of Northampton, with the same feeling, and obtaining their aid in the extraordinary and cruel scheme which was devised to rid them of Overbury. The first step was a false accusation of treasonable practices brought against Overbury, based on the alleged publication by him of certain State secrets contained in papers Somerset claimed to have entrusted to him. He was also charged with a contempt to the Crown in refusing to accept a mission by which it was at first intended to get him out of England. On these charges Overbury was committed to the Tower, and the marriage took place without hindrance. Although the lady was thus wedded to her beauteous lover her desire for revenge was not appeased, and the scheme was concerted by her desire of killing poor Overbury by slow poison, so that his condemning voice should be forever hushed. All this was successfully accomplished; the Governor of the Tower and the servants in attendance on Overbury were changed, and while a prisoner in the Tower he succumbed at last to the repeated doses of poison which were supplied to him. Then suddenly the national conscience was aroused, the minor culprits, the keepers, guards, and servants were arrested and, some confessing, the truth came out. These underlings and subordinates were duly tried and hanged without much delay, and the guilty Earl and Countess of Somerset also arrested and imprisoned. It was then, in the early part of 1616, that the responsibility of their prosecution fell upon Sir Francis Bacon, who had succeeded Yelverton as Attorney General. If he had been the stern lover of justice, who had felt it his painful duty to bring to the scaffold his best friend for rash and imprudent conduct which he construed as treason, there would seem to have been no reason why he should not have proceeded without fear or favor against these illustrious murderers, who had first abused the law's process to confine their victim, and then, while he was under the law's protection awaiting trial, put an end to his life by the lingering torture of a great variety of poisons. King James's ardent affection for Somerset had by this time somewhat cooled, and Sir George Villiers had become prime favorite, but the King still retained some tenderness for Carr, and did not desire his punishment. There was also some secret between the King and Somerset, which was known to Bacon, but the nature of which can now only be conjectured, which made the King most anxious that Somerset should not be pushed to extremity, lest he should make disclosures, which should involve the throne in disgrace.

There is no difficulty in following Bacon's action in the case, for in a series of letters to the King and Villiers, which have come down to us with the King's comments endorsed on them, the whole disgraceful

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story is preserved. These letters, written in the early part of 1616, arranged in detail in advance the whole scheme for Somerset's apparent punishment and real escape, which was subsequently carried into effect in nearly every particular. First, Bacon caused to be hurried on the trials, convictions, and executions of the minor criminals, so that as he explained to the King in one of these letters, the public indignation and clamor for justice might be in a measure appeased; while the trials of the Earl and Countess were from time to time postponed until the popular interest in the case was abated. Second, the indictment, which Bacon speaks of in his letter as "the manner of charging him," was so moderated "as it might not make him odious beyond extent of mercy;" a contrast to the proceeding against Essex, where Bacon admitted he did not proceed tenderly. The Attorney General then carefully wrought, first with the Countess and then with the Earl, by a judicious mixture of threats and promises, and so played upon their hopes and fears, as to induce from them a confession of guilt and a throwng themselves on the King's mercy, and to secure the suppression of the secret, whatever it was, of which Somerset had knowledge. It was then contrived that after a relatively short imprisonment of a mild type, both Somerset and the Countess were pardoned and released, and the greater part of their estates restored to them, after which they retired into the country, begat children and lived and died happily. This happy ending for the Somersets was, however, an evident miscarriage of justice, for which the Attorney General, who engineered the whole scheme, was directly responsible. No higher motive than unscrupulous and obsequious devotion to the Crown can possibly be assigned for his course, while his continual entreaties to the Crown and to the favorite Villiers, for promotion in office and rank and for pecuniary grants, indicate that greed of reward was a strong incentive to his action.

I will allude episodically to two or three other incidents before going on to the last disgraceful scene which ended his Chancellorship.

The first of these episodes is known as Whitlocke's case. It is notable because it was an effort on Bacon's part to take away a time-honored and recognized liberty of the Bar and to degrade and humiliate our profession. Mr. James Whitlocke, a barrister who had studied law in the Middle Temple and was then a man of about forty, engaged in active practice at the Bar, gave an opinion as counsel in the early part of the year 1613 to his client, Sir Robert Mansell, Treasurer of the Navy, and Vice Admiral, that a certain commission issued by the Crown to the Earl of Nottingham, for reviewing certain alleged disorders in the Navy, was not according to law. This opinion was given in private to his client. Bacon, then Solicitor General, caused Mr. Whitlocke as well as his client to be brought before the Lords of the Council in the Queen's Presence Chamber, where he taxed the unfortunate lawyer with what he denounced as a contempt of a high character. In his speech to the Council Sir Francis Bacon said, "We must and do agree that the asking and taking and giving of counsel in law is an essential part of justice . . . but yet for all that, this liberty is not infinite and without limits. . . . So as the privilege of giving counsel proveth not all opinions; and as some opinions given are traitorous, so are others of a much inferior order, which are contemptuous. And among these I reckon Mr. Whitlocke's. . . . For the offense for which Mr. Whitlocke is charged I hold it great and to have two parts, the one a censure, . . . a clipping of the King's prerogative in general; the other a slander and depravation of the King's power and honor in this commission. And for the first I consider it in three degrees, first that he presumed to censure the King's prerogative at all, . . . And lastly that he hath erroneously, falsely, and dangerously given opinion in derogation

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of it." The result was that Mr. Whitlocke, who seems not to have been of the stuff of martyrs, was intimidated into a confession of his error and presumption, and promised thereafter always to employ himself in defence of the King's prerogative. When Bacon's alleged reforms and improvements in legal procedure are lauded, it is important to remember that as much as in him lay he endeavored to poison the pure wells of law at their source, by destroying the independence of its Ministers; and to sweep away their right to advise their clients according to their conscientious view of the law, and to chain them to the car of authority and prerogative. Nor is this an utterly obsolete and unusual peril even nowadays. The danger to the freedom of the Bar is now rather from an excited state of public opinion and a reckless press, which in these times seek to intimidate the lawyer from pronouncing hasty statutes unconstitutional, or the acts of popular officers and magistrates unlawful. It is still, however, the spirit of Bacon, slavish as well as tyrannical, which seeks to deprive by more subtle means the Bar of its well-earned and dearly-prized privileges, although instead of prerogative we have Popular Will and Unconstitutional Statute writ large. That men, not lawyers, should adopt this view and not see that freedom of the State as well as lawful government must perish if the freedom of the Bar be taken away, is not so surprising, but when a great lawyer and jurist conspires so to ruin and degrade the profession he should cherish, it cannot be without our special wonder.

The second of these episodes as they may be called is what is known as Peacham's case, which occurred in 1614, when Bacon was Attorney General. This case is remarkable not only for the remarkable extent to which Bacon succeeded in developing the law of treason, but for the extraordinary and unlawful means used by him in obtaining that success. Peacham was a clergyman of the Church of England suspected of disloyal views. Domiciliary searches of doubtful legality discovered in a desk or other private receptacle, the sketch of a sermon which was never delivered, and which there was no evidence he ever intended to preach, but which it was claimed contained treasonable sentiments. Torture, certainly contrary to the usage of English law even at that day, failed to draw from the unfortunate priest anything more incriminating, so that the case stood alone on these expressions, contained in a written sketch in Peacham's handwriting found among his private papers under lock and key, and the intent to publish which was only a matter of inference. Bacon naturally felt some doubt as to whether, if left to themselves, the Judges would be likely to permit a conviction of treason on such evidence, which not only showed no overt act but no published or even spoken words, and only differed from a man's secret thoughts and meditations by having been secretly committed to paper. To prevent the possibility of a failure in his prosecution, therefore, Bacon resorted to the plan of endeavoring to compel the Judges to commit themselves in advance on the question. The manner in which the Judges were interviewed, cajoled, and threatened is related in Bacon's intimate letters to the King dated Jan. 1, Jan. 27, Jan. 31, and Feb. 1, 1614. Lord Coke and some of the other Judges scrupled much at committing themselves in advance to a decision that Peacham's sketch amounted to high treason. Coke, to his honor be it said, objected that such "particular and auricular taking of opinions was not according to the custom of this realm." But according to Bacon's artful arrangement Mr. Sergeant Montague spoke with Justice Croke, Mr. Sergeant Crowe with Justice Houghton, and the Solicitor General with Justice Dodderidge, while Bacon himself expostulated with Lord Coke, so that his device was ultimately crowned with success. Peacham was convicted of high treason, but died in

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prison before execution. This course of intimidation and cajolery of the Judges, in subversion of the independence of the Courts, was carried still further by Bacon a little later in the well-known case of the *Commendams*, a species of letters issued by the Kings authority controlling church preferments. In this case certain of the Judges had, when the case in some form was before them, expressed opinions questioning the King's prerogative in this matter, whereupon Bacon, the Attorney General, seems to have addressed a communication to the Judges, directing them to postpone any further hearing of these cases until they should have conferred with the King, and that the day of hearing should be put off until the King's further pleasure. To this monition the Judges, headed by Lord Coke, made a noble reply, denying the Attorney General's right so to interfere with or control the course of business between private suitors, and claiming that in the matter before them, the construction of certain statutes, it was their duty if letters of authority (the *Commendams*) were offered before them, which were contrary to law, so to decide, and to certify the same to the King, and go on to do justice notwithstanding said letters. The next step was the summoning of the Judges as a body before the King and council, where they were so bullied and browbeaten that first the other Judges, and finally Coke himself, were driven to confess themselves in error, and to promise to sustain the King's prerogative, and to correct the bold and erroneous speeches which had been used at the Bar in derogation thereof. Am I not justified, therefore, in contending that we should rightly look upon Bacon as an enemy of the Bench and Bar, who as a lawyer did his utmost to degrade and enslave both?

His only excuse seems to be his servile devotion to the Monarch at whose hands, and those of his favorite Villiers, he was continually begging gifts and preferment. No devotion to the Crown and its prerogatives could excuse its legal minister, the Attorney or Solicitor General, who really represents the State, not the Monarch, for such endeavors to humiliate and enslave the Bar, of which the Attorney General is the head, or degrade and fetter the Bench, whose independence it should have been his duty to protect. You may ask what is the relevance of these questions of legal duty to the present day. The answer is the questions are eternal, only the manner and form of the temptation vary. Whether the desire be to gain the favor of an ostensible ruler, king, or governor, or to win the approval of that still more fickle, and sometimes more cruel tyrant the mob, even if we call it the people, the lawyer, or statesman, who to win popular applause manifested by the clamor of the newspaper helps to suppress free speech on the part of the Bar, or to incite public feeling against those who maintain the unpopular side; or the man whatever his position, who by flattery, persuasion, insult, or menace, or even by the supposed weight of public opinion seeks to influence the Bench, deserves the condemnation of Bacon.

The next and concluding act of the drama shows us Bacon not precisely on the Bench he had striven to degrade, but yet higher, upon the Wool-sack. He had won his reward for his subserviency to the King and the new favorite Villiers, and had been made first Lord Keeper, during Lord Egerton's long illness, and Lord Chancellor after his death. His highest ambition had been realized and howsoever foully he had played for the stake, he had won at last.

But circumstances had changed, the King had been compelled by need of funds to call a new Parliament, which came together in 1620 resolved to vindicate the ancient liberties of England, and to check the evils which had accumulated during the long years which had elapsed since the last Parliament had been prorogued. Against no individual was the feeling stronger than against the Viscount of St. Albans, Francis

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Bacon's new title. This was partly because of his political course, but perhaps even more because of his and Villiers', now the Duke of Buckingham's, interest in a number of monopolies, which were deservedly unpopular. Hardly, however, had Parliament assembled when the storm broke from an unexpected quarter.

On the 15th of March, 1620, Sir Robert Phillips made a report on behalf of a Committee appointed by the House of Commons, to inquire into abuses complained of in the Courts of Justice, to the effect that two persons, Mr. Aubrey and Mr. Edward Egerton, had presented petitions against the Lord Chancellor for receiving fees from suitors in Chancery for favorable treatment of their cases. The House seems to have been staggered at such charges, as well as surprised, and in great doubt as to the course to be pursued. It was finally concluded that, as the Chancellor was a Peer of the Realm, it would be proper to communicate the matter to the House of Lords, merely recapitulating the averments made by the petitioners, "without prejudice or opinion and to ask a conference." This course was pursued; Sir Robert Phillips presented the case to the Lords on the 19th March, and on the 20th reported to the Commons that the Lords had received the communication "with affection" and agreed to a conference. The news of the mere motion of the matter aroused other suitors, and on the same day Lady Wharton made complaint of having been compelled to give to the Lord Chancellor two sums, one of £100 to have a decree in her favor entered, and a further sum of £200 to have life put into her decree; that is, I suppose, to have it put in force. The first £100, Lady Wharton handed the Chancellor personally in a purse of her own making, which she asked him to accept as her handiwork, to which he gallantly replied, "What Lord could refuse a purse of so fair a lady's working?" The Register of the Court, a Mr. Churchill, and Lady Wharton's solicitor, Mr. Keeling, were witnesses in this case. A host of other suitors who had been defrauded out of what were great sums for those days came forward, so that by the time the cases came up for hearing in April, 1620, there were no less than 28 charges of bribery and corruption, of which notice was given to the Viscount St. Albans, embracing amounts of about £9000 in money and property, a prodigious figure for those days. The list of the gifts received included silver plate, jewels, and a cabinet valued at £800. To this presentation the Chancellor sent a written reply on April 24th, through the Prince of Wales, afterwards Charles I, who was always a warm friend of Bacon, which contained a general admission of guilt, but asked to be excused from answering the charges in detail, and prayed that his punishment might be restricted to the loss of his office of Chancellor. This answer the House of Lords deemed evasive and inadequate, and Bacon was called on for a specific answer to the several charges. The Chancellor in compliance with this order furnished a further reply, taking up the charges in detail; he admitted nearly all of the accusations in substance, qualifying his answer in some of the cases by the excuse that the payments had been made either before the suit had been formally commenced or after the litigation had been ended, so that there was not actually a *lis pendens* when the gifts were taken. As to the silver plate, rings, and other jewels, he disputed their worth, claiming they were of less value than alleged in the complaints; while as to the cabinet, he contended that not only was it not so valuable as alleged, but that he did not want it, and had sent word to the donors to please send for it and take it away, which they had failed to do; (this seems to have a sound modern and familiar). Bacon further maintained that he had never been influenced by the gifts he received, but had always decided according to his conscience, and without regard to the magnitude of the gifts received from either

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side, and renewed his prayer for a light sentence. The Lords acted with great vigor and dispatch, yet as is apparent with considerable reflection and consideration. Their sentence appears to have been in a measure a compromise between the extreme views of two parties in the body. The Lord Chancellor was found guilty of all the crimes and corruptions charged against him by the Commons, and of sundry other crimes and corruptions of like nature, and sentenced

1. To pay a fine of £40,000;

2. To be imprisoned in the Tower at the King's pleasure;

3. To be forever incapable of filling any office, place, or employment of the State, and

4. Never to sit in Parliament or come within the verge of the Court.

He was not deprived of his peerage, although he lost part of its privileges, nor of his titles of honor. The rest of his sentence was less severe in its application than in its language. The King was not forgetful of his servant, who had so often sacrificed law and conscience to the fulfillment of the Royal behests and the Crown's advantage. Bacon was soon released from imprisonment, and even was mercifully dealt with as to the large fine, which was perhaps imposed not without an eye to the Royal necessities. When his estates were sold, under Exchequer proceedings for the levy of the fine, they were largely permitted to be bought up at low prices by Bacon's friends, so that his loss was by no means total, and a little later the King granted him a pension on his urgent entreaty. He survived his disgrace not quite six years, which he devoted principally to the revision of his philosophic works.

Until recent years Bacon's admirers were satisfied to separate the man from the author, and while they glorified the philosopher, to suffer as far as possible the mantle of oblivion to cover his personal life and character. Within the last few decades, however, a school of writers has arisen who are such intense worshipers of Bacon's genius, and of the great productions recognizedly from his brain and pen that they not only seek to snatch from the brows of other authors their laurels, but have undertaken the task of rehabilitating Lord Verulam's character as a man, a lawyer, and a judge. These defenders of Bacon claim that his offenses and crimes were only those of his time and surroundings, and that his most indefensible actions were the deeds of his friends and servants unjustly imputed to him. The misdoings of lesser men may be safely permitted to be forgotten, but to excuse or minimize the offenses of so great a man as Bacon has unhappily a tendency to lower the moral standard by which other lesser men are to be judged; and this attempted rehabilitation of Bacon has, I think, had a distinctly lowering and degrading effect on the community in general and no the Bench and Bar in particular. It is not surprising that a large portion of the laity and the press, ever ready to disparage our profession as a body, and individually to pull down and besmirch the reputation of the best of us, for the fulfillment of unpopular duty, while always delighted to laud to the skies the popularity-hunting demagogue or the unprincipled blackmailer who degrades our profession should be found in the ranks of Bacon eulogists; but even lawyers and judges have of late been found in this crowd of Bacon's worshipers, regardless of the fact that by this attempted rehabilitation they foul their own nest and lower the standards of their own calling.

I will endeavor to state the position of the Baconians fairly. I understand their contention to be, that the principle of the absolute prohibition of the judiciary receiving personal compensation or reward from the suitors in their courts had not been thoroughly established in England in the time of James I, and that judges still looked, or might look, for a part of their compensation, to voluntary gratuities or thank offerings from successful litigants; and the remark of the Duke of Venice to Bassanio,

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after the learned clerk from Padua had by his skill and eloquence extricated Antonio from Shylock's grasp:

"Antonio, gratify this gentleman;
For in my mind you are much bound to him,"

is cited as illustrating the contemporary tone of thought on the subject. They further allege that a similar custom prevails in some semi-civilized or retrograding countries at this day; and that a lingering trace of it may be found among us, in the compensation of masters, receivers, and other officers appointed by the courts. They adopt as conclusive verity Bacon's assertion that he had never been governed in his decisions by the gifts tendered him, but had uniformly decided according to justice and equity, no matter whether he was paid much or little, and finally assume that the extortion was principally by his servants and officers, to whom Bacon was confessedly weakly indulgent, and that from weakness and a false magnanimity he assumed the guilt himself. These contentions, as I think I can show, are not supported in law or fact. To take the last item first, Bacon admitted in the twenty-eighth clause of his answers that he had given way to great exactions by his servants, both in respect to private seals and sealing injunctions, which he confessed was a great fault of neglect in him that he looked no better to them. Therefore there was no dispute about this and it need not be mixed up with the twenty-seven other more serious charges. This was a case of what would now be called "graft" pure and simple. That is, public officers of a merely ministerial character exacted from the public additional fees for putting the seals on writs and injunctions for their private emolument. It was not merely a tip, a voluntary gift to an officer, which is the excuse usually made by deputies and such like, for getting a larger compensation than the law allows, but a direct exaction or extortion (such as have been known in our own day and even under professedly reform administrations) without the payment of which the officer refuses to do his duty, and the Lord Chancellor winked at the exaction. Yet Bacon was fully conscious of the iniquity of such practices and of their injury to the Commonwealth. In his "New Atlantis," the description of an ideal state, he treats of this offense under the name of double payment, and praises the rule that no one should be twice paid for one labor, and in that happy Island to be twice paid, even if the double payment was voluntary, was accounted disgraceful and criminal. And in his essay on Judicature, Bacon strongly condemns what he calls "polling and catching clerks and ministers who make the Court a thornbush where the sheep loses his fleece." This was, however, the lightest of the offenses laid to Bacon's charge and by him confessed. As to the supposed custom of gifts by successful suitors to Judges or Chancellors, it is so far as England is concerned absolutely unsupported by evidence. In Sir Robert Phillips' report from the Committee on Abuses it is stated but one precedent had been found of such reception of gifts, which he called frankly corruption, and that case was also of a Lord Chancellor (said by the annotator of State Trials and by Lord Coke to have been Cardinal Wolsey). The instance quoted from the poetical case of Shylock *vs.* Antonio is not in point, for in that case neither Bellario nor his supposed cousin was a judge, but they were invited as a species of adsessors to advise a tribunal not learned in the law as to what the law was. Such an adsessor not being paid any salary, it might be in the province of the duke or lay judge to provide for his payment, by an order on one of the parties, and all Shylock's goods having been taken from him by fine and confiscation, the successful defendant was the only person who could furnish the adsessor's fee. When in the subsequent practice of Chancery, Masters, etc., have been compensated by fees, it

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must be remembered that Masters received no salary, and were not therefore twice paid, and their fees were always part of the costs, and paid by the losing and not the winning party. But an examination of a few of the cases as to which Bacon pleaded guilty shows how futile and idle are the excuses of his friends. In the 4th, the case of Lady Wharton's charges, Bacon received from her first £100 before decree and afterwards £200 more was extorted from her before she could have the decree put in force, thus showing that if, as Bacon contended, it was a righteous decree, he obstructed and delayed justice until paid for it. In the Egerton case, the 2nd complaint, he received large fees from both sides, Sir Rowland Egerton and Edward Egerton. Further, Edward Edgerton to obtain a rehearing was compelled to give a bond to the Bishop of Landaff for 10,000 marks, which was to be shared between the Court officers and certain noble persons. The rehearing was not obtained, but the bond was enforced, and Egerton left remedyless.

In the case called the 14th article of the charge, the Chancellor confessed to have received between the date of two decrees made as to the inheritance £500. In the case described in the 27th article of the charge, that of the French merchants against the London vintners, the Lord Chancellor's course was usurping and illegal, as well as corrupt. Without a suit having been brought, he compelled the Vintners by threats, and imprisonment of some of their number, to buy a stock of wines they had refused to purchase. For this intervention Bacon received from the merchants £1000. His excuse was that the refusal of the vintners to purchase at what he considered a reasonable price would destroy the trade, and that the Vintners really obtained a fair profit. He was unacquainted with the language and current opinions of the present day, or he would doubtless have said the vintners constituted a trust, and therefore had no rights that any one was bound to respect, but while ignorant of such phraseology, the boldness of his action in compelling the wine dealers to buy at a price he chose to hold reasonable wines they had not contracted for and did not want was certainly very advanced jurisprudence, and he considered the general service he did to trade entitled him to his £1000, which certainly the beneficiaries of his action, the French merchants, were very well satisfied to pay.

The Lord Chancellor's office even in those days was a very highly paid one, so that the pretense of there being an expectation of the Chancellor obtaining his compensation from the contributions of suitors is as vain as the unfounded assertion that such exactions were customary.

Surely it is only darkening knowledge and obscuring moral principles to allow our eyes to be blinded even by Lord Verulam's transcendant genius to the ignominous degradation of the Bench by Bacon during the period in which he disgraced it. And we may properly look upon it as a fitting culmination of his career at the Bar, which was marked by an absolutely slavish devotion to the Royal power, and by selfish greed of personal gain and advancement, untrammeled either by gratitude or kind feeling on the one hand, or sense of duty and justice on the other.

PHILADELPHIA, PA., June, 1906.

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THE MULTIPLICITY OF STATUTES

By Ernest Bruncken.

FOR some time complaint has been heard very frequently that there are too many statutes passed by American legislatures. At meetings of the bar associations, in periodicals legal and lay, in newspaper editorials and paragraphs the cry is echoed. But very rarely do the complainants seem to have a remedy to propose, beyond the somewhat general advice to the law-making bodies, to be good.

This article proposes to show first, that the plethora of new statutory law is not really quite so great as a simple counting of chapters would lead one to think; and secondly, that an excess of legislative activity is a natural result of our form of government, and would continue to exist even if all "cinch bills" and all lobbies looking for special privileges were to disappear.

One of the reasons for the multiplicity of new statutes is clearly found in the provisions contained in many state constitutions that each bill shall refer to but one subject. This makes it impossible to amend, for instance, the Code of Civil Procedure by a single act, if a number of sections are to be changed. The courts have construed this provision quite strictly, as the State of California found out to its cost. (Lewis *v.* Dunne, 134 Cal., 291.) If this provision did not exist, the biennial or annual number of chapters would probably be reduced very materially.

Next, we must not forget that very much that goes by the name of legislation is really nothing but administrative regulation. Appropriation acts that have to be renewed at each legislative session, bills authorizing the erection of a splash dam in Clear Creek, or fixing the salary of the county surveyor in Backwoods County, are really not the proper business of legislatures. Yet a very large number of chapters in the state laws deal with such trivialities. The federal legislation in this regard is far more sensible and practical. It is rarely that an act of Congress fixes the salary of subordinate officials. Even the number and character of the employees in a federal department is not usually fixed by law. Sometimes the building up of an entire branch of the service, with an elaborate hierarchy of officers, has no basis in specific legislation. Thus the United States Forestry Service was gradually organized in the Department of Agriculture without any other statutory authority than a paragraph in each successive appropriation bill. There is no reason why the various states might not leave a greater discretion to their administrative departments in this regard.

Similarly, if the principle of municipal home rule, such as cities in California and Missouri enjoy, were generally adopted, there would be a great lessening of chapters. For one can see at a glance that much legislation, although general in form, is purely local and should be passed by the people immediately concerned in it.

Akin to the matter just spoken of is the custom of American legislatures to include in their statutes a great amount of detailed regulation which in other countries would be left to the discretion of the executive officials or boards. Undoubtedly they have been taught to do so by the courts which have held many a regulation left to administrative boards to be an unconstitutional delegation of legislative power. So far as a precise rule can be deduced from the rather contradictory decisions, it seems to be this, that an administrative board may make by-laws regulating its own internal affairs, but none which affect or bind outsiders. It is not contended that this is a bad rule. But the fact remains, that the volumes of American statutes would become reasonably thin if all provisions could be left out, which in

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England or Germany are not found in the statute books, but in Orders in Council, *Ministerial-Verordnungen*, or similar documents.

It cannot be denied, therefore, that to count the number of chapters gives a wrong impression of the actual amount of new legislation annually produced in the United States as compared with other countries. We not only are inveterate devotees of the Anglo-Saxon habit of piecemeal law-making, but we include in a single volume, called statutes, a multitude of legislation which in other countries must be sought in a variety of different places and goes by all sorts of names. But after making all these allowances, it were foolish to dispute that we are suffering from over-liberal doses of legislative medicine for our ailments.

The reason for this, however, must not be sought in the wickedness of the legislators, nor even in the still greater depravity of corporate lobbies. No doubt that corrupt laws are sometimes passed. But their number is insignificant by the side of well-meant and honest, though often unwise, legislation. The real reason must be sought in the extent to which we have carried the principle of the separation of powers. As far as I know, there is at the present time no other country in which the legislatures actually perform their theoretical function of statute-making in the same independent manner as in the United States. Both in those countries like England, where the "government" is in effect a committee of the legislature, and in those like the German states, where the executive is independent of the legislatures, the actual work of preparing bills and introducing them is practically left to the executive. The legislature, though it may have the power of initiating legislation, rarely exercises it. This tends to unity of purpose in law-making, and very materially reduces the number of bills passed on. Besides, it improves the quality of the bills, because they are drawn by experts. In our legislatures, every member feels himself obliged to introduce a number of bills, whether drawn by himself or others, and whether he understands the subject or not. The multitudinous committees of non-experts to which they are referred try their best to "kill" them, but many become law despite of all. Nobody knows just which of them will survive, and as there is no single committee that has cognizance of all, it is purely accidental if they do not contradict each other. Probably in no other country is it possible for a legislature unwittingly to pass several bills, the last of which by implication repeals the preceding one, thus defeating the intention of the law-makers. Examples of this sort are by no means rare in American legislative annals.

The circumstance that this intolerable anarchy has been the practical result of our principle of the separation of powers does not necessarily lead to the condemnation of that principle. It merely proves that we have not adapted our machinery to the conditions under which it works. The remedy will be found in some plan of submitting every bill, at some stage of its progress, to expert scrutiny. In what ways this can be done, it is not necessary to consider at the end of this article.

SACRAMENTO, CAL., August, 1906.

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Communications in regard to the contents of the Magazine should be addressed to the Editor, S. R. WRIGHTINGTON, 31 State Street, Boston, Mass.

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

CURRENT LEGAL LITERATURE

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

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

BIOGRAPHY. "Massachusetts Bench and Bar," *New England Magazine* (V. xxxiv, p. 649).

BIOGRAPHY. "Lord Mansfield and His Relation to Our Laws," by William L. Royall, *American Lawyer* (V. xiv, p. 297).

BIOGRAPHY (Bentham). Under the title of "Jeremy Bentham," H. J. Randall reviews, in the July *Law Quarterly Review* (V. xxii, p. 311), a recent biography of that subject by Charles Milner Atkinson.

The *Review* declares that Bentham's supremacy was in the field of legislation and adopts the conclusion of Professor Dicey, in his work on "The Relation between Law and Public Opinion in England During the Nineteenth Century"; that from the beginning of the reform period until 1870, the spirit of Bentham was the dominant spirit in English legislation.

BIOGRAPHY (Somers). In the July *American Law Review* (V. xl, p. 505) is printed a paper by Nelson Phillips, read before the Texas Bar Association in 1905, entitled, "A Great English Lawyer." This is an entertaining account of the career of Lord Chancellor Somers. The author summarizes his views as follows:

"In conclusion, we may say of John Somers, that in a day of servile judges, corrupt statesmen, venal courtiers, and folly in every quarter, he lived his career unprofaned, conferring great benefits upon his country in the improvement of her laws and the security of her freedom; leaving to his profession the simple lessons of a noble and illustrious life, and crowning its high purposes with the enduring glories of a great name."

In connection with this, the *Review* also reprints from the *Law Times* of April, another sketch of the same subject, entitled "Lord Somers, — a Striking Figure in the Legal History of England."

COMBINATIONS. "The Sherman Anti-Trust Law," *North American Review* (V. clxxxiii, p. 189).

COMBINATIONS. In the July *American Law Review* (V. xl, p. 558), Edward L. Andrews discusses the question, "Are Railroad Monopolies Authorized by the Laws of New York?" He contends that the Interborough-Metropolitan deal was illegal, both under the New York Business Corporations Law, under which the new company was organized, and also under the Railroad Law, as being an illegal combination.

CONSTITUTIONAL LAW. "What of our American States?" by James Hagerman, *Central Law Journal* (V. lxiii, p. 124).

CONSTITUTIONAL LAW. In the July *American Law Review* (V. xl, p. 566), Black-

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burn Esterline replies to Mr. Trickett's article in the last preceding number of the *Review*, on "The Great Usurpation," in an article entitled, "The Supreme Law of the Land." He declares that, "It appears conclusively that the judiciary, when guarding against the silent and unlawful encroachments of the legislative power upon the Constitution, has been equally observant that the limitations prescribed by the Constitution were intended for the judiciary as well as the legislature." He further says, "Of the standing of an act by Congress, then, there can be no compromise; it is either the supreme law or it is an absolute nullity." "It is absolutely indispensable to the safety and endurance of a free government, that a law passed by the Congress, not in pursuance of the Constitution, should not supersede that instrument."

CONSTITUTIONAL LAW (Australia). "Secession," by P. McM. Glynn, *Commonwealth Law Review* (V. iii, p. 193).

CONSTITUTIONAL LAW (India). "The Separation of Executive and Judicial Functions in India," by Arthur James Hughes, *Bombay Law Reporter* (V. viii, p. 134).

CONSTITUTIONAL LAW (India). "The Kathiawar Jurisdiction Cases," involving questions of jurisdiction over petty native states of India and the English policy of annexation, are criticised by A. C. Lyall, in the July *Law Quarterly Review* (V. xxii, p. 246).

CONSTITUTIONAL LAW (Judicial Power). An address by Hon. Hannis Taylor, before the North Carolina State Bar Association, on the "Independence of the Federal Judiciary," is published in the July *American Law Review* (V. xl, p. 481). He takes up the question raised during the recent discussion of the Rate Bill in Congress, and considers:

"(1) Does the maxim that the three departments of power shall forever remain separate and distinct really impart an independent existence to the federal judiciary after it has once been organized and put in motion by congressional legislation; (2) does the fact that the judicial machinery was put in motion and must be kept in motion by its organizing power vest in Congress the right to limit and control the exercise of the judicial functions of the inferior federal courts at will?"

He shows that at the time of the making of our first Constitution, "there was a perfectly well-defined domain of judicial power into which the legislature could not intrude," and that the "new American invention of Constitutional limitations on legislative power was first employed by the state courts as a weapon with which to crush attempts upon the part of the state legislatures to limit or control the machinery through which English justice has been immemorially administered." As a result of the discussion, he draws the following conclusions: —

"From the foregoing data we can draw three clear and definite conclusions: (1) In the words of Mr. Justice Story, 'even admitting that the language of the Constitution is not mandatory and that Congress may constitutionally omit to vest the judicial power in courts of the United States, it can not be denied that when it is vested it may be exercised to the utmost constitutional extent'; (2) as the Constitution itself has recognized and prescribed three codes, to wit, the English common law, English equity, and the admiralty code as bodies of clearly defined principles according to which the judicial powers of the federal courts shall be exercised, such courts must administer justice in the cases before them according to the principles as defined in such codes; (3) that while Congress has an undoubted right to amend each of such codes within certain limits, it is purely a judicial question how far that right of amendment shall extend. And here, in my judgment, is the crux of the whole matter; it is upon the limitation of that amending power that the independence of the federal judiciary, so far as the inferior courts are concerned, must ever depend. If Congress has the right to cut out the basic principles upon which rest the three codes which the Constitution itself has given to these courts as rules of action, then we may begin to speak of the omnipotent Congress as the English speak of the omnipotent parliament."

"Just as it is impossible for the legislative power to take away from the courts of law trial by jury because it is a vital part of their

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system of justice, so it is impossible for the legislative power to deny to suitors in courts of equity the right to have the facts involved in such cases considered by the chancellor, because that method of trial is a vital part of their system of justice. Congress may organize and reorganize, in a very free and liberal way, the external architecture of the federal judicial system, and it may likewise reform, simplify, and adapt legal procedure to the ever changing necessities of litigation, but it cannot invade the penetralia of the judicial temple and change the basic principles of the three codes given by the Constitution itself to the judges as rules of action. Upon that principle alone the federal judiciary depends for its independence."

CONSTITUTIONAL LAW (Taxation). "Can the Accumulation of Great Wealth be Regulated by Taxation?" by Hon. A. A. Ferris and Hon. Alexander Hadden, *Ohio Law Bulletin* (V. li, p. 279).

CONTRACTS. "Laws Relating to Bills of Lading," by Hon. Thomas B. Patton, *American Lawyer* (V. xiv, p. 360).

CONTRACTS. "Bills of Lading," by Hon. J. C. Cottingham, *American Lawyer* (V. xiv, p. 305).

COPYRIGHT. "The Copyright Bill," by Charles Porterfield, *Law Notes* (V. x, p. 85).

CORPORATIONS. "A Handbook of Corporation Law, as applied to private business corporations," by Richard Selden Harvey. The Bleyer Law Publishing Company, New York, 1906.

This book does not purport to be comprehensive or exhaustive, but rather suggestive. Its form is somewhat unusual, owing to the abundance of quotations, from standard authors on corporations, as well as judicial decisions, in order to illustrate the principles laid down, and in general style is the sort of book a lawyer might prepare for use in his own practice on corporation law. The authorities cited indicate wide reading and thoughtful selection. The book lacks some of the convenient typographical distinctions which make the use of most modern law books easier, but apart from this defect, should prove useful to the lawyer who desires a concise and correct statement of the leading principles of corporation law, especially on those subjects which have recently developed in importance, such as holding companies, and the fiduciary relations of directors and majority stockholders.

CORPORATIONS (Public Policy). "The Rebirth of the Corporation," by Hon. Peter S. Grosscup, *American Lawyer* (V. xiv, p. 299).

CORPORATIONS (Stock Transfers). The famous English case of *Sheffield* v. *Barclay*, which has been discussed in the reviews at earlier stages of its history, is considered in an article entitled, "Some Aspects of Forged Transfers of Stock," by Lee M. Friedman, in the July *American Law Review* (V. xl, p. 496).

The question is as to the liability of a transfer agent of stock when he has issued a new certificate to a *bona fide* purchaser for value of a previous certificate upon which there was a forged transfer. It was finally held in England, that, as between this innocent purchaser and the transfer agent, the former must stand the loss. The author criticizes this result as follows:

"The real difficulty with a correct solution is to determine what is the actual legal theory involved. You have two innocent persons, one of whom has to stand a loss. Neither has any equity superior to the other, and there is perhaps no innate reason why one rather than the other should be preferred. You are obliged to stand on some legal theory and follow where it logically leads to fasten the loss on one of them. It is the weakest kind of unscientific dodging to invent a tacit understanding between the parties themselves disposing of the whole matter.

It is not a question of legal title. All authorities agree that the title of the original owner is never transferred by a forgery.

It is not a question of contract express or implied. Because after all is said there is no contractual relations between the transfer agent and the transferee as such. The transfer agent issues the new certificate because it had contracted with the corporation to look

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after the issuance of its capital stock and the transfer of its shares. There is no contract relation directly between the transfer agent and the stockholders. The transfer agent contracts to perform in the place of the corporation some of its duties to its stockholders. The contract between a corporation and its stockholders amongst other things is that the corporation will transfer a stockholder's rights to any third person on order of such a stockholder. There is no duty or obligation to this nominee until, and unless, he is invested with the rights of the original stockholder. Then he establishes his relations to the corporation under, and by reason of, the existing contract between the corporation and his predecessor in title under a novation. It is only when the novation is completed and the transferee is an accepted stockholder that the corporation and the transferee have any direct contractual relations. This sort of property and this manner of transfer is too recent to say that there is an established custom of the law merchant in stock transfers that reads into every transaction implied terms of contract. It is judicial legislation pure and simple to imply any contractual obligations merely from the relations of transfer agent and transferee.

The real principles involved are those of the doctrine of estoppel. When the various phases of the rights of parties under a forged transfer of a stock certificate are stated in terms of estoppel, they are logically consistent. When a transfer agent recovers back a new certificate from an innocent transferee to whom it was issued under a forged endorsement of transfer on an existing certificate, the transfer agent has a right to this relief, because the transferee had no title to the shares and has not changed his position on account of any act of the transfer agent. If any harm has come to the transferee it was at the time he bought the forged certificate, and not when the new certificate was issued him, so the transfer agent is free to recall and cancel the outstanding certificate and reissue the original one to the true owner. It simply acts as agent of the true owner to retake his property from one who has no right to retain it. The subtransferee of the new certificate takes nothing from the original registered stockholder. He is not his successor in title. This transferee's right to demand the shares from the transfer agent is not because he has been invested with the legal title of the shares of the original stockholder, but because the corporation by its own acts has placed itself in a position where it must recognize him as the owner of the shares enumerated in the new certificate. So the transfer agent finds itself accountable for more than the total number of outstanding shares; on one hand, because of an actual legal title and on the other, on account of being estopped to dispute the apparent title.

If the transfer afterwards turns out a forgery it is a case of mutual mistake. There is no estoppel imposed on either party under such circumstances. As long as the original transferee holds the certificate the transfer agent may correct the mistake because it can be done without changing the relations of any parties. When the original transferee has transferred the certificate and the transfer agent demands monetary damages from him there is no principle of law which will cost a defendant in damages, because he has been an innocent party to a mutual mistake in which he has derived no unfair benefit.

It is clearly a case for the application of the universal rule that where one of two innocent parties must suffer a loss by the misconduct of a third, neither being at fault, and both equally meritorious, the law will not intervene to shift the burden, but the loss must rest where it falls."

CRIMINAL LAW. "Legal Complications Arising from Grand Jury Proceedings," by F. Beecher, *Central Law Journal* (V. lxiii, p. 67).

CRIMINAL LAW. "Criminal Statistics, 1904," *Law Magazine and Review* (V. xxxi, p. 411).

EMPLOYER'S LIABILITY. "Statutory Regulation of Employer and Employee," by O. H. Myrick, *Central Law Journal* (V. 63, p. 43).

EQUITY. "Equitable Relief in Actions at Law Relating to Contracts of Release obtained

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by Fraud and Actions at Law to Recover Damages for Fraud in Such Cases," by W. A. Gardner, *Central Law Journal* (V. 63, p. 85).

EQUITY (Marshaling). The more important principles of law, relating to the "Marshaling of Mortgages," are defined by W. Strachan, in the July *Law Quarterly Review* (V. xxii, p. 307).

ETHICS. "The Ethics of the Practice," by W. R. Biddle, *New Jersey Law Journal* (V. xxix, p. 200).

HISTORY. A further instalment of the interesting series of articles illustrating the history of the demarcation of "The Province of the Judge and of the Jury," by G. Glover Alexander, appears in the August *Law Magazine and Review* (V. xxxi, p. 451). It continues the story of Lilburn's Trial.

HISTORY. Some of the addresses delivered at the banquet given to Mr. Justice Brown on his retirement from the Supreme Court of the United States, including especially, the address of the President, Judge Brown's response, and remarks by Mr. Justice Harlan, are published in the July *American Law Review* (V. xl, p. 504).

HISTORY. In the August *Law Magazine and Review* (V. xxxi, p. 385), Rev. H. W. Gibson contributes an article on "The Influence of Christianity upon the Law of Rome." He shows that the ameliorating influence in Roman law must be attributed rather to Stoicism than to Christianity, since for nearly two centuries Christianity was proscribed by the state. In two respects, however, there is evidence of the effect of Christianity, viz:

1. In the promulgation of new laws to meet new conditions, such as new corporations, new offices, and new men, which come with the establishment of Christianity.

2. In the amendment of existing law, to meet with the more rigid morality of Christianity.

HISTORY (Year Books). In the July *Law Quarterly Review* (V. xxii, p. 266), "The Year Books," their history and manner in which they illustrate certain aspects of the development of English law, are considered by W. S. Holdsworth. He considers first, the manuscripts and printed editions of the year books, second, the origin and characteristics of the year books, and third, the year Books and the development of English law. The article contains many interesting illustrations of ancient legal methods, and is to be continued.

JUDGMENTS. "Res Judicata," by Janardan Damodar Dickshit, *Bombay Law Reporter* (V. viii, p. 140).

JURISPRUDENCE. The first installment of an article by A. H. F. Lefroy, on "The Basis of Case Law," appears in the July *Quarterly Review* (V. xxii, p. 293).

It begins as follows:

"Case-law, as it exists to-day, consists of a vast fabric of juridical reasoning built up principle upon principle, and rule upon rule, of which part only — perhaps we might say a small part only — finds its ultimate basis either in custom, whether general or local, or in rules of Roman or Canon law incorporated into the English system. The object of the present article is to endeavor to penetrate below the mass of judicial decisions which have no such starting point, and discover on what it is in truth based."

"But what, I would ask, happens when the case which has arisen between *A* and *X* is altogether one of first impression; when, that is, there is not in existence any principle of law which can be applied in any way to provide the proper *ratio decidendi* as between *A* and *X*, other than that very thing which Mr. Dicey says it is not the judges' business to determine, namely, what, under the circumstances of the case, 'may be fair between *A* and *X*.'

"Such cases might naturally be expected to grow fewer as time goes on and precedents accumulate, but as will be presently shown, they not infrequently arise even to-day; and Mr. Dicey's words above quoted can, it is submitted, only be accepted so far as they

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are concerned, if we understand his expression 'principle of law' to include such elementary considerations as justice, common sense, and public convenience. These are the ultimate principles of case law."

The author believes that the only reason why a common sense or reasonable view of the circumstances of a case would be considered a rather dubious ground of judicial decision, by most lawyers, is "because the accumulation of precedents, direct or indirect, has become so great and the original foundations of case law are buried so deep beneath the superincumbent masses, that such lawyers have lost sight of them." He considers the matter under the following heads: —

"1. Justice, humanity, and other moral obligations as a primary source of case law.

"2. Common sense, and the reason of the thing, as a primary source of case law.

"3. Public convenience and other practical considerations as a primary source of case law."

JURISPRUDENCE. In the August *Law Magazine and Review* (V. xxxi, p. 434) Rankine Wilson continues his philosophical discussion of "Responsibility in the Law."

JURISPRUDENCE. "Law and Government," by W. Harrison Moore, *Commonwealth Law Review* (V. iii, p. 205).

JURISPRUDENCE. "A historical sketch of the growth of Mohammedan Jurisprudence," by Abdur Rahim, *Calcutta Law Journal* (V. iii, p. 107*n*.).

LITERATURE. "The First Breach of Promise Case in the United States," by Lee M. Friedman, *Albany Law Journal* (V. lxviii, p. 179).

PRACTICE. "Finality of the Award — and of the Decree passed upon the Award," by Durga Charan Banerjee, *Allahabad Law Journal* (V. iii, p. 179).

PRACTICE. "Service of Answer by Mail," by John D. Lindsay, *Bench and Bar* (V. vi, p. 11).

PRACTICE. "The New Act Concerning Demurrers to Evidence," by S. S. P. Patteson, *Virginia Law Register* (V. xii, p. 275).

PROPERTY. "The Torrens System," by Howell Griswold, Jr., *American Lawyer* (V. xiv, p. 311).

PROPERTY. "When Land is Sold for Delinquent Taxes, and Purchaser Fails to have Deed Executed, Within the Statutory Period, What is the Condition of the Title," by J. F. Bouchelle, *Virginia Law Register* (V. xii, p. 279).

PROPERTY (Future Interests). Albert M. Kales discusses a theory suggested in previous articles in the *Review*, by Edward Jenks, in an article entitled, "Future Interests in Land," the first installment of which appears in the July *Law Quarterly Review* (V. xxii, p. 250).

Professor Jenks had suggested putting future interests into two classes to be described as those obtained by "Succession" and those by "Interruption," on the ground that these are more descriptive of the real distinctions than the present classifications. Mr. Kales then considers: —

"How far were future interests by way of succession valid at common law, and how far were future interests by way of interruption invalid under the same system. How far are both sorts of future interests valid under conveyances by use or devise? How far was the fact that a future interest took effect by way of succession or interruption an essential element in determining its validity or invalidity?"

And states the following as his conclusion to the first part of the discussion:

"The principal objection to the usual classification of future interests is that it is not undertaken enough from the point of view of their validity, and that so far as it is, the discussion is a catalogue of cases, which have certain conventional or historical names that have to be explained. The endeavor here has been to meet these objections by attempting to describe mutually exclusive classes of future interests in terms of the characteristics which furnish the reason for their being held valid or invalid by the common law. It is

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believed that no one will quarrel with the object of this task. The question will be: Has it been accomplished? It is hoped that no departure from recognized results of the authorities has been indulged in. The whole question, then is: Are the characteristic which have been selected for the descriptions of the mutually exclusive classes of future interests the proper ones? Are they the 'essentials' or the 'accidentals'?"

PUBLIC POLICY. "Some Suggested Amendments of the Aliens Act, 1905," by N. W. Sibley, *Law Magazine and Review* (V. xxxi, p. 399).

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

PUBLIC POLICY (see Corporations).

TRUSTS. The law relating to "The Consequences of the Trustees' Failure to Convert as between Tenant for Life and Remainderman," is laid down by Walter G. Hart, in the July *Law Quarterly Review* (V. xxii, p. 285).

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NOTES OF THE MOST IMPORTANT RECENT CASES COMPILED BY THE EDITORS OF THE NATIONAL REPORTER SYSTEM AND ANNOTATED BY SPECIALISTS IN THE SEVERAL SUBJECTS

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

BOYCOTT (Conspiracy — Labor Unions). Pa. — In Purvis *v.* Local No. 500, United Brotherhood of Carpenters & Joiners, 63 Atlantic Reporter, 585, the right of a labor union to take concerted action to injure, and if possible, ruin a manufacturing establishment which refuses to employ union labor, is denied. After plaintiffs had refused to "unionize" their mill at the request of the defendant labor union, the latter, acting with the intention of compelling plaintiffs to either accede to their demands or quit business, refused to allow any union carpenters to work with material coming from plaintiffs' mill, and at various times called strikes upon jobs which it was urgently necessary to complete, and where it was sought to use material manufactured by plaintiffs. In view of these facts the court says: "The rights of mechanics and laborers, and of labor organizations and unions, as recognized in innumerable cases, are not affected by the decree, and need not, therefore, be considered here. The question is the unlawfulness of the conspiracy of the appellants to injure and destroy the property of others, if their demands as to the employment of workmen are not complied with. The question is not as to the unlawfulness of the demands which they make, but is as to their conduct upon learning that these demands are ignored by the appellees. The demands in themselves can do no harm to the latter; it results from the means employed to coerce compliance with them. The appellants contend that they seek only to persuade, and not to coerce; but their means of persuasion are the destruction of the property of those whom they would persuade. As well might it be said that the sight of the club or gun of the highwayman without actual violence simply persuades. No violence was used by the appellants, and it does not appear that any was contemplated or threatened; but coercion may be accomplished without threats or violence, and the attempt to so accomplish it was made in this case. Putting one in actual fear of loss of his property or of injury to his business, unless he submits to demands made upon him, is often no less potent in coercing than fear of violence to his person.

"Restraint of the mind, provided it would be such as would be likely to force a man against his will to grant the thing demanded, and actually has that effect, is sufficient in cases like this." Plant *v.* Woods, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330. Of the conduct of the appellants the words of our late Brother Dean, in Erdman *v.* Mitchell, 207 Pa. 79, 56 Atl. 327, 63 L. R. A. 534, 99 Am. St. Rep. 783, may well be repeated: "How absurd is it to call this peaceable persuasion, and how absurd to argue that if the law attempts to prevent it the right of the workmen to organize for their common benefit is frustrated."

In addition to this injunction, damages to the extent of $1770 are assessed against the union by the decree.

CONSTITUTIONAL LAW (Freedom of Contract). N. Y. — In People *v.* Marcus, 77 N. E. 1073, the provision of the New York Penal Code, which declares that any person who shall coerce or compel any employee, laborer, or mechanic to enter into an agreement not to join or become a member of any labor organization, as a condition of securing employment, shall be guilty of a misdemeanor, is held to be in conflict with the fundamental constitutional guaranties against the denial of the equal protection of the laws. Subject to the proper exercise of the police power, the court declares that an employer and employee may enforce such contracts relating to labor as they may mutually desire. The statute is then construed, and it is held that the words "coerce" or "compel" do not refer to physical violence, but that the statute was intended to prohibit all contracts making employment or the continuance of employment conditional on an agreement by the employee not to join a labor organization. As so construed, it is declared that the statute interferes with and restricts the constitutional right of the parties to make such contracts as they may see fit, and is void. The previous

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cases of National Protective Ass'n *v.* Cumming, 63 N. E. 369, and Jacobs *v.* Cohen, 76 N. E. 5, are referred to as supporting and substantially controlling this case. In the first mentioned case it was held that a person may refuse to work for another on any ground that he may regard as sufficient, and that the employer has no right to demand a reason for it, so that the employee may refuse employment on the ground that he would not work with other workmen who are not members of his organization. In the second case it was held that it was entirely competent for an employer to enter into an agreement not to employ any workmen who were not members of a labor union, and the court argues that if these positions are well taken it must follow that a contract, the making or continuance of which is conditional upon the employee remaining free from all obligations to labor unions, is a proper exercise of the right of contract.

The conflict between individual powers of free motion and locomotion is palpable, and we have no difficulty in seeing that restraint of individual power of physical motion, in the interest of freedom of motion on the part of others, is not an unreasonable and arbitrary deprivation of liberty. The right of free contract is, as it were, a right of free mental motion and locomotion. But the conflict between individual powers of free mental motion and locomotion is subtle, and escapes notice. If, in the judgment of society, the power to make certain contracts unduly interferes with the free mental action of a large class of the community, can it be said that restrictions upon such power are arbitrary and unreasonable infringements upon individual liberty, any more than where the acts and consequent interferences are purely physical? The great danger in cases involving this right of free contract is that they will be treated in the abstract, and not with reference to the concrete facts of our present social and industrial organization. In my opinion, there is a wide difference in this connection between ordinary contracts between man and man, on the one hand, and contracts between employers of large numbers of laborers in industrial pursuits and employees whose sole vocation is labor in such pursuits, upon the other hand. With the former, the public have relatively little concern. Public interests touch the latter at every point. In the case under consideration, the contract was one between a corporation engaged in making skirts and a piece-worker. Unless the employee in such a business is at liberty to enter a union if he chooses, there is, in matter of fact, a very one-sided freedom of contract. Hence I should feel inclined to criticise the decision, as exhibiting too much of abstract individualism.

R. P.

CONSTITUTIONAL LAW (Due Process — Equal Protection). Tex. — In Buttron *v.* El Paso & Northeastern Railway Company, 93 S. W. 676, a rather curious statute of the Territory of New Mexico is construed by the Texas Court of Civil Appeals. The statute provides that no suit for personal injuries or death shall be brought in any other state or territory if the wrongdoer can be served with process in New Mexico, and requires the claimant to serve notice of his claim within ninety days and thirty days before commencing the action, and authorizes the tort-feasor to compel the claimant to come into court for the district in which the tort-feasor resides and litigate the case. This statute is held not to operate to deprive the injured party of his cause of action without due process of law, nor to be objectionable as depriving a party of the equal protection of the laws. Under this statute a tort-feasor commenced a proceeding to compel a person claiming damages to litigate the case, and in the ensuing litigation judgment was rendered for the wrongdoer, which judgment included a decree enjoining plaintiff from instituting a suit in any other state or territory on the same cause of action. This judgment it was held was a bar to an action in another state. There is possibly more to be said in support of this statute than would at first occur to one, for as the court observes, "Viewing the matter abstractly, what justice is there after all in forcing a party interested in the settlement of a controversy to await the pleasure of his adversary as to the time of its litigation; why should they not have equal right and opportunity to bring the matter to issue in the courts."

CONSTITUTIONAL LAW (Due Process). U. S. Sup. Ct. — The right of a street railway company maintaining a tunnel under a navigable river, to receive compensation for the expense of removing or lowering the tunnel, in order to deepen the channel of the river, is denied in West Chicago Street Railway Co. *v.* Illinois, 26 Sup. Ct. 518. In passing it might be well to observe that a practice point decided in this case is not without interest, it being held that a state court cannot by resting its judgment upon some ground of local or general law defeating the appellate jurisdiction of the Supreme Court of the United States, if a federal right or immunity was specially set up or claimed, which if recognized and enforced would require a different judgment. The street railway company constructed a tunnel under the Chicago River, which at the time it was constructed was not an obstruction to navigation, but later became so because of the increased size

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of vessels plying on the river. The ordinance under which the tunnel was constructed contained no stipulation that the city would not exert any power it possessed to deepen the channel and improve navigation, and was adopted while a state statute was in force, which, as construed by the courts, made it a condition of the construction of such a tunnel that navigation should not be unnecessarily interrupted. Under these circumstances it was held that requiring the railway company at its own expense to lower or remove the tunnel, did not impair any contract obligation or constitute a denial to the railway company of the equal protection of the laws. It is likewise declared that the City of Chicago was empowered, even without the approval of the Secretary of War, to require the lowering of the tunnel, so as to give the water above it a depth of twenty-one feet, as required by the River and Harbor Act of March 3, 1899, declaring that all the work of removing and reconstructing bridges and piers, and lowering tunnels necessary to permit a navigable channel to the depth of twenty-one feet, should be done by the city without expense to the United States. The holding as to the rights of the street railway company seems to be founded upon the general principle that though it owned the fee on each side of the river, nevertheless its rights in the bed thereof were subject to the paramount right of navigation over the waters of the river, and in support of this general principle the following cases are cited: Weber *v.* State Harbor, 18 Wall. 57, 66, 21 L. Ed. 799, 802; Illinois C. R. Co. *v.* Illinois, 146 U. S. 387, 458, 36 L. Ed. 1018, 1044, 13 Sup. Ct. Rep. 110; Shively *v.* Bowlby, 152 U. S. 30, 38 L. Ed. 342, 14 Sup. Ct. Rep. 548; Gibson *v.* United States, 166 U. S. 269–276, 41 L. Ed. 996–1002, 17 Sup. Ct. Rep. 578; Scranton *v.* Wheeler, 179 U. S. 163, 45 L. Ed. 137, 21 Sup. Ct. Rep. 48; Chicago, B. & Q. R. Co. *v.* People, 212 Ill. 103, 72 N. E. 219; Braxon *v.* Brussler, 64 Ill. 488; People *v.* Vanderbilt, 28 N. Y. 396, 84 Am. Dec. 351; Sage *v.* New York, 151 N. Y. 61, 38 L. R. A. 66, 61 Am. St. Rep. 592, 47 N. E. 1096; State *v.* Parrott, 71 N. C. 311, 17 Am. Rep. 5; State *v.* Dibble, 49 N. C. (4 Jones L.) 107; Dredich *v.* Northwestern Union R. Co., 2 Wis. 348, 54 Am. Rep. 399; Parmater *v.* Gibson, 10 Price, 412; Williams *v.* Wilcox, 8 Ad. & El. 314; Colchester *v.* Brook, 7 Q. B. 339. A comparison of this case with that of Chicago, B. & Q. Ry. Co. *v.* Illinois, 26 Sup. Ct., 341, mentioned in the preceding number of this magazine, will be both interesting and instructive.

COPYRIGHTS (Copyright by Assignee — Notice of Copyright). U. S. Cir. Ct. N. Y. — Two questions of copyright law are decided in Werckmeister *v.* American Lithographic Co., 142 Federal Reporter 827, one of which seems fairly clear, while the other is in conflict with the only case which the court cites upon the question. The suit was for infringement of copyright, and it appeared that the complainant had purchased from a painter the copyright in a certain picture, and had produced photographic reproductions thereof. The plaintiff did not, at any time, own the picture, but merely took a written assignment of the copyright privilege. Under Rev. St. § 4952, authorizing the copyrighting of a painting by the author or proprietor, or by the assigns of any such person, it is held that the common law copyright being capable of assignment separately from the painting, the assignee of the copyright privilege was within the statute and entitled to copyright the painting, though it was owned by another. The statute further requires notice of copyright to be given by inserting the same in the several copies of every edition published, on the title page, or on the page immediately following if it be a book, of if a map, painting, statuary, or model or design, by inscribing upon some visible portion thereof, or the substance on which the same shall be mounted. The copies which plaintiff published bore a copyright notice, but no such notice had ever been placed upon the original painting. The court, in the case under consideration, holds that this was not necessary, disagreeing in this respect with the Circuit Court of Appeals which, in the case of Werckmeister *v.* Pierce & Bushnell Mfg. Co., 72 Fed. 54, delivered a contrary holding on the same state of facts. In construing the statute the court concludes that in the provision that notice of copyright shall be inscribed "upon some visible portion thereof, or of the substance on which the same shall be mounted" the word "thereof" and the words "the same" do not refer to the words "map, chart," etc., but refer back to the words "the several copies," it is pointed out that there can be no object in placing the notice of copyright upon the thing copyrighted, which the public rarely or never sees, and that in the case of a book the notice is not placed upon the original manuscript, nor in the case of a map upon the engraved plate.

The purpose of requiring notice of copyright to be put upon the copies is, the court declares, to charge the person owning such copies with notice that his ownership is restricted. But the author of a book or painting, or any other intellectual production in its original form, knows whether he has a copyright on it or not, so that a copyright notice is useless.

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CRIMINAL LAW (Immunity to one Furnishing Evidence or Information — Beef Trust Case). U. S. Dist. Ct., Ill. — A case which has enjoyed an inordinate newspaper notoriety, but which we do not remember having seen reviewed from a legal standpoint, is the Chicago Beef Trust case, officially known as United States *v.* Armour & Co., 142 Federal Reporter 808, in which Judge Humphrey held that the officers and representatives of various packing concerns were immune from prosecution because of having given testimony and produced documentary evidence before the commissioner of corporations. A brief digest of the statutes upon which the decision rests is necessary to a comprehension of its principles. Act February 14, 1903, c. 552 (U. S. Comp. St. Supp. 1905, p. 68) creating the department of commerce and labor, by section 6, requires the commissioner of corporations to investigate all corporations and combinations engaged in interstate or foreign commerce, and provides that all the requirements, obligations, liabilities, and immunities imposed or conferred by "An act to regulate commerce," or by "An act in relation to testimony before the Interstate Commerce Commission" shall also apply to all persons who may be subpœnaed to testify as witnesses, or to produce documentary evidence in pursuance of the authority conferred by this section. The act last mentioned (U. S. Comp. St. 1901, p. 3173), which is supplementary to the Interstate Commerce Act, provides that no person shall be prosecuted or subjected to any penalty or forfeiture for, or on account of any transaction, matter, or thing, concerning which he may testify or produce evidence, documentary or otherwise, before the commission, or in obedience to its subpœna, or in any such case or proceeding. Appropriation Act, February 25, 1903 (U. S. Comp. St. Supp. 1905, p. 602) making provision for the enforcement of the interstate commerce and anti-trust laws, contains a similar immunity provision relating to persons giving testimony or producing evidence in any proceeding, suit, or prosecution under said acts.

The commissioner of corporations, while acting under the authority and by the direction of a resolution of the House of Representatives, was directed to investigate the so-called beef trust, and while proceeding thereunder, certain persons, by his request, but without being subpœnaed or sworn, furnished documentary evidence on which he based his report. Afterwards these persons were accused of violations of the anti-trust law and by appropriate plea in Bar raised the question of their immunity from prosecution under the statutory provisions mentioned. Looking to the purpose which prompted the enactment of the statutes creating the office of commissioner of corporations, the judge draws the conclusion that the purpose of the act was to enable Congress to acquire such information concerning corporations and their working methods as would enable it to devise efficient measures for their regulation, and that while the punishment of offenders might have been a secondary purpose, it was, nevertheless, not a primary one. The statutes giving immunity from prosecution are, as pointed out, substitutes for the privilege contained in the constitutional provision, that no person shall be compelled in any criminal case to be a witness against himself. This privilege cannot be taken away without giving the citizen, by way of immunity, something as broad and valuable as the privilege thus destroyed. The immunity law is, however, the court says, broader than the privilege given by the fifth amendment. The constitutional privilege only permits a refusal to answer while the immunity statutes wipes out the offense about which the witness might have refused to answer. The privilege permits a refusal only as to incriminating evidence, while the act gives immunity for evidence of or concerning the matter covered by the indictment, and the evidence need not be self-incriminating. The privilege must be personally claimed by the witness at the time, while the immunity flows to the witness by action of law and without any claim on his part. The argument that the testimony was not given under compulsion because no subpœna was issued and no oath required is met by the statement that as the only object of a subpœna is to secure the attendance of the witnesses and as the witnesses on request of the corporation commissioner voluntarily attended without any subpœna, the fact that none was issued did not affect their right to claim immunity. As supporting these views, the court cites Goodpaster *v.* Voris, 8 Iowa, 334; Leckie *v.* Scott, 10 La. 412; Hunton *v.* H. & H. Co., 76 N. W. 1041, and Starr *v.* Mayer, 60 Ga. 546. It is also pointed out that documentary evidence was furnished and that books and documents prove themselves when produced for the purpose of showing commissions against interest and that no oath on the part of the party producing them is necessary to give them evidentiary force. So the court concludes that the defendants gave, under legal compulsion, evidence concerning the matters for which they were indicted and that they were, therefore, entitled to immunity.

INTERSTATE COMMERCE (Regulation by State — Power of Corporation Commission). U. S.

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Sup. Ct. — In McMeill *v.* Railway Co., 26 Sup. Ct. 722, the statutes of North Carolina, vesting in the corporation commission of that state power to control and supervise all railroad corporations, and to make rules governing railroad companies in the placing of cars for loading and unloading, etc., are held to be without efficacy to give the corporation commission power to make regulations affecting interstate commerce. In exercising the authority conferred upon it by the statutes mentioned, the corporation commission issued an order compelling a railroad company engaged in interstate commerce to deliver cars containing interstate shipments beyond its right of way to a private siding. This, it is held, is an unlawful interference with interstate commerce, whether viewed as an assertion by the commission of its general powers over carriers or of its power to make the order in a particular case in favor of a given person or corporation. The suit was brought against the corporation commission to restrain it from interfering with the interstate business of the railway company, and it was contended that as the powers which the corporation commission sought to exercise were conferred upon it by a state statute, and as the denial of these powers must be upon the ground that the statute was in conflict with the federal constitution, the suit was in effect one against the state. This contention is negatived by the holding that the unauthorized and illegal action of the corporation commission was the thing complained of, so that the fact that this action was sought to be justified under the statute did not render the suit one against the state. In support of this decision the cases of Scott *v.* Donald, 17 Sup. Ct. 262, and Fitts *v.* McGhee, 19 Sup. Ct. 269, are cited.

JURY (Right to Jury Trial — Wrongful Attachment in Porto Rico). U. S. Sup. Ct. — The provisions of the Porto Rico Code of Civil Procedure relative to the ascertainment by a certain special proceeding of the damages resulting from a wrongful attachment, are held in Perez *v.* Fernandez, 26 Sup. Ct. Rep. 561, not to be in conflict with the provisions of the Federal Constitution securing the right to a jury trial. The court does not admit that these provisions are applicable to Porto Rico, stating that the decision of this question is unnecessary to a determination of the case, but holds that even conceding that they are applicable, nevertheless the proceeding is not a suit at common law, but simply a method of ascertaining damages in a special proceeding in which property has been wrongfully seized. It is also held that the general provision of the U. S. Rev. St. § 648 (U. S. Comp. St. 1901, p. 525) providing for jury trials and issues of fact in circuit courts, excepting actions of admiralty and equity jurisdiction, do not necessarily interfere with the enforcement of the special statutory provisions as to assessment for damages and attachment proceedings. The laws and ordinances of Porto Rico are by statute continued in force so far as they are not inconsistent or in conflict with the statutes of the United States, and this provision it is held is sufficient to authorize adherence to the provisions of the Porto Rican Code as to the ascertainment of damages in special attachment proceedings.

MASTER AND SERVANT (Defective Appliances — Promise to Repair). N. J. — A rather pronounced position on the question of assumption of risk is taken by the New Jersey Court of Errors and Appeals in Andrecsik *v.* New Jersey Tube Co., 63 Atl. 719. The action was by a servant for personal injuries, and the evidence showed that plaintiff complained to the superintendent at about ten o'clock in the forenoon, that the machine upon which he was working was out of order. The defect was obvious and the superintendent told plaintiff to go ahead with the work and that the machine would be repaired at noon. The repair was not made at noon but plaintiff resumed work upon the defective machine and at three o'clock was injured by reason of the defect. Under these circumstances the court by Judge Dill lays down the principle that a servant assumes not only the ordinary risks incident to the employment, but as well all risks arising and becoming known to him during his service, and that the master by promising to repair a defect as an inducement to the servant to continue work, takes from the servant the risk and during the period for repair assumes it himself. Where the promise is general and indefinite the master's undertaking to repair runs for a reasonable time, but where it is to repair at a fixed time it runs only until the expiration of the time fixed. The case is regarded as different from a general promise to repair only because the time set for repair is made definite, so that when this time has expired the servant is in precisely the same position that he would be after the expiration of a reasonable time for repair when the promise made is indefinite. Upon this point the court cites the following authorities: Eureka Co. *v.* Bass, 81 Ala. 200, 8 South. 216, 60 Am. Rep. 152; Ill. Steel Co. *v.* Mann, 170 Ill. 200, 48 N. E. 417, 40 L. R. A. 781, 62 Am. St. Rep. 370; Gunning System *v.* Lapointe, 212 Ill. 274, 72 N. E. 393; Burns *v.* Windfall Mfg. Co., 146 Ind. 261, 45 N. E. 188; Breckenridge Co. *v.* Hicks, 94 Ky. 362, 22 S. W. 554, 42 Am. St. Rep. 361; Stalzer *v.* Packing Co., 84 Mo. App. 565; Gulf, etc. R. Co. *v.* Brentford, 79 Tex. 619, 15 S. W.

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561, 23 Am. St. Rep. 377; Stephenson *v.* Duncan, 73 Wis. 404, 41 N. W. 337, 9 Am. St. Rep. 806; Corcoran *v.* Milwaukee Gaslight Co., 81 Wis. 191, 51 N. W. 358; Ferriss *v.* Berlin Machine Works, 90 Wis. 541 63, N. W. 234.

MUNICIPAL CORPORATIONS (Injuries by Mob — Notice to Mayor). Wis. — A statute of Wisconsin, giving a right of action against the city for personal injuries caused by a mob, but providing that no person shall be entitled to recover for injuries caused by his negligence, nor unless he shall have immediately notified the mayor of the city after being apprised of any threat to injure him by any mob, is construed in Long *v.* City of Neenah, 107 N. W. 10, and it is declared that notice given to the mayor of the city by an employer of the person injured, did not inure to the benefit of the employee. In support of this holding the court cites Loomis *v.* Board of Supervisors, 6 Lans. 269, where it was held in New York, under a practically similar statute, that where the property destroyed by a mob belonged to several tenants in common, such tenants as had knowledge of the threats before the injury but failed to notify the sheriff, could not recover, but such of the tenants as had no personal knowledge were entitled to recover.

The case, however, leans strongly in the direction of a liberal construction of the statutes of the class in question as being remedial in their nature. (See also County of Allegheny v. Gibson, 90 Pa. 397.)

It is to be noted, that although the court held that a notice given by the employer did not inure to the benefit of the employee, it nevertheless held that the fact that the calling of the plaintiff "a scab," the threatening to "get him and to knock his block off," and the knocking down of one of his companions within a week of the injury complained of, by persons seemingly identified with the same strike, though not identified as the same persons inflicting the injuries sued on, did not make it necessary for the plaintiff to notify the mayor in order that a recovery might be had, the particular attack being unforeseen and unexpected.

A. A. B.

TELEGRAPHS (Refusal to Send Message — Damages — Mental Anguish). Tex. — A somewhat novel holding on the question of mental anguish comes from Texas, the original domicile and birthplace of the mental anguish doctrine. The action was against a telegraph company for refusal to transmit a message which was addressed to plaintiff by his wife, and announced that a daughter of the parties was dead and requested plaintiff to come home to attend the funeral. The message was held to have been for the benefit of both parties, so that in the action by plaintiff the mental anguish of the wife arising from the absence of the plaintiff from the funeral in consequence of the refusal to transmit the message was an element of damage. It is also held in this case that the telegraph company was guilty of a breach of its duty to the public in refusing to receive and transmit the message, and that it was not excusable because the point to which the message was addressed was on a connecting line, which it feared might not be diligent in orwarding the message. Western Union Telegraph Company *v.* Simmons, 93 S. W. 686.

THEATERS (Tickets of Admission — Resale). Cal. — A case which in a general way concerns the same subject, but is in no way in conflict with a New York case noted in this issue, is that of *Ex parte Quarg*, 84 Pac. 766. The present case concerns the validity of a California statute prohibiting any person from selling tickets to theaters or any places of amusement for a price higher than that originally charged by the management of such amusement. Under California Statutes 1893, p. 220, c. 125, a ticket of admission to a public place of amusement is made an irrevocable license to the purchaser to occupy a place in such place of amusement during the performance, and under this statute it is held that the ticket represents a right of property, and is in itself a species of property, and therefore transferable in the absence of stipulations in the contract. Therefore it is held that the statute which prohibits the sale of the ticket at increased price is void as infringing the property rights guaranteed by the Constitution, and that its enactment is not a valid exercise of the police power, as it prohibits an act which is innocent in character and which has no tendency to affect, injure, or endanger the public health, morals, and safety.

TRADE MARKS AND TRADE NAMES (Unfair Competition). Mass. — An interesting question concerning trade marks and unfair competition is decided by the Supreme Judicial Court of Massachusetts in George G. Fox Company *v.* Glynn, 76 N. E. 89. Complainants manufactured a peculiar variety of bread containing milk and malt, and used the word "Creamalt" as a trade name, and manufactured loaves of a peculiar shape and size having a glazed and "crackled" surface, caused by the introduction of steam into the oven during the process of baking. Each loaf further bore a distinctive label printed in blue ink. After a large demand for this bread had been created, defendants began

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the manufacture of similar bread, copying the form of the loaf and later its surface appearance, and placing upon their loaves a blue label similar to that of complainants, bearing the words "Crown Malt." Both plaintiff and defendant were wholesale dealers and disposed of their bread to retailers. It was held that the act of defendants in placing their bread in the hands of retailers who were thus enabled to deceive the public and palm off the bread as being that of complainants, was an unfair competition, although defendants did not mislead or intend to mislead the retail dealers to whom they sold. It is enough, said the court, to require an injunction if they knowingly place an instrument of fraud in the hands of a retailer, with which he may deceive the public, and in support of this holding the following cases are cited: New England Co. *v.* Marlborough Co. 168 Mass. 154, 46 N. E. 386, 60 Am. St. Rep. 377; N. K. Fairbank Co. *v.* Bell Co., 77 Fed. 869, 23 C. C. A. 554; Hostetter Co. *v.* Becker (C. C.) 73 Fed. 297; Fairbank *v.* Luckel, etc. Co., 102 Fed. 327, 42 C. C. A. 376; Lever *v.* Goodwin, 36 Ch. Div. 1.

WITNESSES (Competency — Criminal Law — Confessions). Mont. — Under the provisions of the Montana Statutes to the effect that all persons who, having organs of sense, can perceive, and perceiving can make known their perceptions to others, may testify as witnesses, it is held in State *v.* Lu Sing, 85 Pac. 521, that a Chinaman who stated that he did not know the nature of the oath he had taken as a witness, and did not know what kind of an oath was administered in the courts of China, but who also stated he could tell what he knew, and that what he would say would be the truth, was a competent witness.

This case also contains a rather curious point involving the competency of an admission alleged to have been made by defendant. The police officer who arrested defendant testified that the latter made a number of statements while on the way to the jail. The defendant was a Chinaman and he spoke English very poorly, so that the officer was unable to understand all that defendant said, but the officer testified that he did understand the defendant's statement "If I kill him, me good man, if I not kill him, no good," and again, "If me no kill him me no good man, and if Tom Sing dead me die happy." It was contended that these portions of the conversation were inadmissible, because the officer was unable to detail the entire conversation. In holding the evidence admissible the court declares that it is not in conflict with the rule that where the state offers only a part of the conversation embodying a confession, the defendant has a right to have the whole of the conversation before the jury, but declares that the great weight of authority and reason favor the proposition that the mere fact that a witness did not hear all of the conversation or did not understand it all, does not render incompetent what he did hear or understand, and in such case the evidence goes to the jury for what it is worth. Westmoreland *v.* State, 45 Ga., 225; Woolfolk *v.* State, 85 Ga. 69, 11 S.E. 814; State *v.* Elliott, 15 Iowa, 72; State *v.* Moelchen, 53 Iowa, 310, 5 N. W. 186; State *v.* Madison, 47 La. Ann. 30, 16 South, 566; State *v.* Vallery, 47 La. Ann. 182, 16 South, 745, 49 Am. St. Rep. 363; State *v.* Daniels, 49 La. Ann. 954, 22 South, 415; Commonwealth *v.* Pitsinger, 110 Mass. 101; 3 Wigmore on Evidence, § 2100; Wharton's Criminal Evidence, § 688; People *v.* Daniels, 105 Cal., 262, 38 Pac. 720; People *v.* Dice, 120 Cal. 189, 52 Pac. 477.

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THE LIGHTER SIDE

Language of Lawrence Jail. — The late Lieut. John P. Bradstreet of the 50th Massachusetts was for many years a deputy sheriff and turnkey under High Sheriff Herrick at the Lawrence house of correction. All the newcomers were by him assigned to their proper quarters.

One day, upon the arrival of a new squad of inmates, there was one who seemed somewhat more " tony " than the rest, and, calling the lieutenant aside, he claimed a little more consideration than the others owing to his previous standing in society.

" I never was in such a situation before," said he, " and I trust you will give me a little different quarters than those others fellows. I am highly educated, and can speak seven different languages."

" Seven? " remarked the lieutenant. " That's altogether too many. We don't have but one language here, and d —— d little o' that."

Choate as an Interpreter. — Rufus Choate was once trying a case before Justice Shaw, and one witness who took the stand was a minister.

" What is your name? " asked Choate.

" Ezekiel Lee," answered the witness.

Justice Shaw, not hearing readily, leaned forward and asked Choate what the witness said.

" He said, Your Honor, that his name was Ezekiel Lee," replied Choate.

" What is your occupation? " continued Choate.

" I am a humble candle-bearer of the Lord," replied the witness.

Justice Shaw bent over the bench and inquired what the witness had said. Choate responded, saying that the witness had said that he was a humble candle-bearer of the Lord.

" Of what denomination are you? " questioned Choate.

" I am a Baptist," replied Lee.

Again Justice Shaw leaned forward and asked what the witness had said, and Choate replied: " He said, Your Honor, that he was a dip-candle."

A Will from the Piedmont. — " Monday, May the 25th 1891. I leaves a peace of writing to show other that it my will for my brother John to have all my property. first bury me respectable and pay my Doctor bill, he has had all the trouble with me none of my people never showed any respect to me and John has had all the responsibility with me and he is the one I want to have it his life time and at his death I want the two little boys Jim and Willie to have a part of it and the three girls to have the rest providing they marrie some one that they will take care of it. This I authorize my friend to write — Jane Smith — I am sick and very weak."

COUGH-MEDICINE

I had a little husband—
I never knew a worse,
For better than his wife or life
He loved his little purse.

I did my best to wheedle him—
He saw my deep intent,
And though he had a chronic cough,
He never coughed a cent.

So I sought a little lawyer—
My husband's own close crony—
And divvied with the man of law
My lawful alimony.

— *Reginald Wright Kauffman, in Saturday Evening Post.*

Divorce. — Jerome K. Jerome while lecturing in New York City was dining with some lawyers at a club.

" As odd a client as you can imagine," he said, " called on a legal friend of mine in Rye one morning.

" She was an extremely pretty client, but her clear, soft eyes were red with weeping. Indeed, she was in tears as she entered my friend's office. Her little form shook with sobs.

" ' Well, my dear,' said he (perhaps I should explain that this client was hardly more than 7 or 8 years old) — ' Well, my dear, what can I do for you? '

" ' Please, sir,' said the child, weeping pite-

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ously, ' I want to get a divorce from my papa and mamma.' "

A Sure Witness. — Judge Hadley of the Lowell police court is a purist in the use of the English language, and hardly a session passes that he does not reprove some one for doing violence to the mother tongue.

" Sure," replied the witness, with great earnestness.

" If you mean ' yes,' say so," thundered the judge.

" Sure," innocently replied the witness.

" Can't you say yes? " asked the judge.

" Sure, yes, sure."

The judge leaned back in his chair, stifled an impulse to laugh and said:

" It was the rule once in all English courts to correct any misused English, but I have abandoned that practice for the most part, and I'm afraid it would serve no useful purpose in this instance."

" Sure," said the witness, nodding his head up and down vigorously; " sure, sure."

Then every one, the judge included, broke out into a roar of laughter.— *Boston Record.*

The Papers in the Case. — A good one is told about a deputy clerk of the Superior Court in the same section of the South where the justice of the peace declared the eternal principal of " ——— law, I go in for justice," and in the same county where the justice of the peace enjoined a whole township from passing over a disputed road and giving as his reason, " If any court can do it, mine can." But the latest is that a clerk coming into his office after a temporary absence inquired as to what had been going on. This clerk was also business manager of the county newspaper and he found that his deputy had been requested to " file this answer and put it in the papers," but he was more than astonished when he found that to get the type distributed he had to pay $4.00 to keep the answer from going in the " papers." The deputy is deputy no longer nor is the clerk a general manager of the county newspaper.

An Honest Man — New School. — Cassius R. Peck, Assistant United States District Attorney of Oklahoma, at a banquet in Guthrie recently spoke on honesty. One thing he said was this:

" What are we coming to? Are we coming to such a pass that our ideas of an honest man will correspond with the idea of old Hiram Stroode?

" Hiram Stroode, for the seventh time, was about to fail. He called in an expert accountant to disentangle his books. The accountant, after two days' work, announced to Hiram that he would be able to pay his creditors four cents on the dollar.

" At this news the old man looked vexed.

" ' Heretofore,' he said, frowning, ' I have always paid ten cents on the dollar.'

" A virtuous and benevolent expression spread over his face.

" ' And I will do so now,' he resumed. ' I will make up the difference out of my own pocket.' " — *New York Tribune.*

Extra-territoriality. — " Yes, your honor, I have lived with my wife twenty-two years, but it has been in hell," testified John Locker, libellant in the contested divorce suit against Mrs. Joanna Locker.

Judge Bond looked up gravely from the book in which he had been writing. " In that case, sir," he said, " this court can have no jurisdiction."

The trial went on, however. — *Boston Record.*

Bumped-into-the-Bureau Kind. — Justice Harlan, of the Supreme Court, despite his length of service on the Bench, still preserves that elasticity of spirit and love of a joke that have distinguished him all through his career.

On circuit last year the justice created considerable merriment in a western court. A learned counsel was arguing the question as to what circumstances constituted an " accident," and was offering instances of what he considered would properly come within that term and what would not, on the other hand. " Suppose, your Honor," said he, " some one were to hit me in the eye, making it black in consequence. The fact of its becoming black could not be called an accident."

" Perhaps not," suggested Harlan, with a chuckle, " but you would doubtless explain it on that ground." — *Harper's Weekly.*

A Maxim Interpreted. — A witness named Leak had sworn palpably falsely in one mate-

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rial particular and the opposing counsel argued "falsus in uno falsus in omnibus," that is, "a bucket with a Leak will not hold water."

"Unsight, Unseen." — Secretary Shaw recently told a story on Representative Smith of Iowa when the latter was a fledgling attorney and anxious to make a reputation for himself. A prisoner was brought before the Bar in the Criminal Court in Iowa, but he was not represented by a lawyer.

"Where is your lawyer?" inquired the judge who presided.

"I have none," responded the prisoner.

"Why haven't you?"

"Haven't any money to pay a lawyer."

"Do you want a lawyer?" asked the judge.

"Yes, your honor."

"There is Mr. Walter I. Smith, John Brown, George Green," said the judge, pointing to a lot of young attorneys who were about the court waiting for something to turn up, "and Mr. Alexander is out in the corridor."

The prisoner eyed the budding attorneys in the court room and after a critical survey stroked his chin and said, "Well, I guess I will take Mr. Alexander." — *St. Paul Pioneer-Post.*

More Light and Less Noise. — A member of the Bar of York County, Me., who enjoys a good joke, relates the following, and applies the moral to himself. Several years ago he was counsel in a case before the late Chief Justice Peters, and during the progress of the trial became a little bit noisy, as he sometimes does, when the judge looked up and said to him:

"Mr. Hamilton, did you ever hear of the man who was lost in the woods during a thunder storm?"

On being answered in the negative, the judge continued:

"A man in attempting to pass through a piece of woods lost his way, and while he was in that predicament a fearful thunder storm came up. The woods grew awfully dark. The roaring of the wind and the crashing of the thunder was terrific. The man was frightened, and started to pray, but, not being used to that business, said: 'O Lord, give us a little more light and a little less noise.'"

There was a great wave of merriment in court, the sheriff rapped for order, and the counsel proceeded in a well modulated tone of voice.

Better Luck Next Time. — A Helena (Montana) subscriber believes our readers would enjoy the judgment of the court in *In re* Carleton, 84 Pacific, p. 788–791, Advance Pamphlet, No. 5, May 28th.

Action for disbarment for unprofessional conduct.

". . . The judgment of the court is, in the light of the findings and our conclusions above, that Mr. ———, now a member of the bar of this court, be suspended as attorney and counselor for a period of three months from this date. At the expiration of this time said —— may resume the practice of law *as heretofore*."

The Happy Medium. — During a recent session, in one of the counties of Tennessee, of the quarterly county court, the question of an appropriation of public funds was under a heated debate. One of the justices of the peace, whose good faith had been attacked, rose in his place and explained himself as follows:

"Mr. Chairman: I am an honest man. I love my country. My constituents have my daily care. I intend to vote on this proposition in accordance with my conscience and the best interests of the people of my country. To this end, Mr. Chairman, I am attempting to reach, in my own mind, that happy medium between right and wrong."

THE WRETCH.

S. I. Litchfield.

The man who travels through this world,
And wilfully neglects
To throw sand on his icy walks
Won't need to in the next.

Easy Money. — The Ithaca police court resounded with wailing. Eight mothers placed a stick given by Recorder Sweetland on the trousers of their offspring. The youngsters had been arrested after hard work by Chief of Police Van Order and two Lehigh Valley railroad detectives for many car burglaries during the last month.

Their parents were poor and Recorder Sweet-

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land offered to remit the fines on condition that the parents administer corporal punishment in court. Their mothers eagerly grasped the rods and proceeded to earn what one of them called " the easiest $5 of her life."

Getting Used to Being Indicted. — Arthur Evans, general counsel for Swift & Co., the meat packers, blew along Pennsylvania Avenue.

" Hi there, Arthur! " shouted a friend. " Where have you been? "

" Oh! " said Evans, " I've been down in Nashville getting indicted with the Fertilizer Trust. Got to be a habit with me now. Every town I drop into I find the hospitable citizens waiting to indict me. All the rage." — *New York World.*

A Cross-examiner Foiled. — Several years ago an old lady by the name of Morrell, living in Lisbon, N. H., was summoned to court as a witness against one of her neighbors. It was her first experience, and she thought it was a terrible thing. Her voice quavered while she was giving her testimony, and her whole body trembled perceptibly when she was cross-examined by the opposing counsel, who hoped to break down her evidence by showing loss of memory.

" How old are you? " was asked.

" I'm almost seventy; shall be next birthday," she replied.

" You are not very well, I see; you seem nervous and excited. Is your memory good? "

" Not very," she answered.

" You can't remember as well as you used to, can you? "

" No, I can't," she replied; " and so I don't dare tell a thing only what I know is so."

Needless to say her evidence was not impeached. — *Boston Herald.*

Look Out for " Sadie C." — A news item in a Waterloo, Iowa, daily says: " Because of injuries received while riding with Charles E. B., Miss Sadie C. has brought suit against the former for $10,000. Defendant was paying Miss C. company at the time, and had invited her to accompany him for the drive. Plaintiff alleges that the harness was defective and that her escort had no right to drive such a fiery team." — *United States Review.*

From Missouri. — An amusing occurrence took place in Conconully, Okanogan County, Wash., last week during the term of the superior court. An alien appeared before the court asking for citizenship papers. When asked by Judge Steiner where he was born, he replied that his birthplace was in Missouri. Thinking he might have misunderstood the man the judge asked the question again and received the same reply and a ripple of laughter went over the court room. Investigation proved the truth of the assertion. He had been born in Missouri, but a few years ago had taken out naturalization papers in Canada, and was now seeking to again become a citizen of his native country.

Mystery of the Jury Solved.—Judge Moore, of Augusta, who is related to ex-Mayor Luther R. Moore, of Saco, was telling his experience with a jury while he was trying cases in Kennebec County some years ago. He appeared as counsel for a man who had been indicted for a minor crime, and as he opened the case he saw a man on the jury who had been a close friend of his for years, and he decided that the juror, because of past friendship, would stand by him in the case on trial.

Finally the case went to the jury. For hours they fought and argued in the jury room in an effort to agree upon a verdict. They came in for instruction, and were again sent out by the judge, who asked them to agree, if such a thing was possible. All night the jury argued and wrangled, and on the opening of court in the morning reported a disagreement and were dismissed.

Judge Moore hunted up his friend on the jury and asked him why he could not swing the men into line.

" Strangest case I ever heard of," said the juror, " and we ain't found out yet about it. After we had talked the case over awhile we balloted. There were eleven for acquittal, and the twelfth man did not vote. We talked it over for awhile, balloting again, and it stood just the same, the twelfth man refusing to vote. We asked every man how he stood on the case, and they all favored acquittal, and I'll be hanged if, when we voted, it was'nt eleven for acquittal, with the confounded twelfth hog refusing to vote. We kept it up

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all night, but he wouldn't vote, and we finally gave up in disgust."

"For heaven's sake," exclaimed Judge Moore, "don't you remember that we agreed to try that case with eleven jurors, as one member of the panel was taken sick just before court came in?"

"Well, I'll be darned," shouted the juror; "that accounts for the whole business." — *Boston Herald.*

A "Persuaded" Prisoner. — The resourceful man is the one who succeeds. There is a deputy marshal in Alabama who does not let any such trifles as extradition laws stop him. A writer in the Washington *Post* tells a story of one of his achievements. When the term of court was about to begin one time a man who was out on bail was reported to be enjoying himself over in Georgia.

Deputy Jim went after him. The next day he telegraphed the judge:

"I have persuaded him to come."

A few days later he rode into town on a mule, leading his prisoner tied up snugly with a clothesline. The prisoner looked as if he had seen hard service.

"Why, Jim!" exclaimed the judge. "You didn't make him walk all the way from Georgia, did you?"

"No, sir," replied Jim.

"I thought not," said the judge.

"No," responded Jim. "Part of the way I drug him, and when we come to the Tallapoosa River he swum." — *Youth's Companion.*

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Alton B. Parker

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The Green Bag

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THE CONGESTION OF LAW

By Hon. Alton B. Parker

FEW questions have been more discussed during recent years than the increasing tendency of legislative bodies to propose and to enact new laws. Scarcely any agitation of a public or a moral question is so unimportant that it does not produce, in nearly half a hundred state capitols, a series of bills supposed to represent it in all its varied and shifting phases. It has become far more common to look for a new law for the punishment of an old offense or for defining anew the relations of individuals to each other than it is to invoke those powers or remedies by which, over many centuries, while law has been gradually taking fixed form, men have been able to punish crimes against society, or to settle their own differences.

And yet every man who has had occasion to study the question, even in its narrower bearings, has been forced to conclude that but a small percentage of proposed new enactments involves a new principle, or even a new policy. It rarely happens that an offense is committed for which no proper punishment has been provided, and it is a long time since any real question has arisen between men to demand legal settlement impossible under existing law.

Most of the laws proposed in such number and variety are assertions of the police power. Even the machinery which they create — under the fond delusion that it is new — is as old as Western civilization itself. It thus connotes a continual growth from the comparatively simple conditions of our modern life, at its best, into the variety, complexity, and interference which have marked all the history of men. It may create an office strange to a given county or state, lodge additional power in the hands of an executive, attempt to expand or contract the judicial authority, or seek to regulate or modify by law habits and customs; but it proposes nothing hitherto untried somewhere.

It has long been recognized that, if our legislators were compelled to study and know the old and settled principles of jurisprudence, there would be fewer opportunities for mediocre men to make for themselves reputations, or even to base careers, outwardly successful, upon laws which have nothing in them that mankind has not tried. It is merely another illustration of the refusal of men to profit by the experience of their ancestors or predecessors, or to take account of the long line of failures; but its fatuity is in claiming credit for something well known already.

It was one of the many wise sayings of Montesquieu that:

"It sometimes is necessary to change certain laws, but the case is rare, and, when it occurs, one should touch them only with a trembling hand."

If this were taken to heart by the members of Congress and of the state legislatures of the American Union, who annually turn out an average of nearly fifteen thousand laws — two thirds of them devoted to private or special questions — it is certain that there would be greater satisfaction, both individual and public; more knowledge of what the law has done and can do, and more respect for it; fewer

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reputations and ambitions built upon the shifting sands; and a general recognition of the fact that quality of laws, and not their number, counts. Fewer aspiring young men might seek seats in these bodies merely as stepping stones to something deemed better; the amateur, the incompetent, and the blackmailer might be less in evidence; the boss who orders legislation, in order that he may sell it or exchange it for personal power, might gradually become extinct; the sensational newspaper — that outward sign of inward popular corruption or hysteria — might have less authority; and men of recognized character and success could be relied upon to keep our laws in harmony with our progress, and thus to promote and insure their efficiency without an over-production that sometimes makes them contemptible.

But as this congestion of legislation has long since become chronic in our modern democratic society and the malady still remains, it is necessary to consider it in some of its many phases. Some small part of it is the result of adjusting our life to conditions, fewer of which are new than is generally supposed. The political theories which have gradually become fairly dominant since the doctrines of the English Revolution of 1688 were intensified by the doctrines of the American Revolution of 1776, and those of the French Revolution of 1789 account for the supposed necessity for many new laws, in spite of the fact that none of these events, singly or even combined, has introduced new or untried theories. Coming back to local government, each branch of it, each added legislative body, has felt itself called upon to enact series of laws for dealing with its conditions, or what it has deemed emergencies.

Although each new migration, as it spread from the Atlantic to the Pacific, has carried with it rules of life and conduct long and successfully tried on many scenes, it has scarcely reached the vestibule of a larger career and opportunity of its own before its legislative body has launched upon the world a new line of enactments dealing with marriage, inheritance, individual rights and property, and all the manifold interests of life, in a manner which its people have thought new. Especially in the relations of corporations to society and business, many states, distant from the scene of origin and development of these organizations, have begun the work of regulating and tinkering with them almost before their people had passed out of the individual or partnership period. The result has been a great mass of legislation that was crude, much that defeated its own ends, and still more that was hurtful to the communities most concerned. It was only when the earlier of these laws were repealed or modified that the commanding natural resources of such states really had an opportunity to find development, and that their people could enjoy the natural reward of their own courage, industry, and intelligence.

Sir John Macdonell, one of the great legal authorities of present-day England, has recently called attention to the fact that for nearly two hundred years the struggle has been toward equality, and that this accounts for much of the great bulk of legislation in this country and the British colonies, and has also expressed the opinion that the tide has now turned, so that the tendency is toward a growing inequality. He points out a tendency, which he describes as universal in all the Western world, to restrict the right of contract. In his words:

"It takes many forms. It creates whole classes of persons who are regarded as abnormally weak, if not irresponsible. The idea of equality before the law . . . becomes fainter. The exceptions were once few. Lunatics were, for most matters, at all events, regarded as incapable of contracting; minors were so for some; and expectant

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heirs were, in certain circumstances, unfettered. Now the list of such classes is more enlarged. The borrower cannot bind himself as against the money-lender; the court enables him to break his word. He who gets a bill of sale finds it inoperative unless it satisfies certain conditions. Farmers are protected against themselves. The Irish tenant is encased in legislative armor against his own weaknesses. The expanding field of labor legislation contains many such provisions. Workmen and seamen, factory operators and miners, cannot contract themselves out of many provisions established for their benefit. In several European countries the working day of grown-up men is limited by statute. Railways and many corporations are subject to restrictions from which they cannot be released by contracts. It would seem as if, instead of the age of status being over, we were rapidly returning to it. Hegel said that in legal restriction lay true freedom; it is the working creed of most legislatures."

If, then, socialism is the subordination of the individual to the state, over-legislation is its outward sign of progress because only thus can the dominance of the state be emphasized, even when it cannot be enforced because abhorrent to human nature, the doctrines of our religion, and the decrees of God. State dominance is, however, no new phase in the history of man, and the attempt to satisfy it by means of laws passed by popular assemblies does not really differ seriously from the previous efforts made by despots, benevolent or cruel, or by Napoleonic or Russian imperial orders. This tendency must, however, account for much of the tentative, or, as it is sometimes called, experimental legislation, enacted year after year. Even the private and special laws fall easily into this category, because, if it is possible to restrict the liberty of contract or action of classes, it is certainly legitimate and inevitable to employ the same method when dealing with isolated, individual communities or groups, or even interests. Once the distinction between those rights purely public, half public, or wholly private, is lost, the circle rapidly enlarges and becomes both complete and vicious.

Legislation of this order is promoted in many ways. One of the most efficient agencies is popular clamor. This may be produced by the demagogue, whose interest it is to make the part appear to be the whole. It may be started by the robbery of a savings bank, or by adulteration on the part of some manufacturer, or dishonesty by the head of a business corporation, or in any one of a hundred different ways. Such an agitation will naturally be encouraged by sensational newspapers, and by the oftentimes scarcely less sensational pulpit. As it goes on it gathers force until it passes into one or the other of the many forms of that hysteria which demands nothing so much as a victim. In such a period the recurring session of a legislature comes in its due course, or an ambitious or sympathetic governor calls an extra session. Thus dozens of useless laws are placed upon the statute books, every one of which chokes the channels of justice.

Another fruitful source of legislation is the neglect or failure to enforce existing laws. A lax public sentiment, plus an incompetent executive, renders of no effect a wholesome law until the breaches of it become so numerous and offensive that an aroused and indignant public sentiment demands relief. The result is often a demand for further legislation, because it is erroneously assumed that the wrong suffered by the public could not have happened had the laws been adequate for its protection. And a crop of new and unnecessary statutes is the outcome — unnecessary because all that is needed is rigid enforcement of existing law. This has been demonstrated within the past year,

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when, in the midst of the most hysterical demands for new laws aiming at certain offenses, successful resort has been had on a large scale to existing laws. The continuance of such efforts will demonstrate the adequacy of the laws when rigidly enforced, to put an end to the practices which they were intended to prevent, and at the same time demonstrate anew the wisdom of enacting only such laws as can be enforced, and then to secure their enforcement.

In many cases the misdirected or ignorant zeal of an executive officer is responsible for many new and useless laws. Such an official — generally with the elements in him of the agitator, and often of the demagogue — has been carried into office, after an hysterical canvass, under the promise to prosecute certain kinds of accused persons. Once elected, he takes up his work in the same spirit that had characterized his electoral campaign. He indicts with great facility. He tilts against classes or individuals, only to find that juries do not convict, or that, if they do, courts will not sustain. Then comes a new harvest of laws in order to justify or supplement the zeal of men who may be honest, but who are wanting either in judgment or knowledge. In addition, there is probably no other class of official, and no form of action, which more surely produces contempt for law, whether new or old, than those inherent in spurts among prosecutors.

In some instances the opposite of the illustration just cited may be found. An official may insist that it is no part, either of his duty or that of the law, to proceed except where he is fairly assured of his ability to prove every charge, and to assure conviction. He may have the old-fashioned idea that it is discreditable to indict without reasonable evidence of guilt merely because some ignorant, irresponsible agitator, or a hysterical victim, or a newspaper, may suggest or demand it. This is apt to produce its supply of new bills at the succeeding session of the legislature, some of which may pass the scrutiny of a careless or an aspiring governor.

Another favorite form of legislation is that for the benefit, or at the behoof of, a party. The continual tampering with election laws and regulations; the creation of useless offices, political or judicial; crusades against or favors conferred upon corporations or interests; the reorganization of city governments: the legislation of one class of officials out of office, in order to put another in; the institution of a state constabulary for the purpose of controlling the police of great cities for party or personal purposes; the tilting against opponents, a process common to many legislative bodies — all these are productive of such infinite and far-reaching harm as to emphasize the doctrine that no partisan legislation, either proposed before the bodies themselves or pushed in their committees, or enacted into law, can be fair, just, or enduring.

The forms of legislative waste here enumerated, and the causes which promote them, serve to show why it is that an almost complete change has come over the character of our legislative bodies. Their presence gives speakers almost arbitrary power, makes committees into a new form of tyrant, develops management and intrigue into fine arts, produces bosses as a natural result, and, while keeping the larger men out of legislative halls, puts small ones into their places. Log-rolling becomes a necessity, and mischievous or useless bills pass easily and almost by sufferance. The existence of these elements also promotes conflict between urban and rural interests in the hope that one or the other may escape a fair share of that taxation which always grows as the result of such a dangerous rivalry.

All in all, these conditions interfere continually with the orderliness and the dignity, with the purity and the whole-

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someness, of our boasted democratic life. Our whole system of government tends to congestion so far as its public channels are concerned — with laws passed in foolishness or wantonness, and without respect to the need for them.

It is not alone in the domain of law-making and the legislator that these abuses are potent. They add to the labor of the judiciary. Upon it is thrown for adjudication, year after year, a body of work absolutely unnecessary, and at great expense to the public and often to private individuals. The constitutionality of much of this new legislation is continually questioned. So true is this that a substantial percentage of the questions brought before appellate courts are related to doubts of the validity of the laws under which actions are brought. Indeed, in the state of New York, in a period covering about twenty years, the constitutionality of over five hundred statutes was challenged in the court of appeals. The dovetailing of new legislation into existing law, and the cost of construing the possible meaning of a legislature, also enters into a considerable part of the annual output of twenty thousand decisions rendered by appellate courts. Many of these mushroom enactments are permitted to slumber by common consent. But this is dangerous, because, in such cases, offensive laws remain upon the statute books, and may later be evoked for mischievous purposes. The continual resort — nearly always for spite, and in almost all the older states — to the so-called blue laws, never properly killed off, well illustrates the perils which lurk in the carrying of inert laws upon the statute books.

In like manner there should be added to the causes of over-legislation already enumerated the industrious and persistent efforts of executive officers to procure legislation which is either agreeable to their parties or to the ideas they represent as individuals. It was the fundamental idea of the founders of our government that the three branches of government should be kept distinct, with certain well-defined and understood differences. The executive officer might recommend legislation, but it was assumed that any interference on his part to command it would not only be going beyond his powers, but would also excite resentment.

Now, however, this idea has gone to the limbo of other beautiful, but dead, ideals. An executive officer may not only recommend, but is expected to urge, and, if necessary, in order to carry his point, to use the great power of his office to compel, the enactment of laws. He may call in the presiding officer and leading members of the legislative department of the government of which he is the executive, and demand of them such legislation as he deems wise, and will be considered justified if he distributes or withholds his patronage for the avowed purpose of inducing or forcing legislation, if at the time there is a public sentiment in favor of such legislation. Instances are, however, not uncommon, in which such an official will make short work of corrupt combinations to get public money, or of bills intended to promote class interests, or of others whose simplest purpose is theft or misappropriation. Legislative bodies, all the way from Congress to a village council, pass bills dealing with their own employes, with letter carriers, or other classes of officials, with departments and bureaus, or with police and firemen, with no other purpose than that of putting the responsibility upon the president, the governor, or the mayor. To the credit of the latter it must be said that seldom is such a reliance vain.

Within the narrow limits necessarily observed in such an address as this it is only possible to indicate, on the broadest lines, the evils incident to the system which makes it impossible to remember that men have long been under the government of law; that mankind is moved everywhere

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pretty much by the same impulses and influences; that, in the course of the ages concerning which history has left us a record, nearly every legal device has been tried; that, in general, man, like nature, casts off the useless; and that each failing experiment, however many times it may be tried, is still the same impracticable movement wasting valuable time and effort.

When we shall learn that legislative bodies must be made up of mediocrities so long as quantity and not quality of laws is regarded as the essential requisite; when some of the temptation to legislate shall be removed by less frequent meetings of such bodies; when trained official draftsmen shall be employed to give the necessary laws legal and literary form; when executives are forbidden, rather than encouraged, by public sentiment to interfere with the orderly course of law-making, — when these simple steps are taken, it will be permissible to look forward with hope to the times when hysteria, blackmail, partisanship, personal ambitions, and selfish interests will not add ten new laws to the statute books when only one is needed. At all times in history the safeguards of the law have been thrown around life and property. As the result of the laws, slowly built up and carefully tested, men have been able to progress, to command a constantly spreading freedom, and to promote civilization. In the future, as in the past, the law must recognize what has been done; it must look forward continually to the protection of men from violence and anarchy, and their property from spoliation. This can best be done by having few and just laws, and by grounding them upon principles and doctrines which have commended themselves to mankind.

If the ill effects of idle and mischievous over-legislation manifested themselves only in the belittled character of our law-making bodies, the result would still be deplorable. But they are most apparent, in the attitude of a people which, starting at its own shadows, comes to depend more and more upon the so-called strong man; in that dissatisfaction with courts because they find temporarily popular legislation either unconstitutional or unworkable along the lines desired; in the opportunities afforded to the shallow agitator, the dangerous revolutionist, or the opulent demagogue; and in that inability to think sensibly and to act with decision in matters of grave importance having to do with the maintenance of our popular institutions in their pristine purity. These are the vital matters — those which really count — in the making and the maintenance of national character, in the creation of that respect for law which is always the sheet anchor of a great people, and in conserving that still more unusual quality of waiting with patience for the slow and sure victory which comes with devotion to fixed principles and policies.

With more than twenty-five thousand pages of new laws added to the statute books each year, it is apparent, if the suggestions so far made be well founded, that relief is absolutely necessary.

During the years between 1899 and 1905 England's Parliament, legislating for the needs of forty-two millions of a home population, and millions of dependents, passed an average of only forty-six general and two hundred and forty-six special laws — the number of the latter being swelled by the necessity for granting franchises for railways and charter amendments for cities. One of the potent elements in the working out of this to us most astonishing result, has been the presence of a salaried draftsman — a lawyer of high repute, well paid for his services — whose duty it is, not only to study the phraseology of proposed laws, but also to make a thorough examination of existing legislation, for the benefit of Parliament and its committees. The pub-

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licity of all committee hearings and the report of their proceedings in the press have also contributed much to promote this result.

While our complicated system of local government will account for a considerable part of our vast volume of legislation, the greater part of it is due to causes such as I have suggested.

Now, it is clear that a cure is needed, and while, of necessity, it must be gradual, it must at the same time be drastic.

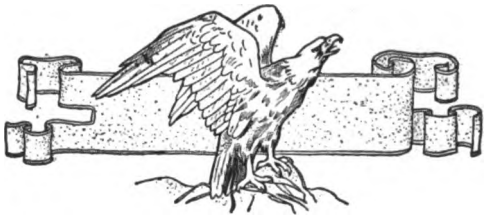
But, as is usual and natural in all such cases, not only the initiative, but also much of the effective work toward the accomplishment of that end, must come from the great body of American lawyers. Their training, ability, and patriotism have cast upon them such tasks from the beginnings of our government to this day. This record in the past justifies the confidence that they will not fail their country in the future.

In this matter a systematic movement should be entered upon by the Bar Associations of the country, from the greatest to the smallest, having for one of its objects the education of the public mind to the point where it will understand its need, and demand it. In such a movement I believe the press would earnestly join, for the great majority of the men who conduct that mighty engine of power in this country are high-minded and patriotic, having the public welfare always at heart.

The duty of the lawyer in the premises is imperative, for he understands the dangers better than any one else. His daily work enables him to appreciate in large measure the wrongs the people are now suffering, and to see the rocks in the distance ahead, toward which we are steadily drifting. Therefore, he ought to take up the task, and carry it on with energy, until our current legislation shall simply properly supplement such part of our present law — whether common or statute — as has justified its existence.

Our Association, it seems to me, cannot better justify itself, or more effectively exert its influence in our society, than by taking up this work, and placing itself at the head of all well-devised movements for the correction of evils which have become so obvious.

New York, N.Y., August, 1906.



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A PHILADELPHIA LAWYER IN THE LONDON COURTS

IN THREE PARTS, ILLUSTRATED BY THE AUTHOR

By Thomas Leaming

PART III

Costs

HAVING in the last two numbers given some idea of the courts themselves, of the difference between solicitors and barristers, the division of the latter into the common-law and chancery bars, with the functions of devils, juniors, K. C.'s, and specials, and the system of masters, some further observations of English methods remain to be recorded.

Costs play an important part in all English litigation. The tendency since the time of the Stuarts has been constantly to increase them. By costs — as understood in England — is not meant the official fees payable to the court officers, but a sum which the unsuccessful party is condemned to pay to the successful party. The aim is to indemnify the party whom the event proves to have been in the right. If he has incurred expense to obtain judgment for a sum of money, then he must be reimbursed by the other side who occasioned his outlay by refusal to pay. On the other hand, if an unjust claim has been made against him, the claimant must repay his expenses in resisting it.

Part of these costs are taxed as the case proceeds. Thus, if one party summon another before a master prior to trial, to obtain an order for the production of some document, the master imposes costs — say, £2.10.0 — upon the party who refused to produce, or upon the party who the master finds has unwarrantably demanded the production. The theory here is to discourage unnecessary and harrassing interlocutory proceedings.

But the principal costs "await the event," *i.e.*, follow the course of the final judgment. They include an allowance for counsel fees, which, however, is not always as much as the amount paid therefor. For if a litigant has indulged in the luxury of an unusual array of counsel he must do so at his own expense, and the master only allows what he should have laid out in fees. Thus a petty action may involve some personal pique, and the plaintiff insist upon his solicitor retaining a K. C. at 50 guineas and a junior at 35 guineas, which, with 3 guineas for the consultation, would be 88 guineas. The defendant, however, is content with a junior at "3 & 1." If the plaintiff succeeds, the master will not allow him the 88 guineas, but will decide that the more modest armament of the defendant would have been sufficient.

But the costs are, upon the whole, very high. In an ordinary action to recover a moderate sum — say, £200 — the costs will generally amount to £50. In a recent action to recover £60, balance of the purchase price of a motor car, costs were claimed of over £400, and actually allowed in a sum over £200; but this was most exceptional, due to the unreasonable stubbornness with which a just claim was resisted, and is by no means typical. It shows, however, the possibilities of the system.

In theory, it seems quite reasonable that the party in the wrong ought to reimburse the party in the right, for having vexatiously put him to expense in obtaining his due. In practice, however, it may be that the prospect of large costs stimulates unjust suits by impecunious plaintiffs, themselves unable to respond in costs if defeated, against richer defendants vulnerable for whatever the chances of war may have in store for them. Upon putting this to English lawyers, they will be found unable to answer, except by saying that if the plaintiff is unable to give security for costs he may, in

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actions of tort only, be remitted to the county court, where the costs are much lighter. But this is merely a mitigation of the evil.

It seems to be the general opinion that high costs discourage litigation. This may be true, but if they tend to obstruct the assertion of just rights and stimulate fictitious claims they are not to be desired by the profession or by the laity.

Fees and Business

An American lawyer will be most curious about two things, as to which he will get the least reliable information; these are: how legal business comes and what are its rewards.

In the case of the solicitor the acquirement of a practice is apparently much like establishing a mercantile business. The majority of them doubtless begin as clerks in existing firms, and, if men of ability, either rise in the firm or form their own business connections. They are not hampered by the same considerations of delicacy and etiquette as the barrister, but may seek employment, although, of course, the one guarantee of real success is the honest and efficient handling of affairs with which they may be entrusted.

In all England and Wales but 17,000 solicitors took out annual certificates last year. This means the number of offices and does not include their clerks (many of whom have been admitted to practice as solicitors), nor those who, for one reason or another, do not practice. Solicitors, instead of being concentrated like the barristers in the Inns of Court in London, are scattered all over the kingdom. Some, especially in the small towns or poor quarters of London, are in a small way of business and must lead rather a precarious existence. A large firm, on the contrary, will have a staff like a bank or insurance company; with clerks, cashiers, bookkeepers, and assistants divided into such distinct departments that minor employees know only their own functions and little of the business as a whole.

The profits of such a firm of solicitors are very large indeed. Much of the money is made, however, in the transaction of business which is not properly of the profession of law at all; such as the promotion of enterprises, the flotation of companies, etc.; just as there is a class of American lawyers pursuing the same lines.

The barrister, in theory — and according to the traditions of the Bar — passes years awaiting recognition by the solicitors, and finally briefs begin to arrive which are received by his clerk with the accompanying fee (in gold), as to which the barrister is quite in ignorance.

Such, however, is not always the experience of the modern barrister. He supplements his reading, sometimes by practical service for a short time in a solicitor's office, and nearly always by deviling for a junior barrister for from five to seven years without compensation. A devil maintains his own identity and may always be retained as a junior himself. Partnerships are unknown and anything approaching them would be the subject of severe discipline.

A barrister may have some relative who is chairman of a railway or large city company, the solicitors of which will be apt to think of him when retaining counsel. In this and other ways, while he cannot receive business directly from an influential business friend or relative, but only through the medium of a solicitor, yet such connections are often definitely felt in giving the young barrister a start. However, his eventual success, like the solicitor's, depends upon how well he avails himself of his opportunities.

When briefed as a junior without a leader in a small action, his fees may be "3 & 1," meaning three guineas for the trial and one guinea for the "conference" with the solicitor. When briefed with a ladder, however,

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his fee, which is always endorsed on the brief, may read:

"Mr. J. Jones . . . . 35 guineas
1 guinea

36 guineas

with you
Sir J. Black, K.C."

The leader's brief will be endorsed:

"Sir J. Black, K.C. . 50 guineas
2 guineas

52 guineas

with you
MR. J. JONES."

The fee is not usually sent by the solicitor with the brief, but a running account with settlements at intervals is common. Contingent fees are absolutely prohibited. The barrister gets his fee, or is credited with it, irrespective of the result.

All speculation as to barrister's professional earnings must be vague, for there can be little accurate knowledge on such a subject.

Chancery men seem to earn much less than common-law men and their business to be of a quieter and less conspicuous character. At the fireside in chambers in Lincoln's Inn, if the conversation drifts to fees, one may hear a discussion as to how many earn £2,000 and a doubt expressed whether more than three men average £5,000, but the gossips will add that they do not really know the facts.

Common-law men's fees, while larger, are equally a matter of guesswork. One hears of the large earnings of Benjamin a generation ago, and R. Barry O'Brien, in his life of Sir Charles Russell, quotes from his fee book yearly, showing that the year he was called to the Bar he took only £117, while thirty-five years later — in 1894 — and just before he was elevated to the bench, his fees for the years were £22,517. For the ten years preceding he had averaged £16,842, and, for the ten years before that, £10,903. The biographer of Sir Frank Lockwood, a successful barrister, relates that he earned £120 his first year and took in £2,000 in his eighth year, while he was glad to accept during his twenty-second year the solicitor generalship, at a salary of £9,000.

The clerk of a recent high judicial officer is authority for the statement that the year before he went upon the Bench his fees aggregated 30,000 guineas. It seems to be the general opinion of those well informed that the most distinguished leader may, at the height of his career, take 20,000 to 25,000 guineas. All such estimates must, however, be received with the utmost reserve and no one could undertake to vouch for them.

Barristers' fees are, of course, for purely professional services, and do not come within the same category as the immense sums one occasionally hears of being received by American lawyers; generally, however, not for real professional services in litigation, but for success in promoting, merging, or reorganizing business enterprises. English barristers' fees are practically all gain, as there are no office expenses worth mentioning.

Upon the whole, professional rewards do not strike an American as particularly large, remembering that the recipients are at the top of the profession in London, which means the kingdom — for all litigation of importance goes up to London and to be a member of the English bar practically means to be a barrister in the London courts, although there are a few barristers at large centers like Liverpool, Birmingham, and Leeds who have quite lucrative practices.

We have no bar with which to institute comparisons. Each county of every state has its own bar, and all the members of the county bars practising in the appellate court of a given state compose the bar of that state, which is a complete entity.

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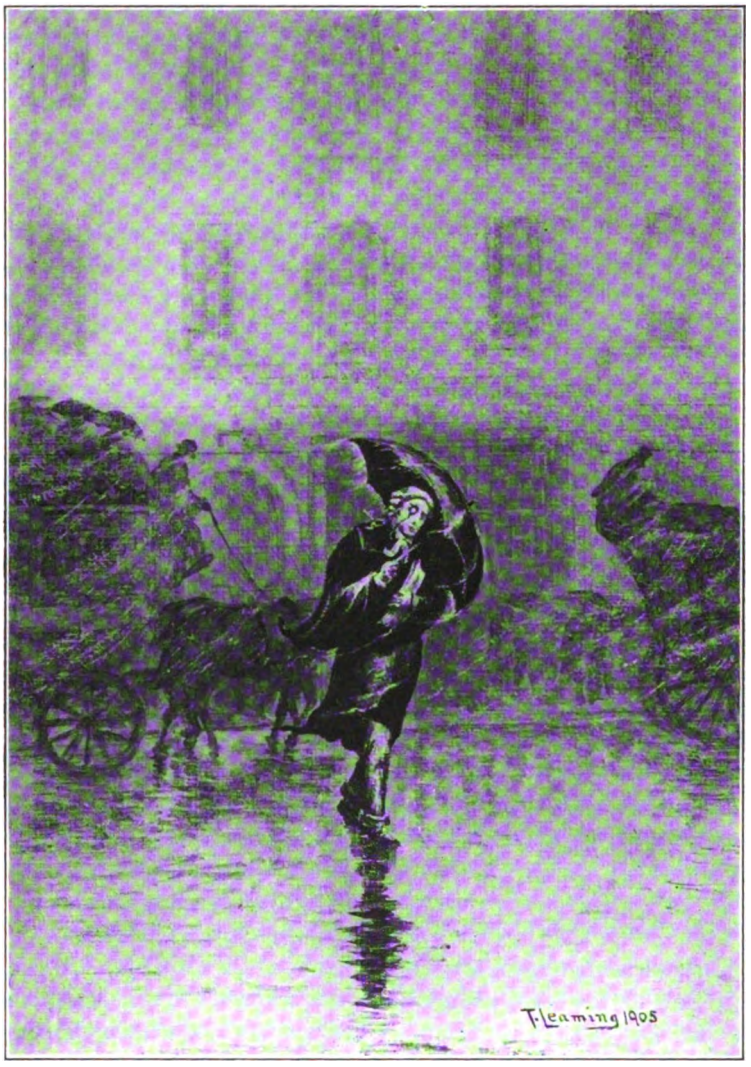
Great commercial centers have larger bars and more business than rural localities, but still no bar in America is a national one like London's.

One cannot escape the impression that litigation in England deals with minor matters as compared with that of America. There are no American statistics for comparison with the admirable judicial statistics of England. But in listening to the daily routine of the London courts there seems to be in the tight little island with, its dense population and well-settled rights, a complete absence of those far-reaching litigations involving enormous sums and the conflicting questions concerning a whole continent, with railroads and rivers traversing thousands of miles and ramifications of trade extending into many states, each with its separate sovereignty.



CROSSING THE STRAND FROM TEMPLE TO COURT

The English bar is small and the business very concentrated, but no statistics are

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available, for many are called who never intend to practice. By comparing the estimates of well-informed judges, barristers, and solicitors, it seems that the legal business of the kingdom is handled by so small a number as from 500 to 800 barristers.

One circumstance rather indicates that the popular estimate of fees is above the truth, and that is the acceptance of judgeships by the most eminent barristers, but judicial salaries in England are high — £5,000 — to say nothing of the salaries of the Chief Justice and Lord Chancellor, which are more.

Solicitors' clerks occasionally haggle and bargain with barristers' clerks in an undignified manner, but of this their masters are supposed to be in ignorance.

It seems that the matter of fees is sometimes abused. In the case of a celebrated barrister, now dead, it is whispered that his clerk would receive a retainer of 500 guineas on behalf of the K. C. who would be missing upon the case being reached. The clerk would then tell the solicitor's clerk that the K. C. was overcrowded, and he did not believe he could get him into court unless 250 guineas were added to the fee. After grumbling and protesting, the addition would be forthcoming, whereupon the clerk would readily find the K. C. strolling in the Temple Gardens and fetch him to court; but this was not regarded as honest and the story itself is doubted.

Cohesion of the Profession.

One of the most striking features of the English bar — in fact of the legal profession which includes the solicitors — is its great cohesion.

The profession is tightly bound together in one compact body, which commands the public respect which is its due, determines the status of its members by elevating the worthy, disciplining the unworthy, casting off and excluding the impossible.

To begin with, every barrister hails from some Inn. Whether he be an Inner Temple man, a Middle Temple man, a Lincoln's Inn man, or a Gray's Inn man, he has "eaten his dinners" whilst reading, and still dines at intervals at his Inn. He looks up to the benchers of his Inn, who are the governing body and who, at the stated dinners, dine at a slight elevation at the end of the historic hall. Later, he may himself, as a bencher, look affectionately down at the juniors at his Inn. His preceptor's chambers were, and his own now are, in some ramshackle old house in a crooked street within the general quarter of the town known as his Inn. He resorts to his Inn library for books he has not got. In short, he belongs to his Inn for life with all the enthusiasm of a university man's loyalty to his alma mater.

His rise is almost wholly dependent upon professional — not public — reputation. He knows lawyers are the best judges of a lawyer's skill. The worst ill which can befall him is professional oblivion or ostracism.

At the head of this coherent body is a lawyer, dispensing the opportunity for advancement; for it is the Lord Chancellor who converts lawyers into judges and creates king's counsel. He, with the Chief Justice and the Master of the Rolls, in rotation, appoint the masters to their coveted positions. Juniors select devils from the most promising young men. Finally, leaders, juniors, and the whole bar look to the trained observation of the solicitor for approval and employment.

This strongly knit body not only disciplines its members for actual misconduct, but enforces by hearing and mandate the observance of etiquette and strict propriety by censuring the slightest departure.

An almost incredible and rather absurd example of the extent to which this may be carried, which was laughed at by the English bar, was the occasion of an investigation of the charge that a barrister about to leave town had recommended another barrister to a solicitor — the objection apparently was that such an act might savor of coöperation

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in the nature of a partnership which would never be tolerated, or perhaps might have violated the etiquette forbidding barristers to extol or decry each other to clients.

Even socially barristers and their families are more cohesive than in America. Of course many of them are active in the general social life of the capitol or in political circles, but nevertheless they largely wine, dine, dance, flirt, and marry in the legal fraternity. In short, there is a social side of law life in England not unlike the society of a seat of learning, an army post, or a naval station.

The solicitors, while not nearly so compact a body as the barristers, are nevertheless well organized; and a firm government emanates from the Law Society, requiring mental and moral qualifications for admission (with strict examinations) and capable of purging itself of unfit practitioners.

The relations between solicitors and barristers are most agreeable. At the great dinners of the solicitors which take place at the magnificent house of the Law Society in Chancery Lane will be found the leaders of the bar with the lord justices as well as the minor judges. This building of the Law Society, the rear side of which is separated from the law courts only by Bell Yard, affords a convenient meeting and lunching place, is conducted as a first-rate club, and is supplied with one of the best law libraries in London. A law library, by the way, looks odd to an American, for the books, instead of being bound exclusively in calf, are largely bound in the brightest of red, blue, and green cloth.

Some General Observations

In America litigation begins in the court room. In England it ends there. American proceedings tend to be somewhat formal, conventional, diffuse, and dilatory, pitfalls and traps are occasionally laid by astute practitioners, which embarrass the side really in the right and delay a conclusion upon the merits. Much is incomprehensible to the layman concerned except the result.

English legal proceedings on the contrary are colloquial, flexible, simple, and prompt — thoroughly in touch with the spirit of the times and with the ordinary man's everyday life.

The legal decisions of the two countries are probably of equal value, and are held in mutual respect, and neither, perhaps, could claim any superiority over the other in its legal results, but in methods England at present is far in advance.

This was not always so. Up to 1875 the English courts were most dilatory, expensive, and unsatisfactory in method, but in these thirty years reforms in methods have been evolved, step by step, and are still progressing, by which the most important action can be tried, a judgment given, appeal be taken, argued, and orally decided as counsel sit down — all in ninety days. The details of these improvements are too technical for the present occasion, suffice it to say that they are characterized by the utmost simplicity, and many of them are capable of adaptation with modifications to American conditions.

In America the bar is almost unorganized. It has little voice in the selection of the judges, of whose qualifications the politicians have no knowledge. It is weak in disciplining and purging itself and in commanding public respect for its rights. Its standards of professional propriety are not clearly enough established, although great improvement is noticeable in all these respects. In England the bar is well organized and governs the whole administration of law, jealously resenting any interference with its ancient prerogatives and preserving its own professional honor.

Thus a close observation of professional life in England will prove instructive and suggestive to the ever alert American. Nevertheless, he will depart with a feeling that, while at home there is room for progress, yet, upon the whole, the old profession in the new world well maintains its proud position.

Philadelphia, Pa., July 1, 1906.

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THE LIMITATION OF ACTIONS BROUGHT BY CREDITORS AGAINST CORPORATION STOCKHOLDERS FOR CORPORATE DEBTS

By George P. Costigan, Jr.

THE subject considered in this paper is largely statutory, but the statutes, though varied, have similarities which permit of reasonably definite classification and call for the application of certain general principles. We shall take up the statutes fixing the stockholders' liability to creditors, consider the nature of that liability, and then discuss the application of the statutes of limitation.

It should be noted at the outset that we concern ourselves here with only two kinds of stockholders' liability to creditors, — namely, (1) where the stockholder has not paid the corporation in full for his stock; (2) where the stockholder has paid in full but an additional liability to creditors is imposed on him by statute or by corporate assessments authorized by statutes. The second is what we mean normally when we refer to stockholders' liability, but the first is so closely connected with it that both will be treated here.[1] The first, while affected by modern statutes, is a liability which equity enforced early as an offspring of the doctrine of subrogation;[2] but the second is purely a creature of statutory enactment, since it does not exist at common law.[1]

The statutes fixing stockholders' liability may therefore be divided into two classes: (1) those which simply give to the creditors the right of action which the corporation had against the stockholder for unpaid subscriptions, or an equivalent right practically identical with it; and (2) those which give the creditor rights of action against the stockholder which the corporation never had.

The first class of statutes just mentioned may further be divided, for our purposes, into those (*a*) which require a levy of an assessment by the corporation and the recovery of a judgment by the creditor against the corporation before the creditor can sue the stockholder; (*b*) those which do not require the levy of an assessment by the corporation but which require that the creditor either recover a judgment against the corporation and have execution returned unsatisfied before suing the stockholder or else join the corporation and the stockholder as defendants in the same action for unpaid subscriptions; and (*c*) those which permit the creditor to sue the stockholder on his liability to the corporation for unpaid subscriptions, or perhaps upon a simultane-

[1] The so-called stockholders' liability which exists where for some reason the corporation is never properly formed, and so the members are liable individually for debts contracted, is really not a stockholder's liability at all. One must first actually be a stockholder in an existing corporation to have any liability as a stockholder. See an article by Professor Burdick in 6 Columbia L. Rev. 1, and a review of that article in 19 Harv. L. Rev. 389.

[2] So. Car. Mfg. Co. *v.* Bk. 6 Rich. Eq. (S. C.) 227, 235.

[1] Salt Lake City Bank *v.* Hendrickson, 40 N. J. L. 52; Pollard *v.* Bailey, 20 Wall (U. S.), 520, 526–7; Terry *v.* Little, 101 U. S. 216, 217; Parkhurst *v.* Mexican Co., 102 Ill. App. 507, 518; Gray *v.* Coffin, 9 Cush. (Mass.), 192, 199. But that very early in the common law individual members may have been liable for the debts of a corporation. See an article by Professor Williston in 2 Harv. L. Rev. 149, 160–162.

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ous and equivalent liability to the creditors, without taking any steps whatever against the corporation.[1] There are other variations in the statutes,[2] but these will suffice. In (*a*) and (*b*) the stockholder's liability is secondary; in (*c*) it is, in form at least, direct and primary.

The second class of statutes given above establish a liability which, though it is in excess of the stockholder's express contract, is imposed merely to do away *pro tanto* with the common-law exemption of stockholders from individual liability in order to protect creditors, and is therefore not regarded as penal.[3] Here, again, the statutes may be divided into those (*a*) where the creditor can sue only after the corporation has been adjudged insolvent, or, as under the national bank act,[4] an assessment has been levied by a designated public officer; (*b*) where the creditor must first get a judgment against the corporation; and (*c*) where the creditor may sue the stockholder direct without any previous action against the corporation.

So much for the statutes fixing stockholders' liabilities. Before taking up the statutes of limitation affecting that liability, however, a word is necessary as to the nature of the liability, and as to the proper proceeding to enforce it. Some of our state statutes of limitation — and this is true of some code states[1] — still base the period of limitation on the old common law forms of action; but most of them are so worded that a different period is fixed if the stockholders' liability is contractual from what is fixed if it is not, and it is important therefore to determine whether the liability can be said to be one on contract.

The liability of the stockholders to the corporation for unpaid subscriptions is, of course, contractual and the corporation's action is assumpsit.[2] This is as true of a stockholder who becomes such by purchase from previous stockholders as it is of subscribers; for such transferees, where they know the stock purchased is not fully paid up, are liable on the subscription contract by an implied assumption as assignees,[3] that is, by what amounts practically to a novation implied in fact.[4] That it is not implied as a

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[1] See Smith *v.* Londoner, 5 Colo. 365.

[2] See note in 1 L. R. A. (n. s.), 901.

[3] 1 Cook on Corporations, 5th ed. page 460. See Huntington *v.* Attrill, 146 U. S. 657; Whitman *v.* Oxford Nat'l Bank, 176 U. S. 559.

A statute forbidding a corporation to do business until certain things are done, and until those things are done making the stockholders liable individually for corporate debts, has been held in Illinois to be intended to impose punishment and so to be penal. Diversey *v.* Smith, 103 Ill. 378. Wherever a liability is penal the statute of limitations covering actions for penalties applies. 1 Cook on Corporations, 5th ed. p. 463.

[4] Deweese *v.* Smith, 97 Fed. 309; Aldrich *v.* Yates, 95 Fed. 78. See McClaine *v.* Rankin, 197 U. S. 154. But see Wyman *v.* Wallace, 26 Sup. Ct. Rep. 495, where the bank went into voluntary liquidation.

[1] See, for instance, Mills Ann. Stat. Colo. §2900; Toothaker *v.* City of Denver, 13 Colo. 219. Under such statutes the common-law remedies to enforce stockholder's liability has been held to be case on an implied assumpsit rather than debt. Carroll *v.* Green, 92 U. S. 509; Corning *v.* McCullough, 1 N.Y 47, 58, 61. See Metropolitan R. R. Co. *v.* District of Columbia, 132 U. S. 1, 12. But see Bullard *v.* Bell, 1 Mason (U. S.) 243.

[2] Beene *v.* Cahawba, etc. R. R. Co., 3 Ala. 360. See Supply Ditch Co. *v.* Elliott, 10 Colo. 327. For other cases see 10 Cyc. 382.

[3] Webster *v.* Upton, 91 U. S. 65; Higgins *v.* Ill. Trust & Sav. Bank, 193 Ill. 394; Hartford, etc. R. R. Co. *v.* Boorman, 12 Conn. 529; Kelly *v.* Clark, 21 Mont. 291; Merrimac M. Co. *v.* Bagley, 14 Mich. 501; Allen *v.* Grant, 122 Ga. 552; See *v.* Heppenheimer (N. J. Ch.) 61 Atl. 843; Wishard *v.* Hansen, 99 Iowa, 307. See Huddersford Canal Co. *v.* Buckley, 7 T. R. 36, and 1 Cook on Corporations, 5th ed. § 49.

[4] This novation which, as between the corporations and the buyer and seller of its stock, is binding, may be disregarded by the creditor (but see Allen *v.* Montgomery, etc. Co., 11 Ala. 437), except that it is proper to hold that the creditor cannot look to the transferrer until he has exhausted his remedy against the transferee. Harper *v.* Carrol, 66 Minn. 487; Higgins *v.* Ill. Trust & Savings Bk., 193 Ill. 394; Wyman *v.* Bowman, 127 Fed. 257.

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matter of law is shown by the fact that by the general rule a transferee of stock which purports on its face to be paid up is not liable if he bought without notice,[1] and that in some states a creditor who becomes such, knowing that the stock issued as fully paid is not so, cannot require the stockholders to pay the unpaid subscriptions.[2]

Where the creditor sues the stockholders at law for unpaid subscriptions his action is also on contract; for the creditor, as a statutory outgrowth of the equitable doctrine of subrogation, is given a legal standing analogous only to that of the beneficiary of a contract in jurisdictions where such beneficiary is allowed to sue upon the contract. Even if the creditor sues in equity (and where not controlled by statute the courts will find that he must so sue because thus the rights of all parties may properly be determined[3]) the creditors suit is still, either in his own right as beneficiary or by subrogation to the corporation's rights, one on the contract.[4] Once it is seen that the creditor sues as the statutory beneficiary of the contract of subscription, the statutory liability being inserted into the contract by implication of fact and the creditor being regarded as a substantial as contrasted with an incidental beneficiary, it can be understood how on this branch of the subject the authority is clear that the liability is contractual[1] rather than *quasi* contractual, though the point is somewhat obscured by talk of a trust fund.

But it is with regard to the additional statutory liability that real difficulty is experienced. Let us take first the most difficult case, namely, that where by statute the creditor is allowed to sue the stockholder without even joining the corporation as defendant. Is the liability there contractual? It is possible to say that the subscriber contracts with the corporation not only to pay for his stock, but also to discharge the debts of the corporation to the extent fixed by statute, that is, that the statute enters into and forms a part of the contract of the shareholder when be becomes such, and then to say that the creditor sues as the beneficiary of the contract. On that view the liability is, of course, contractual, and the weight of authorities holds it to be such.[2] The subscriber's extra liability being contractual his transferee's liability is of course contractual. But another view of this excess liability of a stockholder, found mainly in *dicta*, is that no contract in regard to that liability is intended and that the

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[1] Easton Nat'l Bank *v.* Am., etc. Co. (N. J. Ch.), 60 Atl. 54; Coleman *v.* Howe, 154 Ill. 458, 471–2; Withringham *v.* Rosenthal, 25 Hun (N. Y.), 580; Brant *v.* Ehlen, 59 Md. 1; Burkinshaw *v.* Nicolls, 3 App. Cas. 1004. See Foreman *v.* Bigelow, 4 Cliff (U. S.) 508. Compare Ross *v.* Kelly, 36 Minn. 38; West Nashville, etc. Co. *v.* Nashville Savings Bank, 86 Tenn. 252.

[2] Easton Nat'l Bk. *v.* American, etc. Co. *supra;* Colonial Trust Co. *v.* McMillan, 188 Mo. 547. See Meyer *v.* Ruby, etc. Co. (Mo. App.) 90 S. W. 821.

[3] Terry *v.* Little, 101 U. S. 216. As to the constitutional law questions involved in statutory changes, see Myers *v.* Knickerbocker Trust Co., 139 Fed. Ill.; 1 L. R. A. (n. s.) 1171 and note.

[4] See Wyman *v.* Bowman, 127 Fed. 257, 260, 261. The so-called trust fund doctrine is misleading and may be disregarded. See Clark and Marshall on Corporations, §§ 767, 768. The proceeding to enforce the stockholder's liability is founded on a legal, not an equitable right. Hale *v.* Coffin, 120 Fed. 470; Anglo-American. etc. Co. *v.* Lombard, 132 Fed. 721.

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[1] See Clark and Marshall on Corporations, § 794.

[2] 1 Cook on Corporations, 5th ed., § 223, p. 460. A late case is Anglo-American, etc. Co. *v.* Lombard, 132 Fed. 721.

Even in the late case of McClaine *v.* Rankin, 197 U. S. 154, which holds that where the stockholder's liability does not arise until after an assessment made by the Comptroller of the Currency, the liability is strictly *quasi* contractual — the court calls it "statutory" — it is recognized that where the creditor's right is direct and immediate the liability is contractual. In Hathorne *v.* Calef, 2 Wall (U. S.) 10, where it was held that, as to

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obligation, being purely statutory, is therefore *quasi* contractual.[1]

The most difficult case having been explained the others ought to be easy. Where, by statute, the creditor must recover judgment against the corporation, have execution returned *nulla bona*, etc., before suing the stockholder, or must perform some other condition precedent, the suit in equity, or the action at law which the statute gives him, must surely be one on contract or on *quasi* contract, according to which view you hold of his liability where no conditions have to be performed; for, if you hold that the latter liability is contractual, then it must be as a statutory beneficiary of the contract who has performed all conditions precedent that the creditor sues, while, if you hold that liability to be *quasi* contractual, then this liability is the same,[2] and it must be only as the one expressly given the right by statute that the creditor sues.[1] The Supreme Court of the United States, however, seems to be in the unique position of holding the direct liability to be contractual, and the indirect one to be *quasi* contractual.[2]

We are now ready to consider the application of statutes of limitation to the kinds of stockholders' liability here considered. Those statutes may be divided into four classes, (1) those which in express terms fix limitation periods for actions on such liabilities; (2) those which make no specific mention of actions against stockholders, but provide limitation periods based on common-law forms of action; (3) those which make no specific mention of actions against stockholders. but provide limitation periods for "other liabilities" or "liabilities in action"; (4) those which make no specific mention of actions against stockholders, but fix limitations for actions on "contracts" or "contracts express or implied."

Class 1 presents no particular difficulties except in the case where the bar of the statute has fallen as against the stockholder, but the creditor can still pursue the

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debts contracted before the repeal of a statute imposing double liability, the repeal was unconstitutional as impairing the obligation of a contract, the liability seems to have been direct and immediate, and the case therefore would seem not to apply to a stockholder's liability such as that in McClaine *v.* Rankin. Compare State of Louisiana *v.* New Orleans, 109 U. S. 285; Freeland *v.* Williams, 131 U. S. 405; Morley *v.* Lake Shore Ry. Co., 146 U. S., 162.

[1] Marshall *v.* Sherman, 148 N. Y. 9; Crippen *v.* Laighton, 69 N. H. 540; Hancock Nat'l Bank *v.* Farnum, 20 R. I. 466; Bullard *v.* Bell, 1 Mason (U. S.) 243, 288, 299. See Thornton *v.* Lane, 11 Ga., 459, 502; Andrews *v.* Bacon, 38 Fed. 777.

Some cases supported on the contract theory can also be supported on that of *quasi* contract. A purchaser of corporation bonds gets his assignor's rights against the stockholders, Blakeman *v.* Benton, 9 Mo. App. 107, but as assignee he is strictly a creditor. So a stockholder's liability survives against his personal representatives; Richmond *v.* Irons, 121 U. S. 27; Cochran *v.* Wilchers, 119 N. Y. 399; see Mortimer *v.* Potter, 213 Ill. 178; but since some *quasi* contractual liabilities survive against personal representatives, see Concha *v.* Murrietta, L. R. 40 Ch. D. 543, 553; Patton *v.* Brady, 184 U. S. 608, this *quasi* contractual liability, if it is such, can, as a matter of statutory construction, be held to survive.

[2] Curiously enough, however, the majority of judges in McClaine *v.* Rankin, 197 U. S. 154, do not agree. The opinion, while supporting certain earlier cases where the liability was held to be contractual, says that they are to be supported because the stockholder's liability there wa direct and immediate, but that where the liability is secondary and contingent, it is *quasi* contractual. See Brown *v.* Eastern Slate Co., 134 Mass. 590, 591; Bank of U. S. *v.* Dallan, 4 Dana (Ky.), 574.

[1] Even when the suit is in equity it is unnecessary and therefore wrong to bring in the discredited trust fund theory. It is much better to call the whole matter a case of combined judicial and actual legislation, the courts coöperating with the legislature to give to and enforce for the creditor legal rather than equitable rights. See p. 4, note 4, *supra*, and see an article by George Wharton Pepper in 34 Am. Law. Reg. (n. s.) 448, 459.

[2] McClaine *v.* Rankin, 197 U. S. 154.

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corporation. That case will be considered later.

Class 2 we have already found to cover actions for unpaid subscriptions and actions for excess statutory liability,[1] except where the remedy is in equity and there equity applies the statute of limitations which the law court would apply. Where the right to enforce a stockholder's liability is barred at law it is barred in equity.[2]

Class 3 would certainly seem on principle to cover stockholder's liability since "as a legal term liability signifies that condition of affairs which gives rise to an obligation to do a particular thing to be enforced by action."[3] Liability is a more comprehensive word than contract[4] or than debt[5] and by itself is broad enough to include shareholders' liability.[6] In a given statutory context, however, it may appear that only contractual liability is meant and if so the stockholder's liability, if there regarded as *quasi* contractual, will not be covered.[7]

Class 4 presents no difficulties in view of what has gone before. Where the action is to recover unpaid subscriptions, such a statute would probably be a bar everywhere. Where the action is to recover excess statutory liability the statute would not be a bar in those jurisdictions where the obligation is regarded as *quasi* contractual,[1] but would be a bar in those jurisdictions where the liability is regarded as contractual.

But under all these classes of statutes a still further question has to be considered, namely, when does the statute of limitations begin to run? The answer to that question depends upon the question, when does the creditor have a cause of action against the stockholder? In some jurisdictions, he has it *eo instanti* his claim against the corporation arises and there the statute begins to run at once.[2] But where the liability of the stockholder is for unpaid subscriptions there is often no liability on his part against which the statute can run until after a call for the subscription has been made by the corporation or by the court and, where there is no such liability until then, the statute does not begin to run until such call.[3] So where the dissolution of the corporation must precede liability, the statute does not begin to run until dissolution.[4] So where the liability is in excess of the subscription, but an assessment must be made, as under the national bank act, the statute does not begin to run until assessment.[5]

The stockholder's defense of the statute of limitation may display various phases. For instance, where his liability to the creditor is direct, he may interpose the plea of the statute in his favor to that liability. Or again, where his liability is for unpaid sub-

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[1] See note 1, *supra*.

[2] Hale *v.* Coffin, 120 Fed. 470; Kane *v.* Bloodgood, 7 Johns. Ch. (N. Y.) 90.

[3] Heywood *v.* Shreve, 44 N. J. L. 94, 104; see Salt Lake City Bank *v.* Henderson, 40 N. J. L. 52.

[4] Lattin *v.* Gillette, 95 Cal. 317, 318, 319.

[5] Hill *v.* Graham, 11 Colo. App., 536, 544.

[6] Willis *v.* Mabon, 48 Minn. 140; Pittsburg, etc. R. R. Co. *v.* Clarke, 29 Pa. St., 146, 152. See Hill *v.* Graham, *supra*.

[7] McClaine *v.* Rankin, 197 U. S. 154. A stockholder's liability is of course covered by the phrase "liability created by statute," McDonald *v.* Thompson, 184 U. S. 71; Hawkins *v.* Furnace Co., 40 Ohio St. 507, and by the term "liability created by law"; Hunt *v.* Ward, 99 Cal. 612.

[1] McClaine *v.* Rankin, 197 U. S. 154.

[2] 1 Cook on Corporations, 5th ed. §225, p. 482.

[3] 1 Cook on Corporations, 5th ed. §195, pp. 384–8. For late cases see West *v.* Topeka Savings Bank, 66 Kan. 524, and Cook *v.* Carpenter, 212 Pa. 165. Though the statute has started to run against one call, that does not make it begin to run against the whole subscription. Dorsheimer *v.* Glenn, 51 Fed. 404; Priest *v.* Glenn, 51 Fed. 405.

[4] Cottrell *v.* Manlove, 48 Kan. 405; West *v.* Topeka Savings Bank, *supra;* Gareshcé *v.* Lewis, 93 Mo. 197.

[5] De Weese *v.* Smith, 97 Fed. 309; Aldrich *v.* Yates, 95 Fed. 78.

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scriptions and the creditor is suing after having exhausted his remedies against the corporation, the stockholder may set up (1) that the statute has run against the corporation's claim against the stockholder, and so the creditor is barred; or, (2) that the creditor's claim against the corporation would have been barred but for a new promise or part payment by the corporation and so the stockholder is freed from liability.

Where the stockholder has a defense of the statute of limitations to the corporation's claim for unpaid subscriptions and the court holds that the stockholder's liability is not direct to the creditor, the statute is a good defense to the creditor's suit.[1] On the other hand, if in such case the stockholder's liability to the creditor is direct, the creditor doubtless could sue him at any time prior to the closing of the period which is to bar the creditor's suit, even if the stockholder has the defense of the statute against the corporation.[2] So where the liability of the stockholder to the creditor is direct, the creditor could doubtless sue at any time within the period fixed for his action, regardless of the defense the corporation might have under the statute of limitation to the creditor's claim, unless perhaps the jurisdiction is one where the statute of limitations not only bars the remedy but ends the cause of action.

But the really troublesome case is where the stockholder's liability is not direct to the creditor, and the corporation waives its defense of the statute of limitations or postpones the running of the statute against itself by giving renewal notes, making payments, etc. Where the liability of the stock holder to the creditor is direct, it has been held in such case that the corporation cannot start a new liability on the part of the stockholder by giving renewal notes;[1] but where his liability is secondary there is more doubt.[2] The argument against leaving the stockholder's defense at the mercy of the corporation is that he is a kind of surety who, while he is not released by an extension of time given without his consent to his principal,[3] still cannot be made against his will to have the running of the statute of limitations postponed.[4] The argument the other way is practically that of the business needs of the situation. On the authorities the stockholder has the advantage.

And now in conclusion, it only remains to take up the problem premised under class 1 of statutes of limitations. Suppose the liability of the stockholder to the creditor is direct and the bar of the statute applica-

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[1] Hawkins *v.* Donnerberg, 40 Ore. 97; Van Hook *v.* Whitlock, 3 Paige (N. Y.), 409; South Carolina, etc. Co. *v.* Bank, 6 Rich Eq. (S. C.) 227; see 1 Cook on Corporations, 5th ed. §195, pp. 386–7.

[2] The last case seems never to arise because uniformly the period within which a creditor must sue on the direct liability of the stockholder is either as short as, or shorter than, that in which the corporation must sue the stockholder.

[1] Hyman *v.* Coleman, 82 Cal. 650; Santa Rosa Nat'l Bank *v.* Barnett, 125 Cal., 407; Goodall *v.* Jack, 127 Cal. 258; Hardman *v.* Sage, 124 N. Y., 25; Close *v.* Potter, 155 N. Y. 145; Union Bank *v.* Wando, etc. Co., 17 S. C. 339. Nor can the stockholder be discharged by an agreement between the creditor and the corporation not having that end in view, unless the creditor's claim is satisfied. Knickerbocker Trust Co. *v.* Myers, 133 Fed. 764.

[2] See 10 Cyc. 685. It has been held that in the absence of fraud or collusion a stockholder cannot intervene in the creditor's suit against the corporation for the purpose of treating the statute of limitations against the corporation's debt. Meyer *v.* Bristol Hotel Co., 163 Mo. 59.

[3] Salina Nat'l Bank *v.* Prescott, 60 Kan. 490, 497.

[4] "The liability of the stockholder is to pay the debt of the corporation, not his own debt. His obligation is distinct and dehors that of the company. Being a mere collateral security it must have a fixed limitation. We cannot accede to the proposition that the limitation is shifting and divers, corresponding identically to the unexpired periods of limitation on the corporation debts." Hawkins *v.* Furance Co., 40 Ohio St. 507, 513.

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ble has fallen, and yet suppose the corporation can still be pursued by the creditor? Can the creditor in such case, where there is an unpaid subscription, do indirectly what he cannot do directly, that is, can he, where it is a case of unpaid subscription, get a judgment against the corporation, go into equity to obtain the levy of an assessment, and then ask subrogation to the corporation's right against the stockholder? It would seem not. The general rule is that a proceeding to enforce a stockholder's liability, being based on a legal instead of an equitable right will be held barred in equity where the right to enforce it at law is barred,[1] and that where a corporation creditor has two or more methods of pursuing the stockholder on his liability and the statute of limitations bars one method, the others are barred.[2] This rule is founded upon "that public policy which has lead to the enactment of statutes of limitation."[3]

[1] Hale *v.* Coffin (C. C. A.), 120 Fed. 470; Kane *v.* Bloodgood, 7 Johns Ch. (N. Y.) 90.

[2] Parmalee *v.* Price, 105 Ill. App. 271; 208 Ill. 544.

[3] 208 Ill. at p. 560.

LINCOLN, NEB., September, 1906.

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THREE CASES FROM THE CRIMINAL DOCKET OF A PHILIPPINE COURT

By W. F. Norris

MANUEL BUTRON was a Spanish mestizo, living and doing business in one of the smaller Visayan Islands at the time of the insurrection against the Spanish government. Sometime subsequent to the American occupation, but during the troublesome times preceding the establishment of a settled civil government, a gang of men armed with bolos went at night to the store of the Spaniard, which they looted, taking the proprietor captive and shortly after putting him to death. The circumstances of the case, which illustrate the procedure of similar bands in numerous like cases, were substantially as follows: The band numbered some ten men, under the apparent leadership of Maximo and Roberto, both of whom were under the influence of the real instigator, Vicente, who did not enter the house but remained without, where he was concealed by the darkness, insomuch that it was difficult to establish his identity at the trial. Upon entering the building, which served as both store and dwelling to Señor Butron, Maximo and Roberto seized and bound the proprietor with strips of rattan. The band ransacked the shelves of the store as well as a box of money found within an inner room. After helping themselves to all that they cared to carry away, in which operation they were aided by two domestics of the Spaniard, who turned traitor to their master, the gang proceeded to the seashore, only a short distance from the store, taking Señor Butron with them, Maximo and Roberto guarding him on either side.

At the beach a barota was in waiting, guarded by one of the malefactors detailed for that purpose. Maximo and Roberto, forcing their prisoner to accompany them, went aboard the boat, sitting beside him. Some witnesses state that the captive was unbound after reaching the boat, others that he was bound to the last. Four of the party took oars and rowed out to sea. They rowed some distance before any action was taken. Suddenly the two leaders drew their bolos and stabbed the captive, who fell to the bottom of the boat. The principals then tied weights to the body and threw it into the sea. After the murder they returned to land and the gang scattered.

Cowardly murders of this character were not uncommon during the interval between the suppression of the insurrection and the reëstablishment of civil government. It is difficult to tell the motive in this, as in many other instances. There may have been a racial feeling against the victim on account of his Spanish blood. This was undoubtedly the case in many similar crimes, as Spaniards or men of Spanish blood were frequently the victims. Robbery generally accompanies such murders, the booty being, probably, the chief incentive to the rabble who follow the two or three instigators of the outrage. It is sometimes impossible to tell who of the party were ready accomplices, and who were forced by threats to take part in the transaction. By the Spanish-Filipino Penal Code, which is still in force in the Philippines, the party who has been compelled by force or threats of death to commit crime is exempted from punishment. The plea of compulsion is very frequently urged by the defendant and in numerous instances is undoubtedly true, as the leaders of the predatory bands press into their service whatever unfortunate wight crosses their path, stilling his murmurs of protest with the uplifted bolo, threatening to use its edge after an application of its side to the body of the dissentient.

Juana and Aniceto lived together as husband and wife by mutual consent but without any marriage ceremony; no unusual arrange-

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ment in this country. But what was more unusual was the protest entered by Pedro, the brother of Juana, against such proceeding. It appears that the parties were related. Pedro urged his sister to sever her illicit relations with Aniceto, as it disgraced the good name of the family and was worse owing to the relationship existing between them. Finally, yielding to his entreaties, Juana left Aniceto and took up her abode under the roof of her brother, who had offered her a home if she would abandon her paramour.

Aniceto endeavored to persuade Juana to return to him. The girl steadfastly persisted in remaining under the shelter of her brother's house and refused to resume her relations with him. One evening, about the hour of angelus, Aniceto repaired to the home of Pedro. The master of the house was reclining in a chair. His sister and other women were present; I believe his wife or mother was among them, there being several persons in the room. Aniceto said good evening and took a seat. Some words were spoken relative to ordinary matters, reference being made to some clothes that Aniceto had washed and that were handed to him. Shortly after his entrance the women retired to one side to offer their prayer at angelus. Almost immediately after the prayers were said Aniceto drew his bolo and attacked Pedro, inflicting a mortal wound, from the effects of which he shortly after died. He then made an assault upon Juana, and notwithstanding the attempted interposition of the bystanders reached and killed her with his bolo. Thus died brother and sister by the hand of an assassin, prompted by mingled sentiments of revenge and disappointed lust. One significant circumstance is that the murderer refrained his hand during the hour of prayer. He would slay his former mistress and her brother, because the former would not live with him in sin, and the latter because he succeeded in leading his sister to forsake her evil life. He would commit cold-blooded murder, but would not by its commission violate the holy period of angelus. He tarried till the woman had finished her orisons before he slew her.

"Now might I do it pat, now he is praying;
And so he goes to heaven, and so am I revenged.
That should be scanned; a villain kills my father,
And for that, I this same villain send to heaven."

It was not that he would send his victims to heaven, but that he would not sully his own soul by violating the hour of prayer, that this brutal assassin waited till the prayer was completed before his foul deed.

There was in those days following the insurrection against Spain, and before the establishment of a settled government by the United States, a Spaniard whose name was Echeverria, who lived with his family in one of the Visayan Islands. Señor Echeverria was an elderly man, a merchant who had conducted his business for many years in the community where he resided at the time referred to.

One night the Echeverria dwelling house was assaulted by a large number of men, armed with the divers weapons of the country. At the time, the inmates of the house were the family, consisting of Señor Echeverria, his wife, daughter, and four sons, besides a guest, who, unfortunately for himself, was visiting the family, and a Spaniard who was living with him, as a friend. John, the oldest son, was living with his wife and two children in a house adjacent to the family mansion. One of the leaders of the gang of perhaps eighty men was one Ciriaco de la Cruz. He was tried for the offense, and his trial developed the following circumstances: The gang surrounded the Echeverria mansion and summoned the inmates to descend and give up their weapons. In an evil hour they obeyed the summons, delivering to the malefactors several firearms with which they should have defended the house and themselves. The gang took the weapons and immediately secured each individual by tying his arms behind his back

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with withes of rattan, and then binding them all together with a long strip of the same material. After being thus secured the entire party, including the two women, were led to the neighboring seashore and butchered in cold blood, the bodies being thrown into the sea. The motive of this crime was not shown by the evidence, but judging from fragmentary remarks of witnesses, it is probable that the leader was prompted by revenge for some real or fancied injury done to himself or one of his family. Hatred of the Spaniard may have had its influence on the mass of the malefactors. This crime, as well as that of the murder of Butron, illustrates the condition of society and the nature of many atrocious crimes at that time on the criminal docket of the courts, now happily of comparatively infrequent occurrence.

The final disposal of the cases herein referred to by the Supreme Court of the Philippines illustrates the spirit of the existing criminal law. All three defendants were sentenced to death by the trial judge. The sentence of Ciriaco de la Cruz was confirmed; those imposed in the cases of the other two were modified to imprisonment for life. It might be stated in this connection that all death sentences are transmitted to the Supreme Court by virtue of law, the death sentence not being final until confirmed by the ultimate tribunal. While it would appear that if the capital penalty were to be imposed at all it would be administered to each of the perpetrators of the murders herein set forth, yet if degrees of atrocity are to be observed in so atrocious crimes, Ciriaco de la Cruz was the one whose penalty should have been the least instead of the greatest. The crime in which he participated was committed in times of great excitement and was probably prompted by race prejudice. He was not the leader, but as far as shown by the testimony the second of the chiefs of the assaulting party. Nearly a hundred men were in the band that massacred the Echeverria family. The transaction partook more of the character of a seditious uprising than an ordinary murder.

The crime of Maximo, who was sentenced for the murder of Señor Butron, was of the same character, but there was not the attendant excitement. It was committed in cold blood by a small party of ruffians. There was no evidence showing race prejudice or that any other motive than revenge or loot prompted the act. A comparison of the cases shows that of Maximo to have been the more cold blooded and deliberate of the two. It would seem, however, that so slight difference existed that both men were entitled to the same penalty.

The crime of Aniceto was clearly the most dangerous to society of the three and prompted by the worst motive. Herein lies the weakness of the Filipino-Spanish code. A brute enters the dwelling of a brother and sister and murders both, incited to the crime by revenge and disappointed lust. The motive is lost sight of in a petty balancing of the circumstances surrounding the commission of the act. The fact that it was committed at night, that the assassin entered the dwelling of one of his victims to perpetrate the deed, that he used superiority of force, must be considered by the judge in imposing the penalty; these and many other circumstances are minutely detailed by the penal code as matters which extenuate or aggravate the offense, any of which would be given due consideration by any judge worthy of the name.

The black motive behind the deed, which invests it with peculiar atrocity and makes it the most dastardly, as it was the most dangerous to the public welfare of any of the offenses herein related, is comparatively unnoticed, and the enormity of the act measured by trifling circumstances as set forth by the absurd code which remains in force a disgrace to the criminal procedure of these islands.

The crimes of which Ciriaco and Maximo were guilty pass away with the troublesome

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times that gave them birth. Such offenses are pretty much a matter of history in the Philippines. They cannot be classed as crimes dangerous to the general public welfare for the reason that they do not occur within the pale of organized society. They were of a seditious nature and have virtually ceased where law prevails. They were committed during the upheaval of society following the insurrection and ended upon the restoration of civil institutions. They are likely to be perpetrated in any country, civilized or uncivilized, during the unsettled period following war. The crime committed by Aniceto is likely to occur at any time and in any community. Living in a state of concubinage is of common occurrence in this country. Anger, jealousy, hatred, all the evil passions arising from such conditions, are likely to inflame the excitable Filipino and cause him to draw the ever ready bolo and set forth in search of his rival, or in the case of Aniceto, the girl who refused to listen to his solicitations to continue an evil life, and the brother whose persuasions had induced the sister to abandon her illicit relations with him.

There are or have been two classes of criminals in the Philippines, the seditious criminal, whose deeds have been given undue notice in the press, and the ordinary criminal. The former has brought reproach on the country and created in the United States an exaggerated impression of the criminality of the Filipino people. The crimes committed by the seditious class are not inherently as bad as those perpetrated by the ordinary criminal, nor are they as dangerous to society. In provinces like the one from which I write seditious offenses are a thing of the past, as in numerous other provinces of the Archipelago. Crime has decreased during the past three years, as shown by the court dockets; notorious crimes are comparatively of rare occurrence, and what may be termed the ordinary offenses are becoming more and more infrequent. There is good reason to believe that the work of American courts, schools, missions, and the various agencies of the government is exerting so salutary an influence that the conditions giving rise to much of the ordinary crime among the mass of the population will disappear, and the volume of such crime very materially decrease. As before stated, extraordinary crimes have well-nigh disappeared from the criminal dockets of the country, excepting in certain provinces populated by a semi-savage people, among whom, however, courts have been established, and it is merely a question of brief time when crimes of a seditious nature will have passed with all other remnants of the insurrection and days of Filipino ladronism.

CAPIZ, PANAY, July, 1906.

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SQUIRE ATTOM'S DECISIONS

UNDER THE TWELVE OR FOURTEEN MAXIMS OF EQUITY

AS SPECIALLY EDITED BY HERBERT J. ADAMS

Maxim III

Where Equities are Equal, the First in Time shall prevail this Maxim is Often Misunderstood.

EDITOR'S NOTE: That part of the above maxim following the word "prevail" does not seem to be included in the Latin rendition to be found in the dictionary. The editor does not talk the language, and never heard much of it except at school and at church, — and he had a pig once that got old. It may be that at one time in the past the maxim was understood, and that the closing words have been since added to give leeway to text writers. There is one thing about the maxim as stated which will be appreciated and its publication in the above form hailed with delight by students. They can answer as to what the last five words mean, and can stumble through the rest somehow, especially by the help of the Latin version, *Qui prior est tempore, potior est jure;* and their answers will be just as correct and a little more novel and convincing than "I don't know," or "I give it up." Too, this part can easily be mastered by the active layman.

Again, if the shorthand notes reporting the peculiar case of R. *v.* L. W., I. had shown a period after "prevail," the part following might well be considered a mere excuse or apology on the part of Justice Attom for applying the maxim in the case so as to be entirely misunderstood by the editor.

Rahm *v.* Leatherhead.

Wood Willett, *Interpleader*.

The equity of the case: Where goods, chattels, or personality, or either, have or has been lost or stolen, or have or has strayed, evaporated, or blown away, and the original owner sells the stuff or stuffs to one, and on the same day offers a reward to another for its or their return, and the one sees the belongings through a window, and the other hears of the same through a telephone, *held*, that where equities are equal, the first in time shall prevail this maxim is often misunderstood.

Where each of two parties to a replevin suit acquires a property in property though of divers kinds, *i.e.* of the property first mentioned, *held*, that if the often misunderstood maxim cannot be applied, then equity is at a loss, etc.

Statement of the Case

The plaintiff made the necessary half dozen allegations and was granted a writ of replevin, Wm. Leatherhead and Wood Willett being named defendants. He described where the property was located, stating that he had seen it through the window of an outbuilding annexed to the "shack" of said Wood Willett, better known as "Woodchuck" Willett. There was a bulldog chained at the door; and while intending to claim the property, he got no farther than some feet this side the dog. He managed to get Willett's attention and told him that the property was his. Plaintiff claims Willett is simple-minded, and told him if he wanted the vehicle, to bring a horse, that another person claimed it, one Wm. Leatherhead, and he (Willett) was holding it for him, — that it would take a horse to pull it away from him.

The constable then started to serve the writ on co-defendant, Willett, taking along with him a baseball bat, a butcher knife, a brace of revolvers, and a large steel trap — very large — bear size. Some time about the closing minutes of an hour after the constable had left, a buckboard stopped in front

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of the court room. The occupant transpired to be the constable. He had a sore leg. He limped in with a man who said his name was Willett, who wanted to know who the man was whom he had hauled up. He had not time to get an answer before the constable demanded Willett's arrest for harboring dangerous animals. The court declined to entertain the charge.

The constable claimed he had the trap set and was holding it in front of the dog when the latter sprang clean through it and bit him in the leg.

After declaring that he would remember the constable at election time, Willett wanted to throw himself on the court. The court asked him if he would interplead, and he replied that he would plead nothing, inter or outer. Then the court explained that he would have to elect whether he would defend the suit along with Leatherhead, or interplead. He then said that Bill Leatherhead owed him besides his buckboard bill of storage a dollar bill on a back board bill, and he did not want to mix up with him any further than necessary; therefore he would accept the position of interpleader with all its emoluments.

At this point Leatherhead himself puffed in and claimed the vehicle, and was bent on getting between the shafts and hauling it away. He showed an offer in writing dated the day of the sale to Rahm of a reward of $5.00 for finding the vehicle. He had located it by telephone conversation with a neighbor of Willett's, and Willett had agreed through the 'phone to hold the property for him. He claimed a lien on the property to cover his reward, as the original owner was execution proof.

The plaintiff, after stating his name as Buckingham Rahm, said that he was a native of Ohio, a hunter of big game, a horse trainer, and doctor. He admitted that while he took a bill for the buckboard he had not paid for it except two dollars, balance of three dollars to be paid next week; that the reason he got it so cheap was that that morning the party had missed the conveyance from his yard and didn't know where it was, there was a high wind blowing and did not know but that it had blown away.

Willett, the interpleader, frequently interposed, denying Rahm's testimony as to his personality, — the constable being in the judge's chambers nursing his leg. Willett insisted that while Buckingham Rahm was known as such when doctoring horses as a quack veterinary, his principal occupation was "doctoring" lame and run-down horses and mules for the market while you wait, and that until the humane society got after him the most delusive patent medicine was none too bad for the purpose; that just "Buck" would always get him, for he was mostly a sport.

The evidence of Wm. Leatherhead tended to prove his claim. Rahm interposed and wanted to say on oath that it was a put-up job between Bill (meaning Leatherhead) and "Woodchuck" (meaning Willett) for Woodchuck to get his bill for board against Bill paid out of the reward money.

Willett testified that on the morning before, just after daylight, he saw an object coming along the road down the hill; that he first thought it was an automobile, and he thought of taking to the fields or climbing to his roof; but it was empty, and he ran out into the road and waved his arms and hat to attract its attention. He asked himself (Wood), "Would it stop? Will it stop?" then declared with determination "Wood will it stop." It was the buckboard in question coming along rear foremost; and it halted at his gate, and he (Wood) "chucked" it into his building. Willett also testified that he was a perfumer. At this there was a guffaw from Leatherhead and Rahm that brought several people into the court room from the street, when the court suggested that it would take the case under advisement with respect to the plaintiff and defendant; but that if the interpleader wished to say anything, for him to proceed briefly.

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Judgment subject to various claims including that of the original owner whose appearance was arranged for.

BUCKINGHAM RAHM, *for himself* } *and*
WM. LEATHERHEAD, *for himself* } *against*
WILLETT.
WOOD WILLETT, *for himself, and for the court.*

Opinion by ATTOM, J. P.: I. In deciding this case the court has been considerably aided by the able argument of the interpleader, Mr. Willett; and it is the court's intention to adopt the same to some extent in this opinion. And it is the court's opinion that other courts of last resort, at present and on down through the ages, cannot do better than to quote freely from his language hereinafter introduced, when dealing with the maxim involved, or with anything else, especially as said interpleader is not protected by copyright.

II. It is clear according to the explanation of the true meaning of the maxim so rapidly arrived at by the author of the 54th edition of Mr. Shellfish's work that the fact that only equities are involved is not enough; but there must be no other ground for favoring one equitable interest over another except the element of time. And it is not necessarily the time when the litigants come into the transaction, or when it affects them respectively; but rather it is the time when a litigant comes into an advantage by reason of some fact that controls and gives a priority cognizable in a court of equity. The above author, however, by an involved illustration, seems to go outside the maxim referred to, and finds a result that appears grounded entirely on another equitable maxim. The court must, however, for obvious reasons, hold to the maxim in its entirety from "*Qui*" to "misunderstood," inclusive.

III. To follow the language of Mr. Willett, it appears: "There is no objection to 'Buck' Rahm being a buck, or even a buckram, or wearing buckskin, or buckram clothes too long in the buck, or whether Buck is a Buckeye, or has buckeyes, or buck-teeth, or sells buckeyed bucking broncoes that have bucked him when he ought to have been bucking wood over a saw-buck with a buck-saw, or whether Buck shot a buck with B-B shot or with buck-shot, or whether Buck's buck-hound got the buck first and then Buck shot the buck with B-B shot instead of buck-shot, or whether Buck, wanting a buckboard, paid two bucks and owes three bucks; if Buck didn't buckle a bucker into the buckboard and fade away with his buck aggregation, even the simple-minded can see that Buck can't Buckingham Rahm, or buckram, or ram his way through this court and the three bucking claims in this case amounting to several bucks more than the buckboard is worth, and get possession."

IV. The plaintiff's title, such as it is, will have to be protected by this court, as well as the special properties claimed by the other parties, to say nothing of the original owner whose purchase money lien this court is looking forward to passing upon with a great deal of zest. This court points out that the interpleader, Willett, though the most recent party of all in the history of this buckboard episode, has the prior equity, though called simple-minded, and will remain in possession until his claim for assistance to the constable is first settled as part of his costs, and may still hold the preambulating tangle of kindling wood — such as the buckboard appears from the court's viewpoint to be — against the defendant, Leatherhead, till his storage charges are paid. Then Leatherhead in turn can hold it against the plaintiff until the reward is paid. By the time all that is accomplished the original owner may have an equity to assert against the plaintiff for unpaid purchase money. The court will certainly give him a chance even if it has to swear in a posse.

V. Even if proven, the fact that the interpleader is a perfumer is not material. His

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location would have a bearing upon the question as to how the buckboard came into his possession if there was any question about that. Whether he be a perfumer or a glue maker is not a question demanding as evidence the very strong judicial notice the court once, and only once, took of such location when inspecting a piece of property in his neighborhood with view to buying, but never did. The carcasses being hauled to, and the bones in the immediate vicinity of, his place might be, the court will say, used either for glue, or possibly to work out a base product of the perfumer's art. But the court leans to the idea of dropping the subject.

VI. A warrant will issue for the arrest of the said original owner. The costs of this case will be assessed against the plaintiff and defendant equitably, until a hearing can be had next term, which begins two weeks from to-day and continues till the holidays, and the fine determined on to be assessed against said original owner for disturbing the public peace by provoking this litigation; and when apprehended let him be held till the next term of this court.

OPINION handed DOWN.

MAXIM IV

Where there is Equal Equity, the Law must Prevail

EDITOR'S NOTE: The above maxim seems all straight and nice, and may be applicable in any case where two or more equities are striving to be Master in Chancery, — so far as this note can be relied upon.

Yet the special editor has been strongly tempted to apologize for the decision to follow, not having ever read of a case or been mixed up in one where anything occult or mysterious, like mind-reading, palmistry, astrology, have had consideration in equity. This is to say nothing of dreams — a more serious matter. And before he prepared the decision, after transcribing it from the original notes, he consulted a friend who happens to have been attorney for one of the parties herein, and who loaned him his very much worn little volume on "The Place of the Judge's Nap in Jurisprudence." But there was little satisfaction to be gotten out of it. However, on account of space the apology will be postponed until some future time. A man recently declared that Attom never had any equitable jurisdiction. He was referred with pleasure to the Decisions themselves as annotated.

SCHNEIDER *v.* SIMSON.

Strong Appeal to the Court's Industry, from the Lethargy of Vacation.
(Bare quorum presiding.)

Equity of the case: Whether a party can be charged with constructive notice based on bare intuition, *quære*, — yet *held*, that in equity, whether the intuitive knowledge be either that of the party himself, or is injected into his brain by some other person — borrowed — it may, under accommodating circumstances like estoppel, have the force of such notice.

Where the question as between two or more equities is as to which party has the legal title, *held*, that the maxim, "where there is equal equity," etc., will be applied unless the party having the legal title is early wise thereto, and diligent enough to get his case into a law court, — otherwise, yes.

STATEMENT OF THE CASE

Action for conversion of horse-power, saw-rig, and a mule. Tried to the court. Plaintiff's receipt for part of the purchase money contained a proviso that the transaction be no sale, with forfeiture, if balance was not paid by a certain day, with privilege in grantor to use the property in his wood yard until further notice. Defendant produced one Early Ohio Smiff (colored), who stated his age as 102; had been operating

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the power with the mule in said yard. Other testimony, in part, by him follows:

"Ah knowed Misteh Snideh had to pay on dat day; an' Misteh Simson was theah befo', two, t'ree times, to buy. Ah was some 'la'med, an' had a dream, . . . "

The Court: "Had a *what?*"

Witness: "Yeah, Boss, Ah had a dream, — sure, Boss. Ah c'n prove it by bof dese heah ge'men, — tol' it to 'em bof, de nex' mo'nin', one in de yah'd, an' one in de road. Bof knows it, sure, Boss. Ah dremp dat de stuff was goin' to be sol' to Misteh Simson ef Misteh Snideh didn' pay on dat day."

Plaintiff's counsel objected, and defendant, by counsel, maintained that, though the dream itself might be *non compos mentis*, yet it was a fact near enough to the *res gestæ*, by reason of the witness's relations to the mule in question at least, to warrant its going in on suspicion. Then plaintiff insisted that, if admitted, the dream should be introduced *in toto*, properly filed and marked as an exhibit in the case.

Witness: "Den, in de same dream, Ah dremp dat Misteh Snideh *had paid*."

The Court: "What did these men say when you told them your dream?"

Witness: "Nothin', Boss, 'cept Misteh Simson said, 'Did you dream all dat in one night?' an' Misteh Snideh said, 'Tell me ven I got mo' time already, yit,' — jes' lack dat, Boss. Den I tol' Misteh Snideh, 'When yo' goin' pay meh fur breakin' XXXX Maud in de powah?' He said, 'How much?' an' Ah said, '$5.00.' Misteh Snideh, said, 'Mo' dan Maud is worf.' But Misteh Snideh was roun' wid a big roll wahntin' to pay up, but de boss wahn't nowheah roun.' Bimeby Misteh Simson cum roun' wid a big roll, too, wahntin' to buy, an' de boss cum, an' he did buy."

Upon inquiry by the court the plaintiff admitted that he had agreed to pay the witness for breaking in the mule.

The Court: "If that is all, you may step down, Mr. Smiff."

Witness: "Don' yo' wahnt meh to toto de dream, Boss? Ah aint all in yit."

Counsel for the plaintiff urged that the time of the court was only being wasted by making a serial story out of this dream. But the court ordered the witness to proceed.

Witness: "Ah had a nawful time wid dat mule, an' befo' Ah got him broke Ah named him 'XXXX Maud,' 'cause he was dat cross in ev'y four huffs Ah couldn't name him nothin' else. Neveh could fas'n no shoes on at fust tight 'nough to stay twill night. So Ah dremp in dis heah dream dat Ah tol' dese ge'men dat Misteh Snideh guv meh dat mule fur curin' him. When Misteh Simson was takin' de prop'ty away de nex' mo'nin' early, afteh Misteh Snideh was 'roun' tryin' to pay, he broke de main cog wheel — de geah — ob de powah."

The Court: "Who broke it?"

Witness: "Why, meh mule, Maud, kicked it. He's lackly to git nervous wid strahngehs, Boss."

Offer by defendant to turn over the machine on payment of the purchase price. Plaintiff elected to take money judgment. Decree in accordance with the findings.

FORENSICK JONES, *Attorney for Plaintiff.*

BARNEY PATTEE, *Attorney for Defendant.*

Opinion by ATTOM, J. P.: I. If the "Boss" of the wood yard had not negligently, *i.e.* too early in the day, passed the river, well beyond the "middle of the main channel" thereof, with the defendant's money, and from whence the court is unable to learn, after three days' waiting, that he has returned, or intends to — by which circumstance the plaintiff would have been relieved by operation of law from the constructive notice impliedly charged to him by defendant, even if he could not claim to have used to his welfare the warning — this case, in equity, would have been decided in favor of his paying the costs without more as to the inanimate portion of the property in dispute, under the rule that there is no equitable relief in favor of a bare legal title with an equity, as against an equally good equity

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with possession. This is easy. Brass *v.* Cheek, 2 Smith's Legal Conundrums, 1. The court is as much interested in this point being disputed as it is in laying down the law.

II. That is to say: the Boss, according to the evidence, aside from the "Old Man's Dream," had absconded with defendant's roll before the close of business hours at the wood pile, and before the plaintiff made his final call on that day to liquidate. That plaintiff did not at least take back the hybrid horseflesh when he called the second time is evidence that the mule had not increased in value to him after his conversation with the witness E. O. Smiff, as testified to, in the A.M.

III. Another rule to be observed is that involving a distinction between a mere equity such as the right of remedy for fraud, etc., and an equitable interest, under which, if the Boss had fraudulently induced the plaintiff to delay protecting his contract, and the defendant had bought with knowledge of the plaintiff's claim through dream, delirium, or otherwise, the plaintiff's prior legal title could not have been saved to him by his equitable cause of action based on the prior fraud even in this court, for the reason that the law still prevails here to some extent; though otherwise, it is apprehended, if the defendant had not got possession until after knowledge of plaintiff's equity, equitable interest, or title.

IV. It is desirable to fold by fold unfold the evidence. Supposing E. O. had been satisfied with threescore years and ten, or had died at any time in his first century even, and we had only such evidence as has been offered aside from his: Schneider would have had a scrap of paper, if no other kind, and Simson would have had the goods, the court not grudging him the live stock. And it is to be hoped there would have been no bloodshed.

V. The old man, though of no great altitude, is capped with a bank of hoar, and, bending under his 102 years, says: "Ah dremp dat de stuff was goin' to be sol' to Misteh Simson ef Misteh Snideh didn' pay on dat day." Presto! the stuff was about to be off! Immediately defendant's counsel was hunting for a hole to crawl into. But he makes a feeble objection to the evidence. How the old man knew just what part of the dream to tell on behalf of defendant is a question of expert production of evidence alone.

VI. But the defendant wants that evidence badly. And the plaintiff accommodates. "In de same dream Ah dremp dat Misteh Snideh *had paid.*" At this point the court greatly desired to have it shown that the dream was not competent evidence; but counsel seemed to be thinking of something else.

VII. By these two chapters of the short long story, or long short story, it appears both parties had notice; and it was only necessary for one of them to act on the notice or refrain from acting, to settle the question as to the power and rig; and, as it is proven, the plaintiff was trying to attend to business on that fateful day. But he never had a case as to the mule; and that might have been still owned by Simson had the dream not turned out to be a continued story.

VIII. Counsel for one of the parties — the court does not deem it necessary to say which — has attempted to educate the court by submitting a volume treating of certain alleged habits of judges. The court has wrapped it in asbestos and tied it up with a wire, so that none of its contents can escape in this court room even in case of fire; and it is on the court's desk awaiting such disposition as the owner may be pleased to make of it. It has one case urged by the author as extreme, though this court does not so esteem it. It assumes to relate as an extraordinary case that of a judge who could take one of his naps while his mother-in-law was undergoing the agonies of cross-examination; and it is not in point here anyway.

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IX. Although the defendant has admitted by his payment of $125.00 that the property, including the animal, is of that value, and this is $70.00 more than the plaintiff had paid on it, the judgment in favor of the plaintiff, for reasons not necessary to state, will be only $100.00. Of course the Boss will have a right of action for his balance less any damage sustained by plaintiff, whenever said Boss sees fit to re-cross and claim it. This is equitable.

X. Early Ohio testified, "Dat mule am de flower ob dem all." The sparrows, if not the humming birds, doubtless opine he is as sweet as any. Furthermore, this part of Smiff's testimony might have been confusing had there been an "S" tacked onto his pet's name. As it is, the mind of the court is relieved from wandering back and forth between the blue-grass knolls of Kentucky and the "hee-haw" pens of St. Louis in locating the native soil of the flora bearing so commercial looking a brand. Still further, and to continue the story, the witness says, "So Ah dremp in dis heah dream dat Ah tol' dese ge'men dat Misteh Snideh guv meh dat mule fur curin' him." And this reminds the court to say, that the defendant may pay Mr. Smiff $5.00 or turn over to him XXXX Maud with a good new shoe in the place of the one pried out of the remains of the power — no feed or care deducted — and save costs in suit at the instance of the owner of "meh mule," if he so elects. Otherwise the constable will see to it. And this, it is apprehended, is equity.

SNAP JUDGMENT REVERSED, and Judgment in favor of Smiff ANTICIPATED.

DAVENPORT, IA., September, 1906.

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The Green Bag

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

CURRENT LEGAL LITERATURE

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

AUTOMOBILES. "The Law of Automobiles," by Xenophon P. Huddy. Matthew, Bender & Co., Albany, New York, 1906. Price $3.50.

This book is in two parts, the second containing the statutory regulations for automobiles in the different states and in England. The first part is a collection of the cases so far decided regarding the use of automobiles, discussions of some problems not yet judicially determined, and the application of some of the familiar principles of agency, bailments, and contracts to the questions likely to affect owners of automobiles. In style the book is clear and simple, and will be of value to owners and manufacturers of motor cars as well as to lawyers. While the scope of such a work is too limited to give room for much erudition, the book is valuable as the first collection of the recent cases and recent statutes on this subject.

CODIFICATION. "The Japanese Civil Code," by "H. L. R.," *The Lawyer* (Bombay) (V. vii, p. 23).

CONSTITUTIONAL LAW (Police Power). The decisions under the laws restricting the "Hours of Labor," are collected in a series of articles by O. H. Myrick in the *Central Law Journal* (V. lxix, pp. 145, 163, 181, 198). The article includes sections devoted to "Dangerous and Unhealthy Employments," "Employment of Women and Children," and "Labor on Public Works."

COPYRIGHT. "The Copyright Bill," by Charles Porterfield, *Law Notes* (V. x, p. 107).

CRIMINAL LAW. "The Case of Patrick," by Clark Bell, *Medico-Legal Journal* (V. xxiv, p. 1).

CRIMINAL LAW. "Security for Good Behavior," by Satya Chandra Mukerji, *Allahabad Law Journal* (V. iii, p. 227).

CRIMINAL LAW. "Corporal Punishment in India," by Sir Henry Cotton, *Criminal Law Journal of India* (V. iv, p. 23).

INTEREST. "The Law of Interest," by K. B. Dastur, *Bombay Law Reporter* (V. viii, p. 230).

JURISPRUDENCE. A résumé of the work of the English courts during the past year is published by the *Law Times* (V. cxxi, p. 404), in accordance with its annual custom, under the title of "Noteworthy Decisions of the Judicial Year."

LEGAL ETHICS. "The Lawyer's Conscience," by T. H. Marshall, *Criminal Law Journal of India* (V. iv, p. 17).

MEDICAL JURISPRUDENCE. "What is Criminally Obscene?" by Theodore Schroeder, *Albany Law Journal* (V. lxviii, p. 211).

PRACTICE. "The New Act, in Virginia, Concerning Demurers to Evidence," by Frederick W. Sims, *Virginia Law Register* (V. xii, p. 355).

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NOTES OF THE MOST IMPORTANT RECENT CASES COMPILED BY THE EDITORS OF THE NATIONAL REPORTER SYSTEM AND ANNOTATED BY SPECIALISTS IN THE SEVERAL SUBJECTS

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

ALIENS. (Exclusion — Finality of Determination.) D. Ct., Eastern District of Pennsylvania. — A case which seems somewhat inclined to be in conflict with the rule laid down by the United States Supreme Court in United States *v.* Ju Toy, 25 Sup. Ct. Rep. 644, is that of United States *v.* Rodgers, 144 Fed. 711. It will be remembered that in the Ju Toy case a Chinaman claiming to be a citizen of the United States applied for a writ of habeas corpus to secure his release from the custody of the immigration officers at San Francisco, such detention being pursuant to the rules of the Department of Commerce and Labor, and after a hearing before that department. The Supreme Court held that habeas corpus should not be granted where the petition alleged nothing but citizenship as making the detention unlawful, and that the decision of the department of commerce and labor was conclusive as to the question of the propriety of the detention including the question of citizenship. In the present case it appeared that a citizen of the United States returning to this country after an absence of several years was refused a landing because of the marine surgeon's certificate that he was almost blind and likely to become a public charge. The return to the writ of habeas corpus sued out to obtain the release of the relator stated that the writ should be vacated because the findings of the Commissioner of Immigration which upon appeal were approved by the Secretary of Commerce and Labor were final and could not be inquired into by the court. It appeared apparently without controversy that relator was an American citizen, but it was not apparent but what the fact that Ju Toy was an American citizen was conceded in his case. On the question of finality, the court merely remarks that, that question does not arise because the record shows plainly that the proceedings were had against an American citizen whose entire family were residents of this country, where he himself had resided before his visit abroad, and that under the circumstances he could not be prevented from returning to his home.

CARRIERS. (Street Cars — Wrong Transfer Ticket — Ejection of Passenger.) Ohio Sup. Ct. — Where a passenger on a street railroad who has paid his fare and is entitled to ride over another line belonging to the same company asks for a transfer ticket over such other line and by mistake of the conductor is given a transfer which is not good over such other line, he may nevertheless if he has exercised such care about the receiving and making use of the transfer ticket as persons of ordinary prudence are accustomed to exercise under the same or similar circumstances, lawfully insist in being carried over such other line without further payment of fare, and if such passenger without fault on his part is ejected from the car for refusing to pay fare other than by such transfer ticket, he may recover damages for the tort and cannot be restricted to damages for breach of the contract to carry him. Cleveland City Ry. Co. *v.* Conner, 78 N. E. 376. It was argued that because the conductor who refused to receive the transfer was acting according to instructions and within the line of his duty as between himself and his employer that plaintiff had no cause of action against the employer for being put off the car. To this the court replies that the action is not a controversy between the master and the servant, nor between the passenger and the conductor, nor yet between the carrier and passenger solely in regard to the act of the carrier's servant in ejecting the passenger from the car, but was founded upon the wrongful and negligent act of the servant giving the transfer which was the proximate cause of the resulting injury.

CONSTITUTIONAL LAW. (Equal Protection and Due Process.) N. Y. Ct. of App. — A recent statute of New York providing for the taxation of real estate mortgages is considered in its constitutional aspects in People *v.* Ronner, 77 N. E. 1061. Various objections are urged against the law but all held untenable. The statute imposes a regular annual tax on every

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debt and obligation, and upon the mortgage securing the same, except upon mortgages recorded prior to July 1, 1905, equal to five mills on each dollar of the amount of the principal debt or obligation. The provision of the act exempting from its operation mortgages recorded prior to July 1, 1905, is attacked on the ground that inasmuch as the holder of such mortgages had a right to make deductions for indebtedness while with respect to mortgages recorded after that date he has not, the result was that some mortgages were taxable and some not taxable under exactly the same conditions and hence that the holders of that class of mortgages which were taxable were denied the equal protection of the law. In answer to this contention it is declared that the government may change the methods, or rate, of taxation and classify new subjects for taxation at any time in the exercise of its sovereign power, that the power of the state to impose taxation is in effect unlimited in extent, so far as no constitutional guaranty is infringed upon, and is controlled only by the considerations of wisdom and policy, to be reasonably expected of a legislative body acting in the interests of its constituents. Under these principles and in lieu of the fact that there is no guaranty that taxation shall be just and equal, even though there is from the nature of our political institutions to be implied a guaranty, that taxation shall be equal in the sense that it shall not be arbitrary, it is declared that the statute does not provide for such an arbitrary system of taxation as to be regarded void for discrimination. The feature of the statute which imposes a tax at a fixed rate on the amount due on the mortgage is held not to be a deprivation of property without due process of law. On this point the court says, — "Taking property under the taxing power is taking it by due process of law. In such a case due process of law does not mean some judicial proceedings. Proceedings for the collection of taxes are necessarily summary and if not arbitrary or unequal or illegal, they are not within the constitutional provision. It is not essential to the validity of the tax that the person should have been present or should have had the opportunity to be present in some tribunal when assessed. Due process of law and equal protection of the law are secured, if the law operates alike upon all who are similarly situated and if it does not subject the person to an arbitrary exercise of the powers of government."

CONSTITUTIONAL LAW. (Police Power — Schools for White and Colored Persons.) Kentucky Ct. of App. — A statute prohibiting the maintenance and operation of an institution of learning in which white and colored persons may be taught at the same time, in the same place, is within the police power and valid, Berea College *v.* Commonwealth, 94 S. W. 623. The same principles, says the court, which gave rise to, and furnished support for, the statute prohibiting marriage between the races and the statute requiring the separation of the races in public conveyances, justify the statute in question. In their attack on the statute, counsel argued that while statutes providing for separate public schools and requiring the separation of the races in public conveyances were proper because they prevented an enforced association of the races, nevertheless, the statute under consideration was invalid because it applied to private schools and interfered with the association of the races, even though such association should be voluntary. This, the court holds, is no sufficient ground for drawing a distinction between the statutes. The thing aimed at, says the court, is not merely volition, but something deeper and more important than the mere matter of choice. Indeed the court admits that if the mere choice of the persons to be affected were the only object of the statutes, it might well be doubted whether any of them were a proper exercise of police power. It is, however, argued that the races are, according to the divine plan, separate and distinct from each other, each endowed with the instinct of race preservation and each originally created to inhabit different portions of the globe. The conclusion is drawn from this that the welfare of each of the races depends upon the preservation of its race characteristics unimpaired and unaffected by those of any other race. To accomplish this, the court holds to be the object of these statutes, so that they affect at its most vital point the welfare of society and are especially within the province of the police power.

The following should perhaps be added to assign to the above decision its proper limits.

The statute provides: "Sec. 4. Nothing in this act shall be construed to prevent any private school, college, or institution of learning from maintaining a separate and distinct branch thereof, in a different locality, not less than twenty-five miles distant, for the education exclusively of one race or color."

The court holds that while the spirit of the act would be violated by teaching the two races in the same building or group of buildings, the twenty-five-mile limit is unreasonable and oppressive.

It says that the section violates the limitations upon the police power, but it could have hardly been the intention of the court to throw out the whole section, since the first part of the proviso materially mitigated the prohibition of the act. There remains, in

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consequence, a somewhat different problem of construction, but it must be assumed that the law, as it is allowed to stand, requires teaching in a different locality.

The main point of the decision is supported by authority. It would have been interesting if the court had intimated how such legislation affects a trust or endowment fund created expressly for the common education of the two races.

E. F.

CONSTITUTIONAL LAW. (Right to Contract — Wages.) Indiana Sup. Ct. — In Seeleyville Coal & Mining Co. *v.* McGlosson, 77 N. E. Rep. 1044, a statute requiring employers engaged in mining and manufacturing to pay their employees at least once every two weeks the amount due for labor, and further requiring that the payment shall be in lawful money of the United States and that any contract to the contrary shall be void, is upheld as against contentions that it interferes with the right of contract and is in contravention of a provision of the bill of rights prohibiting the general assembly from granting to any citizen or class privileges which on the same terms do not equally belong to all other citizens. The statute involved is distinguished from that which was held invalid in the Republic Iron Co. *v.* State, 160 Ind. 379, 66 N. E. 1005, where it was held that the statute involved in that case deprived both the employer and employee of the right to contract for employment unless they did so upon condition that the wages earned by the employee should be paid weekly. Under the provisions of the statute involved in the present case the requirement to pay at the time prescribed by the statute only becomes mandatory on the employer on the demand of the employee to whom the wages are due and owing, so his right under the law to semi-monthly make a demand for the amount of wages then due him, is a matter wholly optional with him. As a consequence of this there is no interference with his right to contract or with that of his employer. Inasmuch as the statute operates equally upon all persons who come within the class to which it applies it is held that it is not a denial of the equal protection of the laws and it was also declared that the classification is reasonable and proper. In support of its holding the court cites the following cases in which similar legislation has been upheld: Shaffer *v.* Union, etc. Co., 55 Md. 74; State *v.* Peel Splint Coal Co., 36 W. Va. 802, 15 S. E. 1000, 17 L. R. A. 385; *In re* Opinion of Justices, 166 Mass. 589, 44 N. E. 625, 34 L. R. A. 58; Commonwealth *v.* Hillside Coal Co. (Ky.) 58 S. W. 441; Commonwealth *v.* Reinecke Coal Mining Co. (Ky.) 79 S. W. 287; Skinner *v.* Garnett Gold Mining Co. (C. C.) 96 Fed. 735; St. Louis, etc. Ry. Co. *v.* Paul, 64 Ark. 83, 40 S. W. 705, 37 L. R. A. 504, 62 Am. St. Rep. 154, and authorities cited; Leep *v.* St. Louis, etc. R. R. Co., 58 Ark. 407, 25 S. W. 75, 23 L. R. A. 264, 41 Am. St. Rep. 109; Avent Beattyville Coal Co. *v.* Commonwealth, 96 Ky. 218, 28 S. W. 502, 28 L. R. A. 273.

CONTRACTS. (Illegality — Restraint of Trade.) Ky. Court of App. — In Clemons *v.* Meadows, 94 Southwestern 13, suit was brought on a contract between competing proprietors of hotels in a town, whereby one of them agreed to keep his hotel closed for three years, reserving the right to rent the same for offices and to roomers, and whereby the other agreed to pay a specified sum monthly to the former during the three years. This would seem on its face to be a valid contract in partial restraint of trade, such as the courts uniformly uphold, but is nevertheless declared to be in contravention of public policy and unenforceable. The court points out that the cases in which contracts in partial restraint of trade have been held legal are cases where parties sold their trade or business together with good will. Cases where a merchant sells to his partner or to a stranger, or where a professional man with an established business sells it and the vendor as part of the consideration agrees not to engage in the business for a time, are of this variety. In such cases, however, the court argues the agreement does not contemplate that the business or trade purchased shall be discontinued, and persons whose services are necessary to carry on the trade or business thus thrown out of employment, and likewise the agreement, does not have the effect of depriving the public of any benefits which it has enjoyed from the conduct of the business or pursuit of the trade which has been transferred to another. Such contracts do not have the effect of destroying the competition which previously existed. The contract under consideration, the court says, is to be differentiated from the ones mentioned on more than one ground. First, it is pointed out that hotels are established and maintained for the purpose of serving the public, and consequently are to be regarded as *quasi* public institutions. It is also argued that in the contract under consideration, competition is destroyed and the business is discontinued so that laborers are thrown out of employment and the public deprived of the benefits which would accrue should the competition continue. Under these views, the contract is declared to be in violation of public policy. It would seem that if the contract had been made,

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in connection with the sale of one hotel to the other, and as an incident thereto, it would have been upheld and it is difficult to see what objectionable feature this would have removed from the arrangement, except to bring it clearly within the facts of previously decided cases.

EXTRADITION. (Liability to Civil Process.) N. J. Sup. Ct. — In Rutledge *v.* Krauss, 63 Atl. 988, the Supreme Court of New Jersey declares that a person surrendered to that state by the executive of another state under extradition proceedings to answer for a crime committed in New Jersey may be held, tried, convicted, and sentenced there for another and distinct offense from that for which he was returned, and that a civil suit may likewise be instituted against such person before his discharge or immediately after it, and that he is not entitled to a reasonable time after his discharge to permit him to return to the state from whence he came before such suit may be instituted. The rule thus stated in so far as it applies to prosecutions for other criminal offenses than the one for which the person was extradited is that which generally obtains in most of the states, in which respect there is a difference between interstate and international extradition. In so far as the rule is extended so as to make the person to be extradited liable to civil action, the rule is supported by fewer authorities. Counsel argued that inasmuch as a person coming from another state voluntarily as a witness or party to a suit was free from arrest and service of process in a civil action, the same rule should be applied to the case of persons extradited, but the court asserts that the rule applicable to prosecutions for other crimes is also applicable to civil suits, and in support of its holding cites People *v.* Cross, 135 N. Y. 536, 32 N. E. 246, 31 Am. St. Rep. 850; Com. *v.* Wright, 158 Mass. 150, 33 N. E. 82, 19 L. R. A. 206, 35 Am. St. Rep. 475; *In re* Miles, 52 Vt. 609; State *ex rel*, Brown *v.* Stewart, 60 Wis. 587, 19 N. W. 429, 50 Am. Rep. 388; Ham *v.* State, 4 Tex. App. 645; Williams *v.* Weber, 1 Colo. App. 191, 28 Pac. 21.

INFANTS. (Contracts — False Representations as to Age — Estoppel.) Miss. Sup. Ct. — The case of Commander *v.* Brazil, 41 So. 497, adds another authority to those which go practically to the extent of holding an infant bound by his contracts under certain circumstances. The defendant in this case, while an infant, but after his stature and appearance indicated that he had reached years of maturity, purchased a livery business, and to secure a portion of the purchase price executed deeds of trust covering the property, and also a tract of land. During the transaction he stated several times, in answer to direct questions, that he was twenty-one years of age, and the seller executed the contract believing and relying on those statements. In dealing with the question whether defendant was entitled to avoid the contract and prevent the enforcement of the deeds of trust the court says that practically all the authorities recognize the right of the matter, inasmuch as while holding that a minor cannot be sued on his contract, they nevertheless hold that he is liable for his tort, and can be sued for damages for his false representations. Other authorities lay down the rule that he may not be sued at law but may be sued in equity. The court then suggests that if a minor is to be made liable for his fraud and his property taken to compensate in damages a person who has suffered by the minor's deceit, it is difficult to understand how it can be made any easier on the minor for this to be done through an action of tort instead of on his contract, if the same results follow. And so, limiting its holding somewhat closely to the facts of the case, the court declares that when a minor has reached the stage of maturity, which indicates that he is of full age, and enters into a contract falsely representing himself to be of age, accepting the benefits of the contract, he will be estopped to deny that he is not of age when the obligation of the contract is sought to be inforced against him.

INJUNCTION. (Restraining Prosecution for Crime.) Kans. Sup. Ct. — Levy *v.* Kansas City, 86 Pacific Reporter, 149, is a case almost on a par with the celebrated old English suit for an accounting between highwaymen. The city of Kansas City, Kansas, in violation of law, enacted an ordinance providing for the granting of licenses to gamblers to violate the law in certain portions of the city. Plaintiff, Levy, procured such a license and opened up a place of business within the prohibited district, for which he was prosecuted and fined. He then filed a petition alleging that the city intended to, and would if not restrained, arrest him again if he opened up his place of business, and asked for an injunction restraining the city from again interfering with him or his business. On default of the city a temporary injunction was granted, which on the hearing was dissolved, because the gambling house was within the prohibited limits. In considering the case on plaintiff's writ of error the court says: "This is probably the first instance in the history of the state that a professional criminal, confessing to a daily violation of the law, has had the effron-

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tery to apply to a court of equity for protection from arrest and public prosecution while he pursues his criminal vocation. It would indeed be a sad commentary on our jurisprudence if a justification could be had for holding that a license to commit crime, issued by a city administration, could be made the basis of equitable interference for the protection of the holder from public prosecution while he continues to violate the law. The conduct of the parties is equally culpable and neither deserves any consideration at the hands of the court."

INSURANCE. (Accident Policy — Sunstroke.) Kans. Sup. Ct. — A point which seems to be entirely without direct precedent is determined in Continental Casualty Company *v.* Johnson, 85 Pac. 545. The action was on an accident policy containing a provision that loss of time due solely to sunstroke or freezing should be deemed to be due to external violent and purely accidental causes, and entitle the assured to full benefits. Insured was a fluewelder and while engaged in that occupation was overcome by heat from the forge or furnace near which he worked. Any one wishing a complete collection of the authorities on the question of what constitutes a sunstroke would do well to refer to the opinion in this case, as almost every recognized work, whether of a general or strictly medical nature, is referred to and qouted from in determining the question whether the injury sustained by the insured was a sunstroke. Upon all the authorities the conclusion is reached that the term sunstroke means prostration resulting from extreme heat and is equally applicable whether the heat is the direct result of sunlight or is produced artificially. "There may," says the court, "be an apparent incongruity in calling that sunstroke which has no relation to any effect produced by the sun, but this is only to say that the word is not happily formed to suggest the idea it is employed to express. Etymology is not always a safe guide to the meaning of a term. It is no more imperative that sunstroke shall always mean a disorder caused by the sun, than that lunacy shall denote an aberration due to the influence of the moon." The only cases cited by the court as dealing with the question are Dozier *v.* Fidelity & Casualty Co., 46 Fed 446, and Sinclair *v.* Maritime Pass. Assur. Co., 3 El. & El. 478, which merely hold that sunstroke is not an accident but a disease.

INSURANCE. (Mutual Benefit Societies — Increase of Assessment.) Mass. — The change in rate of assessment adopted not long since by one of the oldest assessment insurance orders in the country has been held valid by the supreme court of Massachusetts in Reynolds *v.* Supreme Council Royal Arcanum, 78 N. E. 129.

The association was organized under a Massachusetts statute which authorizes mutual benefit societies to adopt by-laws declaring the manner in which the purposes of their incorporation may be accomplished, and to prescribe the assessment of benefits in case of disability or death and the conditions under which the same shall be paid, as well as to provide a method for amendment of the by-laws, and make provision for the payment of benefits in case of death or disability or both from the fund derived solely from assessments collected from members, as required in the by-laws. Under this statute, it is held that where it appeared that the society was founded on a plan which would ultimately result in its inability to pay certificates issued, it was authorized to so amend its by-laws as to increase its benefit assessments to an amount equal to the cost of insurance.

At the time of joining the society every member entered into an express agreement to conform to and abide by the constitution, laws, rules, and usages then in force or which might thereafter be adopted, and the benefit certificates of the society promised payment of death benefits only on condition that the member complied with the laws which then governed or might thereafter be enacted to govern the order and its funds. In view of this provision of the contract, the court declares that by-laws changing the society's plan of assessment and adopting an increased graduated assessment schedule sufficient to cover the cost of insurance was not a violation of the then existing contracts of members.

It is pointed out that there are many cases in which it is held that the amount expressly promised to be paid in a certificate issued by a mutual benefit society cannot be cut down by an amendment of the by-laws, and Newhall *v.* American Legion of Honor, 63 N. E. 1, Langan *v.* Same, 66 N. E. 932, and American Legion of Honor *v.* Getz, 112 Fed. 119, are cited as examples of those cases, but a distinction is drawn between the express stipulation of a corporation to pay a certain sum and other provisions relating to the methods of the corporation and the duties of the certificate holders, which properly may be a subject for regulation by by-laws, even though they affect the rights of the members under their contracts.

The assessments to be paid for death benefits are provided for by the by-laws, while the promise in writing to pay a certain sum to a particular person is as to that person a matter outside of

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those corporate rules which may be expected to be changed by an amendment of the by-laws.

As authority for the holding that the duties of members prescribed by the by-laws remain subject to modification when a power of amendment is reserved, the court cites Loeffler *v.* Modern Woodmen of America, 100 Wis. 79, 75 N. W. 1012; Langnecker *v.* Grand Lodge, A. O. U. W., 111 Wis. 279, 87 N. W. 293, 55 L. R. A., 185, 87 Am. St. Rep. 860; Lawson *v.* Hewell, 118 Cal. 613, 50 Pac. 763, 49 L. R. A. 400; Gilmore *v.* Knights of Columbus, 77 Conn. 58, 58 Atl. 223; Ellerbe *v.* Faust, 119 Mo. 653, 25 S. W. 390, 25 L. R. A. 149.

INSURANCE. (Mutual Insurance — Policy — Inconsistency — Construction.) Mo. Ct. of App.— Under a statutory provision that every policy or certificate issued by any corporation doing an assessment insurance business shall specify the exact sum of money which it promises to pay upon the contingency insured against, and that the corporation shall be obligated to the beneficiary for such payment at the time and to the amount specified in the policy or certificate, it is held that a provision of the by-laws of an insurance organization as to the amount of benefit to be paid is controlled by a conflicting recital in the policy. Courtney *v.* Fidelity Mut. Aid Ass'n, 94 S. W. 768. It is, however, further held in this case that where the by-laws of an assessment insurance organization provided that the indemnity for sickness should only be paid to the member himself, and in case of his death before payment should revert to the association, which should only be liable for funeral benefits, and that the association should in no event be liable for both weekly indemnity and funeral benefits; but the policy provided for a fixed payment per month for disability from sickness, and declared that, after continuous membership for twelve months next prior to the death, funeral expenses would be defrayed in a sum not exceeding $100, a further provision of the by-laws to the effect that where disability was the result of sickness, indemnity should be paid for a greater period than ten weeks, was not contrary to the terms of the policy forbidden by the statute or objectionable as uncertain and oppressive. Another point of some interest determined in the same case, though bearing no relation to the ones just mentioned, is that under the policy sued on, which provided that the insurer should not be liable for disabilty resulting from bronchitis, evidence that a disabled member suffered from senile bronchitis and a catarrhal condition of the stomach and duodenum did not relieve the insurer from liability without further proof that the bronchitis and not the affection of the digestive tract caused the disability.

MONOPOLIES. (Anti-Trust Statute — Constitutionality.) Mass. — In Commonwealth *v.* Strauss, 78 N. E. 136, a Massachusetts statute declaring that no person, firm, corporation, or association of persons doing business in that commonwealth shall make it a condition of the sale of goods, wares, or merchandise that the purchaser shall not sell or deal in the goods, wares, or merchandise of any other person, firm, corporation, or association of persons, providing, however, that the statute shall not prohibit the appointment of agents or sole agents for the sale of or the making of contracts for the exclusive sale of goods, wares, and merchandise, is upheld as a valid exercise of the police power. Expressly disclaiming, as all police power cases do, any intention of defining the scope and limits of that power, the court says that it includes the right to legislate in the interest of the public health, public safety, and public morals, and that if the power is to be held within the limits of the field thus defined, the words should be interpreted broadly and liberally. It is then pointed out that the contracts forbidden by the statute are only those which in ordinary competition among equals no one would have any desire or interest to make, and that ordinarily only a person or corporation intrenched in a position of power can afford to refuse to sell to a jobber or retailer unless the buyer promises not to handle any other kind of goods.

In the transaction of business among equals where there is free competition the statute is unnecessary, for there is no inducement to do that which it forbids, and its practical effect is limited to preventing great corporations from making certain contracts intended to drive ordinary competitors out of business. The prevention of this by means of the statute is to be regarded, the court says, as a protection of the public health and public safety, if not of the public morals.

The statute is also declared to be not objectionable as an attempted regulation of interstate commerce, inasmuch as it affects only interstate transactions occasionally, and as it were incidentally, and was not intended as a regulation of interstate commerce.

There was evidence that the defendant in the case named a price at which he would sell his employer's tobacco, and then stated to the person proposing to purchase, that if he bought or sold no plug tobacco except that manufactured by defendant's employer, that defendant would return a

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certain rebate. There was also evidence from which it might have been found that the price at which the tobacco was to be sold, if paid without the rebate, would prevent the doing of business at a profit, and that the proposal of the price without a rebate was not intended by the defendant or understood by his customers as *bona fide*, but was an evasion or subterfuge, and that as a matter of fact no one would purchase or could profitably purchase without conforming to the requirement not to handle the goods of others in order to receive the rebate.

Under these circumstances it was held that a request by the defendant for a ruling that if his proposal merely consisted of the offer of sale and the offer of a rebate, the sale was not made on condition that the purchaser should not sell the goods of any other person, was properly refused.

PHYSICIANS AND SURGEONS. (Operation on minor without consent of parent.) Mich. — In Bakker *v.* Welsch, 108 N. W. 94, the Supreme Court of Michigan had to deal with a rather unusual and interesting state of facts, and as a result to decide a question for which neither court nor counsel seem to have found a precedent.

A boy 17 years old, afflicted with a small tumor of the ear, for which he had taken treatment, went to a nearby city, and, accompanied by adult relatives, was examined by a surgeon, and went back home, agreeing to return later and hear the surgeon's diagnosis. On his return, accompanied this time also by adult relatives, he agreed to have the tumor removed. While an anesthetic was being administered, preparatory to this operation, the boy died.

The question presented was whether the surgeons performing the operation were liable in damages to the boy's father merely because of the fact that he had not consented to the operation, and this is decided in the negative. The decision does not seem to be grounded on any particular principle, but the court merely reviews the facts, draws attention to the absence from the record of any indication that if the consent of the father had been asked it would not have been freely given, or that the physicians knew before the operation that the father had not consented, and concludes that it would be too harsh a rule to hold defendants liable.

RECEIVING STOLEN GOODS. (Attempts — Impossibility of Committing Crime.) N. Y. Ct. of App. — The case of People *v.* Jaffe, which was referred to in the August number of this magazine, and in which the Appellate Division of the New York Supreme Court held that a person could be convicted for attempting to receive stolen goods, though in fact the goods were not stolen, has been reversed by the Court of Appeals, the opinion appearing in 78 Northeastern Reporter, 169. As is pointed out by the Court of Appeals, the judgment of the Appellate Division was founded chiefly on the authority of cases in which it has been held that one may be convicted of an attempt to commit crime, notwithstanding the existence of facts unknown to him which would have rendered the complete perpetration of the crime itself impossible, as, for example, what the court terms the "Pickpocket Cases," where, in prosecutions for attempts to commit larceny from the person by pocket picking, it is held not to be necessary to allege or prove that there was anything in the pockets which could be the subject of larceny. Commonwealth *v.* McDonald, 5 Cush. 265; Rogers *v.* Commonwealth, 5 Serg. & R. 463; State *v.* Wilson, 30 Conn. 500, and People *v.* Moran, 123 N. Y. 254, 25 N. E. 412, are examples of this class of cases. In distinguishing those cases from the present one, the court says: "The crucial distinction between the case before us and the pickpocket cases and others involving the same principle lies not in the possibility or impossibility of the commission of the crime, but in the fact that, in the present case, the act, which it was doubtless the intent of the defendant to commit, would not have been a crime if it had been consummated. If he had actually paid for the goods which he desired to buy and received them into his possession, he would have committed no offense under section 550 of the Penal Code, because the very definition in that section of the offense of criminally receiving property makes it an essential element of the crime that the accused shall have known the property to have been stolen or wrongfully appropriated in such a manner as to constitute larceny. This knowledge being a material ingredient of the offense, it is manifest that it cannot exist unless the property has in fact been stolen or larcenously appropriated. No man can know that to be so which is not so in truth and fact. He may believe it to be so, but belief is not enough under this statute. . . . If all which an accused person intends to do would, if done, constitute no crime, it cannot be a crime to attempt to do a part of the thing intended. The crime of which the defendant was convicted necessarily consists of three elements: First, the act; second, the intent; and, third, the knowledge of the existing condition. There was proof tending to establish two of these elements, the first and second, but none to establish the third. This was knowledge of the stolen character of the property sought to be acquired. There could be no such knowledge, The defendant could not know that the property.

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possessed the character of stolen property when it had not in fact been acquired by theft."

SALVAGE. (Nature of Service — Salvage or Towage.) U. S. Dist. Ct., Dist. of S. C. — A very interesting case, involving the distinction between a salvage service and mere towage, is that of The Robert S. Besnard, 144 Federal Reporter, 992. It is there declared that if a vessel is in a position which requires towage service only, the mere fact that she had previously suffered injury does not change the nature of the service to one of salvage unless there are some circumstances of peril, immediate or to be reasonably apprehended, from which the vessel is relieved, or some hazard encountered or unusual work done by the relieving vessel. The bark *Besnard*, on a voyage from Montevideo to New York, in the winter, was struck by a waterspout when about 500 miles east of Charleston, losing a part of her masts, and having left only six of her nineteen sails. She was sound in hull, and able with her remaining sails to make five or six knots an hour with favorable winds, but the wind becoming northerly after a day or two, she turned for the port of Charleston. Her master asked two or three passing vessels for a tow, which he did not get, but at no time made any signal of distress. One vessel offered to take off himself and crew, which he refused. He reached the vicinity of the Charleston lightship at night, and anchored, all of the crew going to bed except the usual watch. The following morning a tug went out and towed the bark in. The master of the bark endeavored to make a bargain for the towage, but the master of the tug declined, and the service was accepted, leaving the matter of compensation open. The master of the tug had received notice the night before from a passing vessel that she had spoken the bark, and that the sea was heavy, but did not go out until the next morning. The wind was no more than fresh, the bark was securely anchored, and was in no unusual peril, and the towage service was not attended with danger, and was no more than required by all vessels entering the port. On these facts the libelant claimed that the service was a salvage, and not a towage. A large number of cases are cited, all based more or less upon a statement made by Dr. Lushington, in The Reward, 1 W. Rob. 174, where it is said that mere towage service is confined to vessels that have received no injury or damage, and that mere towage reward is payable in those cases only where the vessel receiving the service is in the same condition she would ordinarily be in without having encountered any damage or accident. It is pointed out that this statement is in reality a dictum and that the rule actually applied in the case is not in conflict with that laid down in the present case. Salvage, it is said, is in the nature of a bounty for extraordinary exertions, the amount of the bounty depending upon the success achieved, the value of the property saved, and the degree of danger from which it was rescued, but that while there are many ingredients, the one essential element is that the property shall be saved from danger either actually impending or reasonably to be apprehended, and that in the absence of any peril it is not salvage, however beneficial and meritorious the service may be. Therefore, it is declared that as in the present case the bark was not actually in danger at the time the service was rendered, but had, on the contrary, safely passed through the period of danger and distress, an award for salvage should not be made.

TAXATION. (Property Used for Public Purpose — Bonds Owned by City.) Ky. Ct. of App. — What appears to be a very sensible holding is that delivered by the Court of Appeals of Kentucky in Board of Councilmen *v.* Commonwealth, 94 S. W. 648, where it is determined that nonnegotiable bonds acquired by a city as a part of the consideration for the sale of a gas plant and held by the city solely for the purpose of devoting the income to paying the expenses of lighting the streets, are used for public purposes within a provision of the constitution declaring that public property used for public purposes shall be exempt from taxation and that taxes shall be levied and collected for public purposes only. Cities being authorized by statute to collect taxes for the purpose of building and maintaining water works and lighting plants, the court regards the maintenance of a public lighting plant as a public necessity, so that money devoted to such maintenance is unquestionably devoted to a public use, as a result of which the bonds held solely for the purpose of aiding the city in maintaining its lighting plant should themselves be regarded as used for a public purpose.

WAREHOUSEMEN. (Stock Yards — Regulation of Rates.) Kans. Sup. Ct. — The growing tendency to assert that the public has some rights which even corporations are bound to respect is reflected in Ratcliff *v.* Wichita Union Stock Yards Co., 86 Pacific Reporter, 150, where it is held that the carrying on of stock yards at a commercial center, with which yards all the railroads enter-

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ing the city connect, and which is the only available market in the city and for a large scope of country around it, for the selling, feeding, and resting of live stock, is a business affected with a public interest, and is subject to public regulation and control in respect to rates. The court calls attention to the fact that the business of banking has been subjected to governmental control and regulation and that the exercise of the police power in controling the business of insurance, common carriage, the operation of mills, hotels, theaters, wharves, markets, warehouses for the storage of grain and tobacco, etc., have been upheld in numerous instances. Munn *v.* Illinois, 94 U. S. 113, is referred to as expressly deciding that a warehouseman who receives and stores grain for compensation is engaged in a business of a public nature, that the public has an interest in the use to which he devotes his property, and that for the public good he must submit to public control. The cases of Budd *v.* New York, 143 U. S. 517, 12 Sup. Ct. 468; Bross *v.* North Dakota, 153 U. S. 391, 14 Sup. Ct. 857; W. W. Cargill Co. *v.* Minnesota, 180 U. S. 452, 21 Sup. Ct. 423, and Cotting *v.* Kansas City Stock Yards Co., 183 U. S. 97, 22 Sup. Ct. 30, are cited as upholding the principle upon which Munn *v.* Illinois was decided. Regarding that principle as correct, the court argues that the operation of stock yards has more of the characteristics of a public business than the carrying on of an elevator or warehouse. The conditions referred to in the first portion of this note are reviewed and it is held that because of them the company owning the stock yards has a practical monopoly of a vast business affecting thousands of people who are almost obliged to make use of the yards at whatever rates the company may choose to charge, and for this reason it is declared that public control and regulation is not only proper but almost necessary.

WITNESSES. (Privilege of Witness — Immunity from Prosecution.) Wis. Sup. Ct. — The case of State *v.* Murphy, 107 N. W. 470, contains a construction and application of a comparatively recent statute of Wisconsin which had not previously been presented to the court in exactly the same way. The statute declares that a witness in an action by the state involving the official conduct of any officer thereof shall not be excused from testifying on the ground that his testimony may expose him to prosecution, but that he shall not be prosecuted on account of any transaction concerning which he may testify. The defendant was an alderman of a city and was charged with soliciting and accepting a bribe as an inducement to vote in favor of an ordinance allowing a certain person to lay a sidetrack across a street in the city. He pleaded in bar immunity from prosecution on the ground that prior to the filing of the information he had testified before a grand jury as to the transactions alleged in the information. The clerk of the grand jury produced his minutes showing that accused testified that he knew of no alderman demanding or receiving money to support any contract, special privilege, or franchise. Defendant testified that he was asked as a witness before the grand jury if he had received any money for his vote on special privileges of certain varieties, and that he answered the question, no. Upon this state of facts the court declares that defendant did not testify before the grand jury concerning the transaction for which he was prosecuted and hence was not within the immunity provision of the statute. The substance of the court's reasoning merely is that the statutes would be rendered wholly nugatory and unenforceable if the mere fact that a person who was called before the grand jury and gave no evidence excepting protestations of innocence and ignorance were thereafter to be held immune from prosecution for the offense which the grand jury was investigating.

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THE LIGHTER SIDE

Christianity and the Law. — The editor believes that we do not study with sufficient care the reports of new cases. They are full of wisdom.

The following example of modern judicial conundrums seemed to our correspondent too good to cut, so we print it entire through the courtesy of the West Publishing Company.

Ellis *v.* Newbrough *et al* (Supreme Court of New Mexico), 27 Pac. Rep. 490.

Freeman, J. This is a most extraordinary proceeding. So far as we have been enabled to extend our researches, it is without a precedent. It comes to us by appeal from a judgment of the district court for Dona Ana County, refusing to set aside a verdict of a jury in favor of the appellee. It is an action of trespass on the case. The declaration sets out substantially the following cause of action, viz.: That, at the time of the committing of the grievances that the plaintiff complains of the defendants were engaged "in organizing and establishing a community called 'Faithists'"; and, being so engaged, the defendants heretofore, to wit, about the years 1882, 1883, and 1884, wrongfully and corruptly contriving and intending to deceive and injure the plaintiff, issued and published certain false, fraudulent, and deceitful writings, falsely and fraudulently and deceitfully pretending in said writings to describe the true nature and objects of said community, and to set forth the true state of facts in connection with said enterprise, and thereby to induce the plaintiff to believe that said objects and purposes of the defendants, and said fact in connection with said enterprise, were far different from what they really were, and from what said defendants really intended they should be. The declaration then proceeds to set out what it is alleged the defendants held out the enterprise to be, viz.: That the property of the community was to be held in common, — no one individual to have any separate title and property; that said community was to be conducted on principles of brotherly love, without master or leader to exercise control over the members; that all the members were to enjoy equally a permanent place in the community, with no authority on the part of any member or members to exclude another; that said community was laid on principles of sound morality and purity of life; that the plaintiff, misled by these pretenses, was induced to become a member of the community; "that he did then and there enter into said community with defendants; . . . did consecrate his life, his labor, and all his worldly effects and prospects, together with those of his two children, placing all good faith and confidence in said community; whereas, in truth and in fact, said defendants knew at the time of making said false statements and pretenses that the property of the said community home would not be held in common by the members of said community, but that the title thereto was then and would in future be vested by deed in one individual, to-wit, the defendant, Andrew M. Howland; and whereas, in truth and in fact, defendants well knew, before and at the time of making said false statements and misrepresentations, that said community would not be conducted on principles of equality and kindness, without a master." The declaration then proceeds to charge defendant Newbrough with acts of tyranny, and also with living a life of immorality, etc.; that, by reason of the false representations aforesaid, the plaintiff was induced to become a member of the community; and that he remained a member of such community from October, 1884, until April, 1886, both he and his two children working for the improvement of the home; "and the plaintiff saith that the defendants refused, and still refuse, to pay plaintiff for his said work and labor, or any part thereof; by reason whereof plaintiff saith that he has sustained great damage in loss of time and labor and opportunity and in the education of his children, and that he has suffered great anguish of mind in consequence of the dishonor and humiliation brought upon himself and his children by reason of his connection with said defendants in said community; to the damage of the plaintiff in the sum of $10,000."

To this unique and weird complaint a demurrer was interposed. The second and fourth grounds of demurrer are as follows: " (2) Because there are no sufficient facts alleged in plaintiff's said declaration to charge these defendants, or either of them, with any

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liability to plaintiff by reason of the matters by plaintiff in his said declaration complained of." "(4) Because the said declaration is duplicitous, in this: that plaintiff in his said declaration has attempted to plead more than one, and various and distinct and different causes of action in one and the same count."

We think the court erred in overruling this demurrer. The most that can be gathered from the declaration is that the defendants had conceived some Utopian scheme for the amelioration of all the ills, both temporal and spiritual, to which human flesh and soul are heir; had located their new Arcadia near the shores of the Rio Grande, in the county of Dona Ana, in the valley of the Mesilla; had christened this new-found Vale of Tempe the "Land of Shalam"; had sent forth their siren notes, which, sweeter and more seductive than the music that led the intrepid Odysseus to the Isle of Calypso, reached the ears of the plaintiff at his far-off home in Georgia, and induced him to "consecrate his life and labors, and all his worldly effects," etc., to this new gospel of Oahspe. This much is gathered from the pleadings. The evidence adduced in support of the plaintiff's demand is as startling as the declaration is unique. What the declaration leaves as uncertain, the proof makes incomprehensible. If the court below had been invested with spiritual jurisdiction, it might have been enabled, through an inspired interpreter, to submit to a mortal jury the precise character of plaintiff's demand. We think an examination of the record before us will amply support these conclusions. The first and principal witness offered by plaintiff was himself. He sets out in full the nature of his grievance. He admits, on page 59 of the record, that he made no sacrifice of property to become a member of the organization, but that he "threw up a situation" in which he could make a good living. What induced him to make this sacrifice is set out in his testimony. First in order came some specimen of literature published by the society, community, order, church, or "Faithists," as they were pleased to call themselves. Over the objections of the defendants, two books were allowed to go to the jury. The first and larger volume is entitled as follows: "Oahspe: a New Bible in the words of Jehovih and his Angel Embassadors. A sacred history of the dominions of the higher and lower heavens on the earth for the past twenty-four thousand years, together with a synopsis of the cosmogony of the universe; the creation of planets; the creation of man; the unseen worlds; the labor and glory of gods and goddesses in the etherean heavens. With the new commandments of Johovih to man of the present day. With revelations from the second resurrection, formed in words in the thirty-third year of the Kosmon era." In the preface to the book it is said of it that "it blows nobody's horn; it makes no leader." It is further stated: "When a book gives us information of things we know not of, it should also give us a method of proving that information true. This book covers that ground." The inspired author of this new revelation was doubtless somewhat familiar with the writings of his early predecessors. He had read of the jealousies that had arisen between Paul and Barnabas, so that he takes occasion in his preface to assure his disciples that these gospels are not intended to establish the fame of any one, — "it blows nobody's horn." And again having seen innumerable sects spring up as a result of a misconstruction, or rather of a diversified construction of the earlier gospels, we are furnished with the consoling assurance that this book represents the "method of proving that information to be true." With this comfortable and comforting assurance, the witness opens this volume of light, and bids us satisfy the hungry longing of our restless spirits by feasting our eyes on its simple truths. This new gospel, in order to prepare our minds for the acceptance and enjoyment of its simple truths, proceeds to dispel the mists of superstition that for nearly two thousand years have obscured our spiritual vision. It gives a plain and unvarnished story of the origin of the Christian's Bible. It is this: that once upon a time the world was ruled by a triune composed of Brahma and Buddha and one Looeamong; that the devil, entering into the presence of Looeamong, tempted him by showing the great power of Buddha and Brahma, and induced him (Looeamong) to take upon himself the name of Kriste, so that it came to pass that the followers of Kriste were called Kristeyans; that Looeamong or Kriste through his commanding general Gabriel, captured the opposing gods, together

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with their entire command of 7,600,000 angels, and cast them into hell, where there were already more than 10,000,000, who were in chaos and madness. This Kriste afterwards assembled a number of his men to adopt a code. At this meeting it is said there were produced "two thousand two hundred and thirty-one books and legendary tales of gods and saviors and great men," etc. This council was in session four years and seven months, "and at the end of that time there had been selected and combined much that was good and great, and worded so as to be well remembered of mortals." Plaintiff's Exhibit A, p. 733, verse 55. The council, or "convention," as it would now be termed, having adopted a platform, — that is, agreed upon a Bible, — then proceeded to ballot for a god. "As yet no god had been selected by the council, and so they balloted in order to determine that matter." Plaintiff's Exhibit A, p. 733, verse 36. On that first ballot the record informs us there were thirty-seven candidates, naming them. This list includes the names of such well-known personages as Vulcan, Jupiter, Minerva. Kriste stood twenty-second on this ballot. "Besides these, there were twenty-two other gods and goddesses who received a small number of votes each." Plaintiff's Exhibit A, p. 733, verse 37. The names of these candidates are not given, and therefore there is nothing in the record to support the contention of the counsel that the list includes the names of Bob Ingersoll and Phœbe Coussins. The record tells us that at the end of seven days' balloting "the number of gods was reduced to twenty-seven." And so the convention or council remained in session "for one year and five months, the balloting lasted, and at the end of that time the ballot rested nearly equal on five gods, namely, Jove, Kriste, Mars, Crite, and Siva"; and thus the balloting stood for seven weeks. At this point Hataus, who was the chief spokesman for Kriste, proposed to leave the matter of a selection to the angels. The convention, worn out with speech-making and balloting, readily accepted this plan. Kriste, who, under his former name of Looeamong, still retained command of the angels (for he had prudently declined to surrender one position until he had been elected to the other), together with his hosts, gave a sign in fire of a cross smeared with blood; whereupon he was declared elected, and on motion his selection was made unanimous. Plaintiff's Exhibit A, p. 733. We think this part of the exhibit ought to have been excluded from the jury, because it is an attack in a collateral way on the title of this man Looeamong, who is not a party to this proceeding, showing that he had not only packed the convention (council) with his friends, but had surrounded the place of meeting with his hosts, "a thousand angels deep on every side"; thus violating that principle of our laws which forbids the use of troops at the polls.

After thus endeavoring to demonstrate that Christianity had its origin in fraud, and thus to prepare the minds of its disciples for the new gospel, the Oahspe proceeds to unfold the beauties and the simplicity of the new faith. Passing over many interesting features contained in this exhibit, such as the birth of Confucius, the rise and fall of Mohammedanism, the discovery of America by Columbus, etc., the record brings us to the discovery and settlement of the Land of Shalam, which forms the subject of this controversy. As already seen, the record shows that a tract of land in the country of Dona Ana was selected. This was bought and paid for by the appellant Howland, and conveyed in trust for the use of the society. Among other conditions attached to the trust, one was to the effect that "no meat nor fish nor butter nor eggs nor cheese, nor any animal food save honey, shall ever be used upon any part of the premises, except that milk may be given to children under five years old." Transcript of Record, p. 167. It is admitted that this, among many other conditions of the trust, was violated; so that on the thirteenth day of March, 1886, the trustees, among whom was the appellee, made a reconveyance of the property to the said Howland. There are many other interesting features presented by this record. Much proof was taken as to the conduct of the society or community which was incorporated under the name and style of the "First Church of the Tae." Record, p. 180. They organized also a general coöperative system; established what they called the "Faithist Country Store" (Record, p. 87), — an institution, as we are advised, that did well as long as it kept on hand a good stock of faith.

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There was an outer and an inner council, and contributions were received, to be devoted to the care and education of orphan children. It was charged in the declaration that the members did not practice that degree of morality which was set forth in their circular, and proof was introduced with a view to show the questionable relations existing between one of the promoters of the scheme and one Miss Vandewater, *alias* Miss Sweet; but as the plaintiff remained on the premises eighteen months, and as he assigned no such reason for leaving (page 88), and as he made no demand at the time for compensation for work and labor done, nor for his injured sense of morality, we think this is an after-thought. This society of Faithists, while communistic in theory, agrarian in habits, and vegetarian in diet, was not altogether void of sentimentality nor indifferent to the Muses. One of the fair members of the society, inspired by the poetic surroundings of this fair Land of Shalam, composed some beautiful lines that are incorporated into the record on page 62. They are as follows:

"For all things are held in common,
Hooray! Hooray!
Thus everything belongs to all,
And peace abounds in Shalam;
Away, away, away out west in Shalam!"

The authoress of these beautiful and touching lines is Nellie Jones, a member of the society. She is not made a party to this action, however, and therefore no judgment can be rendered against her. The lines were, by direction of one of appellants, Dr. Newbrough, sung to the air of Dixie. We cannot give our assent, however, to the views of the able counsel for the appellee that causing these lines to be sung to the air or "tune of Dixie" was of itself such an act of disloyalty as to entitle the plaintiff to a verdict. The writer of this opinion, like the appellee, is himself a native of the land of Dixie, that

"Fair land of flowers,
And flowery land of the fair."

— And, as he reads these lines of Nellie Jones, memory carries him back to the days of his boyhood, and to the land of the "magnolia and the mocking bird."

O glorious Land of Shalam! O beautiful Church of Tae! When the appellants, the appellee, Ada Sweet, and Nellie Jones, aforesaid, formed their inner circle, and like the morning stars sang together, it matters not whether they kept step to the martial strains of Dixie, or declined their voices to the softer melody of Little Annie Rooney, the appellee became forever estopped from setting up a claim for work and labor done; nor can he be heard to say that "he has suffered great anguish of mind in consequence of the dishonor and humiliation brought on himself and children by reason of his connection with said defendants' community." His joining in the exercises aforesaid constitutes a clear case of *estoppel in Tae*.

There is another reason, however, why this act of disloyalty on the part of the appellants should not prejudice them; and that is that the plaintiff himself joined in the chorus when the "tune of Dixie" was sung. On page 109 of the record appears the following, the plaintiff himself being upon the witness stand: "Question. You all sang this with a good deal of lustiness? Answer. No, sir; we sang it to the tune of Dixie. Q. All joined in the chorus? A. Yes, sir; all that could." Pretermitting any expression of opinion as to whether it would, under any circumstances, be competent to allege and prove in this court that the ode to Shalam had been sung to the tune of Dixie, it is in proof, as we have seen, that the parties were *in pari delicto*, and therefore neither can avail himself of the other's wrong.

It is insisted, however, that the appellee was deceived by the appellants; that they did not carry out the purposes set forth in their circular and manifestoes; and they that did not live up to the doctrine contained in their Bible. The plaintiff admits that he had read their books thoroughly before he joined them. He belonged to the inner circle; was one of the trustees; joined in the worship; sang in the choir; and listened to the soul-enrapturing voice of Nellie Jones. Moreover, he had entered into the Holy Covenant. That covenant is found in chapter 5 of the Book of Jehovih's Kingdom on Earth. Plaintiff's Ex-

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hibit A, p. 833. The twenty-fourth verse of the covenant is as follows: "I covenant unto Thee, Jehovih, that, since all things are thine, I will not own nor possess exclusively unto myself anything under the sun, which may be intrusted to me, which any other person or persons may covet or desire or stand in need of." Under the terms of this covenant, he cannot maintain his suit, for the defendants insist, and the proof is clear, that they "covet or desire or stand in need of" the $10,000 for which the plaintiff sues. This is a complete answer to so much of plaintiff's cause of action as is laid in *assumpsit*, just as his participation in the church exercises, music, etc., was an estoppel to his right to set up "anguish of mind" and ruined reputation and other matters founded in tort.

It is insisted, however, that the appellee has a right to recover for a deceit practiced upon him; that he was misled by the Oahspe and other writings of the society. On the contrary, the defendants maintain that the appellee is a man who can read, and who has ordinary intelligence, and this the appellee admits. This admission precludes any inquiry as to whether appellee's connection with the Faithists, their inner and outer circles, their music and other mystic ceremonies, their general warehouse and coöperative store, and other communistic theories and practices, gave evidence of such imbecility as would entitle him to maintain this suit. Admitting, therefore, that the appellee was a man of ordinary intelligence, we find nothing in the exhibits which in our opinion was calculated to mislead him. True, the Oahspe, like other inspired writings, such as the Koran, Bunyan's Pilgrim's Progress, and other works of like character, deals largely in figures and tropes and allegories. But, read in the light of modern sciences, they are beautiful in their very simplicity. We would be glad to embody the whole of plaintiff's Exhibit A, but must confine ourself to such citations as will, in our opinion, be sufficient to sustain this view. A careful examination of appellee's Exhibit A, the New Bible of Oahspe, leads us to the inevitable conclusion that its splendid exhibitions of word painting were not confined to the Mesilla valley, although it is in proof, and, indeed, is not denied, that a much larger volume might be written, and yet not exhaust the subject of that valley's many attractions. But while there are many descriptive features in the record that unquestionably apply to the section in controversy, there are others that bear on their face a very different application. As a specimen of the former, we cite the following, found on page 370 of the Exhibit A: "Next south lay the kingdom of Himalawowoaganapapa, rich in legends of the people who lived here before the flood; a kingdom of seventy cities and six great canals, coursing east and west and north and south, from the Ghiee mountain in the east, to the west mountain, the Yublahahcolaesavaganawakka, the place of the king of bears, the EEughehabakax (grizzly). And to the south, to the middle kingdom, on the deserts of Geobiathhaganeganewohwoh, where the rivers empty not into the sea, but sink into the sand, the Sonogallakaxkax, creating prickly Thuazhoogallakhoomma, shaped like a pear." As an illustration of that portion of the exhibit which, in our opinion, was not designed as a description of the Land of Shalam, we cite the following, found on the same page of the exhibit: "In the high north lay the kingdom of Olegalla, the land of giants, the place of yellow rocks and high spouting waters. Olegalla it was who gave away his kingdom, the great city of Powafuchswowitchahavagganeabba, with the four and twenty tributary cities spread along the valley of Anemoosagoochakakfuela. Gave his kingdom to his queen, Minneganewashaka, with the yellow hair, long hanging down." This unquestionably refers to Chicago. The author, after giving a general description of many lands and cities, leads his "deciples" to some high point, most probably Sierra Blanca (from whose snow-covered summit the summer breezes fall like a gentle cascade over the valley of the Pecos), and spreads out before them a vast system of irrigation. The following is taken from the record, and will be found commencing on page 369 of appellee's Exhibit A: "Beside the canals mentioned, there were seven other great canals, named after the kings who built them, and they extended across the plains in many directions, but chiefly east and west." Speaking of the vast canals that formed a network of the beautiful valley, the record says: "Betwixt the great kings and their great capitals were a

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thousand canals, crossing the country in every way, from east to west and from north to south, so that the seas of the north were connected with the seas of the south. In kanoos the people traveled, and carried the productions of the land in every way."

We are of the opinion that a proper cause of action was not set out in the declaration, and that there was no evidence to sustain the verdict of the jury awarding the plaintiff $1,500; that the refusal of the trial udge to set aside the verdict was error; and therefore the judgment of the district court should be reversed.

Poetic Justice. — This complaint was prepared in one of the first cases against the New York City Subway, in the municipal court. The plaintiff objected to having it served, fearing it was not sufficient. However, the person who framed it claims it states a complete cause of action, being a "plain statement of facts" under New York Code of Civil Procedure.

And now comes Albert Nanies,
And to this court complains,
Through Rapid Transit negligence,
He suffered loss and pains.
'Twas the 6th of March of this year
That the incident occurred
Where he sustained the damages,
Which to this court's deferred.

And first the plaintiff further shows,
This rich defendant hath the power,
Under the New York Corporate Law,
To run cars through the subway bore.
The plaintiff was no trespasser,
As he had good right to do,
When he descended in the earth
Through the subway bore to go.

As any other passenger,
Being properly therein,
He was entitled to his ride
Through the tunnel dark and dim.
He then approached the portal
Where a ticket he procured,
And duly paid his nickel
Which safe passage him assured.

The chopping box he then approached,
And on his oath doth say,
Therein he did the ticket drop,
Full fare for transport pay.
A colored porter was in charge,
He did not see the act,
But a witness saw it, standing near,
Who will verify the fact.

The plaintiff hastening to the cars,
The porter made him halt,
Insisting that he had not paid,
And on him made assault.
The plaintiff then indignant grew
Demanding that he should refrain,
The coon insisting he must buy
Another ticket for the train.

So under protest he complied,
Another ticket bought and dropped
Into the box, the only way
From being any longer stopped.
So now this plaintiff shows the court
That he's neither knave nor thief,
But wants Two Hundred Dollars Cash,
As damages for his relief.

The Retort Courteous. — Curran was once arguing in Chancery before Lord Clare, who was seated on the bench caressing a Newfoundland dog, and apparently ignoring Curran's presence. At last Curran stopped speaking. The judge said: "Go on, Mr. Curran."

Curran replied: "I beg a thousand pardons; I thought your Lordship was employed in consultation."

—! A small colored boy was arraigned for some trivial offense, and after all had been heard the judge suggested to the grandfather, with whom the boy lived, that perhaps a little more careful oversight might be beneficial, whereupon the grandfather, who was an extremely respectable African, very tall and of great dignity, looked down on the judge in a pitying manner, but with the utmost respect, said:

"Well, judge, how do you suppose *you* would feel if you was the parent of a little damned nigger young one?"

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Judicial Punning. — Punning is an exercise of wit and humor, but not a good habit.

A dignified judge, however, will sometimes enliven a case by a punning allusion. In a Philadelphia case some years ago, a woman sued a street railway company for damages for injuries caused by being thrown by the sudden stopping of the car. The straps were where she could not conveniently reach them. The company appealed from a judgment against it, but the higher court sustained the judgment and said: "Possibly a woman may be so fantastically and foolishly hooped, wired, and pinned up as to deprive her of her natural power to help herself; but, if so, the question is one of fact and not of law, and so we incline to leave it, instead of imposing upon our brethren below, the difficult duty of prying into the artificial 'stays' of the plaintiff's case."

Would be Right. — Judicial ability of a very respectable order is not necessarily accompanied by the quickest intellectual perception. Judge ——, who presides over one of the circuits of a certain Western state, has never been able to master the intricacies of the game of euchre. A friend was once expounding to him the value of the bowers and the method of determining trump. "But," interposed the judge, "what would happen if you should turn up the left bower for trump?"

Naturally. — A shoemaker was taken up for bigamy.

"Which wife," asked a bystander, "will he be obliged to take?"

"He is a cobbler," replied another, "and of course must stick to his last."

Dogged Persistency. — Business was dull, debtors were shy and wary, and Tim, the process server, was playing in hard luck. A case was on the list for trial in which an important witness named Reardon had defied all efforts to summon him. At last recourse was had to Tim, who was told to get a service in hand.

Tim took the writ and started on his errand. On the road he met Reardon's dog. The dog had a small package in his mouth, and a bright idea at once struck Tim. "Come here, my good fellow," said Tim, caressing the dog in a friendly manner. Tim untied the bundle and placed the summons securely within; and then the dog took up the package and scampered away to his destination. Tim followed at a respectable distance, watched the dog go into the house, saw his master undo the package, and saw the legal paper fall immediately into his grasp.

"That's the copy," joyfully exclaimed Tim, peering forth from his hiding place under the window, "and here is the original."

Tim returned his writ to court; and the court decided after hearing an objection that the service was valid.

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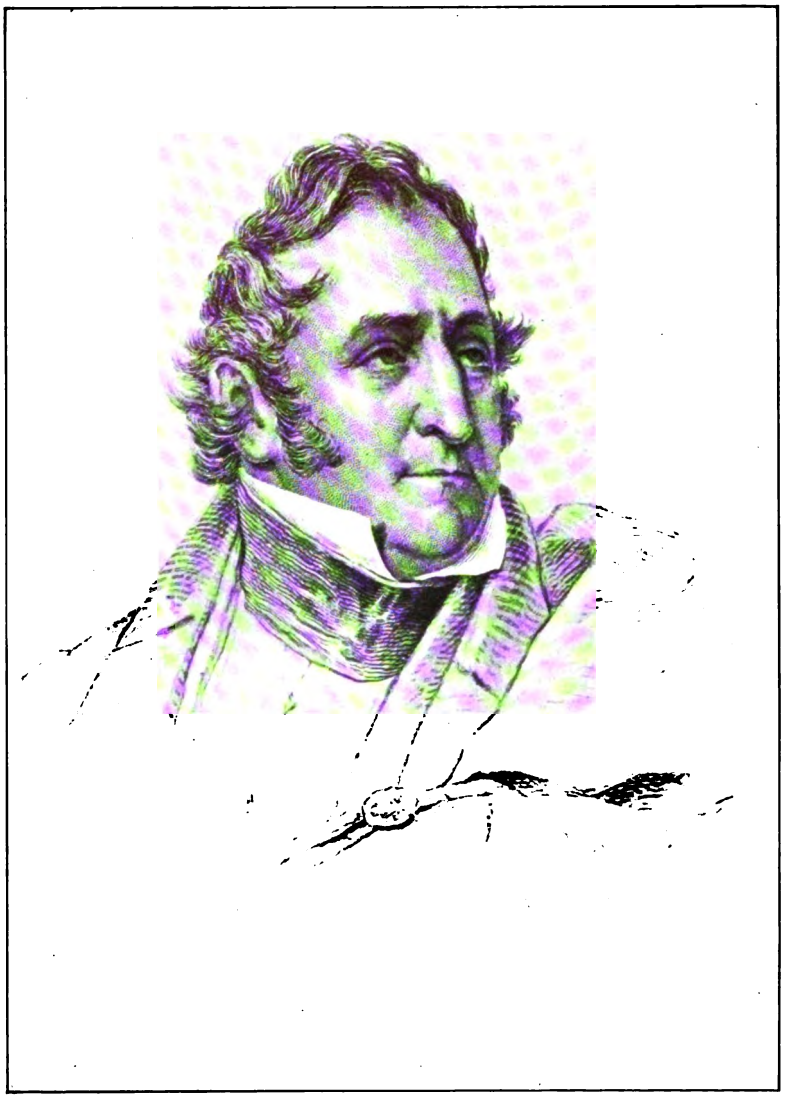

Thomas H. Benton.

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The Green Bag

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THOMAS H. BENTON AS A LAWYER

By Eugene L. Didier

WHEN the wilderness was king, and the fair land of Tennessee was overrun by hordes of lurking Indians, a small body of pioneers from North Carolina crossed the mountains and settled near Nashville, Tennessee. In the party were the widow Benton and her son, Thomas H. Benton. They had inherited a large tract of land from the elder Benton, who had been a lawyer in good standing in North Carolina. The father died when the son was only eight years old, and the boy's education was begun by his mother, who possessed a much broader mental cultivation than was usual at that time and place. She taught her son history and biography, and he thus acquired a taste for reading and study which never left him in all his subsequent busy public life. After the preliminary studies he entered the University of North Carolina, at Chapel Hill, but had been there a short time only when the removal to Tennessee put a stop to his college education. Having decided to study law he found in his father's library the necessary books for that purpose, and he went to work with energy, at the same time teaching a country school.

In the course of time he was admitted to the bar, and opened an office in a log house in the wild frontier town of Franklin. It was a lawless, rough, coarse, brawling set among whom the future senator and statesman was thrown in his early manhood. Physically, they were a splendid body of men — brave, daring, free, and independent; mentally, they were uneducated, unrefined, uncouth. Benton was far superior to the backwoodsmen both in mind and breeding, and in all the higher attributes of the class he was a magnificent representative of the strong, hardy, daring pioneers of Tennessee. His masterful mind and fearless soul marked him as a natural leader among those half-savage men. Dueling was the most refined way of settling disputes among the better class, while street fights, in which lawyers, politicians, and even judges participated, were of daily occurrence. Of these Benton had his share. Like his friend, General Jackson, he knew not the meaning of the word fear, and being quick, fiery, and spirited, he had many affairs of honor and tavern brawls. Like Jackson he fought his way, first through the bar and afterwards through politics, reaching a commanding position in both.

After the War of 1812, in which he was a colonel, Benton crossed the Mississippi and took up his permanent residence in the then territory of Missouri, in the French-American-Spanish city of St. Louis. Missouri was at that time the western border of civilization, or, rather, beyond the border of civilization. The people were very "western" in their habits. Success depended as much, if not more, upon push, pluck, audacity, and personal courage, as upon a knowledge of the law and experience at the bar. Judges rode to court armed to the teeth, carrying enormous pistols, and long, dangerous, murderous-looking knives, which were freely used upon the slightest provocation. Court week was the favorite time for persons to settle their quarrels, and the judge adjourned the court to allow the lawyers, and others, including his Honor, to witness the fight.

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In those days in Missouri and the West, generally, law and politics went hand in hand; all lawyers were politicians, although all politicians were not lawyers. Benton's vigorous intellect and forcible character soon made him one of the leaders of the bar of Missouri. In a new country, where land was acquired upon easy terms, there were many disputed land titles. This was especially the case in Missouri, where the titles to land were very mixed, based, as many of them were, upon concessions of land made by the old Spanish and French governments, which had been ratified by Congress, subject to certain conditions which the Creole inhabitants refused to fulfill. Congress decreed that these "inchoate" claims must be brought before the United States recorder of land titles. The Missouri bar were divided as to what was the proper action to be taken on them. The majority of the lawyers insisted that those claims should be held void, but a strong minority, headed by Benton, were opposed to the forfeiture of property on merely technical grounds, and declared in favor of affirming every honest claim. Benton was the most influential lawyer on that side of the question, and as he was recognized as the ablest, most honest, and active lawyer at the bar, had many titles under his professional care. His compensation depended upon his success, and he might have acquired a great fortune in this business, but before the matter was settled he was elected to the United States Senate, when Missouri was admitted into the Union in 1821, after a memorable contest, in which the newly elected senator had taken an active part. As soon as he was elected he informed his clients that he could no longer act as their attorney in prosecuting the claims, as their success would depend largely upon what action Congress would take; and as he was now a member of Congress, he was bound to consult, not the private interest of his clients, but the good of the whole community. As senator he was determined to be perfectly unbiased in acting upon the matter of the claims. In this he showed a sensitiveness of conscience which might be imitated with advantage at the present day. It was this admirable scruple of the new senator from Missouri which kept him out of a handsome fortune, but won for him the unqualified approbation of the people of Missouri, who, recognizing his preëminent honesty as well as great ability, returned him to the senate again and again until he had served the unparalleled period of thirty years. In this august assembly, Thomas H. Benton ranked high as a patriot and statesman, at the time when the genius and eloquence of Clay, Calhoun, and Webster dominated the Senate, and over-shadowed all lesser luminaries. Colonel Benton was the leader of the Senate in the support of President Jackson's administration, in opposition to the powerful triumvirate just mentioned. His long experience as a lawyer was of great service to him in the many measures which he advocated or opposed in the Senate. His knowledge of the law was not so profound as that of Webster — not so ornamental as that of Wirt — not so showy as that of Clay, but it was just what was required beyond the Mississippi during the first quarter of the nineteenth century. As a lawyer he laid the foundation of his future political fortune, and although he never returned to the active practice of his profession, he never forgot what it had been to him in the strenuous days of his youth.

When Alexander the Great was asked whether he would take part in the Olympian games, it is recorded that he answered, "Yes, if kings will be my antagonists." During the thirty years that Thomas H. Benton sat in the Senate of the United States, he had greater than kings as his antagonists in that great political arena. Not quite forty years old when he was elected to the Senate, he took at once a prominent position in that high assembly, most of the time leading his party, and all the time exerting a powerful influence upon

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public affairs. He was a man of strong convictions, and he had the courage to stick to them in defiance of the press, his party, and public opinion. Five successive terms Missouri had elected him to the Senate, but when he was a candidate for the sixth time, the pro-slavery and ultra Southern men were in the majority of the legislature, and he suffered his first defeat. His active mind could not remain idle, and as he was too old to return to the practice of his profession, he determined to use his pen, as he could no longer use his voice at the bar or in the forum. He wrote his great work, "Thirty Years' View of the Working of the Government of the United States." In this work, which covered his entire period of service in the Senate, he presented a connected history of public affairs from the time of Adams to Pierce. After finishing this important work, he undertook the gigantic task of condensing and revising the debates in the Senate from the foundation of the government. This was a laborious task for a man of seventy-five, but he continued it daily until prostrated on his deathbed. The work was completed down to the great compromise debate of 1850, in which he had taken a prominent part, together with Clay, Webster, Calhoun, Seward, Davis, Chase, and other leaders of the Senate. The last pages of the work were dictated in whispers, on his deathbed, when he could no longer speak aloud, a remarkable example of mental energy surviving physical decay.

BALTIMORE, MD., October, 1906.

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THE JURISPRUDENCE OF LAWLESSNESS

By Thomas J. Kernan

A FEW weeks ago I received from a great metropolitan journal a telegraphic request for a legal opinion stated substantially as follows:

"A man of wealth takes a young and beautiful girl under his protection. After the lapse of a year or more, she marries another man of wealth. After the marriage, her former protector does not renew his relations with her, but makes disparaging and insulting remarks about her, and her husband kills him without warning. Does this statement of facts present a case that would warrant a jury in returning a verdict of 'not guilty' under the 'unwritten law'?"

I promptly replied that I was unable to give an opinion upon the case stated as I was an attorney-at-law and not an attorney-at-lawlessness. The evident good faith and charming naïveté of this request, however, started a train of thought that ended in the query: "Do not we in America have, in reality, a jurisprudence, as it were, of lawlessness as well as a jurisprudence of law?" The more thought I have given this subject the more thoroughly convinced I have become that we have such a jurisprudence with its general principles — or rules, if you object to the use of the word principles in such a connection — its particular exceptions, refinements and distinctions. It is a jurisprudence which has almost assumed the dignity and symmetry of a system. It is neither legislative nor judge-made. It might, not inaptly, be styled a system of jury-made lawlessness, or *juries' imprudence*, which recognizes rights that are forbidden by law and denies rights that are granted by law. Necessarily it has no codes or text books, hence its pre-eminent claim to the title of "The Unwritten Law." It is in flagrant violation of all statutes, hence it is styled by its advocates, "The Law Above the Statutes" or "The Higher Law." It has its basic foundation in the public opinion of the communities in which it prevails, and has all the certainty and sanction that constitutions or statutes could give it.

It is not my purpose at this time to codify this jurisprudence of lawlessness or to make an exhaustive commentary upon it. The subject is too vast to be thus treated within the limits of a paper of this character. I shall merely formulate its fundamental rules constituting, as it were, the decalogue of the system, endeavor to trace their origin and find the reasons, if possible, of their validity and persistence, touch upon their effects upon society and ask if some of them may not be amended and legally adopted into the jurisprudence of law, and the rest wholly abrogated or made harmless.

This jurisprudence of lawlessness has both its criminal and its civil features. I have undertaken to formulate the system's decalogue in the following ten cardinal laws:

Law I.

Any man who commits rape upon a woman of chaste character shall, without trial or hearing of any kind, be instantly put to death by his captors or other body of respectable citizens not less than three in number; and they shall have the right to determine the mode of execution, which may be both cruel and unusual, the Constitution and laws of the state and of the United States to the contrary notwithstanding.

Law II.

Any man who commits adultery may be put to death with impunity by the injured husband, who shall have the right to determine the mode of execution, be it never so cowardly.

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LAW III.

Any man who seduces an innocent girl may, without a hearing, be shot, or stabbed, to death by her, or any near relative of hers; and if deemed necessary by the slayer, such shooting, or stabbing, may be done in the back, or while lying in wait.

LAW IV.

Any man who traduces a virtuous woman's character for chastity may be shot with impunity by her, or by her husband, or any near relative; but the offender must first be given an opportunity to deny and disprove the charge, or to retract and apologize.

LAW V.

The survivor of a fatal duel must be acquitted, if the duel was fairly conducted according to the time-honored provisions of the Code of Honor.

LAW VI.

Any man who kills another in a fair fight shall not be found guilty, either of murder or manslaughter, but must be acquitted, even though he be the sole aggressor.

LAW VII.

The lie direct and certain other well known opprobrious epithets, which constitute mortal insult, are each equal to a blow, and any of them justifies an assault.

LAW VIII.

In prosecutions for stealing horses, cattle or hogs, the presumption of innocence is shifted in favor of the live stock, and the accused is presumed to be guilty.

LAW IX.

In all civil suits by natural persons against corporations, the defendant corporation is presumed to be liable, and can establish want of liability only by a clear and decided preponderence of evidence.

LAW X.

In every action by employee against employer for personal injury, the plaintiff shall recover damages, unless the defendant employer proves want of liability beyond a reasonable doubt; and, in all such cases, the measure of damages shall be the pitiful condition of the plaintiff, the sympathy of the jury and the ability of the employer to pay.

All of the foregoing lawless laws are in full force and effect in some parts of this great and growing republic; and some of them in all parts of it. Wherever they are effective, they are enforced with much greater certainty and celerity, than any written statutes or sacred constitutions. Their existence poses a problem for American lawyers, the solution of which is destined to test severely their ability, courage and patriotism.

It will be observed that most of these lawless laws are operative within the dominion of criminal law; but we shall see later that those operative within the dominion of civil rights are none the less important. All of them, in their last analysis, have their origin and source in some real or supposed failure, defect or injustice of the law itself; most of the lawless rights they establish are granted by them as the counterparts of the real or supposed lawful wrongs which they are meant to compensate. The slow and painful processes of the courts and the utter inadequacy of all legal remedy for certain crimes have given rise to all the rest.

They seem to be abnormal and malignant growths upon the body of the law, and they must be either excised or removed by constitutional treatment of the legal system itself. The indicated remedy is necessarily legal, and it is the first great duty of American lawyers to discover and apply the remedy. That some radical remedy is the crying need of the hour none can deny. When the punishment of crime itself be-

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comes a crime, all organized government is shaken to its foundation stones and the fabric of civilization is fast tottering to its fall. It surely, then, behooves us, as the conservators of order and the preservers of civilization, to consider this subject most seriously and most closely.

These bastard laws of violence and wrong, like real laws, have their evolution from infancy through adolescence to maturity and thence to decay. Some of those we have cited are now in the full vigor of youth, some have reached the fullness of maturity, and some are falling into their decadence. Let us consider them somewhat in detail.

The strongest one of them all is the first which has been designated "Law I," relative to the violation of women by beasts in human form. This seems to be a law of almost universal application everywhere, and both the atrocious crime and its illegal and inhuman punishment seem to be alarmingly on the increase. It is almost impossible to read the morning paper any day in the year without seeing the report either of such a crime or such a punishment, often of both, and not seldom of more than one instance of each.

This deplorable condition of affairs has lately been accentuated and emphasized by the nullification of a decision of the Supreme Court of the United States by a Tennessee lynching and the public shooting of a rapist in the presence of the Governor of South Carolina; while, of late years, the horrors of torture and the stake have been borrowed from the dark ages to add to the brutailty of the terrible spectacle. It is impossible that the best, or even a high type of civilization can be developed or, having already been developed, can endure in a country where such atrocities are permitted, and, worse still, find their advocates and apologists. It may be trite, but it is as true as it is trite, that there is no safety beyond the realms where rules the law unchallenged in serene and sublime majesty proclaiming with the very voice of Deity: "Vengeance is mine; I will repay."

The first great fundamental right of every one accused of crime is a fair and impartial trial, and where this is denied liberty dies, personal security perishes from the earth, and all human rights are crucified. It matters not how heinous the crime or how guilty the criminal, this first great right of man must be preserved. It may, it is true, sometimes prove the means of escape for the guilty, but it is the only protection of the innocent. To those who ask: "If it be only necessary to deny, what will become of the guilty?" it may be fitly answered in the words of the Roman Cæsar: "If it be only necessary to accuse, what then will become of the innocent?" No, this inalienable right cannot be justly denied to any man and should be accorded even to Judas Iscariot if he were called before an earthly tribunal to answer for his betrayal of the Master. Apart from the crime under discussion, there is perhaps nothing more revolting to the human heart than the punishment of the innocent. To prevent this, all constitutions and all systems of law provide for the careful judicial investigation of all criminal accusations. In spite of every possible precaution, it sometimes happens that an innocent man is convicted and punished, as witness the Dreyfus case which so shocked the world. When an insensate and infuriated mob usurps and exercises the functions of the judiciary and arrogates to itself the right to mete out life or death to a fellow human being, what safety is there then for the citizen, what protection for the innocent? How many guiltless men have thus been condemned and executed by lawless mobs can never be known, but it is certain that many more will be added to the number unless this evil practice is soon arrested.

The outrage upon the rights of the individual accused is not all of the evil engendered and propagated by the resort to lynch law in such cases with its frequent attendant horrors of torture, mutilation, and

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the stake. The wound inflicted upon the law and upon society is even deeper and more ghastly. The flagrant violation and open defiance of law involved in the practice sets all law and authority at naught. It degrades the courts, debases the administration of justice, brings judges, juries, and lawyers all into contempt and strikes at the very roots of all social order.

One of the most deplorable results of such open and violent infractions of the law is their baleful educational influence. Apart from their evil influence upon the formation of the character of the youth of the country, apart from the fact that men who have participated in such an execution have now stained their hands with human blood and will be all the more ready to share in other executions of the same kind, these men who have done this and escaped punishment, and even heard themselves applauded for it, are apt to think that, if they have in this case administered justice so much better than the courts, they are able to do equally as well in all other cases, and that the courts of justice are mere useless survivals of an effete and decadent civilization which may as well be abolished or, at least, entirely ignored. Thus the road to anarchy is opened wide with the gaunt, grim figure of the red specter grinning in the distance.

In view of the utter fiendishness of the crime, some of us might be willing to waive even these potent objections to lynch law if it were effective to prevent the crime; but it is not. Experience has clearly demonstrated that it has absolutely no deterrent effect.

If, then, lynch law is an unmixed evil and utterly ineffective to prevent repetitions of the crimes it punishes, why is it that it is tolerated and even approved and applauded in so many highly organized, highly civilized and thoroughly refined communities in our country? The question is pertinent, and it will be necessary to find the true answer before we can hope to discover the remedy. The ready answer of the apologists for lynch law is that to require the victim to testify in open court to the facts necessary to convict is to repeat the outrage. In the case of a pure and modest woman, this is unquestionably a powerful argument; but the men who string up the fiend in human shape, or riddle his body with bullets, or burn the cringing wretch at the stake are not spurred to this frenzied action by any such consideration; such a logical argument comes in cooler moments as an after-thought. It is their overwhelming horror at the unspeakable fiendishness of the crime and their clear conviction that no punishment now provided by law is adequate to expiate it that sends the red blood pulsing from the surging heart to the heated brain, there to cry aloud for vengeance, that brooks no delay and demands sure, swift, and sudden death as the only atonement.

Any remedy for lynching, to be effective, must remove all excuse for it, otherwise it will be merely a remedy for symptoms of the malady, and foredoomed to ignominious failure. The proof of certain brutal facts, now required by law, must be dispensed with, and the attempt, accompanied by actual personal violence, must constitute the crime. In the case of any pure and modest woman, the outrage to her feelings is completed by such an attempt, and the crime also should be held to be then completed.

The testimony of witnesses should be taken *in camera*, in the presence of the accused and counsel and such persons only as the judge may admit to the hearing. The testimony, when taken, should be held inviolate, as is now done in certain divorce cases in some of the states. The publication of sensational reports of the proceedings in court should be prohibited by law. The trial should be speedy, and there should be no appeal. The judgment of the court should be instantly executed.

Attempts and the personal violence that accompanies them vary so greatly with the

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circumstances and the persons concerned in each particular case that the jury should have the right to render a verdict of guilty with or without capital punishment. It is safe to say that they will always impose the death penalty in all proper cases. Where a verdict of guilty without capital punishment is rendered, the judge should have a large discretion in the imposition of the penalty, in crder that he may be able to make the punishment fit the crime. But where the verdict is guilty with capital punishment, swift and inexcrable death, in horrid form, should be the inevitable penalty. The crime stands alone in horror among all crimes, and its punishments too should stand alone in terror among all punishments. The convict should be executed in public by some form of death so supremely horrible as to strike terror even to the hearts of fiends themselves.

The English in India found that the death penalty had no terrors for the mutinous Sepoys until they began to blow them into eternity from the mouths of cannon. It might be well legally to destroy our human fiends by blowing them into atoms with dynamite, or by casting them into a burning pit, simulating as nearly as may be the popular conception of the fires of hell. Only such a death will ever seem adequate punishment for such a crime. If the punishment be inhuman, is there anything human about the crime or the criminal? Is any sacrifice too great to be demanded in expiation of such a crime? If it is not granted by the law, the wild cry for vengeance of a people writhing in dumb, helpless agony will continue to be heard and heeded by the mob; and lawless executions will increase in number and in horror. The situation is daily becoming more unbearable, and we lawyers must end it or cease boasting of our usefulness to civilization and society.

Laws II, III, and IV of our decalogue may be considered together, as they are all of the same character, denounce offenses against women, and impose the death penalty. It is interesting to note the careful distinctions and studied refinements made by this barbarous code of lawlessness which are well illustrated by these three of its laws. It will be observed that the adulterer may be slain by the husband alone, while the seducer and the slanderer may be put to death either by his victim or by any near relative of hers. Mark also that the adulterer and the seducer may be assassinated without warning of any kind, while the slanderer must have a hearing and be given a chance for his life.

None of these three laws are so widely recognized and enforced as Law I, but they are recognized and obeyed to an extent sufficient to make them extremely dangerous both to individuals and to society. When any one of them is set up in defense of a prosecution for homicide, it is seldom, indeed, that the accused is convicted; and who shall say how often they are thus falsely pleaded to excuse bloody murder? While their enforcement is not usually attended with the multiplied horrors of lynching, yet they are amenable to all the other potent objections to that bloody custom and to some others peculiarly their own. The bloody work of the lyncher is not a solitary crime; it is usually done, to some extent at least, in the open, but the offenses denounced by these three laws are usually punished by cowardly assassination at the hands of one man without sponsors or witnesses. In case of rape there is always, at least, proof of the *corpus delicti;* this is frequently lacking in cases of adultery, seduction, and slander. When we add to this grave defect in the proof of a capital crime the many powerful motives to charge these offenses falsely in justification of homicide prompted by other motives it becomes evident that no civilized state can long endure them and that they must be abrogated.

They all probably have for their *raison d'être* the absurdly inadequate remedy provided by law. In many of the states none of these offenses are punishable as crimes,

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and the injured person is relegated to a civil action for damages. What consolation does such a remedy bring to outraged husband or innocent girl victim, or her family, for a happy hearthstone desolated and a precious life blasted forever? "The jingling of the guinea" never did and never will "help the hurt that honor feels." What surprise is it, then, that one so deeply injured should himself seek redress when the law gives him none? Such crimes should be made felonies at law and their perpetrators should be clad in stripes. The humiliation of a public trial should be spared the victims. Such trials, both civil and criminal, should be had *in camera*, and whatever evidence is reduced to writing should be put under seal and kept under seal until it shall no longer be necessary to keep it, when it should be destroyed. When an appeal to the law can be made without real or supposed loss of dignity and with reasonable certainty that a penalty commensurate with the crime will be inflicted, these three lawless laws will cease to have effect and the number of bloody murders in these United States will visibly decrease. God speed the day when this shall be!

It is customary nowadays to say that the duel belongs to a barbarous age that is past, and that the code duello is obsolete. It is true that the formal duel, with seconds and surgeons and all the punctilio of diplomatic procedure, is no longer in vogue in this country, but a much more dangerous and deadly form of it, the street duel, is still too much the fashion and gives no sign of decadence. In the old days of the ceremonial duel the laws of most, if not all, of the states provided that the survivor of a fatal duel should be guilty of murder and punished with death. In those good old days a learned judge, full of years and honors, in his charge to the jury in a case under a such statute, said to them: "Gentlemen of the jury, the law provides that any man who kills another in a duel is guilty of murder and shall suffer death, and I so charge you; but, gentlemen of the jury, the evidence in this case shows that this duel was as fair as any duel ever fought between two gallant gentlemen on Mississippi's sacred soil, so famed for glorious affairs of honor." It is needless to say that the jury promptly acquitted the accused. It is hardly a debatable question that the code duello did save more lives than it cost. I once had a published copy of it in my library and appealed to it more than once with the result of avoiding bloodshed in every instance.

Laws V and VI apply to both forms of the duel. The formal duel has become so rare that, for our purpose, it may be regarded as a negligible quantity. But the street duel is so deadly, both to participants and bystanders, so utterly destructive of all peace and good order, that some means should be found instantly to suppress it. It is true that it gradually disappears before the slow march of civilization; but it is our duty, as lawyers, to speed this unwelcome parting guest. When death occurs, the charge of murder or manslaughter is most frequently met by what has come to be known as the hip-pocket plea of self-defense. It is proved by the prisoner that the deceased reached for his hip-pocket as if to draw a pistol, when the prisoner managed to draw first and shot the deceased in self-defense. The deceased is not in a position to deny the statement; and, although the killing is almost always murder or manslaughter under the law, the jury finds that it was a fair fight, in which each combatant had an equal show, and promptly renders a verdict of "Not guilty"; and the accused receives an ovation of congratulations from his friends and admirers, and returns to the bosom of his family, not a criminal, but something of a hero. So very common are occurrences of this kind in some jurisdictions that the law of manslaughter has become practically obsolete.

The question of a remedy here is most difficult. The plea of self-defense is always

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at hand, the proof is easy, and contradiction, in most cases, impossible. Some have suggested that the old ceremonial duel be revived and legitimized, with the proviso that neither firearms nor daggers be used; in other words, that the French duel should be transplanted to American soil. It is very doubtful whether it would flourish here.

The street duel is usually fought with weapons carried concealed upon the persons of the combatants. If it were possible effectually to prevent the carrying of concealed weapons, these deadly affrays would cease automatically. This, however, seems to be impossible of accomplishment by ordinary legislation; all the states have laws prohibiting and punishing the practice, and yet it goes merrily on without surcease or appreciable decrease by reason of such laws.

However, while it seems to be impossible to prevent the carrying of concealed weapons by imposing a penalty for so doing, much good might possibly be accomplished by making the use of a concealed weapon, where death results, highly criminal *per se*, despite proof of self-defense. A law of this kind properly enforced would undoubtedly materially decrease the number of street duels, because there would be no defense for the survivor if he used a concealed weapon. If the use of a concealed weapon were thus made *per se* criminal, men would cease carrying them, and the many homicides of all kinds which now stain our annals would be materially diminished. All hail and welcome the happy advent of that auspicious day!

Under the theory of the old common law only cowards were permitted to kill in self-defense; a man was compelled to flee like a craven and be cornered like a rat in a hole before he could legally deliver the *coup de grâce* to his adversary. The refinements of the bench and the rough-edged administration of justice from the jury box finally succeeded in amending that absurd law, and now flight is no longer necessary, but the person attacked may pursue and kill his adversary if necessary to his own protection.

Equally senseless as the old law just cited is the modern law that no words justify an assault. By common consent a man who brooks a mortal insult without instantly resenting it stands disgraced in the eyes of all men. In these circumstances, then, can it be expected that such an unnatural and absurd law should command either respect or obedience? LAW VII of our Decalogue of Lawlessness ordains that it shall not; and LAW VII is enforced in all jurisdictions in this country; and it is right that it should be. The law of the land should not force any man to sacrifice his self-respect and the respect of his fellowmen in order to obey the law. Our lawless LAW VII makes the lie direct and certain other mortal insults equal to the first blow that justifies the immediate punishment of the offender. This doctrine is more in harmony with common sense and right reason, and should be legitimized and incorporated in the law of the land. It goes without saying, of course, that when this is done legal safeguards should be provided to prevent its abuse.

When the pioneer first pressed his adventurous way through the hidden mysteries of the enchanted forest that once covered this vast continent, his horse and his rifle were his only friends. When he established his solitary ranch on the lonely and far-stretching prairie, his horses, his cattle, and other live stock were his only wealth. These were all the easy prey of thieves and marauders. Small wonder, then, that they should become the objects of his special solicitude and protection. At first the horse and cattle thieves were unceremoniously hung as soon as they were caught. The same spirit of protection for these dumb members of the household survives and manifests itself to-day in LAW VIII of our decalogue, which presumes the guilt of the man accused of stealing any of them, and gives the animal instead of the accused the benefit of the

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doubt. Fortunately the accused is usually caught in possession of the stolen animal, and then the burden of proof is properly imposed upon him. Be this as it may, the evil results arising from the enforcement of this LAW VIII are not of sufficient importance to merit further discussion here.

This exhausts our discussion on the Unwritten Law in its criminal phases. It was said at the beginning of this paper that it also had its civil features of no less importance than its criminal features. We are now come to the discussion of its doctrine of civil rights, which is, in great part, embodied in Laws IX and X of our decalogue.

These laws are quite uniformly enforced by juries everywhere in the United States. They always give the natural person the advantage of the corporation, and the latter must make out the strongest possible case to escape an adverse verdict. In the case of a suit for personal injury by an employee against an employer, there is almost no escape at all for the employer. I am told that when the jury retires in such a case the first, and about the only question discussed is the *quantum* of damages, or, as they express it, "How much shall we give the poor devil?" The human heart is naturally sympathetic, and it is easy to be generous at the expense of another, especially if that other be rich or reputed so. Right here we find the sanction for these laws that smack so strongly of socialism. It is, as it were, the blind protest of the people against the unequal distribution of wealth, against the hopelessness of the struggle of labor against capital in this republic. The man in need of daily bread sees vast useless fortunes in the hands of individuals, corporations, and syndicates ever growing greater, while his struggle for the necessaries of life constantly grows harder and more desperate. When the average man is called to decide between the two we need not be surprised that he undertakes to restore the economic equilibrium, as it were, to the extent of his power, and favors the living, breathing, suffering man against the soulless corporation and the unfed laborer against the overfed capitalist. Of course this is all wrong, for all parties should be equal before the law, and the scales of justice should be poised by a goddess blinded both to favor and to fear But we all know that they are not so held, and that this chaste goddess obeys LAWS IX and X of our decalogue just as implicitly as common mortal men do. This is a terribly weak spot in our system of jurisprudence, and, if not corrected, bids fair to undermine it utterly.

The same sentiment that makes juries disregard the law in such cases is at the root of the widespread, restless discontent with social conditions that pervades the entire land to-day. The indiscriminate agitation against so-called trusts, the hatred of men of wealth, the agitation for public ownership of railroads and the like, all find their first cause in the protest of the people against the establishment of plutocracy in this country. This species of bastard aristocracy is the worst form of caste known to men. Its ultimate evolution results in a few vulgar masters and a horde of overworked and underfed slaves. Should we be astonished, then, that freeborn Americans protest against the establishment of an oligarchy of wealth upon this sacred soil of ours, won from the wilderness, the wild beasts, and the savage by our great and gallant forefathers and since consecrated by the precious blood of the best and bravest of men.

The ills of a state, "where wealth accumulates and men decay," are not cured by simples. The men of our country have not yet begun to decay, but the day is not far distant when they will unless wealth soon ceases to accumulate at its present alarming rate. I fear we must dig down deep and look far and wide before we can find remedy, or prophylactic, effective to arrest a morbific economic force of such giant strength as finds expression in the ills that now afflict us and promise to afflict us more. Disregard of law by the courts, arbitrary inter-

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ference by the executive power, confiscatory legislation, are all quack remedies, worse than the disease, because they all deal with symptoms only; none of them strike at the root of the disease and eradicate it. Besides, they all involve the prostitution of the powers of government to improper purposes, which tends inevitably to the eventual destruction of all free institutions — nay, all government itself.

Where, then, shall we find the remedy? I represent several railroads and some rich employers of labor. I am thoroughly familiar with conditions in Louisiana and several adjacent states. In respect of the abnormal accumulation of wealth in individual hands, and the consequent prevailing unrest and spirit of socialism that is to-day abroad in the land, I do not hesitate to say that my own, my native state, Louisiana, is far and away more fortunately situated than any other state in the union. *A priori*, this would seem strange, if not impossible; for Louisiana has the most heterogeneous population, living under the most widely varied conditions, of any portion of America. Her people differ from one another in race, religion, language, and tradition. Her topographical structure embraces every type from marsh to mountain. Her variety of climate is illustrated by the variety of her products, which embrace everything from the cotton, cane, figs, and oranges of the South to the wheat, rye, and barley of the North, and from the beautiful tropic camelia to the shrinking northern crocus. It is but a few short years ago that her laws were printed and the processes of her courts conducted both in the English and the French languages. Despite all these contrarieties and consequent obstacles to harmonious government, I repeat that Louisiana is to-day the most happily governed state in the republic, and freest from the "hastening ills" of which the rest complain.

Of course, there is a reason for this. It is to be found in the beneficent wisdom of her laws. There is no subject of which both the people and the profession of other states are so ignorant as the law of Louisiana. To paraphrase an expression much in vogue, it is more Roman than the Civil Law, more French than the law of France. Translated from *La Belle France* to the banks of the Mississippi in the heroic days of the Consulate, it escaped the withering touch of the despotic hands of the first and second empires, and their ill-starred attempts to establish a *parvenu* aristocracy on the ruins of the republic.

The law of Louisiana prohibits *fidei commissa*, or common law trusts, and makes the distribution of estates compulsory by forced heirship. The direct, sure, constant, and powerful operation of these laws effectively prevents the concentration of wealth in the hands of the few or makes it merely temporary. Under their salutary influence the distribution of wealth is uninterruptedly and automatically accomplished. It may be asked to what good purpose did our forefathers flee to the wilderness to escape the baleful effects of the laws of primogeniture, entails, and the other legal buttresses of an arrogant and oppressive aristocracy in England if they are to be revived here, as they are being revived to-day, in the form of a family compact by which the bulk of almost every great fortune is devised to one child, coupled with the agreement that it shall pass on down the line from father to son to the end of time; or if entails are practically reëstablished here, as they are being reëstablished, by long trusts whereby property is tied up and taken out of commerce for an indefinite period.

These evils are dissipated and cannot reappear under a system of law-forbidding trusts and compelling the distribution of estates by an equal division among the heirs. Thomas Jefferson declared that the best of all agrarian laws is the law of equal distribution among heirs.

The limits of this paper do not permit a full discussion of the powerful influence exercised by the laws of inheritance upon

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human affairs. We cannot do better than close this paper by quoting what that eminent publicist, De Tocqueville, says of them:

"It is true these laws belong to civil affairs, but they ought nevertheless to be placed at the head of all political institutions, for they exercise an incredible influence upon the social state of a people whilst political laws only show what the state already is. They have, moreover, a sure and uniform manner of operating upon society, affecting, as it were, generations yet unborn. Through their means man acquires a kind of supernatural power over the future of his fellow-creatures. When the legislator has once regulated the law of inheritance he can rest from his labors. The machine, once put in motion, will go on for ages and advance, as if self-guided, towards a point indicated beforehand. When framed in a particular manner, this law unites, draws together and vests property and power in a few hands; it causes an aristocracy to spring, so to speak, out of the ground. If formed on opposite principles, its action is still more rapid; it divides, distributes, and disperses both property and power."

BATON ROUGE, LA., August, 1906.

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SOME NEEDED REFORMS IN DIVORCE LEGISLATION

By E. D. Leach

WHATEVER the direct influence upon future divorce legislation the action of the late Congress on Uniform Divorce Laws may be, the expressions of dissatisfaction with the present laws augurs well for some radical reforms in the near future.

What these changes should be are not so easily agreed upon, as there seems to be a wide difference of opinion as to the nature and causes of the evils sought to be remedied. The term "the divorce evil" has been so much overworked and is used to convey so many different ideas that it is not always easy to decide just what is intended to be understood when it is referred to. This, it would seem, is sufficient to warrant the statement that that popular opinion in this particular is not the result of well established facts or of reliable data.

Because it is sometimes possible for married persons to secure a divorce with less difficulty in some state other than the one in which they are domiciled, is, undoubtedly, one of the popular conceptions of "the divorce evil." But the facts do not warrant such a conclusion. The Hon. Carroll D. Wright, after compiling the statistics of 231,000 divorce cases in the United States, covering a period of twenty years from 1867 to 1886, discovered that, where the place of marriage was known, 80.1 per cent of these divorces were granted in the states where the marriages occurred. It also appearing that about twenty-three per cent of the people were not living in the same state where born, the Rev. Dr. Samuel W. Dike, the Secretary of the National League for the Protection of the Family, who assisted Mr. Wright in his investigation, estimated that not more than two or three per cent of these divorces were secured by persons changing jurisdictions for that purpose. That conditions have since improved is claimed by Prof. George Elliot Howard, an eminent authority, who says: "At present (1905) the relative number of such clandestine divorces is doubtless much less than in 1886, for in many vital points the laws of the states then chiefly responsible for the evils have become more stringent." So it would appear from the best available authority that the evils of the migratory divorce are chiefly imaginary.

Statistics also show that the number of divorces in proportion to the number of marriages is increasing in European countries as well as in the United States. Therefore, it is quite evident that American legislation is not solely responsible for the present condition, as some would have us believe.

While the statutory grounds for divorce vary in the several states from one in New York to fourteen in New Hampshire, there does not seem to be any perceptible difference among the states in the number of divorces granted in proportion to the number of marriages. The slight variance that does exist is more liable to be the result of other causes than the difference in statutes.

A somewhat extended, though unsystematic, inquiry among lawyers and judges who have given the subject unbiased consideration, confirms my experience that it is the exception rather than the rule when a divorce is sought solely because of a statutory offense. An exception should, however, be made in cases where the statutes permit divorces for confinement in the penitentiary, for insanity, and the like. But with these exceptions it appears to make very little difference what the statutory grounds are, so long as the desire to be freed from the matrimonial bond exists. The mere matter of evidence is largely a formality.

It is right here that Science and the Church are in sharp conflict. The latter

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insisting that it is a sin to satisfy such "fickle desires;" the former believing that these desires are the result of violations of Nature's laws over which Legislation and Religion have no control. Now, what should be the nature of the divorce legislation of the future? If the object of legislation is to benefit the individual and the state, then it must necessarily be along rationalistic lines; if it is to foster ecclesiastical dogma then, of course, let there be no divorce or, if there be, let the grounds therefor be of such fictious character as may be agreed upon. The present system is a typical illustration.

Members of the medical profession are, as a class, the best qualified to speak from experience concerning the primary causes for divorce. They usually know the reasons while the Courts only hear of the results. In an endeavor to ascertain as general an opinion of the profession as possible, several queries were recently sent to physicians throughout the United States, without distinction as to school, city, or country. A wide circulation of the replies received would create more sentiment in favor of reform legislation than any muck-raking achievement of modern times. A summary of the replies to some of the queries will, however, answer the purposes of this paper.

In reply to the query as to what were the principal primary causes for divorce, the answers of eighty-nine per cent of those who replied may be generally expressed as being "improper marriages and unnatural marital conditions." These conditions, it is claimed, are often pathological and the results of ignorance, indiscretion, incorrect modes of living, etc. The other eleven per cent did not answer this question, or replied that they did not desire to express an opinion.

The want of proper instruction seems to be a most important factor, as ninety-seven per cent of the replies expressed opinions that education in sexual matters would overcome, at least to a large extent, the evils of improper marriages and unnatural conditions. Only three per cent doubted this. The character of the instruction is, of course, of primary importance, for a distinction must always be recognized between moral and purely intellectual education. The latter would be of but little value, as piety, virtue, and self-control are not the constant attendants of learning or great gifts of genius; while the influences of the former would, if properly taught, prove of inestimable value to the individual, the family, and to society at large.

The unreasonableness and injustice of our past and present divorce legislation is clearly seen when we understand that no matter what the real causes are which prompt married people to separate, it is necessary for one of them to commit a statutory offense, and in many states a crime, before a Court of Equity can take cognizance of a prayer for relief. To what extent these conditions tend to foster crime and disregard for law, would be an interesting subject for investigation. But that a reform as to statutory causes would be of advantage to the individual and to society is obvious, for ninety-two per cent of the physicians who replied to this query recommended that divorces be granted whenever pathological and psychopathical states, such as accompany or create abnormal sexual conditions, exist. Some few would make a distinction as to certain states when there were children. Of the remainder of those who responded, six per cent did not so recommend, and two per cent did not express an opinion.

Other investigations seem to sustain these opinions. For if divorces are the result of the conditions mentioned, we would expect to find many, if not most, of these conditions manifest soon after marriage, and the more serious the conditions the shorter would be the duration of married life. James Bryce is authority for the statement that in one-half of the cases in the United

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States, divorces have been granted within six years from the date of the marriage. Mr. Wright's investigation showed that on the average 9.17 years elapsed between the marriage and the divorce, and that nearly two-thirds of the divorces were granted to the wives. Some recent investigations show that eighty per cent of the divorces are granted to the wives, and that they usually sue because of desertion when that is statutory, as is now the case in forty-six states and territories. The term of desertion now necessary to be proved varies from one to ten years, with an average of a little over two years, which is much less than was the average in 1886. There is also, undoubtedly, a proportionate decrease in the average duration of marriages terminated by divorce.

From these figures a conservative estimate would place the average time during which divorced persons actually lived together at less than three years in one-half of the cases and at less than six years in the remainder. Judging from the reports of a few states which compile divorce statistics, the next government report will probably show this estimate too high.

While a few hundred physicians cannot voice the sentiments of the whole profession, the unaminity of these opinions, coming as they do from some of the most prominent as well as the less conspicuous practitioners, certainly demands the most serious consideration. And while there is slight consolation here for the ecclesiastic, who can doubt but that legislation applicable to the conditions herein suggested would go far toward solving the real evils of the divorce and many other social problems?

MOUNDSVILLE, W. VA., October, 1906.

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LAWYERS AND CORPORATE CAPITALIZATION

By Edward M. Shepard

TWO matters which concern us as American lawyers, though quite distinct, are truly related. The first is the reduced rank in popular esteem which the Bar holds to-day in public or political matters as compared with its rank a generation or more ago. The second is the reform of one of the abuses in corporate management, which, since corporations are so large a part of the clientage of the modern lawyer, and since he is accordingly held responsible for some of their misdoing, has in real part caused such diminution of his share in the statesmanship of the country.

Is it not true that our profession has in late years suffered a distinct loss of prestige in its relations to public life, a real diminution in its hold upon the public sentiment of the American people? Certainly in my own state of New York, and in the other more populous and richer states, there is such change, material and even serious — at least it seems to be so. Do we not see or feel the change in many, perhaps most, of the states? Lawyers are richer; but they influence the public conscience less. And their influence, such as it is, in behalf of any public cause is often indirect or concealed — I do not now mean for sinister reasons — but lest the support of lawyers may injure the cause with the masses of people. Whether the change is to be permanent, no one can tell. You and I hope not; we believe not. Naturally enough we assume the change to be injurious to the Bar, to its power and large place in the public service; and others will hardly dispute that assumption. There will, however, be dispute whether the change be correspondingly injurious to the public welfare, whether politics and government suffer because the part of lawyers in them is less important. I frankly affirm my belief that our politics and statesmanship do suffer on that account, and that this modern disparagement of the Bar is injurious to the thoroughness and sobriety of our statesmanship, to the persistence of principle in our politics. You remember De Tocqueville's oft-quoted statements with respect to the United States of about 1830. He said:

"As the lawyers form the only enlightened class whom the people do not mistrust, they are naturally called upon to occupy most of the public stations. They fill the legislative assemblies, and are at the head of the administration; they consequently exercise a powerful influence upon the formation of the law, and upon its execution. . . .

"The lawyers of the United States form a party which is but little feared and scarcely perceived, which has no badge peculiar to itself, which adapts itself with great flexibility to the exigencies of the time, and accommodates itself without resistance to all the movements of the social body. But this party extends over the whole community and penetrates into all the classes which compose it; it acts upon the country imperceptibly, but finally fashions it to suit its own purpose."

The statesmen, the publicists, and political administrators, with few exceptions, in both political parties, were, at the time of our Civil War and long before and long after it, lawyers. During that war, many of the ablest officers in the armies, Union and Confederate, had come from the ranks of practicing lawyers. The function of our courts in the determination of constitutional questions, which, in underlying reality, are questions of constructive statesmanship, is, no doubt, one reason for, one illustration of, the breadth of view which has been nobly characteristic of the American Bar. Mr. Frederick Trevor Hill has pointed out, in the recent and interesting articles in the

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Century upon the professional career of Abraham Lincoln, that, when he came to the presidency, he surrendered a railroad corporation practice perhaps the most important of any in Illinois. Seward was a distinguished lawyer, as was his contemporary, Franklin Pierce, and as Webster, Clay, Calhoun, Silas Wright of New York, and your own Levi Woodbury had been before him. The Adamses and Jefferson of a still earlier day were lawyers until public duties occupied their entire time. Even General Jackson had been a successful lawyer and a judge upon the frontier before he was famous as a soldier. Anyone who carefully studies Jackson's life, especially in light of his most interesting autographic correspondence with Martin Van Buren recently acquired by the Department of Manuscripts in the Congressional Library at Washington, will find, and perhaps to his surprise, that Jackson never lost the traits and instinct of the lawyer. Samuel J. Tilden was one of the first, probably the very first, of American corporation lawyers at the time that he was candidate for the presidency, and, as some of us think, elected to it. He was at any rate one of the first of America's statesmen. Mr. Cleveland, when he gave up the private earning of money upon his election to the governorship of New York, held an honorable and successful place as a lawyer, and especially a corporation lawyer, at Buffalo. Mr. Harrison, twice his competitor for the presidency, held a like and even more distinguished professional place in Indiana. And so I might go on. These men filled great places — Mr. Cleveland still fills such a place — in American public life. Disparagements of the legal profession, some of them jocose and most of them tolerably frivolous, were as common in those days as now. But the conception that a lawyer was dedicated for life or his career to the interests of any client, however important, or any set of clients, however important, was not known. It was then and very sensibly supposed that the same rigorous rule of honor to which the lawyer must be subject when he represents a private client must and would dominate a lawyer of character fit to a high place, if he were to come to represent any public interest. His very loyalty to lesser clients would assure his supreme loyalty to the city, the state, or the nation, if it were to become his client. With the enormous growth of business of corporations, and especially of railroad, banking, and industrial corporations, the professional work done for them by lawyers has, of course, enormously increased. And it is with this growth, and partly because of it, that there has arisen this disparagement of the lawyer in his relations to public affairs. In large measure the disparagement has been ignorant; but it has been none the less serious.

Many of our latter day leaders in public life have never been active, practicing lawyers. President Roosevelt, who leads the Republican party, served a very brief apprenticeship as a lawyer, but he never practiced law, and his faculties and achievements, whether they be praised or criticised, are not those of a lawyer. So with Mr. Bryan, who leads the Democratic party, and who also served an apprenticeship as a lawyer, but who did not as a lawyer make any part of his present repute. If we think of his profession as other than that of a politician or statesman we think of journalism. Indeed it is now sometimes doubtful whether the inheritance of great fortune is not, for the American people as it is for the English people, a better equipment for great public station than the training of a lawyer. The rail-splitter or the tow-path boy is not the only ideal young statesman. The fortunes, for instance, which President Roosevelt and Mayor Low of New York City inherited and which enabled them to dedicate their entire time and energy to public service from youth, have, I think, been agreeable to the American people. Mr. Hearst is certainly a powerful factor in present day politics; and his great fortune and

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the idea of his immunity from the necessity of earning an income, certainly do not displease large masses of the American people.

This is a long prelude to the subject of my address to-day; but it is not irrelevant. The relations of great corporations to the lawyers who have advised them have sometimes, perhaps often, seemed sinister to the American people. I know, as no doubt you do, enough of that body of lawyers to realize that among them are men of all kinds; and that some are merely acute and high-class janizaries whose consciences are for hire with their professional abilities. They are, however, exceptions. It is my long and deliberate belief that, in respect of disinterested wisdom on public questions or of a high and rigorous standard of morals for public trusts and the duties of citizenship, no men can be found in any calling superior, on the average, to lawyers, including even the men who have professionally served corporate interests. To say the contrary would disparage the discernment of the corporations even more than it would the morality of the lawyers. The present Secretary of State of the United States, for instance, at the time of his appointment to his present position represented perhaps as many corporate interests as any American lawyer. It is easy for members of the Bar, as until recently it was easy for every intelligent American, to understand that all his retainers, direct or indirect, have been given up and that to-day he holds but one retainer, and that from the people of the United States. To him as to any true lawyer the contrary idea would be abhorrent. If in any public matter he had, when in private life, acted for private interests, upon that matter he would clearly and frankly state his committal and take care that upon that matter the public was served by some one free of any committal. The error, if any, on the part of Secretary Root ought to be, and no doubt is, the error of "leaning backwards." Indeed it is easy for lawyers to realize, as the public generally used to realize, that, even in the relations of public interests to corporate plans and ambitions, the service to the government of the United States or of any of the states, of men themselves thoroughly familiar with corporate plans and procedure, may be of inestimable value. That we may doubtless assume to have been the case in the relations of President Roosevelt with Secretary Root, or with Mr. Knox who, when lately the Attorney General, argued the Northern Securities case for the United States.

But, easy as it would be to cite many and shining examples like Mr. Root or Mr. Knox, the fact remains that the Bar has, through its vastly increased representation of corporate interests, lost, whether deservedly or not, an appreciable part of its just and long time hold upon the public sentiment of the American people. Nor would the facts justify us if we were to deny that for this there is, at the least, some ground. A lawyer may very justly present to a legislative committee or to a governor an argument in behalf of any plan of a railroad corporation, or for any special interest, so long as he speaks confessed and definitely for his client, putting his client's view, but putting it fairly and truthfully. His client may be right or wrong; but in either case he performs a useful function in no way inconsistent with his perfectly independent and trustworthy devotion to the public interests. When, however, it has happened, as it sometimes has, and, I am sorry to say, more often than we could wish, that a lawyer addressing the public or public officers, and assuming the guise of disinterested concern for the public welfare, has really and truly spoken in behalf of undisclosed clients whose retainers were secretly in his pocket, he has done not only something which is inconsistent with the flawless integrity belonging to the true lawyer, but something which ought to be abhorrent to every right thinking man. Whether it be in executive office or in Congress, or as a candidate, or upon the stump, a lawyer dealing with a public question in

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which a client who has retained him is interested, is bound by sheer elementary considerations of honor to frankly state his professional relation to the client. It is his plain duty scrupulously to abstain from any attempt to influence public sentiment in favor of or against any public measure in which his client is interested or upon which he cannot as comfortably differ from his client as he can agree with him, except when he speaks openly and confessedly for his client as a retained advocate.

There is a further duty upon us. Governmental problems related to corporations are of enormous present and future importance to the American people. They involve far-reaching considerations of monopoly and of taxation, a share, oftentimes a dangerous share, in the control of the sources of political power and a share, also a dangerous share, in the control of public administration. It is for lawyers as it is for no other body, and, among them, for those who earn any part of their living by serving corporate interests, to be courageously independent in dealing with questions of corporate reform. I think sufficiently well of the good sense, if not the patriotism of many, perhaps most, of those who control important corporate interests, to believe that they will think no worse of their counsel who, in public relations, advocate reforms and regulations which they, perhaps, may not approve. At any rate, a lawyer who cannot exercise this liberty ought to exclude himself from all participation in public life, or, if he do not, then he ought by his fellow-citizens to be peremptorily excluded from any hearing upon public affairs.

It is by way of an attempt to myself perform some small part of the duty which I thus enforce upon my profession, that I invite you to my second and principal topic. I ask you to consider one feature of American corporation law, its abuses, and the injury it does corporations in public esteem. I refer to the legal requirement of specific capitalization in the incorporation of companies, and the tendency of such capitalization to become nominal or fictitious. I propose for your consideration whether it may not be wise to abolish altogether our requirement of a charter or technical capitalization of corporations. I would permit the creation by a company of as many shares of its capital stock as it sees fit; but I would not have the law require for the shares any money denomination, that is to say, any par value. I would not have the law prescribe a fixed money capital, except, of course, as the law may, in the case of banks or insurance, or railroad or other companies, require that a specific net money capital be on hand as the conditions of doing business.

In your state and in mine, and in all the American states with hardly an exception, the law does not permit the incorporation of a company for transportation, banking, insurance, industrial, or other business purpose unless in the certificate or articles of incorporation the total capital be prescribed and also the number of shares into which such capital is to be divided and the par value of each share. Why should the total capital be prescribed? Why should the par value of each share be prescribed? What purpose do these statements in the instrument of incorporation serve? Do they not lead, and lead very commonly, to fictitious capitalization, to statements by corporations and by those who promote them that are misleading, to an unreasonable and sometimes oppressive or even dangerous effort in the result to justify a capitalization which originally was unjustified? Do they not oftentimes lead to absurd and even immoral discrepancies between the nominal money valuation of the assets of corporations and the valuation made for purposes of public taxation? If our system of corporate capitalization produces, as I think it does, these and other evils, is it nevertheless necessary? Is it useful from the standpoint of sound public policy? Does it serve

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any purpose except to facilitate operations of promoters and of bankers which serve no good purpose to the community?

In brief, I propose a modification of our laws for the formation of corporations so as to abolish all nominal or arbitrary or required valuations or denominations in money of shares of stock. Otherwise than as may be required for taxation, I would have the law leave it to corporations, and those who administer them, to make any representation that they see fit, or, if they see fit, no representation at all as to the net valuations of their enterprises, but with the understanding that they will be rigorously liable for misrepresentations. The law would not prevent the promoters of a corporation from affixing, if they please, a money symbol or value to each of its shares. But if they chose to do that I should hold them to such a liability as would belong to a representation that there was such actual present money value in the shares at the very time of the representation.

As a general rule, capitalization and net assets are to-day two different things. Often they are quite unrelated. It may be the public policy of the government which grants the charter to limit the amount of property which the corporation may hold; but such a limitation is a different thing from the corporate capitalization which I am now discussing. The charter may or may not contain such a limit without reference to capitalization. The corporation may, if you please, be required from time to time to disclose by suitably verified and detailed statements, the net amount of its property and to show that such amount does not exceed a prescribed limit. Such limitations upon the capital or wealth of corporations once represented the policy of the government to limit their money power or influence. But, although still common in the case of charitable corporations, they are not now favored in our country for business corporations. In the more important states I think that they do not exist at all. But whether or not the charter contain such a limitation upon the amount of property which the corporation may hold, I propose that the charter shall not prescribe the amount of the capitalization, which, as I have said, is something very different from the amount of property held by the corporation. We know many — alàs too many — corporations whose total assets are not now and never were equal in value to the total par value of their issued shares. Every one of you has such illustrations in mind. So there are corporations whose actual net assets far exceed their capitalization. In organizing a trust company to-day it is common to require cash payment in of 150 per cent or 200 per cent of the par capitalization. The net book assets of the Chemical Bank of New York are about $8,000,000 as against $300,000, the amount of its capitalization. That is to say, its actual net assets are twenty-six times its capitalization. So in actual twentieth century experience the net assets of a corporation and its capitalization are two matters, which, if not absolutely unrelated, as I am sorry to say they sometimes are, are very far from being one and the same thing. Now the law may, and, in my opinion, should, absolutely require a disclosure of the net assets of a corporation for purposes of taxation. But this is no good reason why the law should require the corporation in its relation with its shareholders, or its shareholders in their relations among themselves, to prescribe any par value to a share or any total amount to the capitalization. From the public standpoint, the capitalization may be a convenient mode for a tax; but obviously a franchise or other tax can be far better imposed upon the basis of actual capital returned for purposes of taxation than upon a nominal and, perhaps, fictitious capitalization.

The origin of the legal requirement that the articles or certificate of incorporation of a business company shall state its capitalization seems to have been in the original,

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but now long lost, identity between nominal capitalization and actual capital or net assets. When the English Crown issued or the English Parliament authorized corporate charters, there was a jealousy of the money power of the corporation. The charter frequently, as in the trading corporations of the time of Queen Elizabeth, gave or sought to give a monopoly of some kind to a corporation. The power of the corporation was dreaded; it was at least a matter of privilege or favor. It was, therefore, to be limited to such and such an amount of wealth. In our time and certainly for our country, this purpose has been practically lost. In New York and New Jersey, for instance, the old limits upon capitalization have been abolished. We have a one and a half billions corporation. We may come to have a ten billion dollar company.

If capitalization be eliminated, as I am now proposing, it will be left to the corporation to issue as many or as few shares as it sees fit. The share, having no par value, bearing no par designation, will, in appearance, neither signify nor symbolize more than it does now in actual and ultimate fact, that is to say, more than merely an aliquot share in the net assets and business of the corporation. If a manufacturing company is to be formed at Concord with a capital of $100,000, my suggestion would be that the certificate of incorporation which New Hampshire issues shall, instead of requiring a thousand shares of $100 each, leave it to the corporators to issue as many shares as they see fit without par value. If the corporators choose to have a thousand shares each share will signify a one thousandth interest, nothing more and nothing less. If the company should be prosperous and its shares come to have great value, no one could object to their converting the 1,000 shares into 10,000 shares or 100,000 shares, for one share will, in each case, truthfully stand for an aliquot part in the business of the corporation determined by the then number of outstanding shares. If the corporation were a bank, and ought to have a minimum active capital in money, say $100,000, the charter would provide that, before the corporation begins business, it should have net assets of at least $100,000.

An institution, or other investor holding shares of stock, is apt to keep an inventory stating the par value of the shares held and the actual value. If it be 100 shares of Boston & Maine stock, the inventory may show $10,000 in par value, or 100 shares at $100 each. Now what useful purpose does the $100 or $10,000 serve in the description of the assets? What does it add to the fact that the man owns 100 shares. Since the Boston & Maine Company has a total capitalization of 320,125 shares, the man owns $\frac{100}{320125}$ parts of the net assets franchise and business of the railroad company. That is all there is of it.

May I now take up objections to this reform? If it be said, as perhaps it will, that a corporation should be made to state its capital, the answer, as I have already suggested, is that nominal capitalization is not a statement of capital and that the change proposed is in no way inconsistent with corporate obligation from time to time to state actual net capital. The legislature may require and, in my opinion, it ought to require, for purposes of taxation, and perhaps for other purposes, an annual statement by every corporation of its net assets and their value. The nominal capitalization of a company affords the taxing authorities no information, or, at any rate, merely a prima facie presumption, which is, or invariably should be, supplemented and corrected by an actual statement. For purposes of general taxation, our present system of corporate capitalization is of no real use whatever. It is something like the silly system of personal taxation in New York City by which the assessors preliminarily fix the personalty of every man living in one street at $50,000, of every man in another street at $25,000, and so on, and

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leave the actual final assessments to sworn statements, which might as well have been required at the outset.

In the next place it may be urged that nominal capitalization affords a convenient standard for franchise assessment. I am not familiar with the law of your state in this respect. But in my own state a corporation, in addition to the taxes it pays upon its net actual property, is required to pay the state an annual tax known as the franchise tax as an equivalent for the mere privilege of doing business as a corporation. The New York statute requires, when no dividend is paid, a verified statement of the actual market value of the shares of stock of the corporation. When dividends are paid, it prescribes a tax on the basis of a six per cent dividend, the tax being more or less according as the dividend is more or less than six per cent. I fail to see that the abolition of nominal capitalization would be an embarrassment or even an inconvenience in the administration of such a franchise tax. The franchise tax can be imposed at the rate of so much upon every $100 of actual net assets to be disclosed by a corporate statement made in the same form as that required for general taxes. Or the tax may be fixed upon every share of stock on the basis of annual dividends or earnings of $6, the tax to be increased or diminished according as that dividend is increased or diminished.

If it be said that, apart from the matter of taxation, the state ought to know the capital of every corporation which it has chartered, I point out that the proposed reform is in no way inconsistent with this. I fail to see that it is of any use to the state to have information which is nominal and may be entirely fictitious. It is within the power and, in my opinion, within the duty of the state to know the actual situation of the corporation. So, as I have already suggested, if the policy of the state should be to limit the amount of the net capital of any corporation, that can be done by ascertaining from time to time what is the actual capital.

Nor does any embarrassment arise out of the preference of stock. The two essentials of preferred stock are generally, first, the preference of such a percentage in dividends, and, secondly, a preference upon liquidation as to capital. The provision usually is that the preferred stock shall receive a dividend of six per cent or seven per cent or eight per cent a year on the par of the preferred, before the common stock shall receive any dividend. It is equally easy, however, to provide — sometimes it is now provided — ignoring the par of the share, that each share of preferred stock shall receive a dividend at the rate of $6 or $7 or $8 a year. Or, if the estimated value of the preferred stock or the cash payment upon subscription be at a less or greater rate than $100, the annual preference would be accordingly greater or less than the $6 or $7 or $8. So, if the estimated value of the preferred share be $100, the provision may be that upon liquidation it shall first, before distribution to common stock, be paid $100, or if a bonus is agreed upon, then $105 or $110 or whatever else is stipulated.

If it be said that a corporation ought, for proposing subscribers to its stock or the investing public, to estimate the value of its shares, I answer that so it ought, or at least to give information as to the actual value of its assets, and that in this very duty is to be found a chief reason for the suggested change. But the corporation in giving such information to those whose subscriptions or investments it invites or promotes should be required to give, not a mere guess or fiction, but the underlying reality or truth. If a newly formed corporation is selling its shares on the basis of $100 or any other sum in cash paid for every share, it should so state. If its shares be issued for property, it should state the cash value of the property; or, if its value be unknown, then ignorance should

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be affirmed. In any case the facts as to the value of the shares when issued should be stated; and the purchasers of stock, as far as possible, put, as to knowledge, into the position of the directors themselves. The mere fact that the share is christened $100 or that the certificate bears the legend "$100" is nothing or worse than nothing. We all well know that in this respect the legal necessity of nominal capitalization is more apt to cause misleading or inadequate or even directly untruthful representations than disclosure of the truth. In this respect as in others, the virtue of the reform, if it have any, is that it would tend to fix attention upon the truth of the case and to compel officers of corporations to make statements both truthful and intelligible.

In the early days of railroad and business incorporation, the requirement was that capital stock should be paid in at par in cash, the same as is now required in the case of insurance or banking corporations. But it is a half century and more since the facilities and seductions of nominal capitalization led to the device of issuing shares of stock for property, theoretically at the rate of par for actual cash value. Property soon came, when sold for shares of stock, to be valued according to the hopes or even the dreams of the vendors rather than according to any actual existing value. I see in the reform, as one of its great advantages, the ending of the long and multifarious and wasteful struggles over disputed valuations of assets exchanged with corporations for their shares. It has been a long and often changing antiphonal chant of courts and legislatures, now the song being of liberality to encourage business enterprise, now of rigor against promoters and original stockholders in order to protect creditors, then again of liberality, then again of rigor, and so on. The chapter of American jurisprudence dealing with the full payment of charter capitalization is as unsatisfactory as it is extensive. Our sister state of New Jersey has now for years been one of the most prolific creators of corporations. It has, however, adhered to its own long time and high standard of judicial administration; and the decisions of its courts in Withervee *v.* Baker, 25 N. J. Eq., 501, and Donald *v.* Am. Smelting & Refining Co. 48 At. Rep. 771, with respect to the obligations upon the directors or corporations issuing shares for property are wholesome. Nevertheless its statutes make the good faith of directors issuing shares a conclusive protection to them and the original stockholders against personal liability, and it is no uncommon thing for exaggerated and even fictitious estimates to be adopted in perfect good faith by business men of sanguine temperaments.

Under the reform for which I am arguing, the situation would be very different. If a corporation with shares already outstanding were to buy property and pay for it in its capital stock, its directors, representing its stockholders, would issue for the property a number of shares which, according to the actual value of the shares already issued as then estimated by or for the stockholders, would be the equivalent of the value of the property. If the property were over valued the injury would be to the holders of the old shares, since the new shares issued on a basis of equality with theirs would be correspondingly under valued. If, however, the property were acquired at the very formation of the corporation and the whole capital issued for it, it would be of no consequence to any one whether more or less shares were issued, for the reason that the shares would have no nominal money value, and each share would represent only its aliquot part of the property so acquired, and each share, if it were the subject of a future sale, would be sold according to the estimate of value of such aliquot part. Every one would realize that ten thousand ten thousandth parts are no more, but precisely the same as a thousand one thousandth parts or a hundred one hundredth parts.

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I have thus dealt with objections to the abolition of nominal capitalization. That is to say, I have criticised the validity of the reasons which, for our day and generation, are supposed to make the system advantageous. There remains, however, a further and practical support for the present system; and that support, I fancy, is ten times or, perhaps, one hundred times as efficient to prevent a reform as all the other reasons put together. It is the advantage, real or supposed, which the nominal valuation of shares which are to be sold or distributed by corporations gives to those who promote or control the corporations. I believe that most successful or legitimate corporations wish and intend that every share of their capitals shall represent full actual value. I fear, however, that I shall not have their support for the reform which I advocate. Very certainly I shall not have the support of those who promote or control the corporations whose promotion or, perhaps, the manipulation of whose stock upon Wall Street makes one of the enormously profitable callings of the twentieth century. Take, for instance, an industrial corporation formed to take over a business heretofore conducted by a partnership or group of partnerships or lesser concerns. It is usual to issue bonds or preferred stock for the estimated actual value of the lands, plants, stock, and other physical assets actually in hand, and then to issue common stock for the present estimated capitalized value of the future income as estimated — or, rather, hoped for — or, perhaps, even rather imagined — of the entire enterprise over and above the amount of the preferred stock, or of the preferred stock and bonds. It excites no surprise, therefore — it is deemed indeed quite normal — that, immediately after the launching of a modern industrial corporation with a seven per cent preferred stock selling at or near par, to have the common stock, in theory also worth par, selling at only 30 or 20 or 10 or 5, prices which represent sound, hard-headed judgment against speculative dreams colored with more or less insincerity. Banking and other syndicate profits are not uncommonly made out of the issues of common stock which — for such is the happy illusion of those engaged in such enterprises — seem not to come out of the pockets of the principals engaged and, therefore, are without much of a wrench, issued profusely to the bankers or promoters. It is needless to say that these happy men do not in such cases mean to retain as permanent investments the common stock which they have thus acquired. They usually mean to sell for cash, and to sell promptly. And it is, I fear, beyond doubt that the purchasing community is affected in its willingness to buy such stock and in the price it is willing to pay by the nominal magnitude of the amounts which promoters and bankers have approved. Many of these transactions are, I concede, or rather affirm, conducted with most scrupulous and conservative precision, the value being carefully and conservatively estimated. But in many cases, very many cases, even those in which men of high character are engaged, the valuations represent, as I have said, hope rather than belief — a hope which is more or less consciously cherished for communication to the purchasers of the common stock and which, to the extent of their purchases, is cherished at their risk rather than at the risk of the bankers and promoters who have sold them stock. If the system of nominal capitalization at round and large figures were abolished, the opportunities for profit of this kind would largely disappear. It will be said that, within the limits of the strictest honesty, it is right to communicate to those who buy stocks the hope and expectation of those who sell them. That I shall not dispute; for it is the right of every kind of merchant. Every seller may transfer his hopeful expectation to the buyer with the goods. I am disputing, however, the wholesome influence of nominal or arbitrary capitalization and for the very reason that it

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diverts attention and thought from actual value. And this brings me to deal with the affirmative reasons for the reform which I propose.

Since nominal capitalization has now been in vogue for generations, and since business and law are in large measure adjusted to it, the sensible man doubtless will not greatly interest himself in its abolition merely because there is at present no substantial reason for continuing it. Inertia carries one on after new motive force has ceased. I believe, however, that there is a weighty affirmative reason against the system. This reason I have just now and, perhaps, sufficiently suggested. It is that, under our present laws, attention is not directed to actual value of corporate shares, but is rather diverted from actual value to nominal or arbitrary value. Every transaction in stocks compels him who sells and him who buys to think of a nominal or arbitrary value which is of no real use or just significance to either party. It is true that Wall Street brokers, in their accounts for stocks sold or bought, do not bother to note the par value of the stocks, but merely state the number of shares. But par value is always assumed at $100, unless some other par is expressly stated. If now the reform were carried through, the corporation, its promoters, its stockholders, and those who propose to be stockholders, would at every stage have to consider the truth of the case, the actual net value of their property or business. If a corporation has been formed to take over a specific property, it must say that it divides net ownership of that property into so many equal shares, and then, without diversion of attention by any nominal par of the shares, it must state the justification for the price at which it is proposed to sell each of such shares. The true underlying nature of the enterprise would be free from a blurring and often deceiving influence. Public indignation would, after the abolition and prevention of this class of abuses, be under less natural provocation to punish the just with the unjust. Demagogy would lose part of its food.

A corporation, it ought never to be forgotten, is merely a partnership with two or three modifications. It has, first, a perpetual or fixed term of life independent of the individual life or solvency of those who compose it; secondly, it exonerates from personal liability unless as a penalty for violation of the law; and, thirdly, it usually facilitates transfer by any proprietor of the whole or any part of his interest to any other person without consultation with his associates. Except in these two or three features which distinguish a business corporation from a business partnership, and in the results of them, there is no reason for hostility to corporations which does not really exist against partnerships. Everything which tends to obscure the fact that the corporation in reality *is* a joint venture or partnership with nothing of value except its assets and the ability and character of those who run it, is an injury to truth and to the sound interest of legitimate corporations. Either corporations and those who promote them do not or they do influence the public by their capitalizations. If they do, the capitalizations are superfluous and irrelevant; if they do not, then the capitalizations are deceitful. The change we are considering would make impossible accusation of such deceit. The burden would be upon the investor of ascertaining actual value; and the liability for misrepresentation of actual value or facts bearing upon actual value would be precisely the same with respect to corporate property as with respect to other property. All the wide-spread and real, and often heated and dangerous, public sentiment about over-capitalized stock, dividends, and the like, would no longer have real or imaginary food to feed on. If the greatest industrial corporation yet known have 14,040,000 shares, the fact would, under this reform, signify to no one anything

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more than that its net assets and business are divided into 14,040,000 equal parts held by its owners, some holding more, some less. The 320,125 shares of the Boston & Maine Railroad, which, for some reason which we outsiders do not understand, seems to be a more notorious entity in New Hampshire than in either Boston or Maine, would signify nothing more to any one than that its net property, franchises, and business are, for convenience, divided into 320,125 parts.

The advantage of the change may be summed up, therefore, in that one word, which generally signifies the nearest approach to a cure of public evils: Truthfulness. The reform would not affect the wholesome public indignation which runs against some corporations because they tend to monopoly or because, as is said of some of them and sometimes truly, that they secure public franchises in ways that are unfit or without giving full value. That indignation might even, with this reform in force, be more effective and intelligently directed. Monopoly and the theft of public franchises are two momentous chapters in the modern history of corporations, chapters far from being closed. The reform would, however, affect the wide-spread and justly powerful public sentiment against their over-capitalization and other misleading or deceitful features. If the chapter with which I am dealing be not as momentous as the other two, it is, nevertheless, genuinely and largely important. If the owners of modern American corporations and the lawyers who advise them can successfully enforce the duty of truthfulness, if they can secure laws and an administration of laws which enforce that duty, legitimate corporations are far less likely to inflict injustice upon others, or to suffer injustice in collisions which they may have with public sentiment.

The older I grow and the larger my observation of public affairs and of corporate and other administration, the more I am convinced of the safety and the cardinal and almost supreme advantage of truth and publicity in all businesses. Great creative geniuses in corporate business, men if you please, like the first Cornelius Vanderbilt or Collis P. Huntington, no doubt reaped profit from the old system of capitalization, perhaps from its very abuses. I do not believe, however, that the net advantages to them for their inventive, creative, soundly adventurous work which they did, would, in the long run, be any less, but greater, if they and all who compete with them were forbidden the fictitious advantage of nominal capitalization. It is the public interest and, in the long run, I believe it to be the personal interest and profit of the great capitalists who so largely organize modern material life, to shut them out from every artificial advantage and to leave them unrestrictedly to the full enjoyment of their just compensation, however large or enormous it may be, for actual and beneficent service rendered to the commonwealth. They would be safer from that menace of demagogy or socialism which to-day corrodes the happiness of so many rich men.

I beg to point out to those who own or are concerned for corporations that in the long run the safety of their stockholders depends upon a complete publicity. In spite of the great flood of reckless talk and of ill considered and cheap thinking to which to-day we must listen, I do not believe that there is any permanent unwillingness or real reluctance on the part of the American people to award great profits for great business or economic services — vast profits, if you please, for vast services of that character. I am far from agreeing with that superficial philosopher, Mallock, in his assignment to the small number of geniuses in discovery or invention or administration or economy, all or nearly all of the vast and widely diffused modern increase in wealth. But to those geniuses beyond any doubt a large part of such increase is due; and it is

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the interest of the rest of us that they shall continue their strenuous labors, so far as they are innocent, and, if their sole worship is money, that they shall not be deprived of even that motive. If the discoverer or inventor or business administrator or capitalist by his faculties bring practically to the masses of men wealth they have never before enjoyed, it is no net loss to them, but rather a great gain, that he appropriates to himself ten or twenty or fifty per cent of the increase which but for him they would not have had, and leave to the community only the remainder. By so much, at any rate, the community is better off than if, through lack of money motive or otherwise, he had abstained from such creative labor. A man with such genius may be selfish and his ideals of life odious; but if he exercise his genius he cannot, under modern conditions, prevent its benefitting others. The capitalists who, without public aid and with infinite courage, tunnel mountains and bridge rivers, or who bring order, harmony, and vastly increased productivity out of economic chaos or inefficiency, they who, in the early stages of their enterprises, may sink their own fortunes and those of others, and who finally give to the public something of very great value, will, if their enterprises be sound, be justly and wisely and, I believe, cheerfully accorded great profits. I do not believe it to be necessary or prudent for them to conceal from the public the exact truth of their profits. Such concealments are often most futile; ofttimes they lead the public to believe absurd and impossible things, and, as the result of such belief, to be aroused to folly or fury against corporate investments.

I believe, indeed, that the day of secrecy as a prime condition of business life has passed. Three generations ago the typical merchant was he who bought in cheap markets of which others were ignorant and sold in dear markets of which others were likewise ignorant. To-day almost every source of supply is known the world over; prices in all quarters are quoted every morning in every town and city the world over. The jealousy of the merchant lest some one else should know his business, the jealousy of the mechanic lest some one else should learn his handicraft, all these represent the narrow and, we may truly say, the less profitable view of the business. The manufacturer to-day comes nearer to the consumer. The successful man is he who can create value with the least investment of money and labor or who can first learn what is valuable and introduce it to the world. Those who are competent to these great functions of modern industry need not call secrecy to aid them in their competition with the incompetent. There are exceptions to this rule, but they are few. The competent man need not fear — the true interests of civilization require — truth and the greatest possible publicity in every business and especially in every business conducted under franchises given by public authority.

May I, in closing, return to the note with which I began? I mean the duty of lawyers in their public relations. Every lawyer, by virtue of his very profession, holds a relation to public affairs over and above his relations as a mere citizen. The men of our calling are, as men of many other professions and trades are not, bound to promote a sound framework of laws and jurisprudence for our civilization. The enormous share which corporate organization now has in modern industry, its enormous influence upon every phase of modern life, necessarily impose upon lawyers who advise or guide corporations, a special and weighty and most honorable duty.

If the men of our profession make it clear to the American people that, in their public relations, they are concerned to enforce truth and publicity upon corporations and upon all who derive from our laws any sort of franchise or right, we may, I think, count

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it certain that the justifiable criticisms and much of the ignorant hostility and suspicion from which lawyers suffer will disappear. They will again take their fit share in public life with its burdens and its honors. This noble profession of ours will hold in the public service and esteem a rank at least as high as that it held until the American people justly became indignant at corporate abuses.

NEW YORK, N. Y., October, 1906.

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LITTLE JOURNEYS TO THE LEGAL PROFESSION. PROPRIETY.

By Stanley E. Bowdle

PROPRIETY is a great matter. It is the difference often between success and failure. Knowledge is a great matter; but unless knowledge espouses itself to the proprieties, and trims its nails, and keeps its clothes brushed, it limps hamstrung through life.

When Adolph Thiers, the young man with buff breeches — that Thiers who afterwards slept in the bed of Louis the 16th, as President of France — went up to Paris to matriculate at the Law School of the great university, he was rejected. This was because, unknown to poor Adolph, there was a rule of that famous school, that no young man could matriculate in the law department, unless he could first prove that he had sufficient income to maintain himself with dignity, whether practice came or not. Now Adolph had nothing but the buff breeches that mother made, and hence was disqualified from studying that exalted science that has brought this world to its present stage of honesty, happiness, and general prosperity. (Adolph afterwards secured the price.)

But the point to all this is, that the regents of that university understood the proprieties and were determined to prevent conditions coming about that might compel lawyers to violate them. The French code of legal proprieties did not contemplate a lawyer eating one franc lunches at Paris hash houses, or riding leg to leg in public trams, or occupying gallery seats at grand opera. It contemplated him as a gentleman, with all the visible aristocracy that clothes, and dignified riding, and decorous dining can give; and hence it was that young Adolph's purse rather than his head, was first examined. With their wealth of sentiment, still how practical are the French!

Of course, we Americans must sneer at this — we simply must. Though we know that we measure everything by money, and clothes, and dining, we simply must sneer at this. Every canon of our traditions compels it. So, having all sneered, let's pass on.

All the same, propriety is a great matter, greater than any of us suspect. He is the universal Cæsar whose tribute money we and our fathers have paid so long that we have forgotten to examine the kingly image and superscription on his lordly coin; and we contribute to the fatness of his purse coffers more promptly to-day than ever.

So great is my own respect for the proprieties, that I have always felt that a chair should be devoted to that subject by our law schools. While it will be some years before we shall demand an inspection of the young student's purse, we should be able *now* to show him that, as a lawyer, a whisk-broom will be more useful than a knowledge of what constitutes agency; and that, however important it may be for him to understand the law of Combinations in Trade, it is of more importance to know that the tooth-brush should not be carried in the vest pocket, and that knee sprung trousers are sufficient to render unmarketable a knowledge of the law of trusts for spendthrifts.

But this trite truth few lawyers comprehend, with the result that much legal genius sits mummified in its box stall office in the shiny cerements of death, and power, ready to effervesce, ambles uncorked about our courts.

Clothes are important to the lawyer — oh, yes! The learned occupant of that chair might devote several lectures to clothes. They are often the only thing that "severs

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a name from nothing." But then, even poor clothes do not work irreparable damage; for Charles Lamb has shown that they may be passed off to the idiocyncrasies of genius. But not so with poor victuals. Dining, decorous dining, is the dean in the assemblage of legal proprieties. You may worry along with shiny coat, and hat of a past epoch; but these will be forgotten in the presence of impressive dining.

This is just what those French schools so well understand. And it is a great and worthy matter. In its presence legal knowledge becomes insignificant, and thousands of pompous law books stand mute. And horrors! reader, this crux, this nexus, this *sine qua non* of all legal advancement, this source of all life, animal and legal — victuals and dining has no place whatever in our legal curriculum. Think of it, too, this is overlooked by a profession whose business is to overlook nothing, and cavil at undotted i's and uncrossed t's. And here we find ourselves in this dazzling new century without a single syllable on this transcendant subject! O ye proprieties, ye venerable gods! forgive while I atone for my profession with a line.

Dining, then, young man, is the most critical thing in legal life; it is the most necessary thing to life; why, pray, should it not be made the most impressive thing *in* life? Yes, Lord Byron was right.

"Since Eve ate apples, much depends on dining."

All depends on dining. But mark you, it must be decorous dining — not that twenty-five-cent-stool dining which advertises at once your hunger and your poverty. It must be dining that advertises your ability to pay, and that tells your co-diners of your success, real or simulated.

Watch the men of the Bar of repute. At the busiest hours they enter the "St. Nicholas" or the "Gibson" of the various cities, advancing to their tables with almighty unction. They regard the waiters with the studied, nonchalant, automobile hauteur of established position; and, as their overcoats are taken, they sweep their eagle eyes over the assembled greatness of the city with the careless military air of Napoleon viewing the heights of Austerlitz. They meet handsome many-languaged waiters with intrepedity, and examine the menu, in foreign tongues, without perturbation. (Oh, how I have coveted this power!) Obviously, these men harvest ice in midsummer. Their affairs move resistlessly on the rubber tires of success; and no marvel, for early in legal life they were confirmed at the altars of this great propriety — dining.

Long fidelity to this admirable propriety has brought dyspepsia upon some of these legal worthies. But it was not the food. It was the four day's abstention in the week in early legal life, that they might dine with dignity the remaining two. It was fidelity to principle that caused it. Two such Nestors of the Bar have honored me with their acquaintance, and I feel in their presence just as I feel when I meet some hero of Chickamaugua or Stone River.

Let us, then, as Solomon puts it, hear the conclusion of the whole matter. You cannot join the golf club, or any other club — you have neither the pull nor the price; a box at grand opera is impossible; you must still ride *vis a vis* and limb to limb with poverty in the only democratic institution that survives; you cannot afford a pew in the Episcopal Church; you cannot even afford good clothes, but, my friend, you can dine twice a week with impressive dignity. By all means do it. Go where men will unconsciously cerebrate about you, put yourself in the dazzling vibrations of success. Dine decorously; eat reputably and conspicuously; and the libation thus poured out to that Great Gastronomic God — America's Deity — will secure you His loving favor (in fees). Put money in thy purse, and eat right.

CINCINNATI, OHIO, October, 1906.

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THE SEYMOUR WILL CASE

By A. D. Young

"FANNIE MINERVA SEYMOUR," a woman of great notoriety, though less enviable than that which surrounds the name of Myra Clark Gaines, died at the city of New Orleans, January 6, 1896.

Singularly enough, the bulk of an estate of more than fifty thousand dollars left by that woman accrued from *lawyers' fees* earned and taxed in suits prosecuted against the city of New Orleans by Myra Clark Gaines. More remarkable still, that a struggle of almost unpredecented vigor and persistence should have been maintained for possession of this estate by the great state of Louisiana, through all her courts, against humble citizens — man and woman — of other commonwealths, claiming it as sole heirs — brother and sister of the decedent, — a struggle drawing in its train a succession of revelations strange as they were perplexing and confusing.

The woman whose history is most dramatically portrayed in the litigation over her succession buried her last husband in 1892. By the provisions of his will she became possessed of the greater portion of the property she finally left; left, somewhat, to the fickleness of chance. Directly after her death, it seeming probable that she had left no will, application was made by the public administrator for control of her estate. Before this was granted a man claiming to be the brother of the decedent, living in California, who had read notice of her death published in California papers the morning after it occurred, made claim in the court of probate of New Orleans to the estate, on behalf of himself and a sister residing in West Virginia. This claim was based on the assertion that the claimants were the brother and sister of the decedent, and her sole heirs.

The state of Louisiana, through her attorney-general, intervened at this stage, claiming as irregular heir of the decedent, alleging that she was born in London, England, and had died without heirs. Thenceforward the efforts of the attorney-general and public administrator were united and energetically mutual.

Pressed as was this contest through the appropriate courts of Louisiana, made proportionately conspicuous by the aggressive tactics of resourceful and astute lawyers, aided by detective ubiquity and cleverness presenting shades both dark and fair, depravity and pathos, in the bright noonday glare, as it were, of a long life, a career multifarious as it was notorious, all finally massed and directed to the one controlling question: the personal family identity of Fannie Minerva Seymour.

But she was *born* on the ninth day of January, 1826, as all were agreed. Whether her eyes were first saluted by the light dimmed by a London fog, or bathed in the crisp, clear atmosphere of Paddy's Run, in Laurence County, Ohio, was the question to be determined.

During fifty of these variously employed years, she had declared orally and in writing, under various circumstances at different times and places, that her name was Fannie Minerva Seymour, that she was born in London, England, and that she had no relatives.

In every phase of this contested succession, the vital point upon which all hinged was simply whether that old, blind, miserly opium-eater, nearing threescore and ten, who died wealthy, but really from starvation, at the Crescent City, was actually the sister of the brother and sister claimants; or whether that suspicious, decrepit old woman, whose identity as widow of the lawyer husband whom she survived, was so well es-

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tablished in New Orleans, was born in a quaker bottom settlement on the banks of the Ohio, and christened "Rachel Fanny Brown."

There was the most plenary proof that the home of the parents of the claimants had been there for many years; that on this date, January 26, 1826, a girl was born to them whom they named Rachel Fanny. She grew up with the other four children of the family, and attended the neighboring country school with them. An elder sister, Sarah Henrietta, married, but shortly losing her husband, went to Cincinnati, about 1839. Fanny joined her there a few years later, and did not return to her home until 1849. The sisters went into service, at first, Fanny living for a time with a family by the name of Seymour. It seemed that Mrs. Seymour wanted to adopt Fanny, but her mother objected. The brother claimant testified that he saw her at the residence of the Seymours at one time when visiting that city.

For several years before leaving Cincinnati these sisters led disreputable lives, conducting a somewhat notorious house of prostitution.

Sarah married again, and in 1849 she and her husband started to California. He died on the way, but she reached Sacramento in 1850. She successively married two other men, dying at that city in 1870.

Fanny returned to her native home in 1849, taking a little girl along with her who was kept by Fanny's mother and the claimant brother until she was thirteen years old. Sarah and her husband, having returned on a visit in 1857, took the little girl away with them.

At the first trial,— there were two, and two appeals to the Supreme Court,— there was a period from 1844 to 1846 during which there seemed to be no very satisfactory evidence as to the whereabouts of Fanny, but subsequent efforts of the attorney-general tended to clear up these obscurities. In support of the contention of the state of Louisiana that the decedent was of English birth and had died without heirs, there was testimony that in June, 1846, among the persons landing at the city of New York from the ship *Waterloo*, Captain Allen, from Liverpool, England, was a young lady, apparently about nineteen years of age. It was testified by some of her alleged fellow passengers that on the way across she had stated that her name was "Fannie Minerva Seymour," and that she was born in London, England. One of these witnesses stated that the young girl impressed him as being of a better class of servants; a barmaid, clearly English, with the cockney accent, although she had lost most of that accent when he last saw her, in 1868, at New Orleans. The testimony of that man supplied some romantic incidents in this memorable history. This witness said that he went to California in June, 1849, and after being there a short time, met her on the street in San Francisco, had a long conversation concerning the pleasant time they had on the voyage from Liverpool to New York; that he bade her good-by and went to the mines, and "never saw her any more till he returned home, in 1857, when he met her on Canal Street, in New Orleans, and after a pleasant chat she informed him that she had changed her name from Fannie Seymour to Fannie Sweet." He said that they became intimately acquainted, that he never lost sight of her for longer than a month from that time until the breaking out of the Civil War. After the war, their acquaintance was kept up until he went to Washington, D.C., in 1868, as an officer of the United States, since which he had not seen her.

Another witness, born in 1830, testified that he was a passenger aboard the *Waterloo*, in June, 1846, and that there was a lively young girl named Seymour (he thought it might have been Fannie Seymour), a passenger "who was with a family or some other parties."

When, however, it comes to be known and remembered that in 1846 these men were aged eleven and sixteen years respec-

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tively, the legal value of their testimony can be more accurately weighed. The effect of the final decision of the Supreme Court was to place them in the category of those "who saw by the ear."

It was also further shown on the part of the state that as early as 1848, the decedent had stated to her roommate, her intimate friend then and for many years afterwards, that she was born and raised in London, England; that she was of good family; that her father and mother died when she was young, and her guardian put her in a bar-room to serve; that she became acquainted with Captain Allen, and that the first thing she knew, in the spring or summer of 1846, she was on board of a ship coming over to New York. It was shown, further, that she stated to two other persons, about that time, that she was born in England, and that they were impressed with the belief that she was an English girl.

It also appeared that a woman calling herself Fannie Minerva Seymour went from New York City to New Orleans in the summer of 1846, with a man of the name of Smith; that in January, 1847, she appeared at some public dance hall as Fannie M. Smith; that she said she had been married to Smith. He died in December ensuing. She was presently sued by an undertaker for Smith's burial expenses. From that time until the spring of 1849, she lived there as a notorious prostitute.

There was conclusive proof that *that* woman went from New Orleans to California in 1849. Thus far, it may be noted, nothing has been adverted to having any *direct* tendency to associate Rachel Fanny Brown with Fannie Minerva Seymour, save the allusion to the Seymour family of Cincinnati. In this connection, it may be said that all the *proof* of English nativity of the deceased rested upon her *alleged* declarations, orally made, and such as were manifested in the several instruments of writing in evidence. Apparently, there was no direct testimony from any of the relatives of Rachel Fanny Brown as to her whereabouts or doings after her visit to her native country, which the claimant brother states was in 1849, until the year 1857, when a correspondence commenced between himself and his son with Fanny.

There was conclusive proof also that the Fanny Rachel Brown who went from Quaker Bottom to Cincinnati was in San Francisco early in the year 1850. From there, in that year, she went to Sacramento, met her sister Sarah, then living under an assumed name. These women stated in conversations with others that they were sisters, and they were so regarded in the community. In San Francisco she was associated with a gambler named Reub Raines, and in Sacramento she was the proprietress of a brothel known as the "Palace," and continued her relations with Raines. At her place, in December, 1852, which she conducted as Fanny Smith, she shot Albert Putnam, a stage driver, and was threatened with hanging by a mob, but was taken by the marshal to a prison brig in the river; was thereafter admitted to bail in the sum of $3,000, after which she disappeared, forfeiting her bond. Leaving California, she was next seen at Acapulco, Mexico, and then, in May, 1853, at Aspinwall, Panama, at which latter place she was living, as his wife, with Abraham Miller Hinckley, the agent of an express company. She was not then married to Hinckley, but was married to him in October, 1853, in New York City. Early the next year, she returned to New Orleans as Mrs. A. M. Hinckley.

During this marriage, she spent much of her time in New Orleans. She was also at New York City with her husband at intervals. She obtained a divorce from Hinckley at New York, in December, 1856, on the ground of adultery.

The certified copy of the divorce suit put in evidence shows where and when the parties were married, where they lived, and her charges of his adulteries. The defendant, in his answer, alleges her bad char-

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acter when he married her; says she solemnly pledged that she would reform, but that during her stay in New Orleans in 1854 and 1855 he learned through the press and his correspondence that her conduct there was so infamous that he did not suppose she would ever want to live with him again; that he himself, at that time, indulged in some of the excesses charged against him; that afterwards, upon her overtures, they were reconciled and reunited as mutually forgiven, and lived together until within a few days before the suit.

The defense was perfunctory, as appeared, and the judgment not only gave the plaintiff the divorce for which she prayed, but also furnished her with a certificate of character to which she added the letters we have already quoted from, making up a record which she seems to have cherished and preserved for the remaining forty years of her life.

She returned to New Orleans in May, 1857, and it seems she then, for the first time, made use for public purposes of the name Fanny Sweet, though then and thereafter, for the purposes of any legitimate business, she called herself Fannie Minerva Seymour, widow, or divorced wife, of Abraham Miller Hinckley. In 1860, and later on at various dates, up to November, 1895, she executed in New Orleans notarial acts of purchase and sale, and wills, in which she so described herself.

In the summer of 1857, she went to the Quaker Bottom settlement in Laurence County, Ohio. The claimants recognized her as their sister, Rachel Fanny Brown, at once. The neighbors, men and women, with whom as children she had associated in her early years, promptly recognized her. The claimant brother and sister then owned the old home. She visited with them until she quarreled with her sister's husband, when she took up her temporary abode with a neighbor. In August, 1857, she caused the remains of her mother to be removed from the churchyard to the old home place, the claimant brother and sister having sold and conveyed such burial plot to her by deed dated 15th September, 1857, in which she was described as Rachel Fanny Minerva Hinckley. This deed was duly recorded in October following, thus placing that name upon permanent record.

As the result of the quarrel with her brother-in-law, she brought a criminal action against him in a justice court, and a civil action in the Court of Common Pleas. The criminal action was for libel based upon a letter alleged to have been written by the defendant, but signed "Judge Lynch."

This case was, after hearing, dismissed at her cost. The civil case was never brought to trial.

She returned to New Orleans in 1856, where she remained most of the time until July, 1861, known, as has already been stated, as Mrs. Fannie M. Hinckley and as Fanny Sweet. In that year she left New Orleans with one W. G. Stevens, said to have had a commission to buy gunpowder for the Confederate government. He had associated with him a highly respected citizen of New Orleans. She was dressed as a man, and introduced as his nephew, "Freddy Stevens," and a partner in their enterprise. They traveled by land to Houston, Tex., where, to this gentleman's disgust, her sex, until then unknown to him, was discovered. A quarrel ensued, and he left the party. Stevens was taken suddenly ill, and died at Brownsville, Tex. Fannie then returned to New Orleans, and was accused of having murdered Stevens, but was never prosecuted. She sued his succession on certain drafts which she brought back with her, and in May, 1865, recovered over $3,000.

From 1862 until the time of her death, she remained at New Orleans, using the name of Fanny Sweet for the purposes of the demimonde, and otherwise using the name of Fannie Minerva Seymour, widow or divorced wife of A. M. Hinckley.

From 1852 to 1896, at various times, to

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eleven persons whom she knew socially and professionally, four of whom were her lawyers, this woman declared positively that her name was Fannie Minerva Seymour, and that she was born in London, England.

She was married the last time in a Catholic church, August 9, 1879, signing the marriage certificate "Fannie Minerva Seymour, widow of A. M. Hinckley." She lived with that husband until his death in 1891.

In his will he left one half his property to his beloved wife, Fannie Minerva Seymour, widow of Hinckley. In a deed to her before his death, this man describes her as his wife, Fannie M. Seymour, widow of A. M. Hinckley.

In 1860 she purchased four pieces of property at different dates; in 1862, 1866, and 1868, three pieces of property, at different dates, in all of which her name is stated to be "Fannie Minerva Seymour, widow of A. M. Hinckley, from whom she was divorced."

In 1870 she made a will before a notary public in which she declared, "My name is Fannie Minerva Seymour, the divorced wife of Abraham Miller Hinckley. I have neither ascendants nor descendants."

In July, 1895, she made another will before another notary public, in which she declared, "My name is Fannie Minerva Seymour, widow by first marriage of Abraham Miller Hinckley, deceased, and by second marriage of William Reed Mills, deceased. I am a native of London, England. I was born on the 9th day of January, 1826. I have no forced heirs."

In August, 1895, she made another will before another notary, in which she declared, "My name is Fannie Minerva Seymour, widow by first marriage of Abraham Miller Hinckley, and widow by second marriage of William Reed Mills. I am a native of London, England. I was born on the 9th day of January, 1826. I have no living relatives, and consequently no heirs of any kind"

In November, 1895, by an act of revocation before still another notary, in which her name is stated to be "Fannie Minerva Seymour, widow by first marriage of Abraham Miller Hinckley, and widow by second marriage of William R. Mills," she revoked all previous wills. Before the day of this revocation, she declared to that notary that she was born in England, and had no relatives. During the last days of December, 1895, she sent for this notary, who told her she ought to make another will, because if anything happened to her in her present condition, what she left would go to the state. She replied to him, that "under the circumstances, she did not know but that was the best disposition to make."

About 1892, her health began to fail. She then became addicted to the opium habit. In 1893 she became blind, miserly, suspicious, living in constant fear that some one would rob her, and finally died really of starvation, two days before the eighty-fifth anniversary of the great battle of New Orleans, in which the English met such disastrous defeat.

Her estate was inventoried at about $55,000; the greater part of which was derived by her from the estate of her last husband, and which had accrued to his estate from that of Myra Clark Gaines, for attorney's fees in her actions prosecuted against the city of New Orleans.

On the first hearing, one of the chief points contended for the attorney-general was, that it rested with the claimants to show a motive upon the part of the decedent to studiously conceal her identity as Fanny Brown.

Was that attempted concealment more consistent than to thus treasure to the last evidences of her more secret perfidies and impositions upon the ignorance and credulity of the unsuspecting persons with whom she legitimately came in contact?

The identity of the decedent as Fanny Rachel Brown was further evidenced by the direct testimony of many witnesses still

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living in Ohio, and by others who knew her in early days at Cincinnati, in California, and at New Orleans.

At the first trial of this celebrated case, in the District Court, the judgment went in favor of the opponents — claimants — brother and sister of the decedent.

From that judgment an appeal was promptly taken by the state to its own Supreme Court. After the record was filed an application was made by the attorney-general to remand the case to the District Court, in order that additional testimony, proposed to be furnished by that officer, might be submitted. This application was not considered until the case was decided upon its merits.

On December 3, 1897, the Supreme Court affirmed the judgment of the District Court.

Allusion has been made to the fact of an application by the attorney-general to remand the cause to the District Court. That action, or rather the ultimate effect of it, proved something of a case of "the engineer hoist with his own petard." This application set forth "that on account of partial developments of facts before the trial, and of certain occurrences on the trial, he became strongly impressed with the conviction that plaintiffs had not fairly exposed their family history," etc., and that consequently he had determined to make a more extensive investigation. His plan was, subsequent to the rendition of final judgment, to send a detective to Ohio to institute rigid inquiries among the people of the vicinity where Rachel Fanny Brown was born, and resided during her girlhood, in order to ascertain the real facts and incidents of her history. The investigation thus set on foot formed the basis of the application to remand.

The court, in disposing of this motion, said:

"In our opinion, the conclusion at which we first arrived is not thereby materially altered; for they are perfectly consistent with the evidence in the record with regard to the lives and characters of 'the Brown girls,' and particularly of that of Rachel Fanny Brown; but in one important particular they make a new disclosure, to the effect that Rachel Fanny Brown resided in the vicinity of her childhood's home in 1844 and 1845 and a part of 1846 — a period of time which has not heretofore been accounted for by any of the witnesses.

"They further definitely disclose the fact that, in the latter part of 1845, or the early part of 1846, she discontinued her employment as a chambermaid at the Chapman House at Guyandotte, W. Va., and returned to Cincinnati. That statement more closely connects Fanny Brown with the character of Fannie Seymour in June, 1846, than the testimony of the witnesses had done; but it is in no way inconsistent therewith. On the contrary, it makes it all the more probable that Fanny Brown made her way to New York, and thence to London, in the early part of 1846, from which latter place she was returning in June, 1846, on the *Waterloo*. That statement is not inconsistent with that of the witness Edward Fulton, who said he knew Fanny Brown intimately in Cincinnati in 1847, and the early part of 1848, nor that of George Duvall, who saw and knew her in New Orleans in 1846 — both of whom saw and knew her in California in 1850."

The court then said that the formal testimony of the various affiants would not alter the decision already announced, the motion to remand was refused, and the judgment in favor of the opponents, as the brother and sister claimants were styled, was affirmed.

The reasonable assumption would have been that the sovereign state of Louisiana would gracefully bow to the decision of her highest court, even if not satisfied of its justice. Lame and impotent conclusion. Application for re-hearing was seasonably filed. On the eighth of March, 1898, a little more than three months after the case had been affirmed, the court announced that

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after having carefully considered the reasons assigned for and against the application made for a rehearing in the case, and the arguments of counsel for the appellant and appellee, it was as fully prepared to reach and announce its conclusions as it would be upon a rehearing formally granted, and — on what slender threads hang everlasting things — concluded by saying:

"The court is not fully satisfied with the condition of the evidence and is of the opinion that the interests of justice will be best subserved by setting aside the judgment which it has heretofore rendered herein, and also that of the District Court appealed from, and remanding the cause to the District Court, there to be reinstated and tried on the evidence already taken in the case, and such additional evidence as both parties can and shall produce."

Another trial resulted in favor of the opponents (the sister having died in the meanwhile, was succeeded by her sole heir, a married daughter). The state again appealed — the same attorney-general appearing. On the twentieth of November, 1899, Monroe, J., delivered the opinion, beginning:

"The only question left in dispute in this case is whether the decedent was Rachel Fanny Brown, born in Laurence County, Ohio, or Fannie Minerva Seymour, said to have been born in England, and to have come to this country on the ship *Waterloo* in 1846."

Then succinctly stating in chronological order the facts deemed established by the evidence respecting the life of Rachel Fanny Brown under her various names and aliases; also the history of her family, particularly of her elder sister Sarah, the court again — unanimously — held in favor of the opponents — Brown and sister.

We shall not attempt to follow the logical and forcible reasoning of the distinguished jurist. One extract must suffice:

"The only single thing that she was consistent about was in not telling that her name was Rachel Brown, and that she was a poor, uneducated girl from the banks of the Ohio River. Whether she had scruples about disgracing the name borne by her mother, or whether she thought Fannie Minerva Seymour sounded better than Rachel Fanny Brown, is a question that she alone could answer. We are inclined to think, at all events, that, in the case of a woman leading such a life as hers, the open and reiterated announcement of a name should rather be taken as an indication that the name so freely given is not her real name."

There was, as has already been stated, an attempt to identify the Brown sisters with Ann and Mary Stevens, of Cincinnati. That was entirely unsuccessful. Several witnesses for the state swore most positively and circumstantially that Sarah, who as it was claimed afterwards became Ann Stevens, was chambermaid on the steamboat *S. F. Vinton* as early as 1847. But it was conclusively shown that that boat was not built until 1850. Some of the witnesses then undertook to say that it might have been the *Swiss Boy* that she was employed on, while others persisted in saying that she was on the *S. F. Vinton* at a time when the attorney-general himself admitted that boat was not in existence.

The judgment of the District Court was affirmed unconditionally, and presumably the estate has been distributed accordingly.

There is yet a mystery in that no showing seems to have been made of any communication or intercourse of any sort between the decedent and any member of the Brown family since 1882. There was no evidence of letters to her, nor from her, after that time. No explanation is offered, so far as appears, as to such cessation, no apparent reason why an appropriate holiday present, inscribed in terms of endearment, should have opened a gulf of separation never to be closed.

San Diego, Cal., October, 1906.

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The Green Bag

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

CURRENT LEGAL LITERATURE

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

ATTORNEYS. "The Authority of a Solicitor to Receive Money in Conveyancing Business," by Goodwin Gibson, *Canada Law Journal* (V. xlii, p. 577).

BANKRUPTCY. A Digest of the Bankruptcy Decisions under the national bankruptcy act of 1898 reported in the American Bankruptcy Reports, Vols. 1 to 44 inclusive, by Melvin T. Bender and Harold J. Hinman, Matthew Bender & Co., Albany, New York, 1906. Pp. 560. Price, $5.00.

The publishers state that this is the only complete digest of bankruptcy decisions under the act of 1898.

BIOGRAPHY. "R. L. Stevenson as an Advocate," by "R. A. B.," *Scottish Law Review* (V. xxii, p. 285).

CONSTITUTIONAL LAW. "Public Regulation of Bill-Boards," by Harold W. Eldridge, *The Brief* (V. vi, p. 207).

CONSTITUTIONAL LAW. "The Power of Congress to Regulate Interstate Insurance Transactions," by "T. H. C.," *Law Notes* (V. x, p. 124).

CONSTITUTIONAL LAW. A severe arraignment of the Dartmouth College Case by John Z. White is published in the St. Louis *Mirror* (V. xvi, p. 5). His thesis is that the new radical proposals of government ownership and taxation of corporate franchises will find a stumbling-block in this decision; that the decision is illogical and wrong and due to the dominating toryism of John Marshall; that the power to regulate corporations is really inherent in state sovereignty and that the decision should be reversed. One striking phrase bears much truth. The author says, "The people think they live under the Constitution. In fact, they live under Marshall's decisions."

CONSTITUTIONAL LAW (History). "The Constitutional History of New York, from the Beginning of the Colonial Period to the year 1905, showing the Origin, Development, and Judicial Construction of the Constitution," by Charles Z. Lincoln. In five volumes. Rochester, N. Y. The Lawyers' Coöperative Publishing Company. 1906. pp. xxx, 756; xvii, 725; xviii, 757; xxvi, 800; 550. 8vo.

These five volumes contain a valuable collection of material relating to the constitution of the state of New York, together with a considerable amount of informing comment and narrative. From page 410 of the first volume to the end of the third volume the text consists of a chronological history beginning with the colonial period and ending with the constitutional convention of 1894. The rest of the space is devoted mainly to reprints, annotations, tables, and indices. Especially valuable among these are the exhaustive annotations contained in the fourth volume and the list of statutes held either constitutional or unconstitutional contained in the fifth volume. For the busy lawyer searching for authorities volumes four and five will be especially valuable, while the more leisurely student will be able to trace in the first three volumes the history and development of constitutional doctrines.

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The proceedings of the conventions and commissions that have assembled for the purpose of revising the constitution are given in great detail, and the proceedings of the convention of 1894, which framed the present constitution, are so fully set forth that the whole of volume three is devoted to them. While some omission and compression of this kind of material might have rendered the book more readable, the inclusion of it will be useful to many who may not have access to the printed proceedings of the conventions.

The author has shown great industry in the collection of material, and one cannot but regret that for the aid of later investigators footnote references are not given to the sources. With such aids these volumes, already a great storehouse of documents and authorities, would have been doubly valuable. Even without them future historians of the constitution, as well as present day workers, will find themselves constantly indebted to Mr. Lincoln's painstaking industry.

CONSTITUTIONAL LAW (see Employers' Liability).

COPYRIGHT (see Patents).

CORPORATIONS. "Modern Business Corporations," by William Allen Wood, with forms by Lewis P. Ewbank. The Bobbs-Merrill Company, Indianapolis, 1906. This is a convenient account of corporate organization and management, which will be especially valuable to young lawyers unfamiliar with the actual practice of business men and corporate financiers. The book is so clearly and simply written that it should also be very instructive to business men who are contemplating incorporation. It is not intended as a text-book and contains no citations of authorities, though occasionally quoting from text-books on corporations, but it states succinctly the leading principles of corporation law. The most important parts of the book relate to corporate finance with which lawyers who have not served apprenticeship in offices having large corporate practice are very unfamiliar. The forms, though not numerous, are well selected for purposes of illustration. The appendix contains many tabulations of state fees and other statutory requirements that will be very instructive to lawyers who are forming corporations.

CORPORATIONS. "Commencement of Winding-Up Proceedings," by Frank E. Hodgins, *Canadian Law Times* (V. xxvi, p. 627).

CORPORATIONS (see Constitutional Law).

CRIMINAL LAW. "The Ethics of Corporal Punishment," by Henry S. Salt, *Criminal Law Journal of India* (V. iv, p. 52).

DAMAGES. "Damages for Mental Injuries," *Bench and Bar* (V. vi, p. 92).

ELEMENTARY LAW. "The Foundations of Legal Liability — A Presentation of the Theory and Development of the Common Law," by Thomas Atkins Street. The Edward Thompson Company, Northport, New York. 1906. Three volumes. Price, $15.00.

The first volume of this rather ambitious work deals with Torts, the second with Contracts — including Bailments, Bills, and Notes and Agency — and the third with Pleading. The subjects are not treated in such a way as to render the volumes useful in daily practice, for the discussion is theoretical, historical, and scholarly in form. Nor are the volumes adapted to class-room use, for they do not cover the whole, nor even nearly the whole, of the selected subjects. The reader aimed at is obviously a person of maturity and of scholarly tastes — probably a teacher of law. Such a reader will find in these volumes much to approve and much to disapprove. In thoroughly competent hands the plan adopted would lead to desirable results. The principal part of the plan appears to be to present in systematic form the light which has been cast upon a few elementary subjects by the researches made by scholars within the last fifty years. To this end the author has studied the books of Sir Henry Maine, Sir Frederick Pollock, Professor Maitland, Professor Langdell, and Mr. Justice Holmes, and also numerous scholarly contributions to periodicals. As the light of the new learning, derived from combining investigations into primitive law with careful study of reported cases, has not yet been carried into

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all parts of any one of the subjects presented in these volumes, the treatment here given is incomplete. For example, in the volume on Pleading much is said about writs and declarations, but nothing about pleas and replications; and one is at a loss to perceive any reason, theoretical or practical, for the inadequate treatment, save that the scholarly writers upon whom these volumes are based happen not to have covered as yet the subject of defenses. The author, it would seem, ought to have mentioned the omission; but he has done well not to attempt to supply it with the fruits of his own researches. When he has departed from his predecessors, or has attempted to supplement them, he has failed to win confidence. For an example of this disappointing shortcoming, it is enough to cite the chapter entitled "Scope of the Bilateral Contract." Nor do the author's foot-notes make any material addition to the machinery available for readers of scholarly tastes; for the references are almost exclusively those gathered by the original investigators from whom these volumes have drawn so freely and so frankly. E. W.

EMPLOYERS' LIABILITY (Constitutional Law). In the *Central Law Journal* (Vol. lxiii, p. 278) Gerrard B. Winston and Blackburn Esterline argue that "The Act of Congress Known as the Employer's Liability Act Affecting Common Carriers is Unconstitutional and Void." They confine themselves to one reason, namely, that the act as drawn is so broad as to make all employees and all operations of common carriers, whether or not in the particular instance engaged in interstate commerce, subject to the operation of the act if the carrier is at any time or in any part of its business engaged in interstate commerce. Other regulations of interstate carriers are said to have been more carefully restricted to operations which were themselves interstate commerce.

EVIDENCE (see Witnesses).

HISTORY. "State Rights and Political Parties in North Carolina," by Henry McGilbert Wagstaff, The Johns Hopkins Press, Baltimore, Md., 1906.

HISTORY. "Russell Sage's Career as a Litigant," by John Caldwell Myers, *Bench and Bar* (V. vi, p. 83).

HISTORY (see Constitutional Law).

INSURANCE. "The Armstrong Amendments," by H. Gerald Chapin, *American Lawyer* (V. xiv, p. 389).

INTERNATIONAL LAW. "International Interference on the Ground of Humanity," by Samuel Herrick, *The Brief* (V. vi, p. 195).

JURISDICTION. "On the Conflict of Jurisdiction between Civil and Revenue Courts," by Abul Karim Khan, *Allahabad Law Journal* (V. iii, p. 249).

JURISPRUDENCE. "The Quest for Error and the Doing of Justice," by Hon. Chas. F. Amidon, *Canada Law Review* (V. v, p. 364).

JURISPRUDENCE. "The Interpretation of Negative Precepts in Hindu Law," by Dr. Priya Nath Sen, *Calcutta Law Journal* (V. iv, p. 21 *n.*).

JURISPRUDENCE (see Elementary Law).

MUNICIPAL CORPORATIONS. "The Municipal Codes of the Middle Western States," by J. A. Fairlie, *Political Science Quarterly* (V. xxi, p. 434).

PATENTS. "Patent and Copyright Law Considered with Reference to the Contract of Employment," by C. B. Labatt, *Canada Law Journal* (V. xlii, p. 529).

PRACTICE. "The Law Providing for a Municipal Court in Chicago," by Hon. Robert McCurdy, *Albany Law Journal* (V. lxviii, p. 246).

PRACTICE. "The Collection of a Judgment," by James C. McMath, *Illinois Law Review* (V. i, p. 157).

PRACTICE. "The Supreme Court and its Method of Work," by Orrin N. Carter, *Illinois Law Review* (V. i, p. 151).

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PROPERTY. "Third Parties' Consent in the Law of Alienation of Property in India," *Madras Law Journal* (V. xvi, p. 243).

PROPERTY. "Power of Revocation in Deeds," by Chas. L. Bartlett, *Central Law Journal* (V. lxiii, p. 222).

PROPERTY. "The Torrens System," by Howard Griswold, Jr., *The Bar* (V. xiii, p. 16).

PROPERTY (Public Policy). "Mortmain," by D. H. Chamberlain, Jr., *Central Law Journal* (V. lxiii, p. 240).

PUBLIC POLICY. "The Evolution and Prevention of Trusts and Monopolies," by R. M. Benjamin, *Albany Law Journal* (V. lxviii, p. 239).

PUBLIC POLICY. "The Eight Hour Movement in New York," by G. G. Groat, *Political Science Quarterly* (V. xxi, p. 414).

PUBLIC POLICY. "Independence of the Judiciary," by Hon. Judson Harmon, *American Lawyer* (V. xiv, p. 391).

PUBLIC POLICY. "The Quality of Jurors," by Jackson Guy, *Virginia Law Register* (V. xii, p. 430).

RAILROADS. "Doctrine in Virginia as to the Duty of a Railroad Company to Licensees of its Tracks," by Robert W. Withers, *Virginia Law Register* (V. xii, p. 419).

TRADE MARKS. "A Digest of the Law of Trade Marks and Unfair Trade," by Norman F. Hesseltine, Boston. Little, Brown and Company. 1906. pp. xxxix, 390.

Of the great value to the practicing lawyers of this digest of the law of unfair trade there can be no doubt. Not only are the cases well abstracted, but the headings and subheadings under which they are arranged are well designed for ready reference. It is to be deplored that the standard of commercial dealings has been so low as to produce so many cases in late years where there has been fraudulent imitation of the brands and names of the goods of established firms by new adventurers, who have gone so far in some cases as to copy the very markings and dress of well-known articles. But it is a subject for congratulation that the judges have been so steadfast and vigorous in the face of persistent and ingenious arguments in protecting the business rights of legitimate enterprises from the depredations of these commercial outlaws. B. W.

WILLS. "Validity and Effect of Conditions to Legacies and Devices against Contesting Wills," by "B. B. C.," *Law Notes* (V. x, p. 128).

WITNESSES (Privileged Communications). A recent statute of Wisconsin requiring physicians to report tubercular cases is discussed in the *Central Law Journal* (V. lxiii, p. 261), under the title of "Privileged Communications Applied to New Conditions," by F. Beecher. He points out the conflict between this statute and the Wisconsin statute making privileged communications between patient and physician and collects the cases in which this modern privilege as conferred by statute in the different states has been defined and limited.

WITNESSES (Evidence). "The Use of Medical Books in the Examination of Experts," by Joseph H. Taulane, *Criminal Law Journal of India* (V. iv, p. 33).

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NOTES OF THE MOST IMPORTANT RECENT CASES COMPILED BY THE EDITORS OF THE NATIONAL REPORTER SYSTEM AND ANNOTATED BY SPECIALISTS IN THE SEVERAL SUBJECTS

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

ATTORNEY AND CLIENT. (Compensation of Attorney — Contingent Fee.) New York Sup. Ct. — In Johnson *v.* Ravitch, 99 N. Y. Supp. 1059, the Supreme Court, through Gaynor, J., holds that where by a contract between an attorney and client the attorney is to receive a contingent fee, for the prosecuting of a personal injury action and the client dismissed the attorney, he can on dismissal recover only for the services actually rendered up to that time. Every attorney enters into the service of his client subject to the rule that the client may dismiss or supersede it. If he makes a contract for future services it is necessarily subject to such rules, and made with full knowledge that he may never perform such services, and in that event he will not be paid therefor.

CARRIERS. (Loss of Shipment — Evidence as to Damages.) Alabama. — In Southern Express Co. *v.* Owens, 41 South. 752, an action against a carrier for the loss of a manuscript, the question arose as to how the damages were to be determined in the absence of a market value. It appeared from the evidence that the manuscript was that of a history of the development of South Carolina literature, intended for a school text book, on which subject there was no text book; and the court concluded that under the circumstances it was proper, on the question of damages, to permit plaintiff to testify as to the time that he had spent in the preparation of the manuscript, and as to what he considered it worth. The court says that while it may be that property destroyed or lost has no market value, and that it may be that no rule absolutely certain can be laid down, plaintiff cannot on account of such circumstances be awarded merely nominal damages; but that where the article is unusual in character, so that the market value cannot be determined, plaintiff's damages must be ascertained in some other rational way. "Where the article lost has no market value, the rule of damages seems to be its value to the plaintiff, in ascertaining which inquiry may be made into the constituent elements of the cost to plaintiff in producing it." In support of this decision the court cites Green *v.* Boston R. Co., 128 Mass. 221, 35 Am. Rep. 370; Louisville & Nashville R. Co. *v.* Stewart, 78 Miss. 600, 29 South. 394.

CARRIERS. (Passengers — Injuries — Proximate Cause.) Colorado. — In Snyder *v.* Colorado Springs and Cripple Creek District Railway Company, 85 Pacific Reporter, 686, plaintiff became a passenger on a crowded car and stood near the door with his hand resting on the door jamb. Other passengers were standing between him and the door, and some on the steps of the car. The conductor in pushing his way through the crowd of passengers pressed plaintiff against one, who was sitting in a seat on the side of the car. Such person became angry and pushed plaintiff with such force that he was thrown from the car, passing over the head of a man standing on the lower step. The question, of course, was as to what was the proximate cause of the accident, and the court decided that the proximate cause was the action of the passenger who pushed plaintiff, and that hence the company was under no liability. The court cites from Denver & Rio Grande Ry. *v.* Sipes, 26 Colo. 17, 55 Pac. 1093, where proximate cause was defined as that cause "which in natural and continued sequence, unbroken by any efficient intervening cause, produced the result complained of, and without which that result would not have occurred," and Burlington & M. R. Co. *v.* Budin, 6 Colo. App. 275, 40 Pac. 503, where proximate cause was considered to be an act which is the proximate cause of an event "when, in the natural order of things, and under the particular circumstances surrounding it, such an act would necessarily produce that event." Stone *v.* Boston & A. R. Co. (Mass.), 51 N. E. 1, 41 L. R. A. 794; Lane *v.* Atlantic Works, 111 Mass. 136, are also cited for definitions of proximate cause. The court says: "it was of course possible that some

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extremely nervous or irritable person would become angry because of his being inconvenienced on account of the crowded condition of the car; but it is not in accordance with the usual and ordinary course of events to anticipate that a seated passenger would so far lose control of himself on account of having a standing passenger crowded against him that he would eject the standing passenger from the car with such force as to throw him over the head of one who was standing upon the step below the party so ejected."

CARRIERS. (Who are Passengers.) Mass. — Fitzmaurice *v.* New York, New Haven, and Hartford Railroad Company, 78 N. E. 418, is an enunciation of the principle that one whose presence in the conveyance of a carrier is brought about by fraud, was not a passenger. Plaintiff, while riding on a train of the defendant, was injured in a collision, and in an action for the injuries it appeared that she had obtained her ticket by presenting to the plaintiff's ticket agent a forged certificate purporting to be signed by her father, to the effect that she was under eighteen years of age and a pupil in a certain art school, and agreeing that she would not use the ticket except in traveling to and from the school, and by presenting a forged certificate purporting to be signed by the principal of the school, certifying that plaintiff was a pupil, and it was shown that by such fraudulent conduct plaintiff had obtained a ticket at reduced rate. Rev. Laws, c. 111, § 228, authorizes a railroad to make contracts for the conveyance of passengers at such reduced rates as may be agreed on by the parties, and the court decides that owing to the fraud practiced by plaintiff she was not a passenger, and this notwithstanding that defendant's conductors had accepted the coupons of plaintiff's tickets. The court cites Way *v.* Chicago, Rock Island & Pac. Ry., 64 Iowa 48, 19 N. W. 828, 52 Am. Rep. 431, and Toledo Wabash & Western R. Co. *v.* Beggs, 85 Ill. 80, 28 Am. Rep. 613, where there was a similar acceptance of coupons, and Condran *v.* Chicago, Milwaukee & St. Paul Ry., 67 Fed. 522, 14 C. C. A. 506, 28 L. R. A. 749; Toledo, Wabash & Western Ry. *v.* Brooks, 81 Ill. 245; Chicago, Burlington & Quincy R. R. *v.* Mehlsack, 131 Ill. 61, 22 N. E. 812, 19 Am. St. Rep. 17.

CHARITIES. (Charitable Hospitals — Liabilities for Injuries to Servants.) New Hampshire. — Hewett *v.* The Woman's Hospital Aid Association, 64 Atlantic Reporter, 190, decides in favor of plaintiff the question whether a hospital conducted as a charity is liable for the negligence of its manager in failing to notify a nurse of the contagious nature of a case assigned to her. The facts showed that plaintiff was a pupil nurse in the hospital under a contract whereby she was to be trained as a nurse, receiving $10.00 per week as compensation, that the manager of the hospital put her in charge of a patient suffering with diphtheria, which fact was known to the manager, that plaintiff was not informed by any one as to the nature of the disease, and developed it shortly after taking charge of the case. Defendant was a corporation formed under the general incorporation law of the state, which authorizes persons to incorporate for the establishment and maintenance of hospitals, and which provides that the corporation, its officers and stockholders shall have all the rights and powers and be subject to all the duties and liabilities of other similar corporations, except so far as limited by the statute. In determining the question, the court calls attention to the fact that defendant was not incorporated for the purpose of carrying out the provisions of an express trust in reference to property or money donated under a limited deed of trust, but that it held its property under its charter for the general purposes of a hospital, and it is held that notwithstanding that the corporation had no capital stock and made no division of profits, but that all its property was devoted to charitable purposes, it was liable for the negligence of the manager. In support of the liability of charitable corporations in actions of tort, the opinion cites: Stewart *v.* Harvard College, 12 Allen (Mass.) 58; Davis *v.* Society, 129 Mass. 367, 37 Am. Rep. 368; Bishop *v.* Trustees 1 E. & E. 697; Gilbert *v.* Trinity House, 17 Q. B. Div. 795, and states that if the language of some courts is broad enough to deny the liability of charitable corporations in all actions of tort, Perry *v.* House of Refuge, 63 Md. 20, 52 Am. Rep. 495; Downes *v.* Hospital, 101 Mich. 555, 60 N. W. 42, 25 L. R. A. 602, 45 Am. St. Rep. 427, "it cannot be regarded as a discriminating statement of the law." In reply to another contention, the court is of the opinion that though plaintiff was an apprentice learning a trade, she was nevertheless a servant, and that the fact that at the time she was employed she represented herself to be older than she was did not relieve the corporation of its ordinary duty to her as a servant.

The question of a public charitable corporation's liability for torts is a vexed one and there are various holdings. By the most reasonable and perhaps the most general holding, such a charitable corporation must respond in damages to third persons for its failure to exercise due care in the selection of its servants, though it is not liable for the torts of these servants. See Huffcut on

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Agency (2d ed.) § 261, and cases cited. There are some duties which cannot be delegated, and for their performance the corporation must be held accountable. The principal case is therefore supported by the same logic when it makes the public charitable corporation liable to its own servant for its own breach of those duties toward him which cannot be delegated.

It should be noted, however, that the distinction which the court seeks to draw between this and other cases because the defendant "is a charitable institution whose powers and duties in the management and expenditure of its funds is unlimited, except so far as they are governed and defined by the general charitable purposes of its incorporation" will not bear scrutiny. See the recent case of Parks v. Northwestern University, 218 Ill. 381. Where tort liability on the part of defendant was denied on the broad ground that a corporation organized solely for charitable purposes necessarily holds all its funds in trust for such purposes and hence is exempt from liability for the negligence of its employees. The real justification for the New Hampshire decision, as contrasted with some others, is found near the end of the opinion where the court says:

"Experience shows that negligence — the failure to exercise ordinary care — is to be expected when men engage in industrial pursuits. It may, not inappropriately, be said to be necessarily incidental in the accomplishment of most practical results through the agency of man. The donors of the defendant's property for hospital purposes were not ignorant of this fact, and are presumed to have given the trust property, knowing that it might be required for the liquidation of claims in tort as well as for claims in contract incurred in carrying out the purposes of the corporation. Indeed its conceded authority to contract for the employment of nurses and other necessary agents would seem to include power to respond in damages for all breaches of such contracts, one essential or incidental element of which is its duty to exercise care as well as its duty to pay the stipulated compensation."

It is not that public charitable corporations are not to be protected from tort liability unless their funds are donated under a limited deed of trust, but that the general trust purposes of such a corporation are not hindered by holding the corporation liable for breach of what are known as nondelegable duties.

Geo. P. Costigan, Jr.

This accords with the now generally accepted theory that, while a charitable corporation is not liable under the doctrine of respondent superior for the torts of its inferior servants, it is liable for the torts of the administrators and managers of the corporation. See the able discussion by Hammersley, J., in Hearns v. Waterbury Hospital, 66 Conn. 98, 33 A. 595.

COMMERCE. (Interstate Regulation — Freight Rates.) U. S. Cir. Ct. N. D. Ill. — Freight rate difficulties are presented in Interstate Commerce Commission *v.* Reichmann, 145 Fed. 236, where it appeared that a corporation owning cars used for the transportation of live stock on all railroads had no direct relations with shippers, but that it merely received mileage from the various railroads, and the question before the court was whether the making of payments by the corporation to shippers, in order to promote the use of the corporation's cars, constituted a violation of Act Feb. 19, 1903, c. 708, 32 Stat. 847 [U. S. Comp. St. Supp. 1905, p. 599], making it unlawful for any corporation to offer, "grant, give, or solicit, accept or receive, any rebate, concession, or discrimination, in respect of the transportation of any property in interstate or foreign commerce, by any common carrier, . . . whereby any such property shall by any device be transported at a less rate than that named in the published tariffs filed by the carrier. Considering the statute and the conditions which the statute was designed to remedy, it is held that freight rates are to be construed as meaning the net cost to the shipper of the transportation of his property; that the practice of making such payments on the part of the corporation destroyed uniformity, and was a violation of the statute, the contention that the only effect of the statute is to prohibit the shipper from soliciting or accepting preferences from the carrier itself, and the carrier and its agents from offering or giving any preference, being clearly without merit. The effect of the holding appears to be that any conduct on the part of any one which tends to bring about lack of uniformity in the net cost of shippers is within the statute.

CONSPIRACY. (Injuring Person in Business.) New York Sup. Ct. — A case which has attracted considerable attention is that of People *ex rel.* Burnham *v.* Flynn, 100 New York Supplement, 31, it being a prosecution for conspiracy for excluding the dramatic critic of a prominent publication from theaters controlled by defendants. N. Y. Pen. Code, § 1068, subdiv. 5, under which the prosecution was brought, makes it a misdemeanor for persons to conspire to prevent another from exercising a lawful trade or calling or doing any other lawful act by force, etc. It appeared that defendants had entered into an agreement not to admit the critic to the various theaters under their control, that they had given instructions to their

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employees not to admit him, and that he had been forcibly prevented from entering such theaters after purchasing a ticket. The court refers to the case of Collister *v.* Hayman, 183 N. Y. 250, 76 N. E. 20, 1 L. R. A. (N. S.) 1188, decided by the court of appeals, where it was held that the conducting of a theater is a private business which the proprietor can open or close at will, admitting as many as he sees fit, and charging what he may choose, and that the manager and proprietor of a theater has the right to say who shall enter his theater. After citing Collister *v.* Hayman, 183 N. Y. 250, 76 N. E. 20, 1 L. R. A. (M. S.) 1188, where the court of appeals held the conducting of a theater to be a private business, the court finds that the manager and proprietor of a theater has the right to say who shall enter his place of entertainment and who shall not, or what class of people shall be entitled to do so and what class shall not. This necessarily follows from the fact that his enterprise is a private one, and because while he may entertain the public at large, he is under no obligation to do so. His rights and duties are not like those of carriers, who have public franchises. And it is decided that defendants under such principle did not enter into an unlawful agreement, that if they disliked the presence of the critic, or thought his attendance was injurious to their business, they had a lawful right to agree to exclude him, and that if he attempted to enter their places of amusement, they had the right to prevent him from so doing by any reasonable force, so long as the agreement entered into was not actuated by the sole motive of preventing the critic from exercising his lawful calling. National Protective Association *v.* Cumming, 170 N. Y. 315, 63 N. E. 369, 58 L. R. A. 135, 88 Am. St. Rep. 648, is cited to sustain the proposition that persons may combine to do any lawful act without subjecting them to responsibility, either civil or criminal.

"Sole motive" is altogether too strong an expression. If the dominant motive was to injure the critic in his business the purpose of the Statute was violated. Rideout v. Knox, 148 Mass. 368, 19 N. E. 390. Moreover, there is no justification in reason for the statement that what one may lawfully do any member may lawfully combine to do; that doctrine is the gospel of the boycott and has made New York state its congenial home.

CONSTITUTIONAL LAW. (Validity of State Statute — Discrimination Against Patented Articles.) (**U. S. Cir. C. App.**) — Ozan Lumber Company *v.* Union County National Bank of Liberty, Ind., 145 Federal Reporter, 344, is a case in which the court was called to pass upon the validity of a statute of Arkansas. Act April 23, 1891 (Sand & H. Dig., §§ 493–496) which provides that every negotiable instrument taken in payment for any patented machine, implement, substance, or instrument shall be executed on a printed form, showing on its face that it was so taken, and making its violation punishable by a fine, and all such negotiable instruments not so showing on their face, absolutely void. The legislation was upheld by the state court, but the federal court holds that the statute is unconstitutional and void, for the reason that it creates a discrimination between articles of property of the same class or character, which discrimination is based on the fact alone that those discriminated against are protected by a patent granted by the United States. Support for the statute was claimed to be found in Patterson *v.* Kentucky, 97 U. S. 501, 24 L. Ed. 1115, and in Webber *v.* Virginia, 103 U. S. 344, 26 L. Ed. 565. In the first case a statute of Kentucky required the inspection and gauging of illuminating oils and fluids, recognized as standard those that ignited and permanently burned at a specified temperature, and condemned those more inflammable as unsafe, and it was sought to exempt from the statute a patented oil which could not be made to conform with the test, on the ground that the oil was protected by patent, and it was held that there was no such exemption. In the latter case, an agent of a manufacturing company sought to escape the operation of the license laws of Virginia, on the ground that the articles sold by him were patented, and in that case it was held that the rights conferred by the patent laws did not exempt the patented articles from the operation of the local law. The court distinguishes these cases from the one at the bar by stating that their doctrine is well defined and is "that the tangible products of an invention become a part of the mass of property of the state and fall within the domain of its police power, and that immunity from the lawful exercise of that power cannot be claimed solely because of the incident of the patent; but it is an entirely different thing to say that merely because articles are patented, they may, for that reason, be selected from the mass of other property of like character for invidious and hostile discrimination." The court points out that if the state could lawfully enact such a statute as that in question, it might with equal reason destroy the negotiability of all notes taken by national banks, by other corporations organized under the laws, by citizens of other states, and in interstate commerical transactions, which obviously is not within the power of the state. The court cites a number of cases upholding local

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statutes, requiring notes given on the sale of patent rights to recite such fact upon their face. Tod *v.* Wick, 36 Ohio St. 370; Mason *v.* McLeod, 57 Kan. 105, 45 Pac. 76, 41 L. R. A. 548, 57 Am. St. Rep. 327; New *v.* Walker, 108 Ind. 365, 9 N. E. 386, 58 Am. Rep. 40; Herdic *v.* Roessler, 109 N. Y. 127, 16 N. E. 198; Hankey *v.* Downey, 116 Ind. 118, 18 N. E. 271, 1 L. R. A. 447; Sandage *v.* Manufacturing Co., 142 Ind. 148, 41 N. E. 380, 34 L. R. A. 363, 51 Am. St. Rep. 165; Haskell *v.* Jones, 86 Pa. 173; Pinney *v.* Bank, 68 Kan. 223, 75 Pac. 119, and other cases denying the validity of such statutes: Pegram *v.* Alkali Co. (C. C.) 122 Fed. 1000; Reeves *v.* Corning (C. C.) 51 Fed. 774, 787; Castle *v.* Hutchinson (C. C.) 25 Fed. 394; Helm *v.* Bank, 43 Ind. 167, 13 Am. Rep. 395; Cranson *v.* Smith, 37 Mich. 310, 26 Am. Rep. 514; Crittenden *v.* White, 23 Minn. 24, 23 Am. Rep. 676; Woolen *v.* Banker, 2 Flip. 33, Fed. Cas. No. 18,030; State *v.* Lockwood, 43 Wis. 403; Wilch *v.* Phelps, 14 Neb. 134, 15 N. W. 361.

DEAD BODIES. (**Mutilation — Damages — Mental Anguish.**) **Oklahoma.** — Long *v.* Chicago, Rock Island & Pac. Ry. Co., 86 Pac. 289, was an action by the parents of an infant child against a carrier, to recover damages for mental pain and anguish, occasioned by the mutilation of the dead body of the infant, owing to the negligence of defendant in transporting the remains, and liability is denied. The case of Foley *v.* Phelps, (Sup.) 37 N. Y. Supp. 471, is considered, where it was held that one might recover for the mutilation of a dead body of a relative, on the ground that such act is a violation of the legal right of the relative to have the body in the condition in which it was at the time of death, and that there is a remedy at law for the interference with every legal right; but the case is disapproved of, and it is held that there is no difference in principle between a recovery of a parent for mental pain and suffering caused by the death of a child from personal injury, and a recovery for the same as a result of the mutilation of its body after death. The court says: "The position in which the courts declare the right by reason of the *quasi* property interest of the relative is the only one which can be supported by any degree of logic, but those courts fail to recognize that the dead body of a relative, neither by the natural law of mankind, by the common law of England, nor by the statutory law of the states, may be sold for personal gain or disposed of, except by burial, . . . and has correctly said 'A dead body belongs to no one, and is under the protection of the public.'"

Though the cases upon the subject cannot be reconciled, the conclusion in this case seems opposed to the weight of authority. Several important cases are not noticed in the opinion, though it seems scarcely conceivable that they were not brought to the attention of the court. Foremost among them is Larson v. Chase, 47 Minn. 307, 50 N. W. 238, 28 Am. St. 370, 14 L.R.A.85. Koeroer v. Patek, 123 Wis. 453, 102 N. W. 40, 68 L.R.A. 956, is also important and contains an exhaustive collection of the authorities. Renihan v. Wright, 125 Ind. 536, 25 N. E. 822, 21 Am. St. 249, 9 L.R.A. 514, must also be considered, though it may be thought to be affected by the later case of Western Union Tel. Co. v. Ferguson, 157 Ind. 64, 79, 60, N. E. 674, 1080. The telegraph cases and the case at bar are thought by the Oklahoma court to stand upon the same footing. The Wisconsin court, however, has distinguished them.

F. R. M.

EMINENT DOMAIN. (**Condemning Right of Way Through Cemetery.**) **Tenn.** — In Memphis State Line R. Co. *v.* Forest Hill Cemetery Co., 94 Southwestern 69, a railroad sought to condemn a right of way through lands belonging to a cemetery. The right was denied, and Wilkes and Shields, JJ., in a separate opinion, express themselves in language of no little vigor: "In our view real estate in Tennessee, conveyed for cemetery purposes forever, whether to a public or private corporation, or to a board of trustees, to have perpetual succession, is *ipso facto* as a matter of law dedicated to a public use of a sacred character. . . . We do not believe that any legislature of the state will ever undertake to authorize such invasion, and the condemnation of such property. . . . No emergency or contingency or necessity can justify the invasion of the resting places of the dead." And in conclusion the judges state that they are of opinion that the law and the spirit of our government and civilization, as well as the dictates of sound public sentiments, demand that cemeteries shall never be invaded for railroad or other secular purposes. "The wheels of commerce must stop at the grave."

LIBEL. (**Publication by Corporation — Liability of Managing Editor.**) **U. S. C. C. A.** — The liability of the editor-in-chief of a newspaper, having general supervision of the matter published, for the publication of a libel, though he has no actual knowledge thereof, is considered in Folwell *v.* Miller, 145 Fed. 495, and the editor is held free from liability. The facts in the case showed that the libel was published in a newspaper of which defendant was the editor-in-chief, but that the publication was caused by a subordinate during the absence of the editor-in-chief, and that he had no knowledge of the publication until there-

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after. The court states that it has never been distinctly decided that the liability of the editor is coextensive with that of the proprietor, and that while some text writers indulge in statements implying coextensive liability, the authorities cited do not justify the implication. The case of Smith *v.* Utley, 92 Wis. 133, 65 N. W. 744, 35 L. R. A. 620, is cited as a carefully considered adjudication, in which the liability of the proprietor and managing editor is held to be coextensive, but after reviewing authorities relied upon in Smith *v.* Utley, among others Watts *v.* Fraser, 7 A. & E. 223, and Nevin *v.* Spieckemann (Pa.) 4 Atl. 497, the court says: "Notwithstanding these adjudications we are not convinced that the editor's liability is commensurate with that of the proprietor, where it appears that he was not on duty during any part of the time between the reception of the libelous matter and its publication. . . . The action of libel is not based on neglect of duty, but is a positive tort."

SALES. (**Right to Restrict Future Sales.**) **U. S. Cir. Ct. E. D. Ky.** — Hartman *v.* John B. Park & Sons Co., 145 Fed. 358, is a case involving the validity of contracts whereby the manufacturer of a widely advertised proprietary medicine sought to avoid "price-cutting," by the controlling in certain respects of the disposition of his property after it had been sold outright by him. It appears that the medicine was compounded in accordance with a secret formula, and invariably placed on the market in a certain style and dress, and under a certain trade name, and that by a system of contracts between the manufacturer and wholesalers they were bound to sell only at a certain price, and only to retail dealers designated by the manufacturer, and that by a contract between him and the retail dealers, in consideration of such designation, they agreed to sell only at a certain price to consumers. Defendant obtained the medicine from complainant's wholesalers, in violation of their contract with defendant, and sold the medicines to retailers operating cut-rate drug stores, and the manufacturer sought an injunction. Defendant relied upon two grounds in support of his contention that the contracts were invalid — that the owner of a patent or copyright has the right to sell the article outright, and retain control of subsequent trade, by virtue alone of the federal statutes, but that the owner of a mere secret process has no such right; and that the contracts were unlawful as in restraint of trade. In disposing of the first ground adversely to defendant, the court discusses Edison Phonograph Co. *v.* Kaufmann (C. C.) 105 Fed. 960; Same *v.* Pike (C. C.) 116 Fed. 863; Victor Talking Machine Co. *v.* The Fair, 123 Fed. 424, 61 C. C. A. 58; National Phonograph Co. *v.* Schlegel, 128 Fed. 733, 64 C. C. A. 594, in which cases the owners of patents sold the patented articles under agreements and restrictions on the subsequent trade in the article, which restrictions were sustained, and after an examination into the nature of the rights conferred by the patent and copyright statutes, the court concludes that the "sole creature of the statutes is a distinct property right, to wit: the exclusive right to make, use, and sell the thing patented or copyrighted; that is, to prevent others from making, using, and selling it"; that when the owner of a patented or copyrighted article sells it outright he can or cannot, as he chooses, give a license to re-sell, and limit the license as he chooses, but that the right to impose restrictions upon vendees and subvendees by contract is a common law right, not derived from the federal statutes alone, the only effect of which, in the case of a patented or copyrighted article, is to give a remedy in the state courts for a violation of the license, and that hence there is no reason why complainant did not have the right to lawfully make the contracts in question. On the second ground, contracts in restraint of trade are regarded as falling into two classes — one class being where one party agrees to restrain himself for the benefit of the other, and which are regarded as valid if the restraint is reasonable, and contracts "between two or more persons engaged in the same business, sometimes including all the persons so engaged in a particular locality or elsewhere, but each one engaged separately and with no concern or interest in the business of any other one, and each one agrees to restrain himself in some particular for the mutual benefit of all," — contracts which Judge Taft defines in United States *v.* Addyston Pipe & Steel Co., 85 Fed. 271, 29 C. C. A. 141, 46 L. R. A. 122, as contracts having no purpose but to restrain competition and maintain prices, and it is held that the manufacturer's contracts, belonging to the former class, are valid as not unreasonable, in that the restraining agreement is ancillary to the main purpose of the contract, and merely for the protection of the complainant's business. As supporting this conclusion the court cites Elliman *v.* Carrington, 2 Ch. 275, 84 L. T. (N. S.) 853; Garst *v.* Harris, 177 Mass. 72, 58 N. E. 174; Walsh *v.* Dwight (Sup.) 58 N. Y. Supp. 91; Park & Sons Co. *v.* National Wholesale Druggists, 175 N. Y. 1, 67 N. E. 136, 62 L. R. A. 632, 96 Am. St. Rep. 578; Whitwell *v.* Tobacco Co., 125 Fed. 454, 60 C. C. A. 290, 64 L. R. A. 689.

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TRADE MARKS AND TRADE NAMES. (Deception of Public.) Michigan. — Warren Brothers Company *v.* Barber Asphalt Paving Company, 108 Northwestern 652, concerns the extent of the right acquired by the owner of a trade name. It appeared that complainant had employed as a trade name for a pavement which complainant was in the business of putting down, the word "Bitulithic," and had caused such word to be copyrighted and filed for record as a copyrighted word in the office of the secretary of state; that the city of Detroit through its department of public works called for proposals for the construction of a large amount of bitulithic pavement, the proposals requiring the pavement to be made according to certain specifications, which showed the materials, manner of construction and various details of the work, and that defendant contracted with the municipality for the putting down of such pavement, whereupon complainant sought to obtain an injunction. The court considered the question before it as to whether the fact that complainant had employed such name and advertised it, prohibited defendant and others from offering to bid upon the construction of pavements called in the proposal "bitulithic," where the proposals went further and specified the method of construction, materials, etc. Complainant was held not entitled to an injunction on the ground that a trade name does not give one the exclusive right to make or sell a given kind of goods, citing Globe-Wernicke Co. *v.* Fred Macey Co., 119 Fed. 703, 56 C. C. A. 304; Fairbanks *v.* Jacobus, 14 Blatchf. 337, Fed. Cas. No. 4, 608; Putnam Nail Co. *v.* Dulaney, 140 Pa. 205, 21 Atl. 391, 11 L. R. A. 524, 23 Am. St. Rep. 228; Powell *v.* Birmingham Vinegar Brewing Co., 2 Ch. Div. L. R. 1896, pp. 68, 72. The court quotes from Canal Company *v.* Clarke, 13 Wall. (U. S.) 311, 20 L. Ed. 581, where the court through Justice Strong said: "The office of a trade mark is to point out distinctly the origin or ownership of the article to which it is affixed, or in other words, to give notice who was the producer . . . in all cases where rights to the exclusive use of a trade mark are invaded, it is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another; and that it is only when this false representation is made, that equity can give relief." In conclusion the court states that no one can claim protection for the exclusive use of a trade mark or trade name, which would practically give him a monopoly in the sale of any goods other than those produced or made by himself, and that no generic name, or a name merely descriptive of an article of trade, of its qualities, ingredients, or characteristics, can be employed as a trade mark, and that hence defendant's offer did not amount to an offer to furnish a pavement made by defendant as being a pavement made only by complainant, any person having the right to make a pavement according to the specifications.

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THE LIGHTER SIDE

BREWSTER'S CLIENT

By Herbert W. Holcomb

Brewster cherished certain ideals. There was no reason why he shouldn't. After finishing his course at college and law school he found himself possessed of a *mens sana* in a six foot *corpora sano* with a thorough knowledge of football and a fair acquaintance with the law. As he "officed" in his father's building in Chicago and lived in the family home in a suburban village, he was not confronted in the practice of his profession with the sordid details of rent and the other et ceteras which are the most prominent features of the advent into business of the oft mentioned average lawyer. It was not difficult for him, therefore, to determine that *he* would practice law as a man and a gentleman, for reward if the client's circumstances justified it, but without if his duty to his client and to his profession demanded it. The opportunity soon found the man.

Returning one night from the golf club, where he had recuperated from an exhausting review of contingent remainders and an equally exhausting wait for clients, he found a neighbor's colored coachman awaiting him. As Brewster's ideals and lack of clients were equally well known to his family, his sister hastened to inform him that the coachman was a prospective client, and that she had cheerfully spent a half hour in entertaining him, lest he should change his mind before Brewster's arrival.

Brewster, notwithstanding his somewhat negligee golf clothes, hurriedly assumed what professional dignity he could summon and opened the interview.

"Well, Sam, is there something I can do for you?"

"Why, yes, Mistah Brewstah, yo see a while ago I maa'ied a yalla gull down 'Lanta way, and 'bout two yeahs back she up and goes to Wisconsin and maa'ies anotha fellah, an' ahm mighty lonesome and ah dun ast a lady 'at lives heah to maa'y me an' she's willin', but Mistah Preston he sez dat I can't get maa'ied nohow 'twell ah gets one o' them deevocis, an' ah thawt praps yo all cud get me one."

Brewster winced, "and yet," he argued with himself, "why not?" His ideals did not include divorce practice, but his mind reverted to the half forgotten pet theory of his old professor in "Social Science A," "the lack of moral sense is one of the great handicaps to the race." A refusal seemed almost immoral. Prompt action might inculcate respect for the law among the considerable colored population of the village.

"All right, Sam," he said, "I'll undertake it."

After prolonged questioning Brewster gathered the necessary information as to the dates and places of the two marriages of the irresponsible Mrs. Sam. He felt that a proper respect for the majesty of the law would be better conserved in Sam's mind by delaying action until Sam advanced the court costs, and so closed the interview by informing him that the production of ten dollars would be the first step in the court procedure. Sam agreed to bring this amount around on his next pay day, some two weeks in the future. Brewster said that this time would be well employed in collecting the evidence.

He sat down to a cold dinner with that sense of honest pride as a helper of the oppressed that comes at times to every decent lawyer. Next morning he caught an early train to the city. He curtly answered chaffing inquiries as to the reason for his early appearance with:

"Have to get an early start on running down some evidence."

After corresponding with the county clerks of various counties in Georgia and Wisconsin, he found that Sam's information was correct, and he even secured certified copies of both marriage certificates. Brewster's family of course was advised of the progress of events, and, through Brewster's sister's chum, the neighborhood.

On the day before Sam's pay day all was in readiness for the institution of the action. As Brewster opened the front door he saw Sam shuffling across the lawn, with his face wreathed in smiles.

"Mawnin', Mistah Brewstah, ah'se got some news foh yo. Ah's glad to say — no, ah's sorry to say — no, ah ain't sorry — well, any

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way, de woman's daid. Ah jes' got word dat she done up and died las' week."

Of course the news soon spread, and the lost cause was a favorite village topic in Brewster's presence for some time, but he announced that any further mention of the subject would be an immediate *casus belli*, when the secretary of the law club asked him at the Bar luncheon to get up a paper on "Divorce by Act of God."

CHICAGO, ILLINOIS, October, 1906.

Followed Paige's Advice. — The late John C. Paige had at one time as a protégé the son of a very particular friend, a pleasant, gentlemanly young fellow, but always ready to make a bet or to take a hand in a quiet game, and on this account it was thought best by his parents to send him to Boston on a limited income, with the hope of breaking away from old associates and of getting some business energy into him.

Mr. Paige gave him some good, wholesome advice and started him along in business, particularly instructing him to "get his name before the public, to let the people know he was living," etc.

Not very long after this Boston début Mr. Paige, very late one evening, was requested to call at a nearby police station. The young man, it appeared, had got into a very noisy game and was arrested, but not before he had been cleaned out of everything he possessed.

"Well, young man," said Mr. Paige, "this is nice, isn't it?"

"Well, sir, you told me to get my name before the public."

"Oh, yes," Mr. Paige replied, "but I didn't tell you to have a judge and jury go with it to fix the advertising rates." — *Boston Herald.*

Ready to Address the Jury. — George Small of Norway, Me., a painter, used occasionally to look upon "the ardent." At one time he was summoned to testify in a case in court. Being somewhat under the influence of liquor, his speech was rather thick, and, to make matters worse, he directed his conversation to the attorney questioning him, so the jury could not understand half of what he said.

Finally the judge turned to him and said: "Mr. Witness, speak louder, and address the jury."

"Upon what subject, your honor?" asked Small.

The judge joined in the laughter which followed.

Evidence in a Melon Patch. — About forty years ago "Squire" Worcester of Townsend had a law office at Groton Junction, now Ayer, and went back and forth each day upon the train. One morning as he was on his way to the station he was accosted by a neighbor, Deacon Peckham, who wanted some advice about catching the "young rascals" who were stealing his melons. "Get some evidence," said the squire, "and I'll see you again."

The next morning the squire was again accosted by the deacon, who asked him to take a look at the melon patch. Now the squire was afflicted with a lameness that compelled him to wear a boot having an iron half-circle on the sole, and judge of his astonishment to find the soft earth in the deacon's melon patch completely tracked over with imprints of that "iron boot."

"Well," said the squire, as he started for the station, "circumstantial evidence, purely circumstantial."

Perhaps the squire's son, "Joe," as he was then called (I think he is now a practicing lawyer), could have explained the matter if he had not been in fear that the same "circumstantial evidence" might interfere with his sitting down comfortably at supper time. —*Boston Herald.*

A Preface. — Mr. Manson's Preface to the Index Volume of English Ruling Cases is rather more readable than the average introductions to law books. We quote from it as follows:

"Matthew Green, in his poem, 'The Spleen,' written early in the eighteenth century, describes:

"Law grown a forest where perplex
The byeways and the brambles vex;
Where the twelve verderers every day
Are changing still the public way.
And if we miss the way and err,
We grievous penalties incur;
And wanderers tire and tear their skin,
And then get out where they got in."

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Webster Retained Retainers. — Edward M. Nason, superintendent of buildings for the state of New Hampshire, tells the following anecdote of Daniel Webster.

One day a gentleman came to Webster's office and consulted him in regard to a prospective lawsuit. At the close of the conference he paid the attorney a retainer of $100 to look after the matter. Upon returning to his place of business he found that his partner had already settled the suit, obtaining the sum demanded without an attorney. He thought $100 was altogether too much for an office fee, so he dispatched his clerk to look after the subject.

"Mr. Webster," said the young man, "my employer thinks you should return a part of your retainer. That case has been settled."

"Young man," said the lawyer, "you go back and tell your employer that a retainer is something to be retained." — *Boston Herald.*

Lawyer as a Client. — The late Nathaniel Whitmore, a lawyer of considerable prominence and wealth in Maine, was able to appreciate a joke, even when aimed against himself. When he was past sixty a young man graduated from his office who became a fit rival to his teacher.

Mr. Whitmore owned some houses in the town where the young lawyer set up his office. Partly to encourage him, and partly to save himself trouble, he put the property into the young man's care as agent for him. Everything was drawn up in legal form, and the young man fulfilled his duties most satisfactorily. The rents came regularly, together with full accounts of repairs, which were much less than formerly; tenants were satisfied; the property never paid so well before, and Mr. Whitmore was well pleased.

Then came a brief letter stating that the property had been sold for taxes. Dumbfounded, Mr. Whitmore hastened to his agent to demand what this meant.

"How does it happen that I am sold out for taxes?" he asked.

"There was nothing in the agreement about taxes," explained the young man, handing to his former client the signed agreement. "Had taxes been mentioned, I should have paid them."

"Who bought the houses?" the elder man asked, with a shade of amusement in his tone, as a light began to dawn on his mind.

"I did," replied the young man, modestly.

"The devil you did! Where did you learn that trick?" asked Mr. Whitmore, now fully comprehending the situation.

"In your office," came the answer, in the same modest voice. "I look out for a poor client, but a rich lawyer can look out for himself."

Mr. Whitmore recognized one of his own maxims. The two men shooks hands and changed the subject.

Simultaneous-like. — In pursuance of our policy of preserving from oblivion the occasional gleams of falling gold that illumine the forest of decisions through which we take our pilgrimage, we turn from distant Texas to the classic precincts of the First Circuit of the United States and read with joy, "Quite simultaneously, if not simultaneously with the contract with the plaintiff," 145 Fed. 877.

The Patron Saint of the Law. — In answer to a correspondent the New York *Sun* recently printed the following concerning the patron saint of the law: It has been a long, a toilsome, even a desperate search to discover the patron saint of the Bar. Yet at the end he has been discovered. He is St. Yves-Hélori born of a gentle family in 1253 at the Breton manor of Kaer-Martin, died at Lohanec in 1303. His studies were pursued at Paris, at Orleans, and finally at Rennes, where he entered official life, eventually being transferred to Tréguler. The earnestness of his pleading the causes of the widow and the unfortunate earned for him the honorable surname of "the advocate of the poor." Bishop Alain, of Bruc, raised him to the priesthood and designated him rector. From that time on he consecrated himself to the service of the poor. He was canonized in 1347 in the pontificate of Clement VI at Avignon. "The tribe of lawyers have assumed him for their patron," is the mischievous comment of another Breton lawyer of a later epoch, M. de Kerdanet. The same authority assures us that St. Yves is the only lawyer known to have attained to the honor of being canonized. About him has grown

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this legend: Dying, he presented himself at the gate of paradise in a train of many nuns. Of these St. Peter demanded: "Who are you?" "Nun." "Enter then; heaven is full of your sisters." Then addressing himself to St. Yves: "And you?" "Lawyer." "Come in; we have never had till now a man of law." St. Yves found his way in all right, but a day arose when there was a pettifogging inquiry into his title deeds, and the effort was made to expel him from paradise. "I will not resist," said the saint, "but it is necessary that service of the writ of my expulsion shall be made upon me by a bailiff." Needless to say, the legend concludes, they were never able to find a bailiff in heaven. In the breviaries of Vannes and of Rennes is found this fragment of a hymn in his honor:

"Sanctus Yvo
Erat Brito
Advocatus
Et non latro
Res miranda
Populo."

A Georgia Pleading. — A Macon, Georgia, correspondent sends us this novelty in pleading. When the case was called for a hearing plaintiff's attorney had entered a judgment sustaining a claim filed by "A." Also a motion to make claimant a party, dismissing as to Richard Roe and John Doe, which the court formally did. Query. What is the status of the case?

Georgia, Bibb County.

Personally appeared before me, A. W. Stokes, who being duly sworn, says that John Doe and Richard Roe, of said County and State is indebted to him in the sum of three and $\frac{50}{100}$ ($3.50) dollars, for storage of property at 518 Mulberry Street, Macon, Georgia, rent now due and unpaid.

A. W. Stokes.

Sworn to and subscribed before me this 16th day of July, 1906.

Elmo Prentice Clay,
N. P. Exofficio J. P.

Georgia, Bibb County.

To any lawful officer to execute and return.

Whereas, A. W. Stokes has made oath before me that John Doe and Richard Roe of said County and State is indebted to him $3.50 for storage of property at 518 Mulberry Street, Macon, Georgia, rent now due and unpaid.

These are therefore to command you to levy on and sell a sufficiency of the property of said John Doe and Richard Roe, to make the sum of $3.50 and cost of this suit; and have you the said sums at the Justice Court of the 514th District G. M. to be held on the 11th day of August, 1906, ready to render to said A. W. Stokes, and costs of suit.

Given under my hand and seal, this the 6th day of July, 1906.

Elmo Prentice Clay,
N. P. and Exofficio J. P.

Sorry he Learned Law. — A prominent attorney in the Tremont Building has a new office boy. The last one resigned a few days ago because the law business did not suit his temperament.

"How long have you been here?" asked the attorney when the small boy made known his intention to engage in a different vocation.

"Six months," replied the boy.

"And you don't like the law business?"

"Naw; it's no good, and I tell you straight, I'm mighty sorry I learned it."—*Boston Herald.*

Well Put. — We respectfully suggest that when the State takes charge of the railroads a law be passed limiting the number of attorneys to one for every two miles of road. — *Greensboro (N. C.) News.*

Legal Metaphor. — "My client acted boldly," said the counsellor. "He saw the storm brewing in the distance, but he was not dismayed. He took the bull by the horns, and had him indicted for perjury."

De Jure. — A disciple of Coke, in Charleston, S.C., when asked by a "brudder" to explain the Latin terms *de facto* and *de jure* replied, "Dey means dat you must prove *de facts* to de satisfaction ob *de jury*."

Lame Lawyer. — A Scotch advocate, limping down High Street in Edinboro, overheard a lady say to her companion, "That is Mr. C., the lame lawyer." Turning round, he replied, "No, madam, I am a lame man, but not a lame lawyer." — *Christian Register.*

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As Sober as a Judge; State Farm. — Stephen Conroy, who was in the Cambridge District Court one morning charged with drunkenness, tried flattery as a means of exciting the court's clemency. When the charge was read, Conroy said, " Your honor, I was sober as a judge." Judge Almy looked at him quizzically, however, and said " State Farm."

Court and Lawyers Caught. — Attorney Don H. Powers of Maine, a brother of Congressman Lewellyn Powers, was once defending a man who was charged with some minor offense. The trial was before a trial justice in a country town, and at the close of the preliminary hearing a wag in the court room arose and said: " Mr. Judge, I will make a motion that the prisoner be discharged."

" I will second the motion," chimed in another spectator.

The trial justice, who evidently forgot where he was, and thought he was presiding at a town meeting, said: " The prisoner is discharged."

Powers and the prosecuting attorney were so astonished at this method of deciding the innocence or guilt of the respondent that they never opened their mouths, and the case ended in this fashion.

Squire Meredith's Docket. — A correspondent sends in the following complaint copied from a justice's docket.

Commonwealth
v.
Henry Thimble, } No. 34, September Term, 1900.

Upon oath of Fred Fleschut who being duly sworn deposes and says that on the 17th day of Sept., 1900, at the Borough of Towanda in said County, One Henry Thimble, Jr., being than and there did wilfully and *feloniously* go into my celler of MY dwelling house in the first ward of Towanda Boro, while the cellar door was locked and he entered said celler through a whole left open for air, and did steal and carry away a quantity of cider and pulled out the cork in the end of the barrell and plugged up said whole with a corner of a bag and by so doing caused about all the cider in said barrell to run out of the said celler floor, causing me a damage or a loss of about 30 gals. of cider of the value of $5.00 Contrary to the form of the Acts of assembly made and provided in such cases.

Now, Dec. 31, 1902, Defendant brought into office, complaint read aloud in his hearing, he enters plea of not guilty. Complainant being deceased and after hearing proofs and allegations of witnesses, deft. discharged.

Docket of John Meredith, J. P., No. 1, Page 289.

Barbarous. — In the Town Topics criminal libel suit there was much to contribute to metropolitan gayety. In examining the talesmen for the jury to try the case against Norman Hapgood, who was charged with libelling Colonel Mann, they were all asked if they had ever read Town Topics. Three of them said that they had glanced over it in a barber shop. The next talesmen had never even heard of the publication.

" I shave myself," said he.

Story on Sidewalks. — The late Judge Story of the Somerville Municipal Court was one day asked by a neighbor if he were allowed any of the trees which were being cut down in front of his house. The judge thought that abutters on the street were entitled to that privilege, and so the neighbor secured a couple of good chopping blocks.

The next morning one of the workmen noticed that the blocks were missing, and found them in the adjoining yard. He immediately began to roll them out again, when he was stopped by the neighbor, who began to assert his rights to the man. Finding that his argument made no impression upon the man, he said that Judge Story told him that abutters on the sidewalk were entitled to some of the trees which were then being cut down.

At mention of the judge's name the workman became very angry, and, shaking his finger in the man's face, cried: " Look here, my good man, Judge Story may know law, theology, and thim things, but he don't know a d—n thing about a sidewalk." — *Boston Herald.*

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A Difficult Case. — Former Chief Justice Logan E. Bleckley of the Georgia Supreme Court, who, at eighty, is the father of four children each younger than his youngest grandchild, delights, since his retirement on account of advanced age, to revisit occasionally the scene of his many years of labor and join again, as a sort of mental exercise, in the discussions of the consultation room.

The other day Judge Bleckley walked into the Supreme Court library when the justices were in the midst of a deeply involved case, one which had for some days given them no little worry. Seeing a possible opportunity to get the benefit of well-considered and valuable advice, the Chief Justice remarked:

"Take these briefs and tells us what you think of this case."

It was just the mental athletics Judge Bleckley seemed to need. He took the briefs and other papers and read them carefully for one — two — three hours, occasionally consulting authorities, while the members of the court were occupied with other duties. Then he returned the papers to the Chief Justice, while the whole court looked up expectantly for his opinion.

"Gentlemen, this is one of that class of cases," Judge Bleckley said measuredly, "that whichever way you decide it, you will decide it wrong." — *Saturday Evening Post.*

Pennsylvania Law Good Enough for Him. — An old farmer one day walked into the office of a Pennsylvania ex-judge, and said: "Judge, I borrowed some money from a man a good many years ago, and gave him my note for the amount for one year, with interest at ten per cent. When the note was due I could not pay it, and he figured up the interest, added it to the debt, and took a new note for another year. Well, to make a long story short, I was never in shape to pay, so he kept on compounding the interest at ten per cent and taking a new note every year until now the debt is pretty big, and the interest, as he has figured it, is a good deal more than all the money I borrowed from him, and he has got my note for the whole thing. How much will the law make me pay." The ex-judge said: "My friend, according to the moral law you must pay the full amount of your last note, but under the law of Pennsylvania that man can collect only the amount you actually borrowed from him with interest thereon at six per cent from the date of the loan up to the time of payment."

The old farmer said: "Judge, suppose you figure it both ways and see what the difference will be." The ex-judge made the computations as requested, and then told his client that if he settled according to the law of Pennsylvania, instead of the moral law, he would save about three hundred dollars, but he would forfeit the friendship of the holder of the note. The old man thought the matter over very carefully, and then said: "Judge, I guess the law of Pennsylvania is good enough for me. Three hundred dollars is worth more to me just now than any one man's friendship."

He went away, taking with him the computations and statement made out by the ex-judge, and in a week or so returned apparently with a heavy load off his mind. "Judge," says he, "I made that man a tender of the amount as you figured it. He jawed and cussed around a good while, but I told him it seemed to me it would be better to settle all such matters in this world than in the next, and he finally took the money, and gave me the note.

"Much obliged to you judge."

Three Years. — "How long," asked the judge of a vagrant negro, "have you been without any means of support?"

"Since my wife died in 1903, suh," responded the darky respectfully. — *October Lippincott's.*

Fall Worth $1 a Foot. — In the early forties there was an accident on the Fitchburg railroad near Prison Point, and the engine and one coach went overboard. Among the injured was Timothy Batts of Charlestown, the commodore's runner on the receiving ship *Columbus.*

The officials of the road wanted to settle with him, and asked him what he wanted. He asked how far he fell and was told it was twenty feet. Then he said he thought it was worth $1 a foot. — *Boston Herald.*

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Recommendation for Clemency

" An extenuating circumstance? "
The judge was much surprised;
The prisoner hung his head and said,
" My doctor so advised."
" But you admit you stole the cash — "
" Oh, yes, but that's not strange
For when the doctor left his bill
He said I needed change."
(S. I. Litchfield.)

Butler Found a Way Out. — When Gen. B. F. Butler's office was in Pemberton Square a druggist from Cambridge Street called upon him for advice. The druggist said he had just finished remodelling his store, putting in fancy shelving, etc., and that when all was done the landlord had raised his rent. He told the landlord that, before he would pay the additional rent, he would move, and the landlord said: " You can move if you want to; but, according to the law in Massachusetts, you can't draw a nail in that new shelving."

Butler looked toward the ceiling a moment; then, turning to the druggist, he said:

"Your landlord is right. According to the law, you cannot draw a nail, but you can easily remove the shelves." Then his voice assumed a louder tone, as he said: " There is no law under God's heaven that will prevent driving those nails in." — *Boston Herald.*

Testimony. — Paul Murry, a French Canadian, who is employed as watchman at the Maine Central roundhouse in Skowhegan, Me., was called some years ago before the Somerset County Court to testify against a man accused of larceny.

The lawyer for the plaintiff asked Murry to tell the jury where he saw the man, what he was doing, and what he had in his hands.

Murry took the stand and in a drawling tone said: " Well, she was coming up the railroad track and she had a valukus in one hand and a tronk in de oder." Here he stopped and began to scratch his head and then exclaimed in a loud voice: " And she had a lantern in de oder hand."

The lawyer for the defendant jumped up and said: " Now look a-here, Mr. Murry, how many hands do you think this man has? "

Murry replied: " Well, if you know more about it than I did you can tell it." and he left the stand. — *Boston Herald.*

A Leg Worth More Than a Man. — Jesse James, the noted outlaw's son, is, at the age of 30, one of the most talented and respected lawyers of Kansas City.

In a claims case that he recently won Mr. James told an amusing story.

" There was a woman," he said, " whose husband was killed in a railway accident. The railroad, to avoid suit, gave her $5000 damages.

" The sum satisfied the woman, but a month or two afterward, taking up a newspaper, she read about a man who had lost his leg in the same accident, and behold, this man was given by the company damages to the amount of $7500.

" It made the woman mad. She hastened at once to the office of the railway's claim adjuster. She said bitterly:

" ' How is this? Here you give a man $7500 for the loss of his leg, while you only gave me $5000 for the loss of my husband.'

" The claim adjuster smiled amiably and said in a soothing voice:

" ' Madam, the reason is quite plain. The $7500 won't provide the poor man with a new leg, whereas with your $5000 you can easily get a new husband, and perhaps a better one.'

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Thaddeus Stevens

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The Green Bag

Vol. XVIII. No. 12 BOSTON December, 1906

THADDEUS STEVENS AS A COUNTRY LAWYER

W. U. Hensel

THADDEUS STEVENS was born in the first term of George Washington's administration, and he died in the last year of Andrew Johnson's. His experience was not exceptionally extended, but it was stormy. While it lasted most of the history of American jurisprudence was written, but he did not enrich it with any material contribution. In the great volume which the Marshalls and Websters, and our own Gibson and Tilghman, Binney and Sergeant, and a thousand other leaders of the profession have written, no page is his; nor shall I make bold to hang his portrait in the gallery of great American lawyers.

But the fact that he was a Pennsylvanian of first rank, and that before he entered the field of national politics, and long before he became the parliamentary leader of a triumphant party, he had rapidly risen to the front as a trial lawyer, and the observation that so little of his work is recorded in the permanent annals of Bench and Bar, make sufficient apology for a brief recognition.

His struggle — or, rather, that of his widowed mother, for her lame boy, the youngest and favorite — to get an education, his escapades at Burlington and graduation from Dartmouth, his choice of the law and beginning the study of it under Judge Mattocks in his native state; his unexplained venture from Peacham, Vermont, to York, Pennsylvania; his engagement there as a teacher in an academy; how, outside of any law school, or even of any lawyer's office he pursued his studies diligently under David Casset, one of the leaders of the local Bar, are all matters of familiar history.

His admission was characteristic of the practice of his time. It may have been *infra dig.* in the York of that day to combine the study of a learned profession with self-support as a school teacher; his alien Yankee ways or caustic tongue may have won him personal enemies. Whatever prevented his application for admission there, it is certain he rode horseback to Bel Air, the seat of the adjoining county of Harford, in Maryland, and presented himself, an entire stranger, on Monday, August 26, 1816, for membership at a Bar, where, if the gate did not stand open, its latch was loose. The judges sitting were Theodoric Bland and Zebulon Hollingsworth. They, together with Joseph Hopper Nicholson, chief judge, constituted the judges of the sixth judicial district, comprising the counties of Baltimore and Harford.

A committee of examination seems to have been appointed, and one of the members on it was General Wm. H. Winder, a noted lawyer, who had been a distinguished Maryland soldier in the late war with Great Britain, in command of the District of Virginia, Maryland, and the District of Columbia. It is also related that Judge Chase, of later impeachment fame, participated in the examination, which was held after supper at the hotel; and a pre-requisite of the proceedings was an order (by the applicant) of two bottles of Madeira, which satisfactorily passed the committee's test. Then after young Stevens' assurance that he had read Blackstone, Coke upon Littleton, a work on pleading and Gilbert on Evidence, and that he knew the distinction between a contin-

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gent remainder and an executory devise — and the production of two more bottles of Madeira — his certificate was signed — a much more expeditious, and, perhaps, more agreeable method of testing professional fitness than the methods prescribed and pursued nowadays by the State Board of Law Examiners.

The "subsequent proceedings interested" a large concourse of persons attending court, and in "the game that ensued" of "fip-loo," to which Stevens was then something of a stranger, he lost nearly all of the fifty dollars he had brought with him.

The minute of the court next day thus records his admission:

"Upon the application of Stevenson Archer, Esq., for the admission of Thaddeus Stevens, Esq., as an attorney of this court the said Thaddeus Stevens is admitted as an attorney of this court and thereupon takes and signs the several oaths prescribed by law, and repeats and signs a declaration of his belief in the Christian religion."

The day after he had qualified as a lawyer in Maryland, Mr. Stevens rode from Bel Air to Lancaster, scarcely escaping drowning while crossing the Susquehanna River at McCall's Ferry, took a hasty look at the town, and (for come unaccountable reason) quit it for Gettysburg, where he started upon a career as a lawyer, without friends, fame, family, or fortune.

Tradition, based, however, most likely upon his own personal narration, has it that, just when he had begun to despair of success, fortuitous employment to defend a notorious murderer brought him a large fee and great reputation, followed by many retainers. Confidence in the entire accuracy of all the details of the incident is disturbed by the reflection that a $1,500 fee in Adams County, at that time, paid to a yet obscure local lawyer, by a murderer whose case never reached the Appellate Court, and who was himself hanged, seems somewhat improbable. Certain it is, however, that Mr. Stevens, to his death, protested the mental irresponsibility of his client and acknowledged this case to have been the beginning of his professional fame and the basis of his fortune. Thenceforth he leaped to the front of the local Bar and to fame. In all the courts of his county, especially in the Common Pleas and Quarter Sessions, he became engaged in the very miscellaneous practice which crowds the desk and throngs the office of a busy and successful country lawyer. From 1821 (7 S. & R.) to 1830 (2 Rawle) he seems to have appeared in every case in the Supreme Court from Adams County. Compared with the modern volume of business and reports, or the multitude and variety of cases from populous counties, this record is not, in itself, a very extensive one; but the fact that, out of the first ten appeals in which he appeared, he was successful in nine — six times, as plaintiff in error, reversing the court below — may help to account for his sudden rise to eminence and his lucrative returns in fees.

The first reported case in which Stevens seems to have appeared in the Supreme Court was Butler, *et al.*, *v.* Delaplaine (7 S. & R., 378), heard at Chambersburg, where the court then sat, Tilghman being chief justice, Gibson and Duncan the justices. Oddly enough, he appeared against a colored woman claiming freedom for herself, her husband, and two children. The Adams County Court, on a writ of *homine replegiando*, submitted the case to determination by a jury, who, duly charged, found a verdict against the slaves under the following circumstances:

"Charity Butler was admitted to be the slave of Norman Bruce, an inhabitant of the state of Maryland, and still to continue a slave, unless she obtained her freedom by the laws of this state; and if she were free, her children after her emancipation were likewise free. Norman Bruce, in 1782, was the owner of a tract of land in Maryland, stocked with a number of slaves, and demised it, with the slaves to cultivate it, to one Cleland, and removed to a place seventy miles distant in the same state. Shortly after the lease, Cleland entered into a contract with one Gilleland, respecting Charity. Gilleland, for her services, was to feed and

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clothe her, until her arrival at sixteen years of age. Gilleland was an inhabitant of Maryland. A separation took place between Gilleland and his wife, and Mrs. Gilleland, being left destitute, was obliged to support herself and an infant child. She quitted housekeeping, and went to reside with her mother in the house of Mrs. Patterson, who lived in Maryland, near the line between that state and Pennsylvania, taking Charity with her. She was a seamstress, and occasionally went into Pennsylvania to work, taking the child and Charity with her to nurse it. She returned, at intervals, to her mother's in Maryland, which continued her domicile. Whether she ever remained with Charity, at any one time, for six months, was a fact left to the jury. She returned Charity to Norman Bruce, when she arrived at the age of eleven years. Mrs. Gilleland never was an inhabitant of this state, and never came into it, with an intention of residing."

Under the Abolition Act of 1780, and its supplement of 1788, a residence in Pennsylvania, for six months, with the consent of the owner, would have entitled Charity to her freedom, and her children born after such residence would follow their mother's condition; but if she were a slave by being born in Maryland they were slaves also. Mr. Stevens successfully contended that a lease of land to cultivate it gave the lessee no right to carry away any of the slaves out of the state, and that, as to the continued residence for six months, a slave, who happened to come with his master into Pennsylvania on different visits, which may, on adding up the time of their duration, exceed six months, could not, therefore, claim freedom. Upon this latter phase of the contention, it is not without local and timely interest at this particular meeting to quote the language of Mr. Justice Duncan in delivering the opinion of the court:

"It was well known to the framers of our acts for the abolition of slavery that Southern gentlemen, with their families, were in the habit of visiting this state, attended with their domestic slaves, either for pleasure, health, or business; year after year, passing the summer months with us, their continuance scarcely ever amounting to six months. If these successive sojournings were to be summed up, it would amount to a prohibition — a denial of the rights of hospitality. The York and Bedford Springs are watering places frequented principally, and in great numbers, by families from Maryland and Virginia, attended by their domestic slaves. The same families, with the same servants, return in each season. The construction contended for by the plaintiffs in error would be an exclusion of the citizens of our sister states from these fountains of health, unwarranted by any principle of humanity or policy, or the spirit and letter of the law."

In his Congressional reminiscences of Mr. Stevens the late Godlove S. Orth, of Indiana, who was a native of Pennsylvania, and spent his boyhood in this state, narrates the following incident of Mr. Stevens' early career at the Bar. It has been told elsewhere in somewhat different form and may be in the main accurate, though no relator seems to have altogether verified it:

"On one occasion, while journeying to Baltimore for the purpose of replenishing his law library, he stopped for the night at a hotel in Maryland, kept by a man with whom he was well acquainted. Soon after his arrival he discovered quite a commotion among the servants at the hotel, and a woman in tears approached him and implored his assistance to prevent the contemplated sale of her husband, who was a slave. On inquiring who and where her husband was, she replied, 'Why, Massa Stevens, he is the boy who took your horse to the stable.' Stevens knew the 'boy,' and at once went to his owner and expostulated with him in reference to his sale, and at length offered to pay him $150, half the price, if he would restore him to liberty. The landlord was inexorable, and Stevens, knowing the relations between the slave and his master, replied, 'Mr. ———, are you not ashamed to sell your own flesh and blood?' This stinging appeal only brought forth the response, 'I must have money, and John is cheap at $300.' Prompted by his generous nature Stevens purchased and manumitted 'John,' and then retraced his steps to Gettysburg, without completing his journey to Baltimore. At that time $300 was a large sum of money for one who had

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been but a few years at the Bar, and he postponed the replenishing of his law library to a more convenient season."

Throughout the first period of his professional career, and while he was laying the foundation of a large practice, he wisely abstained from activity in party politics, though he was a pronounced Federalist. Like many successful lawyers in counties where the so-called Pennsylvania-German is a large and important element, he gained and kept the confidence of a people with whom he seemed to have nothing in common.

During the next decade, and before his removal to Lancaster, his professional work was frequently and materially interrupted by bold and aggressive incursions into the fields of political strife, by intense advocacy of anti-Masonry, radical membership of the General Assembly and the Constitutional Convention of 1837, and on the Board of Canal Commissioners, by his heroic, eloquent, and effective defense of the common school system and its executive patron, who was his dire party foe, and by his inglorious, if not ludicrous, figure in the bloodless "Buckshot War." But his prominence in politics and in official life added to, rather than detracted from, his success and eminence at the Bar. He continued, as an adviser of clients and trier of causes, to gather practice and reap fortune, and he was tempted to engage largely, and (as often happens to the business ventures of brilliant lawyers) disastrously in manufacturing enterprises and real estate investments.

From 1830 to 1840 he continued to be engaged on one side or the other of all important litigation in Adams County, and was often called into neighboring courts. The reports of the period tell of his activity and the wide range of his practice; though it was restricted to a rather narrow locality, it partook of great variety. The meager reports of the arguments of counsel and the few citations of authorities by no means detract from the strength or strenuousness of those earlier contentions; and it is easy to conceive that ejectments for "one hundred and fifty acres of land, with grist mill, saw mill, oil mill, and plaster mill erected on it" (Roth *v.* McClelland, 6 Watts, 68); questions of "an estate tail in the first taker, or an estate in fee with an executory devise over" (Eichelberger *v.* Barnitz, 9 Watts, 447); and the disputed freedom or servitude of the son of a manumitted female slave (Scott *v.* Traugh, 15 Sergeant & Rawle, 17) were just as warmly contested and as learnedly disposed of as the more complex and profound questions which now vex Bench and Bar — and even bewilder the "many-sided" reporter.

Though I am warned by the limitations on both my time and my topic not to refer to Mr. Stevens' political career, it may not be altogether a transgression to note, as part of his work as a lawyer, that he was a member from Adams County of the so-called "Reform" Convention of 1837, to revise the Constitution of Pennsylvania. The many volumes which contain the stormy debates and exhibit the partisan virulence of that convocation teem with illustrations of his biting personalities and caustic wit. Politics, especially on the anti-Democratic side of pending controversies, was in a somewhat disorganized condition, and Stevens was something of a free lance — being not entirely satisfied with the Whig leadership — nor it with him. With characteristic consistency, that in a body to reform the organic law of the Commonwealth mounted almost to offensive obduracy, he battled against recognition of any race or color distinction; and a generation before he came to select a site for his grave or to write his own memorable epitaph, he refused to affix his name to the document promulgated as the new Constitution, because it restricted suffrage to "white" males.

Nor can I forbear to cite a passage at arms in that convention which may well serve to "point a moral" to those who constantly bewail the degeneracy of modern

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manners and who fancy that the attitude of the old school lawyers and politicians toward each other was always so dignified and unruffled. It happened that Mr. Stevens (who, in this instance, at least, had absorbed Jefferson's sentiment that cities were "sores of the body politic), favored a limited legislative representation in Philadelphia — just as a later convention actually engrafted upon the fundamental law a restriction in senatorial representation which a most thoroughly regenerated executive and legislature have both found an insurmountable obstacle to the constitutional enforcement of the Constitution. Mr. Meredith, resenting the bucolic reflection upon urban rights, spoke of Stevens as the "Great Unchained of Adams," and called him even worse names; whereupon — imagine the feelings of a polite Philadelphian — the artillery of Gettysburg thus blazed forth:

"The extraordinary course of the gentleman from Philadelphia has astonished me. During the greater part of his concerted personal tirade I was at a loss to know what course had driven him beside himself. I could not imagine on what boiling cauldron he had been sitting to make him foam with all the fury of a wizard who had been concocting poison from bitter herbs. But when he came to mention Masonry, I saw the cause of his grief and malice. He unfortunately is a votary and tool of the 'handmaid,' and feels and resents the injury she has sustained. I have often before endured such assaults from her subjects. But no personal abuse, however foul or ungentlemanly, shall betray me into passion, or make me forget the command of my temper, or induce me to reply in a similar strain. I will not degrade myself to the level of a blackguard to imitate any man, however respectable. The gentleman, among other flattery, has intimated that I have venom without fangs. Sir, I needed not that gentleman's admonitions to remind me of my weakness. But I hardly need fangs, for I never make offensive personal assaults; however, I may, sometimes, in my own defense, turn my fangless jaws upon my assailants with such grip as I may. But it is well that with such great strength that gentleman has so little venom. I have little to boast of, either in matter or manners, but rustic and rude as is my education, destitute as I am of the polished manners and city politeness of that gentleman, I have a sufficiently strong native sense of decency not to answer arguments by low, gross, personal abuse. I sustained propositions which I deemed beneficial to the whole state. Nor will I be driven from my course by the gentleman from the city or the one from the county of Philadelphia. I shall fearlessly discharge my duty, however low, ungentlemanly, and indecent personal abuse may be heaped upon me by malignant wise men or gilded fools."

It was possibly due as much to what his most admiring biographer calls his "total want of creative power" as to his partisan and personal antagonisms that Stevens' influence was very light in a convention composed largely of lawyers and assembled to make laws; but he was no inconspicuous figure in a body which embraced in its membership beside Mr. Meredith such distinguished and able men as Daniel Agnew, Wm. Darlington, S. A. Purviance, James Pollock, George W. Woodward, John Sergeant, Joseph R. Chandler, Joseph Hopkinson, Charles Chauncey, Thomas Earle, Charles J. Ingersoll, James M. Porter, and Walter Forward.

Thirty years later, when Mr. Stevens died, one of this distinguished galaxy, George W. Woodward, was his colleague in the federal House of Representatives. He had been justice and chief justice of the Supreme Court of Pennsylvania, and knew the lawyers of the Commonwealth for a full generation. He had no political sympathy with Mr. Stevens and deplored "the final influence of his great talents;" but he "knew much of him as a lawyer," and when, after his death, the memorial addresses in the House were made, Judge Woodward said of him:

"As a lawyer Mr. Stevens was bold, honorable, and candid, clear in statement, brief in argument, and always deferential to the Bench. He was not copious in his citation of adjudged cases. I think he relied more upon the reasons, than upon the authorities of the law. Indeed, his tastes inclined him rather to the study of polite literature than

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of the black letter. He loved Pope's 'Essay on Man' more than 'Siderfin's Reports.' Yet he betrayed no defect of preparation at the Bar. He always came with a keen discernment of the strong points of his case, and he spoke to them directly, concisely, and with good effect. His humor was irrepressible and trenchant; sometimes it cut like a Damascus blade. He was a lucky lawyer who would go through an argument with Mr. Stevens without being laughed at for something. Mr. Stevens' legal sagacity was exhibited here, in the presence of all of us, when he suggested the eleventh article of impeachment, which came nearer costing the President his official life than all the other articles together."

It certainly requires no apology — and scarcely an explanation — for any man's removal from anywhere to Lancaster, even seventy years ago. As a part of the "history of the case," it may, however, be fitly stated that Mr. Stevens, born to poverty, had, in early youth, learned to know the value and to keenly appreciate the power of money, and he never forgot his lesson. It is much less discreditable than many other things said about him, that he had, in a large degree, the spirit of the gambler; and it is surely to his credit that though he may have played high and, at times, even recklessly, he always "played fair," and never indulged in what has come to be called "a tight game." Personally, he was open-handed and generous, and paid his legal and moral debts to the last farthing.

Furnaces and farms, even in Adams County, are fine things for a lawyer to own, when he does not have to practice law to keep the fires burning or the plow moving in the furrow; but there are — or, at least, there used to be — times of agricultural depression and industrial stagnation when, like the luckless Jerseyman in Mosquito County, the more one owns, the poorer he is. Between ventures in business and expenses in politics — before the days when campaign disbursements are rigidly filed in verified public statements — Mr. Stevens' debts approximated the then enormous sum of nearly a quarter million dollars, and he was "land poor." He came to Lancaster mainly to better his personal fortunes and to extend his practice, but not without regard to enlarged political possibilities. He found himself at a Bar of able, brilliant, and successful lawyers. There was no particular warmth of greeting toward him, neither did he ever get — nor apparently seek — generous social welcome; the dominant elements in his own political party were altogether too conservative to invite him to its leadership; and there, as in the county of his first "home-at-law," he bided his time to grasp political control. Though he was not personally well known to the general public in Lancaster County, his political fame had preceded him, and business naturally came without special contrivance. Like many a less famous lawyer, he did not hesitate to first break a lance in the Quarter Sessions, and his volunteer defense of a negro ruffian was so spirited as to widely advertise the newcomer. Within six months he was recognized as a leader, and his place in the foremost rank remained undisputed as long as he was in active practice. Until his death he retained property interests in Adams and Franklin counties, and had a large clientage there as long as he practiced. The reports from 1842 (3 W. & S.) to 1858 (30 Penna. State) teem with his appearances in the Appellate Court; but the wealth of his professional labors lay in the varied miscellaneous practice of a populous and rich agricultural county, inhabited by people who not only "know their rights," but who — may the Lord long bless them — are willing to pay lawyers to assert and defend them.

Among his more distinguished contemporaries at the Lancaster Bar were Attorneys General Ellmaker, Champneys, and Franklin; Judge Ellis Lewis, later of the Supreme Court, who became judge of the local court soon after Stevens came to Lancaster; W. B. Fordney and Reah Frazer, local "sons of thunder;" Samuel Parke, whose ingenious special pleading was Stev-

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ens' special aversion; Isaac E. Hiester, who beat Stevens for Congress in 1852, and upon whom Stevens revenged himself in 1854 by beating him with ex-Sheriff Roberts; the meteor of the Bar, "Wash" Barton, and the brilliant John R. Montgomery, who survives in tradition as the star of first magnitude in our local constellation; A. Herr Smith, who became one of Mr. Stevens' successors in Congress and served there more years continuously than the "old Commoner" himself; Judge D. W. Patterson, Judge John B. Livingston, who studied under Stevens, and Hugh M. North, who, full of years and honors, yet connects us with what at least is secure — a glorious past.

Although, as previously noted, he was not welcomed to the Lancaster Bar, and his invasion of it was regarded jealously by most of its members, he was especially antagonized at the outset by Benjamin Champneys — later attorney general under Governor Shunk — an active and pugnacious, but withal learned lawyer. The traditions of the local Bar are replete with stories of their collisions. Stevens was wont to sneer at Champneys' copious citations of English authorities, and sometimes, it is to be feared, displayed the character of the demagogue in court. When Champneys blustered, however, Stevens was cool and sarcastic. On one occasion when his antagonist "rode the whirlwind," Mr. Stevens slyly expressed the hope that the jury would "not be taken by storm" — "nor by strategy," hissed Champneys, dreading the effect of his opponent's sarcasm. When a railroad attorney vigorously objected to Stevens' "leading" one of the witnesses on the other side, Stevens raised a laugh among the jurymen by observing "he looked so young and innocent I felt it my duty to lead him." When in an arbitration at a tavern his antagonist hurled an inkstand at him; Stevens dodged it and dryly said: "You don't seem competent to put ink to better use." In his defense of a young man charged with that odious crime which south of Mason and Dixon line is regarded as no less horrible than murder, Mr. Stevens actually illustrated the trite Elizabethan story with sword and scabbard, and acquitted the defendant.

That Stevens was not unwilling at times to risk the reproach supposed to attach to a lawyer who presents his own cause, appears from a number of reported cases to which he himself was a party. Adjoining his furnace and timber lands to which, after his native county in Vermont, he gave the name "Caledonia," were the estates of a Hughes family, rival iron masters of that day. As far back as 3 Watts and Sergeant, 465, heard at Harrisburg in May, 1842, in an action of trespass *quare clausem fregit*, Stevens had won his title to the disputed *locus in quo* "on the headwaters of the Conococheague in the South Mountain." Years afterward the strife was renewed in Stevens *v.* Hughes (31 Pa., 331), where he sharply reversed the lower court's binding instructions against him and secured from Justice Strong the assertion of the principle that "one judgment upon the title to real estate in an action of trespass is so conclusive as to preclude the same parties or their privies from afterward controverting it."

On the new trial Stevens recovered $500 damages. He had been indignant at his summary treatment by the court on the first hearing, but was now quite as much astounded when, in jocose mind, he moved the court to assess treble damage, to have the court promptly raise the verdict to $1,500 and enter judgment for that amount. An appeal being taken Colonel McClure (who was of counsel for record and is my authority for the statement) scarcely had the hardihood to print a paper book in defense of the judgment, and Stevens, who, after dodging all other responsibility for the appeal, had agreed to argue it, disappeared at the critical moment. His associate promptly lost the case, and when Stevens himself re-appeared and learned the outcome, he grimly said he had expected it, he "knew it all the

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time," but he wanted the Supreme Court also to see and know "what an utter d — d fool the judge below really was."

In an earlier case, Dobbins *v.* Stevens (17 S. & R., 14), 1827, Mr. Stevens successfully defended his conduct in purchasing a property at sheriff's sale, upon the title to which he had given an opinion that was claimed to have deterred purchasers. The court below said he had committed a "legal fraud," but Chief Justice Gibson set him right. His opponents, however, at the Bar and in politics were wont to remind him of the case; and "Dobbins, Dobbins" was frequently fairly roared at him. Dobbins was an Adams County lawyer who died in the almshouse.[1]

Besides land-title and water-right cases, in which he was eminently successful, notable litigation like the case of Commonwealth *v.* Canal Commissioners (5 W. & S., 388), in which he was associated with Mr. Meredith; Stormfeltz *v.* Manor Turnpike Road (13 Pa., 555); Commonwealth *v.* Orestes Collins (8 Watts, 331), involving the judicial tenure of a Lancaster County judge under the Constitution of 1838; the perennially interesting Coleman *v.* Grubb (23 Pa., 394) — Mr. Stevens was very frequently employed in cases of contested wills and especially delighted in that sort of fray. One of these which excited great popular interest and intense local feeling was the Stevenson case (33 Pa., 496), in which the decedent left an estate to strangers to his blood. Mr. Stevens lost it below — as most lawyers will lose such a case when left to a jury of the vicinage — but the trial judge went so far as to say, in substance, that, for a testator to be competent, he must know who were the natural objects of his bounty, and how his estate was to be distributed "among them;" to which the dictum of Justice Woodward aptly replies that "a man without parents, wife, or children, can scarcely be said to have natural objects of his bounty." After reversal the case was settled.

One of the notable cases outside of Lancaster County in which he was engaged while at the Lancaster Bar was that of Specht *v.* The Commonwealth (8 Pa., 312), involving the right of the Seventh Day Baptists to engage in worldly employment on Sunday, in accordance with their conscientious belief that the seventh day of the week was the true Sabbath of the Lord. The report of the case presents Mr. Stevens' argument at exceptional length and is illustrative of his scholarship and legal learning. He recognized that the question at issue had been decided against him in Commonwealth *v.* Wolf (3 S. & R., 48), in which Tilghman, C. J., being absent, Yeates, J., rendered the opinion, Gibson concurring, and it was held that "persons professing the Jewish religion and others who keep the seventh day as their Sabbath are liable to the penalties imposed by the law for this offense." But he boldly grappled with *stare decisis* and argued that the question should be re-opened and the constitutionality of the Act of 1794 be reconsidered, because the former opinion had been rendered "by two judges, one of whom was just closing a long life of usefulness and was then of great age; the other was just entering upon his judicial career." Questions, he contended, of such "importance to the happiness of man" had been frequently reconsidered by the court, and he cited significant precedents. He derided the doctrine that "the Christian religion is a part of the common law," and declared that this doctrine had been "promulgated in the worst times and by the worst men of a government that avowedly united church and state; in times when men were sent to the block or the stake on any frivolous charge of heresy." Of course the judgment of the court was adverse to his contention, but his argument is a most readable and interesting one.

Like a large proportion of leading lawyers

[1] See also Miles *v.* Stevens, 3 Pa., 21.

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in the interior of the state, Stevens seldom appeared in the federal courts. It is not likely he was ever admitted to the Supreme Court of the United States; and, with all his large practice and professional activity for forty years, he cannot be said to have linked his name with any great case or legal principle, to have aided the development of jurisprudence, or to have made material contribution to the literature of the law.

In one branch of practice, happily now forever extinct, he attained unique distinction. It was altogether to have been expected that, in cases arising under the fugitive slave law, so conspicuous a political advocate of the free-soil doctrine would find and even seek frequent and most generally unrequited employment in the defense of the fugitive bondmen. It was not an uncommon thing for him, in *habeas corpus* hearings, and before magistrates and commissioners asked to detain or release alleged slaves, to make most extended, brilliant, and effective speeches. These were eagerly awaited and listened to. When, too, as was frequently the case with the prominent Lancaster lawyers of his period, he and they visited the village taverns to try their lawsuits before arbitrators, he was greeted by troops of partisan admirers.

These "halcyon and vociferous" occasions — be it noted in passing memory of the older and wiser Bar — were generally graced with the cheerful presence of that "old Madeira" for which Lancaster was famous (now, alas! lamentably scarce), and the price of several bottles was frequently added to the "docket costs." Physical encounters between opposing counsel were not unheard of, and Mr. Stevens' sometimes too loosely-fitting wig, which covered an entirely hairless head, tradition has it, was at times displaced in the collision. He himself scarcely ever indulged in ardent spirits; but, though of deformed foot, he was an athlete and a lover of the chase

In what is said to have been the first suit in Pennsylvania under the fugitive Slave Act, a Cumberland County man named Kauffman was indicted and suit was brought against him for the full value of a lot of slaves to whom his family had given food and shelter without his knowledge. The great public and political importance attached to the principle involved made the case a celebrated one. It was tried in the Federal Court at Philadelphia, Stevens for the defense. A bitter and lengthy legal fight ensued, and, after long delay, the case went to the jury on the facts. It may be presumed the government had the better of it, but Stevens excelled in the valuable professional gift of selecting a jury with excellent judgment; and a prominent citizen of his own county and a political sympathizer was on the jury. He kept his fellows out for six weeks and the defendant was acquitted.

Of all the cases of this character, however, in which he was engaged as counsel, none was so sensational and dramatic as the trial for treason of some of the persons engaged in what has passed into history as "The Christiana Riot." On the 11th of September, 1851, near the village of Christiana, in Lancaster County, on the border of Chester, and about ten miles above the Maryland line, Edward Gorsuch, of Baltimore County, Md., accompanied by deputies marshal and slave catchers, sought to arrest his escaped slave, who was hidden and protected in the house of a free colored man named William Parker. The cottage, which became the center of a fierce battle and witnessed the first bloodshed in resistance to the fugitive slave law was located in a valley where nearly every house of its Quaker residents was a station on the famous "underground railroad." It was not an uncommon thing for the residents of the neighborhood to speed fugitives on the way which lead to the blazing North star of freedom; nor was it an unknown incident in that locality that, when the disappointed

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slave holder failed to find his lost property, he could enlist the services of those known as kidnappers to replace the fugitive with a free negro. These social and political conditions were well calculated to promote angry collisions between those who took upon themselves the official responsibility of enforcing an odious law, and earnest abolitionists who stoutly believed in the higher law of freedom for men of all race and color.

There had been a gathering of negroes at Parker's house the night before the arrival of the slave catchers, and the blowing of a horn soon collected a motley crowd of blacks, with a sprinkling of whites, armed with axes, hoes, pitch-forks, and corn-cutters. In the onset upon the house Gorsuch was killed by a shot from a gun, presumably in the hand of his own slave, and his son was seriously wounded and the posse put to flight. Conspicuous among those who assembled at the scene — and who, if they did not give active aid to the infuriated negroes, at least refused to assist the officers in executing their writs — were Castner Hanway and Elijah Lewis, prominent citizens of the neighborhood, of pronounced and well known abolition sentiments and sympathies. The death of Gorsuch and the armed resistance to the enforcement of the law produced a flame of excitement throughout the country, only equaled in its intensity by the events of the John Brown raid nearly ten years later. This is not the occasion to exploit the far-reaching consequences of the event, nor can we at this time calmly measure the confidence with which it was popularly asserted the offense committed on the peaceful soil of Lancaster County rose to the dignity of treason, by making war against the United States in resisting by force and arms the execution of the Fugitive Slave Law, and for obstructing the United States marshal in the execution of due process.

Wholesale arrests followed, including Hanway and Lewis, and more than a score of negroes. At the preliminary hearing, in the city of Lancaster, Stevens outlined the testimony which the defense would produce, and, while he admitted the crime of murder had been committed, and was deplored by all the citizens of the county, and promised that the perpetrators, when ascertained and secured, would receive due punishment, he denounced, with characteristic savagery and invective, the testimony of the deputy marshal, and pictured, with vivid power, the provocation which the people of the neighborhood had to resentment and excitement by frequent outrages perpetrated upon innocent freemen by slave catchers from outside the state, and from desperate kidnappers who plied their nefarious trade at home.

On the trial in the United States Circuit Court in November, upon the charge of treason, Judges Grier and Kane sitting, it required a week to select a jury, and, by another strange coincidence, its foreman was a Lancaster Countian, a conservative Whig, who lived to be a candidate for Congress against Stevens and one of the most formidable opponents he ever encountered. A mere outline of the exciting features of that trial would far outrun the limits of this paper and of your patience. For prudential motives, the leading part of the defense was assigned to John M. Read, then a Democrat with free soil inclinations, and Mr. Stevens even refrained from addressing the jury. But he was the central figure and dominating spirit of the scene, which was rendered especially picturesque by the two dozen accused colored men sitting in a row, all similarly attired, wearing around their necks red, white, and blue scarfs, with Lucretia Mott sitting at their head, calmly knitting, the frightened negroes half hopefully regarding her sidewise as their guardian angel, and the tall, stern figure of Stevens as their mighty Moses. It will be remembered that James R. Ludlow, afterwards the distinguished judge, assisted United States Attorney Ashmead in the pros-

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ecution; and it will never be forgotten with what vigor and venom the learned and ordinarily temperate Judge Grier, in his shrill, piping voice, hurled his anathemas at the "male and female vagrant lecturers" of the abolition cause, "infuriated fanatics and unprincipled demagogues" who had counseled "bloody resistance to the laws of the land," the necessary development of whose principles and the natural fruitage of whose seed, he declared, was this murderous tragedy.

None the less, his judicial temper was so far restored that he felt constrained to admit the accused had not been shown to have been involved in a transaction which "rose to the dignity of treason or a levying of war." The prisoners were acquitted.

It is by no means certain, however, that Mr. Stevens' regard was not such as to lead him to deprecate lawlessness, even in advancement of his pronounced abolition ideas.

No less accurate a chronicler than Judge Penrose relates that he was in Lancaster and in Stevens' office when the news came of John Brown's raid and capture. Some one said, "Why, Mr. Stevens, they'll hang that man;" to which he replied, "Damn him, he ought to be hung." It may be, however, that Mr. Stevens despised the blunder more than he hated the crime.

For the purposes of this study or sketch, Mr. Stevens must be regarded simply as a skillful, brilliant, and successful trial lawyer. To this task he brought undoubtedly great natural qualities, a liberal education, and arduous special preparation. These were supplemented by a broad and intimate knowledge of men, gained in the varied fields of business, legal, and political activity; by unbounded physical courage, and moral fearlessness to even do the wrong. A rare quality of wit and sarcasm, which he always knew how to use effectively and without abuse; perfect control of his temper, joined with unusual power of invective; readiness of expression, without any tendency toward mere "sound and fury" or rhetorical waste of vigor — were other distinguishing marks of his style. His vernacular was not, however, entirely destitute of picturesque forms of speech. On one occasion in the Common Pleas, when he assailed one whom he conceived had acquired lands by fraud, and the defendant was not of an altogether prepossessing countenance, Stevens turned to him savagely, in the sight and hearing of the jury, and said: "The Almighty makes few mistakes. Look at that face! What did He ever fashion it for, save to be nailed at the masthead of a pirate ship to ride down unfortunate debtors sailing on the waves of commerce?"

If he was weakened by a lack of faith in others, he atoned for it, in part, by supreme confidence in himself; if he was naturally sympathetic, he did not permit this infirmity to mislead him from a sternness which he could readily harden into cruelty. To a lawyer friend, from whom he had a right to expect something better, but who did him a nasty trick, and not in a nice way, he once said, "You must be a bastard, for I knew your mother's husband, and he was a gentleman and an honest man." To a constituent who listened with intense interest to Webster's great Seventh of March speech, a plea for the Union, with or without slavery, but always for the Union, and who spoke to Stevens in admiration of the speech, came the crushing reply, "As I heard it, I could have cut his damned heart out."

And yet, he had a milder mood. When a committee of somewhat perturbed preachers called upon him for advice and expressed some apprehension lest they could not afford to pay his fee, he cheerfully assured them that he often defended clergymen for all kinds of misdemeanors and never charged them a cent. Neither in life nor in death did he ever seem to be unmindful of the mother who bore him, or of the sacrifices she made to equip him for life's battle; but if he ever spoke other words of defense or exaltation of womanhood, the whisper died in

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the air. He was disgusted at the nomenclature adopted in the creation of some new districts in Lancaster County, and when one was called "Elizabeth," he declared he could never remember "townships named after women." His most fulsome biographer says he had no conception of beauty as expressed in painting, architecture, or sculpture, and he "was not a man of taste." He read history and the classics, not novels nor poetry.

It will be remembered that on the memorable occasion which called forth Judge Black's superb eulogy on Gibson, at the May term of the Supreme Court, Harrisburg, May 9, 1853, the formal announcement of the ex-chief justice's death was made by Stevens; and those who read the proceedings as reported at the beginning of 6 Harris — and none can afford not to read them — will not fail to be impressed with the stately severity of Mr. Stevens' literary style and his high appreciation of a great jurist; however much, as a politician, he may have ignored the true principle of selecting the judiciary, as a lawyer he professed the loftiest ideals.

Although Mr. Stevens had a great deal of kindness of heart and never seemed to be happier than when doing acts of charity to the deserving or extending relief to the unfortunate, or in ministering to the crippled and deformed, his tendency toward sarcasm and his disposition to say "smart things," often made him regardless of the feelings of those with whom he came into contact — especially if they were persons of power and influence. It is related that when Chief Justice Thompson once told him of the infinite pains which he took in the preparation of his judicial opinions — often writing them over and over before he got them into a shape to satisfy himself — Mr. Stevens replied, "Yes, and then you don't get them in shape to satisfy the profession."

Once in the Lancaster County Oyer and Terminer, when the court assigned a rather inferior member of the Bar to defend two notorious negro murderers, Stevens remarked, "The court appointed H —— to defend them, so that there would be no doubt of their conviction."

It is perhaps a trite — though very characteristic — story that once when a lady admirer rather effusively addressed him as the "Apostle of Freedom" and begged a lock of his hair, he gallantly took off his wig and, laying it before her, invited her to "help herself."

As to what were his professional standards, his ethical ideas, or religious beliefs, there is wide room for divergence of opinion. He had no social aspirations nor elevated domestic tastes. He viewed and even joined in football with the judicial office without concern; and it was a matter of no particular importance to him if every man in public life had his price — except himself. He attracted many law students, and when he was asked for terms, he replied, "Two hundred dollars. Some pay; some don't," — a custom at our local Bar which, by the way, is occasionally still honored in the observance. It is not at all certain that his influence on those closely associated with him was not more enduring for ill than for good. He was a student of the Scriptures, but rather for their historical and literary value than as a lamp to his pathway.

As a lawyer, Judge Black once said of him to Mr. Justice Brown, "When he died he was unequaled in this country as a lawyer. He said the smartest things ever said. But his mind, as far as his sense of his obligation to God was concerned, was a howling wilderness."

Mr. Blaine, who had reversed Stevens' order of migration, and between whom and Stevens no love was lost — they were quite different types — sums up some of his characteristics as a parliamentary figure which were inseparable from his quality as a lawyer. He characterizes him as a natural leader, who assumed that place by common consent, "able, trained, and fearless," "unscrupulous in his political methods,"

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"learned in the law," and holding for a third of a century high rank at the Bar — listen gratefully, brethren, to this even from an adopted New Englander — "of a state distinguished for great lawyers." He was taciturn, even at times misanthropic; "a brilliant talker, he did not relish idle and aimless conversation;" "he was much given to reading, study, and reflection, and to the retirement which enables him to gratify these tastes;" like Emerson, he "loved solitude and knew its uses;" he spoke with ease and readiness, "his style resembling the crisp, clear sententiousness of Dean Swift;" his extempore sentences bore the test of grammatical and rhetorical criticism; he indulged in wit, not in humor; when his sharp sallies set the House in an uproar, his visage was that of an undertaker. His memory of facts, dates, and figures was exact, and his references were to the book, chapter, and page. "He had the courage to meet any opponent, and was never overmatched in any intellectual conflict." Mr. Henry L. Dawes, in his Dartmouth College eulogy, accords him like high praise.

Col. A. K. McClure, who was for many years in close personal relations with him, and had large opportunities to make this contrast, has repeatedly told me substantially what he twice committed to permanent record; that Stevens was the most accomplished all-round lawyer of his day in Pennsylvania; thoroughly grounded in the fundamental principles, and altogether familiar with the decided cases; he was most skilled in eliciting testimony from his own witnesses and adroit in confounding the opposition in cross-examination; he was ingenious and convincing in addressing a jury, and courteous to his opponents, especially if they were younger men, and unless they transgressed professional urbanity. Summing up his traits as a lawyer, Colonel McClure says, "I have known many of our great lawyers who were great advocates, or great in the skillful direction of cases; but he is the only man I recall who was eminent in all the attributes of a great lawyer."

No one was better qualified to analyze his character and career as a lawyer than his most distinguished student and immediate successor, as representative of Lancaster County in Congress, the late Hon. Oliver J. Dickey, himself a leader of the Lancaster Bar in his day. His father was a prominent citizen of Beaver County, Pa., whose political devotion to Mr. Stevens had much to do with young Dickey's coming east to study law with him and locating in Lancaster to practice. In his eulogy of his predecessor in Congress, Mr. Dickey pronounced the same high estimate upon his ability as a lawyer as those from whom I have already quoted; and he added:

"No matter with whom associated, he never tried a cause save upon his own theory of the case. At *nisi prius* he uniformly insisted on personally seeing and examining, before they were called, the important witnesses on his own side. Generally relying upon the strength and presentation of his own case, he seldom indulged in extended cross-examination of witnesses, though possessing rare ability in that direction. He never consented to be concerned or to act as counsel in the prosecution of a capital case, not from opposition to the punishment, but because it was repugnant to his feelings and that service was the duty of public officers. He was as remarkable for his consideration, forbearance, and kindness when opposed by the young, weak, or diffident, as he was for the grim jest, haughty sneer, pointed sarcasm, or fierce invective launched at one who entered the lists and challenged battle with such weapons. He was always willing to give advice and assistance to the young and inexperienced members of the profession, and his large library was ever open for their use. He had many young men read law with him, though he did not care to have students. There were, however, two recommendations which never failed to procure an entrance into his office; ambition to learn, and inability to pay for the privilege."

The recollections of his few surviving contemporaries and the oral traditions of

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the community concur with the recorded impressions of his two local biographers — one, Alexander H. Hood, his devoted friend and political ally, the other, Alexander Harris, his inveterate antagonist. They agree that as a lawyer he showed marvelous early training. His power to remember and accurately repeat testimony without taking notes was unrivaled. In the famous Jackson land title case tried at Hollidaysburg, reported in 13 Penn. St. R., 368, which lasted many days, Stevens was not observed to have taken a single note; but his summing up of the testimony was such a marvel of accuracy and voluminousness that it remains to this day a vivid tradition of the Blair County Bar.

His illustrations were apposite, his speeches were effective, never flowery, never tedious; his citations were few, but directly to the issue; his attacks were sharp and always concentrated on the weak point of his adversary. His hand-writing was illegible, and he was often unable to read it himself—a characteristic of greatness which, I believe, has come into modern vogue.

Intuition, education, and experience combined to endow him with that most valuable acquirement of a trial lawyer — the ability to wisely select a jury. When he could not get one to suit him, he would often make zealous effort to continue the case. One time, it is related, under such circumstances in a case of his own, he found his antagonist just as anxious to continue, of which disposition he was quite willing to take advantage. The counsel for each, however, professed disinclination and insisted on the other paying the costs as a condition of the case going over. Stevens, apprehensive lest there might be a miscarriage, stepped forward and said to his counsel, "Mr. H. and I will settle the question of costs between us," and while counsel were adjusting the motion Stevens and his antagonist went to the nearest tavern and decided the liability for costs of the term by a game of "seven-up."

In his earlier forensic efforts there is not lacking evidence of classic reading; and his style then had much of the florid rhetoric and historical allusion so characteristic of the popular oratory of that day. For example, his speech in the Pennsylvania House of Representatives, March 10, 1838, in favor of the bill to establish a school of arts in Philadelphia and to endow the colleges and academies of the Commonwealth, teems with references to the commerce of "Ancient Tyre or modern Venice," the "Appian ways of Rome," "the deserted plains of Palestine," "the eloquent example of Troy," "the learning of the Grecian bard," "the once proud, populous, and powerful capital of Edom," and her "rock built ramparts," "the poverty of Sparta," "the silken Persian with his heaps of gold," "the victors and victories of Marathon and Salamis," "the law giver of Sparta," "the mighty captain of Thermopylæ," "mighty ocean of Pierian waters," etc. Unlike many others who in later years disdain their earlier florid style, Mr. Stevens recalled this highly decorated speech with some fondness; for as late as 1865 he republished and widely circulated it among his local constituents.

Not the least valuable of the lawyer-like gifts he possessed was the faculty of knowing when to quit, and of not going on after he was done. I have noted his effective, rather than his copious, citation of authorities, and his directness rather than tediousness of speech. He was unexcelled in the management of witnesses. In one exciting trial he greatly disconcerted his client by refusing to call his strongest witness. Stevens had just apprehensions that his ultra-positiveness would prejudice the jury, and risked the chance of dispensing with him — very wisely, as it turned out. Unlike many men with ready wit, he never resented and always appreciated a keen shaft turned upon himself, and some of the old court criers and interpreters tell amusing stories of retorts by witnesses under cross-examination whom Stevens quickly

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dropped, joining heartily in the laugh evoked at his own expense. He was quick to discern when he caught a Tartar.

He once won a close case by making an important witness against him, a very plain Amishman, admit on the witness stand that he was a "horse-jockey" — a term which he used with telling effect upon a jury of farmers.

In his defense, in the Adams County Court, of Taylor, tried for the murder of Bluebaugh, the principal witness for the Commonwealth swore to the declaration, made by the accused at the time of the shooting, "By G—d, I have shot him." Mr. Stevens succeeded in getting the witness to state that the words might have been "My God, I have shot him," with all the force an exclamation of surprise and regret would have, in contrast with one of malicious acknowledgment and satisfaction; and thus Mr. Stevens acquitted his client.

When Mr. Stevens returned from Congress in 1853, after two terms of rather conspicuous service, he reasonably expected no further official experience. Not only was rotation the rule, but he had not yet become a controlling factor in local politics. The enlargement of his practice, the restoration of his fortune, and the redemption of his property had much to do with his change of purpose; but the organization of the Republican party, its aggressive attitude against the extension of slavery, and the increasing arrogance of the South opened the path to his reëlection in 1858. That year saw his last recorded appearance in the Supreme Court, and thereafter his docket shows but desultory attention to the business of his office.

His last notable case in the local court was at the January Oyer and Terminer of 1860, in Lancaster County, when he appeared with David Paul Brown, of Philadelphia; William Darlington and J. Smith Futhey, of Chester County, in the defense of Sylvester McPhillen (so indicted, otherwise "McFillen"), charged with murder. The case was one of the most famous and the trial one of the most exciting in the annals of the Lancaster Bar. The parties resided on the extreme eastern border of Lancaster County, and the homicide occurred along, if not across, the Chester County line. McFillen was indicted for the murder of Thomas G. Henderson. There was a long standing feud between the two families, who represented respectively the old aristocratic and more pretentious English element of the community and the rougher and more popular Irish class. They met on August 11, 1859, at a "picnic," a semi-public function rather of the character of a harvest home. Three Henderson brothers were there and two of the McFillens, with attendant partisan friends. There was a series of altercations; one of the incidents was McFillen hurling a good-sized stone, which struck Thomas G. Henderson on the back of the head. At first he was not supposed to have been seriously injured, but he died four days later.

Each party to the controversy had its adherents, and for months preceding the trial there was a rancorous feud, which gradually involved almost the entire neighborhood. The late Col. Emlen Franklin was district attorney, but the manuscript indictment is in the handwriting of one of his colleagues; Hon. Isaac E. Hiester, one of Stevens' political antagonists, the late Col. William B. Fordney and Hon. O. J. Dickey, all eminent lawyers of their day, having been specially retained to prosecute the defendant to the utmost. The indictment was found at the November term, but there was a plea "against the jurisdiction of the court," it having been contended either that the stone was thrown or that its victim was struck on the Chester County side of the line. The plea was overruled. At that time the new provisions of the Criminal Code of March 31, 1860, providing for the trial of offenses committed near the boundaries of counties, had not yet been adopted. In the report on the Penal Code, the new 48th and 49th sections (which pro-

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vide that trial may be had in either county for offenses occurring within five hundred yards of the inter-county boundary line, P. L. 1860, p. 427) are recommended as "of real practical value" "to obviate the difficulty of proof" which occurs when it is doubtful in which county the offense has been actually perpetrated.

The case came on for trial January 19, 1860, but Mr. Stevens did not take the leading part, a circumstance which was due in some measure to the fact that he was liable to be called away from the trial to his Congressional duties in Washington. It was also ascribed to the reason that he was not accustomed to play the secondary part, even when so distinguished a criminal lawyer as David Paul Brown was his colleague. Mr. Brown, it will be remembered, was almost a fop in dress and manner, and his rotund and pictorial oratory was of a kind with which Mr. Stevens had little sympathy. It is related that during the trial he manifested a certain restiveness not common to him. The number of witnesses in attendance on the case was unusually large. They were divided into rival bands of rank and rabid partisans, who gave noisy vent to their sympathies and met in nightly brawls at public places in the city. The trial lasted Thursday, Friday, and Saturday. Mr. Hiester opened for the Commonwealth, but before he had entirely closed his argument, Mr. Stevens was granted leave to address the jury on behalf of the defense, as he was obliged to leave for Washington, his "pair" with an opposition member of the House expiring that day. He deplored the rancor which had characterized the prosecution, defined the different grades of murder under the law, expressed regret that the prosecution was pressing for conviction of the higher grade, and urged that his client was at most guilty only of involuntary manslaughter. On Sunday the jury attended the Presbyterian Church in the morning, St. James Episcopal Church in the afternoon, and heard a temperance service at the Moravian Church in the evening. Mr. Hiester concluded for the Commonwealth on Monday; the local newspaper reports that when he was followed by David Paul Brown, for the defense, who spoke nearly all afternoon, Brown's remarks "were listened to in deep silence and with such intense interest that although the bar was surrounded with an audience standing seven or eight deep, and the hall crowded to the door, it appeared like a collection of human statues." Colonel Fordney occupied the evening session with an address that lasted from half after seven until past ten o'clock. After being out two hours, the jury returned with a verdict of "not guilty," and such a scene of disorder ensued as the Lancaster County court house has probably never witnessed before or since. The newspaper reports that "for a time a stranger might have supposed himself in the hall of the House of Representatives at Washington or in a court house where Sickles was tried and acquitted." The court crier stamped his foot and demanded silence, informing the crowd that they were "neither in a playhouse nor at a horse race." The street scenes until daylight were even more uproarious and disorderly. McFillen's friends engaging in a prolonged demonstration, cheering the defendant's counsel and the jury, and groaning for the prosecution. Mr. Stevens, however, was not at home to see or hear the popular "vindication" of his last client in the criminal courts.

Years later he rendered a last service to the members of his profession by writing his own will, to which circumstance may be due in some part the fact that the contract for the orphans' home he founded was let only last month. The rapidly succeeding events of the war and his rise to leadership of his party, through parliamentary control of the popular branch of Congress, took him forever from the Bar and ended his career as a practicing lawyer — with which only I have to do now.

LANCASTER, PA., August, 1906.

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APPOINTMENTS TO THE UNITED STATES SUPREME COURT

By James Schouler

OUR people have seen, within the past few months, a singular spectacle. A vacancy upon the Bench of the highest tribunal of the land has been left unfilled by the President of the United States, in order that a cabinet officer, one of his special favorites, may consider with full deliberation and opportunity whether, on the one hand, to retire permanently into so dignified a retreat or, on the other, to pursue longer the prize of the next presidency, or rather the ambition of being nominated by the Republican convention, some two years hence, as its party candidate. Meanwhile pressing business before the Supreme Court suffers from this irksome delay. Perhaps other vacancies may occur later, and the secretary's option be extended by the President in point of time, the status of his local residence being disregarded. Could only the chief justiceship be placed within reach that would probably decide him, but the Democratic incumbent of that much envied place, though seventy-three years old, does not probably mean to resign, so long as a hope remains to him of surrendering his commission to a presidential successor of his own party faith.

And yet the situation is by no means intolerable. President Roosevelt means to place a good man upon the Bench. Secretary Taft is a man of probity and capacity, well fitted for appointment to the present vacancy. His confirmation by the Senate may be taken for granted. He has good qualifications either for President or Chief Justice. And if he hesitates whether to exchange the possibility of four years at the White House for the certainty of a life incumbency on the Supreme Bench, he is not the first of our statesmen who has done so. His residence identifies him with a particular state and section, and yet his varied services have given him a national character. Probably with so honorable an office once accepted by him, he will consider all further aspirations in active politics at an end. The chief point of objection in the present situation is, that the interests of suitors and the public suffer while an important vacancy waits so long to enable one who has the opportunity of filling it to make up his mind.

As a matter of fact, the President of the United States may exercise his constitutional discretion so freely in appointing to our federal judiciary, and yet finds his opportunities of patronage in that respect so few and casual that the idiosyncrasies of no particular chief magistrate are likely to do permanent harm. Then again, there is the safeguard of a Senate's approval or disapproval which can never be lightly regarded. Under an executive successor less strenuous, impulsive, and wilful than our present one, we may fairly expect to see vacancies in the Supreme Court, when they arise, filled once more with due regard to maintaining the representative or circuit character which this third department of national supremacy ought always to sustain before the people Perhaps, too, we shall see professional attainments and reputation considered for such appointments rather than political services to an administration, political bias upon constitutional questions which may come up for decision, or a political reputation, however exalted.

This expansive and well-organized judicial system which we see at the present day has become a prodigious power in the land, which legislation in Congress tends constantly to increase and strengthen. Dealing

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largely with controversies growing out of such peculiar branches of law as patents, public lands, bankruptcy, revenue, and commerce, interstate or foreign; passing upon the profoundest issues of constitutional law and congressional legislation; our federal judges require for efficient service a peculiar legal training and aptitude. An experience in Congress or in the administrative branch of government is by no means inappropriate here, if one brings to the federal court of higher or lower degree good legal acquirements, besides character and integrity, and a growing capacity for active work. Promotion from the district or circuit courts comes fitly to United States judges young enough to make a good reputation still better. The time was when circuit courts were swept away by Congress and circuit judicial tenure disappeared with the jurisdiction itself, but never so with our Supreme Court sitting at Washington. That tribunal has remained continuous from 1789, and free from innovation except for the number of justices allowed or the range of business; lesser courts of the United States may indeed be changed or remodelled any time at the will of Congress, but the Supreme Court itself is permanent and continuous, for so the federal constitution created it. This establishment, the head and crown of our whole judicial system as concerns the Union, and the federal tribunal of last appeal, remains as perpetual in functions, as intact and independent as Congress itself or the Executive. No law can abolish or supersede it; no presidential fiat can change the incumbency; nor even can the compensation of any one of the justices be diminished (though Congress has power to increase it) while he remains in office. The distinguished attention and consideration which these supreme judges, one and all, receive at the nation's capital, has no counterpart elsewhere on the American continent. At state dinners and on all ceremonial occasions their high rank and precedence are as fixed and positive as those of dukes or marquises in an European court; their decorous assemblage in black gowns for business at the old Senate chamber of the capitol — alone of all national dignitaries at Washington to wear robes of office — is one of the choice sights for casual spectators in that city. They constitute a close and intimate fraternity among themselves; and whoever of their number may choose to mingle in the high social functions of the winter, or instead to live in seclusion, his choice will be respected.

From 1789 down to the present time the selection of justices for this noted court has been made with due regard to the public welfare and the promptings of propriety. Each President, as vacancies have arisen, has shown a becoming sense of the example which Washington himself set when organizing the court originally. The Senate has almost constantly exercised its own confirming power as though such responsibility were a grave one. Rarely has unseemly strife or partisanship been manifest in the selection of associate judges, nor ever has a man notoriously unfit for the place been placed among them. But regarding the chief justiceship much zealous rivalry has been shown, much interest in the award of so rare and so consummate a public distinction. President Washington conferred the earliest honor of this kind upon a Revolutionary patriot of talent and spotless integrity; but John Jay had been bred to a career of politics and diplomacy, and the duties of the new position involved so little labor in his day that he found time to advise the chief Executive, almost as one of the cabinet, and to go as special envoy to England besides for arranging a treaty; and finally he resigned that splendid sinecure — for such he found it — to serve as governor of his native state in preference. In Oliver Ellsworth, President Washington raised another Revolutionary statesman to the chief justiceship who served but a few brief years in that office, and, like Jay, made an embassy to Europe its crowning incident. The choice

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of the first long incumbent of that post devolved upon President John Adams, already defeated for a reëlection, who transferred his able secretary of state to the Bench when retiring from office. Marshall, though something of a thorn, politically speaking, in the flesh of Adams's next executive successor, Jefferson, mellowed, as we all know, during his long judicial tenure, into a Chief Justice beloved by the people, and made his exalted office felt in the quiet shaping out of a constitutional policy favorable to national supremacy. The vacancy made by Marshall's death was filled by President Jackson, whose appointee, Taney, the Senate confirmed after a previous rejection of the same person to fill a simple vacancy among the associate justices. Here, as in other instances, the old warrior at the White House indulged his combativeness to doubly humiliate his adversaries by promoting to higher honors the man whom they had defeated for lower. For this new Chief Justice had chiefly won Jackson's preference because of his courageous compliance in the cabinet when Jackson made aggressive war upon the United States Bank. Taney, with his newer associates, set the Supreme Court for a time upon a new and reactionary tack towards state rights; and, like Marshall, a man of integrity and simple habits, he served a long career as Chief Justice, vacating his office only with his life. President Lincoln selected to succeed him in the Civil War a secretary of the treasury from whom he had lately parted under vexatious circumstances, and in doing so gave one of the strongest instances of sovereign magnanimity known in history. Had Chase, on taking the ermine of his new office, foresworn forever all future hopes of the presidency, he might have lived longer and more happily in his new position. Upon his death the glorious opportunity of bestowing this office came to President Grant[1], who made one or two blundering appointments which the Senate refused to confirm before a fair and unopposed selection was found in Morrison R. Waite. Waite's death while in office afforded President Cleveland the casual chance of giving to the Supreme Court a new official head while the Democratic party briefly triumphed in the nation. And Melville M. Fuller, the seventh in order of all our Chief Justices actually sworn in upon the Supreme Bench, still sits at the center of the table. Resignation from this grand office has not been known since the nineteenth century opened.

Upon the whole, and granting that perfection is not to be looked for in human institutions under any circumstances, I, for my own part, favor strongly the present rule of our Constitution, both as to the method of appointing judges of the United States courts and the tenure of good behavior for each of them. Perhaps I am influenced in this respect by the example, almost solitary among the states at the present time, which Massachusetts sets in this respect, adhering to the older custom at the outset of independence. No rule certainly suits so well the adjustment of a judiciary to our broad Union, whose interests are so vast, complex, and antagonistic. And here, I think, Congress should always be heedful of locality; requiring circuit and district judges to be identified as residents with their several jurisdictions, and incumbents of the Appellate and Supreme Courts to be broadly representative, assembled from different quarters of the Union. Thereby does the executive range of selection for a vacancy become practically narrowed so that local opinion can

[1] Grant's civil appointments as President were as erratic as his military appointments while a general were praiseworthy. His administration is accused, not without reason, of favoring on opportunity the schemes of party supporters who sought to have the Supreme Court minority reinforced so that the first decision upon the Legal Tender Cases might be promptly reversed. But it should stand to his credit as President, that, when Congress greatly increased the federal judiciary by a circuit court act, he left the list of appointees to be made up by competent professional advisers and gave to the country an admirable establishment in that respect.

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formulate its preferences. The Senate's power to confirm operates, moreover, as a check upon hasty or indiscreet selection by the Executive, and even though presidential favoritism should force a way, an appointee would rarely be confirmed, if openly challenged, unless honest, at all events, and fairly fit for the place. Then again, with the present secure tenure, vacancies scatter and occur but seldom; hence deliberation over a new appointment is readily invited. Both in Massachusetts and where our federal jurisdiction pertains, the old English principle of holding office during good behavior is well justified by a long line of honorable incumbents, impartial and uncorrupt, constantly gaining by experience. Once promoted to the Bench, they have dismissed all other public ambition and devoted themselves faithfully and unreservedly to administering justice while active life remains. Men thus placed we see rising perhaps to still higher honors on the Bench, seldom turning to active politics; and content with a moderate salary which may not be diminished, with perhaps a pension promised upon final retirement, they seldom return to the active walks of the profession to seek larger emolument.

But should the rule be altered, a choice of United States judges by both Houses of Congress would seem preferable to elections by the people at large. For such incumbents would be peculiarly liable to the debasing influence of party caucus and convention machinery — of boss deals or boss dictation — were they set to canvassing for their nominations; while in the election contests they would most probably lose or win simply as subsidiary to the presidential or congressional candidates on whose tickets they were placed. We have to-day, in most states, the choice of judges at the polls; yet here the range is circumscribed and only in an agricultural district or commonwealth, simple and sparse, can it be said that such tests for the judicial office are satisfactory. As for limiting the tenure of a judiciary to a fixed term of years, state experiments have varied; but men in the legal profession most desirable will not readily come forward upon such inducements, but prefer their own private independence. States, once committed to the new and popular choice have not, to be sure, returned to the older methods; yet in populous and wealthy states, particularly where great concerns are litigated, the tendency of late years has been towards longer terms of judicial office than were favored when the reform commenced.[1] Massachusetts, in 1853, spurned at the polls the effort of her constitutional convention to limit the tenure of her judiciary; and as for the United States, all discussion must be considered academic, as to either tenure or mode of appointment, since the federal constitution is not to be easily changed at all.

Were, however, the judiciary article in our federal constitution to be amended hereafter in any respect, a change in the method of removing judges for crime, misdemeanor, or positive incapacity would seem desirable. Resignation cannot be forced; and the only method now available for ridding the federal judiciary of an obnoxious incumbent (short of abolishing such tribunals as are inferior to the Supreme Court) is the antiquated and spectacular one of a legislative impeachment, applicable to all civil officers of the United States. This involves much waste of time which Congress needs for its regular business, and when applied to our lesser judicial incumbents it is as cumbrous as to work some ponderous pulverizer to crush an acorn; only high and prominent political offenders — the hated or the beloved of the people — deserve so pompous a procedure. Nor is the Senate a safe tribunal to be intrusted with important trials, in addition to functions more purely political which it so amply exercises. The judge who deserves removal is usually corrupt, immoral, or manifestly incapable, but rarely

[1] In New York the highest judges are now elected for fourteen years and in Pennsylvania for twenty-one.

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is he infamous. Mere manners on the bench seldom give offense in these days. Now in Massachusetts judges have constantly been liable to removal by the governor (with the consent of council) on address of the two Houses; while in Maryland a judge may be removed for misbehavior on conviction of a court of law. Widely among our states, the governor "shall" remove (or, as some commonwealths prefer the text, "may at discretion remove") on the address of two-thirds of each branch (or, in some states, the majority) of the legislature; while some constitutions leave this power to the legislature apart from the Executive. Regarding the federal judiciary, some such liability to a discretionary removal on the part of Congress would not only prove a salutary means of efficient discipline in extreme cases, but would induce misbehaving judges to surrender their commission rather than invite such procedure. And the constitutional provision might be so explicitly framed as to guard against the possible mischief of a sweeping national proscription of deserving judges under the temporary stress of political passion.

BOSTON, MASS., *November*, 1906.

NOTE. Since this article was written, Secretary Taft seems to have dismissed all claims of successorship to the present vacancy on the Supreme Bench, and another cabinet officer, Attorney-General Moody, will receive the honor. Objection has been made in some quarter, to the official bias of Mr. Moody as to certain controversies which the Supreme Court must eventually decide; but to this writer the objection appears even stronger that a wise and time-honored custom is to be disregarded in the incumbency of two justices, not only from the same section of the Union but from the same State. However, President Roosevelt is both capable and strongly desirous of advancing his personal favorites, while disposed to introduce official customs of his own; and as this newly named appointee has high character and professional talent in his favor, the executive preference is likely to prevail.

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THE CONTROL OF CORPORATIONS

By Frederick N. Judson

THE "Imprisonment of Corporations" was the suggestive title of an interesting communication published in the April Green Bag, which argued tentatively that the control of corporations could be best effected by imposing a punishment for violation of law analogous to that of the imprisonment of individuals, *i.e.*, by forfeiture or suspension of the exercise of the corporate functions. The communication assumed certain postulates: first, that a corporation may commit a crime; second, that a corporation may be punished for a criminal offense; and third, that a corporation may be punished by a fine, and concluded that it did not logically follow, as ordinarily assumed, that a corporation could not be imprisoned; as it was argued that it may be deprived of the liberty to exercise its corporate functions, as an individual when convicted of a crime is deprived of the right to exercise his personal liberty. It was suggested that the existence of such a penalty would create a demand for "conservative lawful management of corporations from their stockholders in the country and that the public service corporations would be the most carefully and beneficently managed of all."

These postulates must be stated with some qualification. A corporation may be guilty of crime, when the only intent required for the commission of the crime is the intent to do the prohibited thing. Thus the corporation may be indicted for offenses of nonfeasance and misfeasance; but as an artificial personality existing only in contemplation of law and having no soul except the souls of the individuals by whom its corporate acts are committed, the corporation cannot commit a crime where a specific criminal intent is required to constitute the crime, beyond the mere intent for the commission of the act.

It cannot be denied that the subject presented in the communication is one of vast and growing importance. It is emphasized by the great extension of business associations through corporate organizations in all kinds of business activity. The punishment of corporations is only a means of effecting the rightful public control of corporations, and this is complicated by our dual form of government which renders the efficient control of public carriers, as well as of any corporations engaged in interstate commerce, one full of legal pitfalls and embarrassments. Without entering into these questions, which would require a discussion too extended for the limits of this article, the matter may be considered in the light of the general relation of the corporation to the state in the exercise of the latter's supervisory power over its own corporate creations. In this broad view it must be conceded that the author of the communication has done a good service in discussing a matter of such grave import from a novel point of view.

The fundamental difficulty with the remedy suggested, and with the reasoning on which it is based, is that the basis and purpose of all corporate organization is entirely overlooked.

All corporate franchises, and *a fortiori* the franchises of public service corporations, are presumably granted for the public good; in the case of the latter, for the performance of services necessary for the public good. It may be true as stated that the stockholders of a corporation properly suffer for the wrongdoing of the agents whom they have selected to manage the corporation, and in fact they do suffer in every case for the imposition of a corporate fine which is paid from the corporate assets.

The question must therefore be considered not only in the light of the interests of the

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stockholders, but of the public at large. It is obvious that the enforced suspension of the functions of a public carrier, or in fact of any public service corporation, would involve an incalculable amount of public inconvenience and pecuniary damage and distress. This may be illustrated by the individual suffering and the paralysis of business when the operations of a street car company or other public service corporation are stopped by a strike. The same consideration applies, though in a lesser degree, to the case of any great corporation engaged in the business of production or distribution. As corporations are presumably only organized for the furtherance of the public good in any form of business activity, it follows that the enforced interruption of corporate business would involve inconvenience and loss to the general public.

The reasoning of the author seems to be based upon the consideration that the mere enactment of these penalties would be sufficient, and that they would effectively deter corporations from violating the laws. In other words, they would stand *in terrorem* over the corporations. This view, however, ignores the recognized fact based upon human experience, that the enactment of penalties which are practically unenforceable do not deter from crime and afford no protection to the public. Thus when Blackstone published his Commentaries, one hundred and sixty crimes had been declared by acts of Parliament to be felonies without benefit of clergy, or in other words, worthy of instant death; and he remarked that such a dreadful list of penalties, instead of diminishing, increased the number of offenders. Parliament was at length brought to realize this truth, and greatly diminished this list, and our modern statutory criminal law is based upon the recognition of this principle. It is safe to say that any system of forfeiting or suspending the exercise of corporate functions as a punishment for the delinquencies of corporate officials which would involve inconvenience and damage to the public, would become practically unenforceable and therefore no protection to the public.

This necessity for protecting the interests of innocent parties in the exposure and punishment of corporate abuses was illustrated in the recent insurance exposures. Insurance companies do business in the several states through comity, though the business is essentially national, in that citizens of the different states are interested in the administration of the funds for their mutual benefit. The insurance commissioner of Missouri made a demand upon the president of one of the companies that unless he restored within thirty days certain campaign contributions made from the company's funds in certain political campaigns, that he, the commissioner, would forfeit or rather suspend the license of the company to do business in the state. This threatened action of the commissioner was restrained by the United States court as not authorized by the statutes of the state. Irrespective of that question, however, which is not related to this discussion, the forfeiture or suspension of the company's right to do business in Missouri would have been very disastrous to the interests of the Missouri policy holders, and they would have suffered this damage and pecuniary loss as a punishment for an offense of corporate officials, over whose actions they had no control and for whom they were in no wise responsible.

These considerations of the impolicy, impracticability, and essential injustice of punishing the delinquencies of corporate officials by the forfeiture or suspension of the company's right to do business, apply measurably to the case of any business corporation. Notwithstanding the laxity of the corporate laws of many of the states, corporate franchises are granted, in theory, for the promotion of the public good. It may be that this principle has been lost sight of in the loose provisions of our general corporation laws, and that reform is here necessary.

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The general principle, however, may be laid down that wherever the public has an interest in the continued operation of a corporation, that interest would necessarily be prejudiced by any forfeiture or suspension of its rights to continue operations. This principle has been recognized by the courts in the enforcement of the common law and statutory remedy of *quo warranto* for the forfeiture of corporate franchises in the exercise of the supervisory power of the state over its own corporations. Courts are extremely reluctant to adjudge forfeiture of charters, and this is especially the case, remarks Mr. Thompson in his treatise on Corporations in the case of corporations organized to promote desirable public works which it is the public policy to foster and encourage. It follows that malfeasance and breaches of trust on the part of corporate officials, and even their illegal acts which do not involve a statutory ground of forfeiture, or an actual nonuser or misuser of corporate franchises affecting the public interests will not authorize the sentence of forfeiture. It has been said by the Supreme Court of Ohio that to visit the perversion of corporate objects by a few upon the heads of the entire membership would result in irremedial hardship.

Cases quite numerous in recent years are to be distinguished, where the power of the state is directed against the illegal control of corporate action, as the Northern Securities case, where though a corporate organization may be dissolved, there is no interference with the continued business of production, transportation, or distribution by the corporations actually engaged therein. This includes the cases arising in the enforcement of statutes directed against unlawful combinations for the suppression of competition effected through the medium of so-called holding companies.

The true remedy, therefore, for the evils of which we complain, and the only remedy consistent with the interests of the public, is not along the lines suggested by the paper, of dealing with the corporate entity and thereby damaging not only the innocent stockholders but the general public also; on the contrary the road to effective public control for the prevention and control of corporate abuses lies in exactly the opposite direction, in restricting the corporate fiction to its necessary limitations and enforcing the individual responsibility of the corporate officials through whom and by whom it necessarily acts in any violation of law. The development of our jurisprudence is clearly along the lines of a more rigid enforcement of the personal responsibility of corporate officials for violations of law in the corporate name. This is necessary from another point of view. The disposition inherent in human nature to win favor and promotion by successful results tends to dwarf individuality and to deaden the sense of individual responsibility for the invasion or violation of law. Especially is this the case with our great corporations with their armies of graded officials. It is essential, therefore, that the laws fixing personal responsibility upon the corporate officials should be impartially and thoroughly enforced.

It is fundamental in the law that a fiction will not be carried further than the reasons which led to its introduction necessarily require. This principle obviously applies to the theory of distinct legal entity in the corporate relation. Private corporations, in the language of the United States Supreme Court, are but associated persons, united for some common purpose and permitted by law to use a common name and to change members without dissolution of the association. Mr. Thompson in his treatise on Corporations says that a sensible and practicable conception of a corporation is that it is an organized body of men acting within certain prescribed limits and with a certain agency. In our constitutional law, the corporation is not a "citizen," but is a "person," protected against deprivation of property by governmental action without due process of law. The Supreme Court has recently held, in the

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Paper Trust case, that a corporation does not have the right of an individual in constitutional protection against self-incrimination by the enforced production of books and papers.

It was said in the recent case of the United States *v.* Milwaukee Refrigerator Transit Co., 142 Fed. 247, that a corporation will be looked upon as a legal entity as a general rule, or until sufficient reason to the contrary appears. But when this notion of legal entity is used to defeat the public convenience, to justify wrong, to protect evil, or to defend crime, the law will regard the corporation as an association of persons. Thus where one corporation was organized and owned by the stockholders of another, making their interests identical, they would be treated as identical when the needs of justice required.

It necessarily follows that the protection of the public against unlawful corporate action must, as a rule, be sought by preventive remedies rather than punitive, and the latter as a rule can only be effectually enforced against the individuals, through and by whom the unlawful corporate action is effected. The use of preventive remedies seems more firmly established in the English courts than in our own, as there the distinction between the powers of courts of equity and courts of law has in this respect now only historical interest. It is obvious that in a progressive industrial civilization, preventive remedies are frequently the only adequate remedies when business or property rights are invaded or threatened. Where the public interest intervenes, as in the case of interstate carriers, some form of preventive relief, usually that of injunction, is usually the only available remedy. There is a popular prejudice in certain quarters against the use of injunction in trade disputes. But such objections doubtless grow out of the occasional abuse of the writ of injunction, as it is clear that it is not only the most effective, but oftentimes the only remedy available for the protection of the public against unlawful corporate action. In our busy industrial civilization we are coming to recognize that it is far more effective to prevent evils to persons and property than it is to recover damages for them after they have been inflicted. This is in harmony with public policy and protects at the same time the general public and the innocent stockholder of the corporation.

The dependence of even a preventive remedy upon the responsibility of the individuals connected with the corporation is illustrated in the enforcement of an injunction through the familiar procedure of contempt. Originally the individuals of a corporation were the only parties liable to punishment for contempt in disobeying an injunction, as there was a technical difficulty in holding a corporation guilty of a criminal offense. The corporation could not be attached for contempt, as it had no body which could be arrested and could only be forced into court through distraint of its lands or goods. In remedial as distinguished from criminal contempts, where the order of the court is made for the benefit of a private party litigant, there is sometimes a reason for including a corporation as a party to the contempt in order to reach the corporate treasury for the payment of the fine, where officials are pecuniarily irresponsible, and the fine is collected for the benefit of the plaintiff. In such cases the object is more to collect a fine than to punish a wrong. In criminal contempts, including cases where an injunction is violated which is sued out by the government for public purposes and the criminal offense of obstructing justice is committed by, that is on behalf of the corporation defendant, there is a technical difficulty, which has been recognized by the courts, in holding the corporation liable at all. They can only be held liable by an extension of the rule, rather of public policy than of logic, which holds them liable for the malicious torts of their agents and servants.

There is no question, however, that the officers by and through whom the corpora-

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tion acts are responsible, as the direction of the court is to them as well as to the corporation and requires not only that the order should be obeyed, but that they should see that it is obeyed.

It therefore follows that the remedy of injunction, which is the only effective remedy for stopping and preventing corporate wrongs, cannot be effective unless it is enforced, and it cannot be enforced unless the personal individual responsibility of corporate officials for the corporate action is declared and enforced. Where an injunction against a corporation is violated, some official is responsible, as the corporation could only act by and through its officials, and those in charge of the business at the time are, therefore, properly and necessarily called upon to explain why the injunction was not obeyed, and it is for them to show that they are not responsible for the disobedience. It is important that this fundamental principle which is essential to the effectiveness of this remedy for corporate abuses should not be obscured by personal or political considerations.

These fundamental principles involved in the protection of the public against corporate abuses have been effectively illustrated in the legislation of Congress in the regulation of interstate commerce. The provisions of the original Interstate Commerce Act for the punishment of rebates and irregular practices, though on the statute books for several years, proved practically ineffective. This was owing to the absence of any effective preventive remedy, as well as to the difficulty of procuring the evidence necessary for criminal prosecutions or recoveries in civil cases by injured parties. The passage of the Elkins Bill of 1903 giving the specific remedy by injunction for the enforcement of the act proved, in the language of the chairman of the Interstate Commerce Commission, a most complete and effective measure for the stoppage of illegal practices. It was supposed at the time that this remedy by injunction, with the incidental power of enforcement against individuals by process of contempt, would be found sufficient, and the penalty of imprisonment of individuals was repealed. Practical difficulties however were encountered in the enforcement of obedience to injunctions against corporations, and in view of the pressure for illegal practices in granting rebates by officials it was deemed necessary in the Rate Bill of 1906 to restore the penalty of imprisonment which had been repealed in 1903.

The control of corporations, therefore, other than by the preventive measures above referred to, must be effected primarily through the enforcement of the legal responsibility of the individuals whom the law has permitted to be associated in the corporate relation. This can be done without prejudice to the public interests, which are assumed to be promoted by the authorization of corporate organizations. The fiction of the legal entity must find its limitations in the necessity and public policy which are responsible for its creation.

ST. LOUIS, MO., November, 1906.

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THE ORANGE ROUTING CASE: A STUDY IN COMPETITION

By William A. Bowen

I

THE orange growers of Southern California occupy a station singularly well placed. All winter long, while Eastern farms are snow-bound and desolate, their gold and yellow fruit is hanging from leafy boughs, humming-birds are flitting among palms, and the air is sweet with blossoms. Cottagers, thus embowered, taking their ease in their happy valley beneath snow-capped mountains, may well be thought almost unduly favored of fortune. Certainly their task seems easy; they need but irrigate their groves a few times yearly, and now and then cultivate, fertilize, prune, and spray; the rest is leisure and the collection of income. Unfortunately, however, Californians cannot eat twenty-five thousand carloads of oranges in the year; and at California's door lies the Great American Desert. Those who will buy and eat their fruit dwell a thousand, two thousand, three thousand miles away. To bring the fruit to these with profit and dispatch constitutes the crux upon which hangs the prosperity of this favored people.

Two railroads hold in their hands this power of life and death: the Atchison, Topeka, and Santa Fé system, and the Southern Pacific system. The former does not carry east of Chicago, nor the latter east of Ogden, Utah, and El Paso, Texas. Beyond those points fruit must be carried by other lines. The difficulty is obvious at once. If shippers should be left to deal with initial and connecting carrier separately, how would the rate be apportioned; would it not necessarily be ruinously high; how would shippers ever be able to collect claims for damages; how would initial carriers ever be able to compel prompt return of their empty cars; how would shippers ever be able to make prompt and convenient arrangements with distant railroads? On the other hand, if the initial carriers should arrange with all the Eastern lines for a through tariff, payable by the shipper to the initial carrier, to which alone he should consign his fruit, and to which alone he should look for delivery and for damages, who would select the connecting carrier; would the shipper surrender his control of his shipment to the Western railroad; would the Eastern roads decline to be subject to the dictation of Western roads and insist upon their right to compete among the shippers for the business; and in such a case, would not empty cars be returned slowly, to the detriment of shippers and initial carriers alike?

The situation was difficult in the extreme. The first plan was obviously impracticable. In adopting the second, a compromise was effected, and, up to January 1, 1900, observed. Shippers obtained a through rate, and looked to the initial carrier for through transportation; but they were allowed to select their connecting carrier, and not only to designate their preference in that regard, but even to change the destination of their freight while in transit, diverting it to such markets as should in the meantime appear to offer the best advantages. This practice came to be universally observed. It began to seem that the entire orange industry depended upon it: the fruit being routed by the shippers themselves, they in consequence knew at any moment where their cars were, they had a desirable personal relation with the connecting lines themselves, and they could at any time avail themselves of the most favorable market offering.

On January 1, 1900, this system was demolished at one blow. Thenceforth, said

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the Santa Fé Railroad and the Southern Pacific Railroad, shippers should have no dealings whatever with connecting carriers if they wanted a through rate; the two initial lines would thenceforth choose for themselves what Eastern lines should carry beyond their own terminals; and shippers should designate the destination of their fruit and adhere to it.

Consternation and dismay followed the announcement of this radical change. The orange industry was thought to be ruined beyond recovery; the two great Western railroads had taken the industry out of the hands of the growers and into their own; they would thenceforth divide the traffic between themselves and among their Eastern friends as they thought fit, would extort higher rates than ever, give slower service than ever, and subject their impoverished customers to all the ills of a tyrannical and conscienceless monopoly. Seven weeks after the new rule went into effect, complaint was made, in a fever of haste, to the Interstate Commerce Commission. *Six years* later, almost to a day, a final answer was given by the courts. The Interstate Commerce Commission ordered the two railroads to refrain from enforcing the routing rule. The latter disobeyed. The commission then brought suit in the United States Circuit Court, at Los Angeles, to compel obedience. Judge Wellborn, in that court, decided for the commission, and enjoined the enforcement of the routing rule. Appeal was taken to the Supreme Court, and on February 24, 1906, that court reversed the two previous decisions and declared unanimously in favor of the railroads.

Immediately a storm of denunciation broke upon the heads of that devoted court. A leading journal of Los Angeles three days later fulminated thus:

"As a bolt from the blue came from Washington yesterday the news that the United States Supreme Court had reversed the Wellborn decision in the citrus fruit routing case and *delivered the orange growers and shippers of Southern California, bound and gagged, into the hands of the railroad combine.* Stunned amazement was the first effect produced by the news upon shippers of fruit. Some tried to find a ray of hope in the surmise that the court had found technical defects in the proceedings which might be remedied in another action, but that hope went glimmering when the grounds of the decision were made known, and it appeared that the Supreme Court had gone into the merits of the case and *driven another nail in the coffin of the powers of the Interstate Commerce Commission.* . . . The United States Supreme Court has been whittling away for years the power which the people of the United States intended to delegate to, and thought they had conferred upon the commission created to administer laws regulating commerce, and by this latest pro-railroad decision it has reduced the commission to a pitiful futility. *The court says the commission is powerless to grant any relief from railroad oppression to the people.* . . ."

At a mass meeting of fruit growers and shippers at Corona, an orange center, the following week, it was resolved that "the recent decision of the Supreme Court of the United States, taking from the shipper the right to rout his fruit, does to the citrus fruit industry of California a great and lasting injury, paralyzing said industry to a great extent and causing at times great loss to the grower, and *at the same time legalizing pooling by the railroad lines.*"

At Redlands, about the same time, a similar mass meeting resolved unanimously that the decision gives *legal sanction to freight pools*, that it *denies control of commerce* and of rates *to the Interstate Commerce Commission*, and that it places Californians and their business at the mercy of the railroads.

Let us see.

II

The orange-producing lands of Southern California comprise about eighty-eight thousand acres. Of these, some twenty-seven thou-

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sand are tributary, on account of their location, to the Santa Fé system, and a like area, for the same reason, to the Southern Pacific system. The remainder are served by both jointly. This geographical condition has always operated, both before 1900 and since, to divide the orange traffic about equally between the two systems, the variation being only a few hundred cars every year in favor of the Santa Fé. As may be supposed, the same rate has on this account always been charged by both systems for citrus fruit, and no rate-cutting war has ever been indulged in. Such a contest would not in any material degree change the natural division of the business imposed by physical conditions. Only once, in a respect incidental to our main theme, which we are shortly to notice, have these roads been betrayed, against their judgment and with disastrous consequences, into competition. But in any true sense, competition between them there is none, and has not been, and in the nature of things cannot be.

The cars required for this traffic are specially constructed for ventilation and refrigeration, are heavy, expensive, and useless to the railroads except during the orange season. Consequently they are owned, not by the railroads, but by various private car companies, such as, at the beginning of 1900, the Continental Fruit Express, the Fruit Growers' Express, the Santa Fé Refrigerator Line, and the Overland Fruit Despatch, and by them leased to the railroads. Their compensation consists of mileage, paid by the railroad, initial and connecting respectively, and of charges for refrigeration, paid by the shipper. The usual mileage, paid by the railroad to the car company, is three-quarters of a cent or a cent. The car line's charge to the shipper for refrigerating the fruit, per car load, to Kansas City is $60, to Chicago is $75, to New York $90. The railroad rate to shippers from California to the East is, as we have said, a through rate, and is and has always been $1.25 per hundred pounds, amounting for the minimum carload of twenty-six thousand pounds to $325. The total transportation charge to New York is therefore about $415 per car. The standard weight of a box of oranges is seventy-two pounds, and a minimum carload contains therefore about three hundred and sixty boxes. Statistics concerning the cost of production and prices are extremely unreliable; but it is perhaps safe to conclude, with the Interstate Commerce Commission, that the bare cost of production, including investment cost, cultivation, irrigation, fertilizing, picking, sorting, packing, boxing, hauling, and loading, is about $1.10 per box, or $397.10 per carload. The transportation charges above mentioned bring the cost of a carload in New York to about $812. Prices vary greatly, of course, with the quality of the fruit and the condition of the market. In 1902–3, which was a bad year, the average price in New York was perhaps about $2.20 per box, or about $795 per carload. Evidently the orange grower might better have let his fruit rot on the ground. In good years, like the present of 1905–6, the grower makes a handsome profit; but he must charge against it such losses in other years as those we have just indicated. Naturally any possible means for the reduction of expenses will be seized with avidity by the whole orange growing community; and naturally a feeling prevails that the railroads, which collect their stated income in good years and bad alike, whether the shipper loses or gains, are preying upon their customers and taking an unfair advantage of their helplessness.

Fruit growers do not always market their fruit personally and independently. A considerable number do, amounting perhaps to a narrow majority; the rest operate through the fruit "Exchanges." In each of the communities of production, the growers who favor this plan form an "Association," having its own packing house and shipping facilities. The members of the association deliver their fruit to the local packing house

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where it is weighed, graded, receipted for, and put into a common pool of all fruit received of a like grade, the whole being marketed as occasion offers and the proceeds divided among the members according to the quantities shown on their respective receipts. The associations in a given center of production form in turn a local "Exchange," and the local exchanges are in turn members of a principal or general exchange, having control in matters of general policy and government, whose directors are elected by the constituent exchanges, one from each. It was by two of these general exchanges that the present proceedings were brought.

Originally, in shipping his fruit East, the shipper selected that connecting carrier, under the privilege accorded him by the Santa Fé and the Southern Pacific, which would get his fruit to market best and with the least delay. Keen competition of course at once arose among the connecting lines to obtain the preference from shippers in the selection of their routes. Some of these connecting roads were not so well situated as others to command a fair share of this traffic. Physical and geographical difficulties embarrassed them in the contest; they could not offer shippers a short route, a speedy delivery, or adequate terminal facilities. But there was something they could offer, and they did.

It is at this point that we begin to see in practical operation that great principle of competition which has so long been held up to us as the palladium of our liberties, the panacea for our commercial ills, the preserver of individualism, the infallible solution of the problems of monopoly and wealth. But unfortunately competition of the polite and submissive sort contemplated by our law would have been quite useless to these handicapped railroads; they accordingly resorted to competition of the only possible kind. They came into California and offered rebates to shippers who would route their fruit over their lines.

Now the shippers are also competitors. The exchanges are, like all other trusts and combinations, fighting the independents. If a reduction of *cost* might be obtained, the exchanges could easily undersell the independents, and compel them to come to terms. The independents would gladly, of course, seize the same opportunity if it presented. When it arrived in the offer of rebates from connecting carriers, the exchanges welcomed the chance with open arms. The independents were not organized, and as usual missed their opportunity. The connecting carriers commenced to bid against each other for the routing of the exchanges' business, the exchanges contested with the independent shippers to obtain rebates, and with this weapon made war upon them in all the markets of the country, to an extent which demoralized the business, depreciated orange lands, and ruined many growers. One of these exchanges, the Southern California Fruit Exchange, a bitter complainant in this present action, received afterwards in four years, in rebates, the neat sum of $174,491. Under these circumstances, oranges might be sold with profit for less than the cost of production and sale; and the plight of those who were not important enough in themselves or through the trust to command rebates, may be imagined.

But the car lines are also competitors. Why should shippers receive the whole of a benefit which might be divided with a car line, to its advantage over *its* competitors? Why should an Eastern railroad wield the power attending rebate giving when that power might be used by a car line to its advantage over its competitors? Shippers were accordingly instructed in the advantages of dealing with a *car line* instead of with numerous connecting railroads a thousand miles and more away. Shippers and railroads were warned, and it was universally believed, that there was great danger in the giving of rebates by *railroads*, but none at all in the giving of rebates by *car lines*, upon the theory that the latter were

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not subject to the Interstate Commerce Act. To *pay* these rebates, the car line had to *get* them from the Eastern railroads; and to *get* them, it had to be able to award the Eastern traffic. To the latter, the shippers were easily persuaded to agree, and to the former the Eastern roads agreed with equal readiness. The selection of Eastern routing was thus sold by the shipper to the car line, in consideration of the payment of rebates by the latter. This transfer of the routing privilege transferred also the objective of the connecting carriers' fight for business from the shipper to the car line. The weapon employed was now, as before, the rebate, but in a disguised form. An Eastern road, competing for business, simply agreed with a car line that in consideration of the latter's routing its oranges over the former's road it would pay to such car line an excessive mileage per car, viz., instead of the usual mileage of three-fourths of a cent a mileage of a cent or a cent and a half. This excess the car line divided with the shipper for the privilege of routing his fruit. At the opening of the season, an understanding was had between the shipper and the car line that the use of its particular cars would secure the shipper an allowance on refrigeration charges. The full tariff was duly paid by the shipper, and his rebate was afterwards returned to him by the car line. Even when there was no refrigeration, it was customary to allow a rebate nevertheless. The rebate from the car line to the shipper amounted, under refrigeration, to as much as $35 per car to the Atlantic seaboard. When the fruit was not moved under refrigeration, the rebate varied, according to distance, from $10 to $25 per car. In four years, as we have already said, one of the large shippers received in such rebates nearly one hundred and seventy-five thousand dollars.

The Santa Fé and Southern Pacific systems, while not competing with any true belligerency, sometimes found themselves competitors against their will by reason of the state of affairs we have been describing. For instance, the Arlington Heights Fruit Company, a large shipper at Riverside, had its natural shipping station exclusively on the Santa Fé line. In 1897–98 the general freight agent of the Santa Fé found that the entire business of the Arlington Heights Fruit Company was going to the Southern Pacific at its station at Colton. The freight agent protested to the manager of the Fruit Company that it did not seem exactly right that the latter's business should go over the lines of the Southern Pacific when it was located on the lines of the Santa Fé. The answer was that the Continental Fruit Express, the car company to which the routing of the fruit had been surrendered, absolutely refused to allow it to go over the Santa Fé. The latter's freight agent called on the manager of the Continental Fruit Express to find out what the trouble was, and, as he says, "he soon learned." The trouble was simply this: "If the Santa Fé Railroad would allow the Continental Fruit Express excess mileage amounting to $10 per car to Kansas City, and $12.50 per car to Chicago, the business of the Arlington Heights Fruit Company would be sent over the Santa Fé lines, otherwise the Continental Fruit Express could not afford to let the business go over the Santa Fé lines, as they had contracted to pay the Arlington Heights Fruit Company a certain amount per car for the routing.' The Santa Fé was obliged to come to terms; it did so and got the business.

The general competition was reaching fever heat. To command the power of routing, the car lines were compelled to grant the demands of the large shippers, who were becoming more and more clamorous. To reimburse themselves, they were obliged to demand in turn heavy excess mileage from the Eastern roads, which were obliged either to pay it or to lose the business. A point was reached where the connecting carriers, in the excess of their zeal, took this business often at a positive loss and in almost every case without profit. In spite of

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this no one was willing to give it up, and they continued the war in a vague hope that some day things would be better. But they remembered the beginning of competition for the orange business, and found themselves hoist with their own petard.

The situation eventually became intolerable. The orange trust was demoralizing the market, and doing it at a profit; the small growers were being ruined; the connecting roads were carrying oranges without profit; traffic was in a chaotic condition over the initial lines, for their connections had no interest in effecting a prompt return of empty cars, and the result was a constant car shortage; neither had their connections any interest in making prompt deliveries; transportation became slower; great quantities of fruit spoiled in transit; and the result was litigation, loss, and general dissatisfaction.

The Southern Pacific and the Santa Fé began to think the time had come to put a stop to this general orgy of competition. On October 6th and 7th, 1899, a conference was held at San Francisco, at which it was resolved to resume control of the routing of citrus fruit, by publishing a new joint tariff containing the following provision: "In guaranteeing rates, the absolute and unqualified right of routing beyond its own terminals is reserved to initial carrier giving guaranty." This determination was communicated to all the connecting lines, and was greeted by them with applause. "We are indeed glad," wired the freight traffic manager of the Cleveland, C. C. & St. L. R. Co., "to get this information, as it will protect the revenues of the Eastern roads against the undue competition of the several refrigerator lines, who have heretofore practically sold their business at auction." The car lines and the fruit exchanges were not so well pleased, for obvious reasons.

The new rule went into effect January 1, 1900. On the 24th and 26th of February, following, two of the disgruntled exchanges commenced proceedings before the Interstate Commerce Commission, demanding that the Southern Pacific and Santa Fé be required to compete, that the connecting lines in the East be required to compete, and to that end that the old order be restored. Two years and a quarter were consumed in obtaining a decision from the commission; two years and a quarter more in obtaining a review by the circuit court; and a year and a half more in obtaining a reversal by the Supreme Court of both the previous decisions. No rebates have since the first day of January, 1900, been given or received.

III

To a student of the chief economic question of our day, this case is extremely instructive. It illuminates vividly several important phases of the problem, suggests many others, and points its own moral with much emphasis. A few of the conclusions clearly indicated or dimly shadowed it will be interesting to note. They touch the vital points of a very vital matter.

First, competition is war. Its ends are victory and the spoils of victory. It gives no quarter, and it cannot be made polite by law. Its weapons are determined solely by the exigencies of battle, and are as far beyond the control of law as are the effects of supply and demand. If rebates are a necessary weapon of competition, no law can suppress them.

Second, the law in such cases as the present both requires competition and at the same time prohibits competition. The only means of competition in this case, as in many others, is the rebate, the only alternative combination. Both are prohibited by law.

Third, in such cases as the present, the only hope for the preservation of commerce lies in a deliberate violation of law by combination; and the demoralization of commerce is assured by observation of the law of competition.

Fourth, in such cases as the present,

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courts are placed in an awkward dilemma. Either they must enforce the law and demoralize commerce, or repudiate the law and preserve commerce.

Fifth, competition is the father of monopoly. Success in competition means the destruction of competition. The victor must of necessity find himself without competitors. The monopolist is but the successful competitor. To compel competition by law and at the same time prohibit monopoly by law is to compel battle and deny victory to the victor, to encourage the means and defeat the end.

Sixth, competition fosters combination. Its end being success to the strong, the wise will always combine for strength.

Seventh, competition constantly requires the restraining hand of combination. Nothing could display better than the present case the disastrous consequences of free competition, and its need of restraint by combination.

Eighth, the principle of competition is impossible of consistent application. Competition which is beneficial among capitalists may be highly injurious among laborers. Competition which is beneficial between two neighboring grocers may be highly injurious between two neighboring railroads. Competition is thought to be a sacred and inalienable right; but the Chinese can compete with us successfully on our own ground; they must therefore not be allowed to compete. Special reductions in transportation rates from the warehouse to the railroad station are wholly legitimate; but special reductions in transportation rates from the railroad station in California to that in New York are anathema, though they are precisely the same in principle. Discounts in the purchase of raw material and discounts in its transportation are alike in principle, but vastly different in practice. Competition through railroad rates may not be indulged in between two competitors living five miles apart on the same railroad, but competition through railroad rates may be indulged in between two competitors living five miles apart on different railroads. Two railroads running by parallel routes across state lines may not combine their business, but one millionaire may buy them both. Two stage-drivers traversing a state line by parallel roads may certainly form a partnership if they wish, but two railroads may not. An agreement between competitors not to sell for less than cost, or not to sell at less than a six per cent profit, may be highly beneficial; an agreement between them not to sell above a fixed figure may be sometimes not undesirable; but an agreement not to sell for less than a conventional, arbitrary, and extortionate price may be in the highest degree objectionable; yet all are condemned alike.

Ninth, the principle of competition is, even in theory, irrational and unsound. It is founded upon a specious and deceptive syllogism: monopoly is a great evil; competition is the opposite of monopoly; good is the opposite of evil; therefore competition must be a great good. It is also founded upon, and is intended to maintain, the right of every man to earn his livelihood as he pleases, free of compulsion or prohibition of any kind. But instead, by its own inexorable nature, it subjects him *a priori* to the compulsion and prohibition of stronger fighters than himself.

We in this country have declared loudly and without reservation for competition. The Sherman Anti-Trust Act announces, protects, and fortifies this great principle in a manner certainly plain and consistent enough. We have by that law, said the Supreme Court in the Northern Securities case, "prescribed the rule of free competition among those engaged in such commerce. . . . *Every* combination or conspiracy which would extinguish competition between otherwise competing railroads is made illegal by the act. . . . Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question

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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."

Now obviously a joint tariff is a combination in restraint of competition of the most radical kind. It affects rates, the most vital object of competition; it takes them by agreement out of competition at once; it fixes them beyond the power of competition to change. Joint tariffs, over *continuous lines* only, are expressly authorized by the Interstate Commerce Act. "In cases where passengers and freight," says the Act, "pass over *continuous lines or routes* operated by more than one common carrier, and the several common carriers operating such lines or routes establish joint tariffs of rates or fares or charges *for such continuous lines or routes*, copies of such joint tariffs shall also, in like manner, be filed with said commission."

It is perfectly plain that the permission to combine on rates is limited to *connecting* carriers, and is denied to *competing* carriers. The intention is equally apparent to preserve between competing roads that contest upon rates which is the chief feature of our competitive system. In the case we are now discussing *all* the carriers, as well the Eastern competing roads with one another as each of those roads with its Western connection, agreed upon a through rate for oranges of $1.25 per hundred pounds. Nothing could be a more patent combination in restraint of competition. But even if the joint tariff had been in this case only over *continuous* lines the result would have been the same. Suppose the Santa Fé should make a joint tariff agreement of $1.25 per hundred with the Pennsylvania Railroad for continuous transportation to the East via Chicago, and another agreement, in identical terms, with the Baltimore and Ohio (referring to the time when they were true competitors) for continuous transportation to the East via Chicago, and file each joint tariff separately. Obviously, though the separate *forms* are preserved, this is nothing in the world but a tariff combination between the *three* roads, two of them competing. The restraint upon competition between the two latter is completely effectual.

Moreover, the Interstate Commerce Act makes it unlawful "for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads;" which certainly might be accomplished by agreement for a fixed freight charge and by giving to one of the parties the power to apportion the freight among them all. This was in effect the joint tariff arrangement in the present case. At any rate, this pooling provision, taken in connection with the general policy of the law, evidently contemplates entirely free competition among the carriers in the acquisition of business; and certainly such free competition is prevented by the power reserved to one of them by the tariff in question.

This presented a difficult situation. To declare this joint tariff void and to announce that no agreement for through rates is permissible where it is made by competing carriers, would have been action of the most radical and dangerous character. All persons, no matter what their interests, desired a through uniform rate over all the Eastern lines; and the advantage of such a tariff is plain. A most beneficial and reasonable commercial arrangement would thus have been demolished at one blow to the dissatisfaction and indignation of everyone con-

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cerned. But on the other hand, to sustain any joint tariff between competing roads would have been to violate the plain provisions of the law. The learned circuit judge met the issue squarely and decided in favor of the law. The Supreme Court of the United States, realizing the absurdity of the law, decided in favor of common sense and the practical needs of the public. To do so the court was obliged to strain a point and use a little sophistry. It decides that the joint tariff in question does not restrain competition between the competing carriers, because they were not competing carriers. They "were really not competing roads," it says, because "prior to the adoption of the routing rule these connecting railroads were already acting under a through rate tariff which continued up to the time when the agreement for the routing was adopted. When so acting it was no longer possible to compete with each other as to rates." This is of course merely begging the question; it only removes the inquiry a little further back. If the present tariff is void the previous one was also, and it will not do to say that the present one is valid, because there had been another theretofore precisely like it, restraining competition in the same way. Indeed, the invalidity of the previous tariff is all but admitted by the language of the court, when it says, "The railroads are no longer rate-competing roads after the adoption of a through rate tariff by them." The conclusion is irresistible that a tariff which accomplishes such a destruction of competition is void.

Never has the utter impracticability of the principle of competition been so clearly demonstrated. When the Supreme Court is reduced, in the interest of common sense and the public good, thus to decline, in the face of the statute, to apply the principle, it is evident there is some fundamental deficiency in the doctrine itself. It is an admission in the particular case, of the fact which has become notorious in all phases of commercial life, that in application the principle retards progress, opens the door to fraud, prevents necessary conveniences, is inconsistent within itself, makes the struggle for life bitter and unscrupulous and, to use a phrase of Mr. Justice Holmes, makes "eternal the bellum omnium contra omnes." The present frenzy of enthusiasm for this principle is sufficiently strange in itself, and, as may be supposed, its expression takes strange form. In Kansas City two business men have been sentenced to the penitentiary for competing with the only weapon available — the rebate. In Toledo five business men have, on the other hand, been sentenced to the workhouse for a year for not competing at all. The Government proposes a great and definitive attack in the near future upon the greatest competitor of all, the Standard Oil Company, for the reason, apparently, that it has been too successful in a battle to which this very Government has continually encouraged it. And when we remember that the foundations of its success were laid at a time when the means used were not unlawful, and that those means, to wit, the procurement of lower rates for a greater volume of business, are daily employed with universal approval in the barter of every commodity and service known to trade except the single item of transportation, the attitude of criticism seems peculiar in the extreme. At any rate, it is not disclosed to us what alternative remains when one is liable to be sent to the penitentiary for engaging in competition of the only possible kind and equally liable for not engaging in competition at all.

In the present case not one of the parties concerned came into court with clean hands. They had engaged in a rebate war of the most obnoxious sort; they proposed to enter into a combination of the most obnoxious sort. It was not possible, under the approved system, that their hands should be clean. No moral turpitude was involved whatever. "We tried," said the assistant traffic manager of the Santa Fé with considerable naïveté, "the costly experiment of

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being honest in this thing, living up to the law as we understood it and declining to pay rebates; and we lost so much business that we found we had got to do as the Romans did." The blame lay, as we think, not so much with these culprits and with those others who are now being sent to the penitentiary, as with the system under which they live. The illuminating fact is that the only relief possible from this disgraceful and intolerable competition was a combination and conspiracy in restraint of competition and in violation of law.

"So-called competition in public service industries," said Mr. George Stewart Brown in a recent review, "is not competition at all — it is war. The stronger company either buys out the weaker at once without further parley or it divides the territory with the weaker, if the territory is big enough to divide, and agrees on rates; or it temporarily lowers the rates below the point of profit until the weaker succumbs. As a matter of fact, with the exception of the telephone service, industrial public service war has had but one universal result — consolidation. Not a single instance to the contrary can be cited." Such a war is cruel enough in itself, but what shall be said of the case when the law which encourages it prohibits not only the sole possible means of carrying it on but the sole possible relief from it?

But, it will be objected, the law of competition is an inexorable law of life. Alas, none who live can doubt it. Such also was the law of an eye for an eye, a tooth for a tooth, until one wiser than his time announced a better rule. To the end of time, unless some saving intervention prevail, doubtless the fittest will continue to survive, the strong to prey upon the weak, wit to conquer dullness. Certainly the terrible warfare needs no encouragement from human law. But it does cry, with a thousand urgent voices, for mitigation. Not only do the submerged, the ruined, demand it; the victors themselves, sitting on their thrones of privileges and power, preach, in spite of themselves, moderation and peace. Nor will anything avail but the destruction of the whole tree, root and branch. To occupy ourselves with the regulation of railway rates is but to touch a detail, when fundamental measures can alone suffice. It is necessary that we abandon competition, acknowledge that it is false in principle, ungovernable as anarchy, cruel and deadly in operation; and in its place we must erect coöperation. Doubtless this savors of socialism, certainly it looks toward federal and municipal ownership. But we are fast losing that horror with which, a few years ago, we heard those words; we are fast coming to approve a saner and friendlier relationship in our daily lives; and it may be the time is not distant when the policy of war for each against all shall give place to that of coöperation by all, under such wise direction as human imperfection may permit, for the common good.

Los Angeles, Cal., November, 1906.

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HOW SHOULD EVIDENCE BE TAUGHT?

By Charles F. Chamberlayne

A CASE-BOOK for class use is, as a rule, of interest merely from the standpoint of pedagogics. Designed to assist the compiler, such a book becomes, almost of necessity, a reflection of what he deems important. The work of compilation thus is essentially one of selection, and no two persons would probably make precisely the same choice in a mass of conflicting material. That the particular case-book under consideration has interest usually denied to books of its class, is the impelling reason for a somewhat more extended examination than is generally accorded.

In the present state of the law of evidence, much that is, as a rule, true of case-books is especially applicable to one on that subject. In no branch of the law would the work of selection be more largely determined by the author's particular view-point or that selection be more important in the results to be reached in the mind of the student.

As an incident in legal pedagogics, therefore, Dean Wigmore's recent selection of "Cases on Evidence" (Boston, Little, Brown and Company, 1906) possesses for these and similar reasons a unique interest, and suggests almost inevitably certain general considerations relating to the most advantageous method of teaching this fundamental subject.

Primarily designed for Dean Wigmore's own class work, it may fairly be regarded as, in a measure, amplification, for purposes of practical instruction, of the compiler's very distinguished treatise on "Evidence," the arrangement, terminology, and general scope of which it closely follows. The case-book, indeed, conspicuously displays the same splendid industry and philosophical fullness of critical analysis which marks the general work, and will assist to bring the earlier work within the somewhat arbitrary requirements of the law school class room. It is admirably adapted for such a purpose. The condensation of fact is happily done — leaving much of the dramatic interest of the special facts which meant, at the time, so much to the immediate actors. A valuable help to memory as well as a strong element to attract the attention is thus preserved. If evidence can best be taught by the examination and comparative study of cases, it is difficult to see how the work of instruction could be better fostered.

The doubt implied in this hypothetical statement is suggested by the peculiar relation which "Evidence" sustains to instruction by cases — study. The growth of other branches in the law, so far as they readily occur to one, is from the simple to the complex. To study the germ principle, the root thought, or conception as it works itself out in the practical affairs of litigation, is, therefore, most helpful. Nothing could well take its place; not alone by reason of the gain in mental discipline; but still more largely because such a diagnosis of present situation is, as the medical men would say, the only safe basis on which to cast a prognosis respecting future conditions. The increasing complexity in relations with which the substantive law is called upon to deal affords a satisfactory guarantee for belief in the permanence of the system of case study. It must and will long continue, in other branches of the law, to vindicate the wisdom of its authors and the admiration of its friends.

"Evidence" is, however, unique; among other things, is this — that its future development must be in the opposite direction, *i.e.*, from the complex to the simple. To a certain extent this has for some time been the trend of its development, in obedience to the obvious necessity — unless, indeed, the wheels of judicial administration

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are to be hopelessly clogged or turn uselessly round and round in repeated trials and retrials — that, in proportion as the substantive rights of the parties become more complex, the method of adjudicating upon them should become more simple.

The development of codification or of statutory regulation in this direction, the especially strenuous assaults repeatedly made upon the "hearsay rule," the distinctively anomolous feature of the entire system, are not without significance. These are gropings for relief; an instinctive protest against an intolerable situation. Evidently, however, these efforts have not proved even palliative, much less adequate to the need. Signs are not lacking that the present multiplicity in the "rules" of evidence, each implying possible error and consequent reversal, under the "presumption of prejudice from error" theory, is felt to be a very serious impediment to the dispatch of business, and, what is much more serious, to the doing of justice. The leading thinker on this subject has not stated the present situation of the law of evidence a shade too strongly.

"In part the precepts of evidence consist of many classes of exceptions to the main rules — exceptions that are refined upon, discriminated, and run down into a nice and difficult attenuation of detail, so that the courts become lost, and forget that they are dealing with exceptions; or perhaps are at a loss to say whether the controlling principle is to be found in the exception or in the general rule, or whether the exception has not come to be erected into a rule by itself. In part, our rules are a body of confused doctrines, expressed in ambiguous phrases, Latin or English, half understood, but glibly used, without perceiving that ideas, pertinent and just in their proper places, are being misconstrued and misapplied." (Thayer, Prelim. Treat., 512.)

The entirely reasonable sentiment is widely felt and freely expressed, through authoritative sources, that the administration of justice, more especially of criminal justice, is in reality breaking down in America, if, indeed, it cannot be more truly said that it has already done so — with a train of attendant evils entirely obvious.

No insignificant part in this situation, as has been said, is played by the "rules" of evidence; particularly by the fact that the working out of just administration in a trial court of fine shades of distinction between matters of degree, about which equally intelligent men might easily differ in opinion, is made the subject of a *rule*, in the observance of which each party has *rights* on appeal, regardless of the relation which the question raised bears to the merits of the controversy or to the substantial justice of the result. It inevitably follows that reversals follow rulings on such points of administration with such frequency as to amount for many litigants to a denial of justice, and to most a deferring of it. The multiplicity of these rulings introduces no inconsiderable burden upon a trial judge. It permits and almost invites the desperate advocate of a worthless cause, in lieu of any substantial trial on the merits to prepare himself for hearing by an elaborate study of minute distinctions. These constitute the basis of requests for rulings so cunningly adjusted in a blending of too much with too little that, as is hoped, the trap frequently escapes the notice of an overworked trial judge, with all the troubles of a trial term on his hands. The trap may then be successfully sprung, at leisure, with the aid of the "presumption of prejudice from error" as a sort of necessary trigger, in an appellate court. Such a system lends itself readily to constant repetitions of the process, until worthy suitors find it easier to forego their claims and mobs go on "lynching bees" rather than put the country to an enormous expense with no result except to demonstrate the inefficiency of the present system which is to the lynchers sufficiently obvious already.

It is not without importance in connection with the future of the law of evidence that probably no portion of this badly de-

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ranged machinery of judicial administration can be so readily and safely repaired and adjusted to proper working as complexity in the "rules" of evidence. Vested rights or constitutional guarantees so complicating as to jury trials, substantive law, and the like, seldom intervene at this point. The law of evidence is, properly considered, not so much a thing in itself as a *mode* or method of doing something else. It is a tool, not a product; a form, not its content. In other words, it is a perfectly practical method of getting at results. Its utility is its only test. If this fails to demonstrate itself, change is easy. If the law of evidence is not practical, it is nothing which jurisprudence should keep or need keep.

It seems hardly doubtful that Professor Thayer foresaw the nature of the change demanded by present conditions and the necessity for it with entire clearness. As he points out:

"The chief defects in this body of law, as it now stands, are that motley and undiscriminated character of its contents which has been already commented on; the ambiguity of its terminology; the multiplicity and rigor of its rules and exceptions to rules; the difficulty of grasping these and perceiving their true place and relation in the system, and of determining, in the decision of new questions, whether to give scope and extension to the rational principles that lie at the bottom of all modern theories of evidence, or to those checks and qualifications of these principles which have grown out of the machinery through which our system is applied, namely, the jury. These defects discourage and make difficult any thorough and scientific knowledge of this part of the law and its peculiarities. Strange to say, such a knowledge is very unusual, even among the judges."

The remedy was as apparent to him as were the maladies. Back of these "rules" of evidence, underneath them and at their basis are certain broad administrative principles for the attainment of justice through the use of reason. Instead of these numerous rules, each with its train of exceptions and modifications, each of which, if neglected may be deemed error, these underlying principles of administration, logically and ethically sound, should be placed in the hands of competent judges, with wide discretionary powers, the exercise of which should not be interfered with by an appellate tribunal so long as, on the whole, reason has been followed and substantial justice attained. Certain simple rules of exclusion, recognized as exceptions to the fundamental rule that all relevant facts, and no other, are competent, might properly be added. But, in general, both "rules" and rulings should be but guides to the wise exercise of the administrative function of the court. It is impossible to doubt that the future and, very possibly, in certain jurisdictions, the *early* future of the law of evidence will develop itself along these lines.

To pass minor and incidental difficulties in teaching evidence by the use of cases, it may be suggested that the great *desideratum* in teaching the subject would be to teach the student not so much the form and configuration of his keen tool, evidence, but how best to use it. To know when to waive the benefit of a rule is often fully as important as to know when it is possible to insist upon its enforcement, occasionally, more so. The disadvantage of using a sharp tool is that its use requires caution, lest one be cut by careless or ignorant handling. All this is part of a much larger subject than "Evidence" itself, which, for want of a better term, one may fairly call forensic strategy. A case, when properly tried, resembles in certain aspects a military campaign. Intimate knowledge of all relevant facts constitutes, as it were, the topography of the field covered by the contending forces. Knowledge of one's own strength and weakness, and those of the opponent, both in position and numbers, are equally essential in both. There are masked batteries, reconnaissances in force, feints to conceal the real point of attack. Above all, there is vitally important in any court the

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general plan of campaign, not held to at all hazards, as a fetich, but lending coherence to the facts; but which the skilled advocate is ready instantly to abandon without changing a muscle, should need appear for doing it. The rules of evidence, especially those relating to cross-examination, become invested with a new and vital interest when so considered.

The conduct of a competent master in this art, so hard to realize except in its effects, would be illuminating to the future member of the Bar in a high degree — not from the standpoint of the story teller, who chuckles at a misled jury, but in order that one may notice why the master saw fit to do as he actually did; what results followed and what might reasonably be expected to have happened had he seen fit to adopt a different course. This would be to study the rules of evidence *algebraically* — to gather from cases not only and not so much what the "rules" are (for this question is so confused with local practice, rules of court, and the like, in any particular jurisdiction, as to be of comparatively slight value), but in order that the student may learn the more difficult and far more valuable lesson of how they should practically be applied; *whatever they may*, specifically, be, within certain general principles of judicial administration.

It may be said that this may be done by the pupil by observing for himself the action of suitable models, when, later on, he undertakes the practical work of his profession. The objection overlooks the important fact that typical modern methods afford no time for such a course. The head of a modern law office cannot take time to give personal attention to this or any other branch of perfected professional training of his young associates. His needs demand from the modern law school a furnished product. It is, therefore, the duty and privilege of the law schools to furnish it to the profession.

Dean Wigmore recognizes the practical value of this training and suggests it as a proper element in a complete instruction in evidence. In the preface of his present case-book, after consideration of other practical methods in which this instruction may properly be carried on, the dean proceeds to offer the following suggestion and confession:

"Two complete trials may be taken, one English and ~~one~~ American, both to be of classical merit as examples and of great interest in their facts. The class is first to peruse the trial as a whole; then to take it up in parts, and to analyze and discuss the various problems of management of proof; asking, first as to the plaintiff or prosecutor and then as to the defendant, what were from his point of view the strong and the weak points of his case, what the proper features of emphasis, what the preparatory caution, and what the best order of presenting the witnesses. Then the testimony of individual witnesses is to be examined and discussed, the need or utility of specific questions, and the total effect of his testimony. Then the proper lines of closing argument on the testimony would be considered, and the actual arguments compared therewith. In these and other ways the analysis would develop in useful fashion a comprehension of the strategy and the tactics necessary in some degree or other in every trial, and practiced with more or less conscious skill by every experienced trial-advocate. But there are two almost insuperable obstacles in the way of this valuable adjunct to a course in evidence; first, it must be conducted by a practitioner who unites a warm interest in the art as such and a large experience in trials, and this combination is rare; secondly, two suitable trials must be found, and a reprint must be in the hands of each member of the class. The present compiler had hoped to include in this volume two such trials, with a view to making feasible this branch of the work; but no American trial, suitable in compass and in other necessary features, and fully reported, has thus far met his search. The plan is mentioned here in the hope that it will attract the attention of some one interested in the subject, who may be more fortunate."

It may be doubted whether the difficulties here found or suggested are, in themselves,

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insuperable. The wide reading and indefatigable industry of Dean Wigmore should enable him to collect from many cases the treatment of crucial situations by competent practitioners, which he very naturally fails to find in any two special trials. It is doubtful whether he can increase the obligation under which he has already placed the profession in any more striking way than by a comprehensive survey of the field of forensic strategy and tactics.

The benefits of such instruction could not be, in any way, confined to his immediate students. It would at once be recognized as useful in a wider field. Probably among the conditions which have assisted to render the trial of causes protracted and of uncertain or untenable issue, few exceed in practical effect the conspicuous lack, on this side of the Atlantic, of a class of skilled and trained advocates. Somewhere, in every case, there is a *hinge* upon which it legally and logically should turn. To a large number of practitioners before our courts, even in commercial centers, it is as difficult to strike it as for an unskillful carver to hit the second joint of a duck. Such attorneys, almost of necessity, dispute every fact because ignorant which of them are really pivotal. Instead of massing their available forces for assault on the stragetic point, the campaign degenerates into a series of undecisive, wearisome skirmishes, consumptive of time, impotent in result. The creation of a trained body of men, to whom the rules of evidence should be, as it were, the tools of art, could not fail to prove an inestimable boon to overworked judges, a great economizer of time and expense to parties, and a blessing to the community at large, so deeply interested in the furtherance of speedy and substantial justice. It is greatly to be hoped that Dean Wigmore, who has done so much along kindred lines, may be able also to assist in bringing this to pass.

MONUMENT BEACH, MASS., November, 1906.

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The Green Bag

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

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

THE appointment of a committee of the American Bar Association to draft a code of professional ethics has been hailed by the press as the most important action in its history. The committee appointed by President Parker is as follows: Henry St. George Tucker, Virginia; David J. Brewer, justice of the Supreme Court of the United States; William Wirt Howe, Louisiana; Francis Lynde Stetson, New York; James G. Jenkins, Wisconsin; Ezra R. Thayer, Massachusetts; Franklin Ferris, Missouri; Lucien Hugh Alexander, Pennsylvania, and Frederick V. Brown, Minnesota.

Though the composition of this committee insures its success in the difficult task of reducing honesty to working formulas, it will hardly be expected that the promulgation of this code will directly effect the elevation of professional standards, but its efforts will be of inestimable value, if by demonstrating the existence of moral ideals in the law they silence the philistines, who through generations of satire have bred such distrust of lawyers that men of otherwise unimpeachable sanity and fairness frankly avow their belief that the lawyer is expected to cultivate a different standard of morals from that of other men, and that just as a lifetime on the stage tends to create an artificial character in the actor, so the partisanship of the advocate unconsciously warps his moral fiber. The proposed code moreover will doubtless strengthen the influence of our active reformers of the many specific abuses which only the conservatism and preoccupation of the profession have permitted to cast disfavor upon the law. The removal of these would clear the ground for a more discriminating criticism of individual standards. As an example of this one thinks first of the importance of placing the selection of jurors in the control of the courts, thus diminishing opportunities for improper influence; and next of the adoption of some sensible system of adjustment of claims for personal injuries to wipe out the present artificial but profitable business of the wholesale tort lawyer and relieve our trial judges and courts of appeal from the labor of classifying and distinguishing what are really pure matters of fact under the guise of decisions on points of law. Any impetus in the direction of these reforms will be worth the effort spent to gain it.

THE publishers of THE GREEN BAG, in their quarterly advertising paper "Legal Bibliography," for October, asked an expression of opinion from lawyers who received it, as to who should be appointed to the next vacancy on the Supreme Court of the United States, — in view of proved legal ability and judicial qualities, aside from prominence in politics. If the response had been general it was intended to analyze and tabulate the vote, and try to determine whether a national reputation is possible for a lawyer who confines himself to practice and does not get publicity through participation in affairs outside of the law.

The answers received, while coming from such prominent lawyers, and from so many states, as to be representative, were not numerous enough to form the basis of a formal article, or of a table of comparative professional rank.

No judge or lawyer received more than about one tenth of the votes cast. The three favorites — the only ones who got anywhere near a tenth of the votes — were (in the following order):

Hon. Wm. H. Taft, Hon. Elihu Root, and Judge Lurton.

It will be noted that the first of these made

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an excellent reputation as a judge, but owes his present prominence to participation in public affairs — the second, known as an able lawyer, has also come to national reputation in larger politics — while the third owes his votes only to proved legal and judicial ability.

The other lawyers and judges who received more than a scattering vote were: Parker, Choate, Rose, Sanborn, Gray, Grossup, Baldwin.

It is to be regretted that the response in this legal "Referendum" was not more general, and that the American Bar did not take this opportunity to place on record its opinion of the judicial aptitude of its leaders.

THE most important events of the month in the legal world have been the formal announcement of the promotion to the Supreme Court of the United States of Attorney General William H. Moody to fill the vacancy left by the retirement of Judge Henry B. Brown last spring, and the transfer of Mr. Bonaparte from the navy portfolio to the department of justice.

Mr. Moody's reputation at the Bar has been made as a public prosecutor rather than as a judge, but his broad experience in the former capacity has given him a training that peculiarly fits him to deal with the most important class of cases that is coming before the Supreme Court. Though it might seem embarrassing for him to sit in judgment over the final contests of the litigation he has started against our great monopolies, he is known to his intimates as a man inclined by nature to independence of judgment and none who know him will doubt that he will be true to the best traditions of Anglo-Saxon lawyers and assume with his robes of office the impartiality which makes one often the best critic of one's own former acts.

Mr. Bonaparte's career as a lawyer has already been ably recounted in our pages by his old associate in practice, Mr. Reynolds. His work in the prosecution of the Post Office frauds proved him no less able a lawyer than ardent a reformer, and he will doubtless bring new enthusiasm to the conspicuous work of his department in demonstrating to restless millions the possibility of enforcing the law against incorporate riches, and the justification of a system of private property in a republic.

THE action of the Supreme Court of the United States in postponing consideration of important cases until a full Bench was available made the work at Washington of the past month devoid of interest. The most striking incident of late in the trial courts has been the success of the first round of the prosecution of the Standard Oil Company by the State of Ohio. The institution of proceedings against this Company by the United States is already begun at St. Louis and it is to be hoped that the unfortunate experience with the Beef Trust cases will be turned to good account in the preparation of all these later causes.

IN November 13th the National Congress on uniform divorce legislation began its second session at Philadelphia with consideration of the draft of a bill prepared by its committee since the first session last winter in Washington.

The bill drawn by the committee names six causes for which divorces can be granted. They are infidelity, felony, bigamy, desertion, habitual drunkenness, and intolerable cruelty. The committee recommends that the various legislatures be asked to agree on a period of residence, before application may be made for divorce. The uniform bill finally adopted closely conformed to the committee's recommendation.

THE ceremonies attending the removal of the remains of James Wilson, one of the first judges of the Supreme Court of the United States, from North Carolina to Philadelphia, indicate a gratifying continuance of the interest in our legal history recently evidenced by the celebration of the centenary of John Marshall.

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CURRENT LEGAL LITERATURE

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

THE recent legal magazines attain a high level of general excellence in their articles, though perhaps it cannot be said that any one stands out as preëminently the most important of the month. An exceptionally well written article of general interest, however, is William M. Meigs' article on the power of the judiciary to declare laws unconstitutional, in which he takes sharp issue with those who have recently called that power a "usurpation." Judge Brewer's article on "Legal Ethics" is timely and important. The defects of our legal system cause two other unusually interesting articles in Roscoe Pounds' paper on "The Causes of Popular Dissatisfaction with the Administration of Justice," and Charles F. Amidon's address on "The Quest for Error and the Doing of Justice." They agree in saying that the worst feature of our system is the lavish granting of new trials.

BIBLIOGRAPHY. "Catalogue of the Books in the Library of the Honorable Society of Gray's Inn," by M. D. Severn Witherby & Co., London, 1906. An artistic volume of nearly a thousand pages listing the books under the names of authors, but with an index of subjects appended.

BIOGRAPHY (Langdell). Appreciations of the late Professor C. C. Langdell by former colleagues and pupils appear in the *Harvard Law Review* for November (V. xx, p. 1) as follows:

Professor Langdell: "A view of his career,' by Eugene Wambaugh; "His student life,' by Jeremiah Smith; "His personal influence," by Austen G. Fox; "His later teaching days," by Joseph H. Beale, Jr.; "His services to legal education," by James Barr Ames.

BIOGRAPHY (Cockburn). "The Hon. Lord Cockburn," by C. J. Guthrie, *Scots Law Times* (V. xiv, p. 73).

BIOGRAPHY (Lincoln). "Lincoln the Lawyer," by Frederick Trevor Hill, The Century Co., New York, 1906, $2.00 net.

This interesting and important narrative of the legal life of Lincoln which is now published in book form was extensively reviewed in these columns during its publication in the *Century*, beginning with our issue of February, 1906.

BIOGRAPHY (Lindsey). In the November *McClure's* (V. xxviii, p. 74) Lincoln Steffens discusses Colorado politics in describing one of our recent contributors, Judge Lindsey, under the title of "Ben B. Lindsey; the Just Judge." There is much in the article regarding the Juvenile Court work in Colorado written in popular vein, which was covered by the judge in our March number.

CONSTITUTIONAL LAW. "Racial Distinctions in Southern Law," by Gilbert T. Stephenson, *American Political Science Review* (V. 1, p. 44).

CONSTITUTIONAL LAW. "Negro Suffrage: The Constitutional Point of View," by John C. Rose, *American Political Science Review* (V. 1, p. 17).

CONSTITUTIONAL LAW. "The Usurped Powers of the Senate," by A. Maurice Low, *American Political Science Review* (V. 1, p. 1).

CONSTITUTIONAL LAW. "The Initiative of the President," Judge Emory Speer's enthusiastic lecture on the Storrs foundation, is printed in the November *Yale Law Journal* (V. xvi, p. 6). It instances with hearty approval the exercises of the presidential initiative from Washington to Roosevelt, treating the matter in the manner and language of the orator rather than of the jurist.

CONSTITUTIONAL LAW. "Studies in Constitutional Law. Due Process under the Federal Constitution." By Lucius Polk McGehee. Edward Thompson Company, Northport, N. Y., 1906, pp. vi, 451.

This book, excellently gotten up in every way, deals with one of the most interesting subjects in the whole range of constitutional law. Its object is to present the views entertained and maintained by the United States

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Supreme Court on the constitutional guarantee of due process. It hence confines itself primarily to the decisions of that court, and hence also an effort has been made by the author to include all of its decisions up to the end of volume 199 of the United States Reports. The work opens with a brief but most excellent historical introduction, and the body of the book is based on a classification that cannot be too highly recommended. The principles of due process, as applied to notice and hearing, are discussed early in its pages, and taxation, eminent domain, and the police power are dealt with in the order named, and not in a reversed order as is occasionally done. In all these points, and all of them are improvements on the author's own previous classification as it appeared in the American and English Encyclopaedia of Law, the arrangement of the subject leaves little, if anything, to be desired. To the thoughtful and attentive student a good classification constitutes more than half the value of a law book, while the busy lawyer that cannot study, but only consult the pages of a volume, looks for an index that affords an easy and prompt reference to sub-topics and details. Here we have both. No student of constitutional questions, no lawyer with an occasional or permanent practice in the federal courts should neglect to add the book to his library.

When carrying out the plan of his work, the author has wisely, though probably more than he had originally intended, gone into the wide field of state decisions on due process, and cited many of the leading cases, especially in New York, Massachusetts, Illinois, and Missouri, much to the elucidation of the subjects discussed. For readers of the book here reviewed, as well as for the purpose of a second edition by the author, we would suggest the following additional federal cases of importance: Under *State Laws impairing the Obligation of Contracts*, Railway Company *v.* Rock, 4 Wall. 177; Eustis *v.* Bolles, 150 U. S. 361; Gelpcke *v.* Dubuque, 1 Wall. 175; Beers *v.* Arkansas, 20 How. 527; Louisiana *v.* Jumel, 107 U. S. 711; The Binghamton Bridge, 3 Wall. 51; Fertilizing Company *v.* Hyde Park, 97 U. S. 659; Illinois Central R. R. *v.* Illinois, 146 U. S. 387; under *Taxation*, Loan Association *v.* Topeka, 20 Wall. 655; License Tax Cases, 5 Wall. 462; Hylton *v.* United States, 3 Dall. 171; State Tonnage Tax Cases, 12 Wall. 204; Dobbins *v.* Commissioners of Erie County, 16 Pet. 435; Van Allen *v.* Assessors, 3 Wall. 573; Crandall *v.* Nevada, 6 Wall. 35; Thompson *v.* Pacific R. R., 9 Wall. 579; Railroad Co. *v.* Peniston, 18 Wall. 5; Western Union Telegraph Co. *v.* Massachusetts, 125 U. S. 530; California *v.* Central Pacific R. R., 127 U. S. 1; Horn Silver Mining Co. *v.* New York, 143 U. S. 305; under the *Police Power*, *in re* Rapier, 143 U. S. 110; United States *v.* Dewitt, 9 Wall. 41, and Railroad Co. *v.* Husen, 95 U. S. 465. Under *ex post facto* and retro-active laws, as well as under eminent domain, it seems that not a single leading case has been overlooked by the author. — WILLIAM E. WALZ.

CONSTITUTIONAL LAW (Eminent Domain and the Police Power). Recent American evolution has shown a great growth in the æsthetic sense of the people. Vast domains and large sums have been appropriated for purely pleasure and artistic purposes. The legal decisions which mirror this recent advance and define the public's powers are examined by Wilbur Larremore in the November *Harvard Law Review* (V. xx, p. 35) in an article entitled " Public Æsthetics."

The authority of a state or municipality to appropriate or acquire land for public parks or recreation grounds under eminent domain is well settled. " A public park once established is to be held sacred to the ends of recreation and æsthetic gratification. . . . The legal crux arises as to the control of private property in the interest of the general sense of beauty. . . . It is believed that both on theoretical and practical grounds the law must be taken as settled that, although public æsthetic ends may be effectuated through the exercise of eminent domain, the same object may not be accomplished by legislation under the police power without compensation.

" It does not, however, follow that the analogy of offensive advertisements to offensive sounds and odors will always remain utterly futile. It is submitted that judicial power might be exercised under the facts of a given case to restrain a particular advertisement, or collection of advertisements, as a nuisance. An inherently lawful business may

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constitute a nuisance because of the manner or place in which it is conducted. It is entirely possible that the increasing æsthetic sentiment will, in time, sanction the judiciary in taking cognizance of particular nuisances, as is now done with nuisances of noise and smell. . . . The suggestion has also been made that advertisements may be controlled through the taxing power. . . . If billboard advertisements must exist, the public might as well derive a revenue from them, and if the tax be made substantial and graded according to the space employed, it may indirectly tend toward diminution of the evil itself. Such legislation would be analogous in policy and effect to liquor tax laws. A statute applying generally to all use of billboards and with uniform regulation as to gradation of tax would doubtless be constitutional. It is improbable, however, that the abuse could be entirely suppressed through taxation. Chief Justice Marshall's famous dictum that the power to tax involves the power to destroy has been materially limited in its application. The present writer shares the doubt expressed by the author of the note in Cooley on Taxation whether an affirmative exercise of nominal taxing power would be justified that has not revenue in view, 'but is only called a tax in order that it may be employed as an instrument of destruction.'"

CONSTITUTIONAL LAW (Employers' Liability). "Is the Act of Congress of June 11, 1906, Known as the 'Employers' Liability Act,' Unconstitutional?" by J. J. McSwain, *Central Law Journal* (V. lxiii, p. 356).

CONSTITUTIONAL LAW (Employers' Liability). "The Federal Employers' Liability Act," by "T. M.," *Law Notes* (V. x, p. 145).

CONSTITUTIONAL LAW (Inheritance Tax). An article entitled "The Inheritance Tax Law of Kentucky," by W. H. Field, in the September-October *American Law Review* (V. xl, p. 711), argues that under the peculiar constitution of Kentucky the law recently passed in that state is "invalid to the extent that it imposes a rate in excess of fifty cents upon each one hundred dollars of value."

CONSTITUTIONAL LAW (Judicial Power). "Government is a most uncertain science, and no approach has yet been made to an agreement as to its best form. But, when a people have lived for many years under a specific system with reasonable prosperity, it would seem that those words of the Declaration of Independence are applicable, which tell us that 'prudence . . . will dictate that governments long established, should not be changed for light and transient causes.'

"Some strikingly opposite opinions have, however, recently had advocates: and it is amazing to find that views which can only be classed as ultra revolutionary have been advanced by men whose function in life is that of instructing budding youth in our universities and colleges. Surely they, more than most of the community, should be very careful in the acceptance and teaching of new and raw doctrines, which are at least not certain to result in betterment and which may be very harmful. To advance the view that Congress may pass what law it will and that the co-ordinate branch, the judiciary, must lend its aid to the usurpation, even though in the very teeth of the Constitution, or that the President of the United States is clothed under the Constitution with almost absolute power, is to be so radical that a listener fairly catches his breath, no matter who is the spokesman. But the instructors who teach such doctrines to callow and plastic youth as a portion of their education and enlightenment in our institutions of learning, are dangerous leaders and are running grave risk of sending their charges forth into the world with minds in a state of chaos upon government and ready on far too slight consideration to take up still other equally harmful and untenable nostrums."

With these vigorous words William M. Meigs opens an article on "Some Recent Attacks on the American Doctrine of Judicial Power" in the September-October *American Law Review* (V. xl, p. 641), answering a recent argument of Professor Trickett of the School of Law of Dickinson College to the effect that the American doctrine of the power of courts to hold laws unconstitutional was a "great usurpation," and one largely on the same lines by Chief Justice Clark of North Carolina. Mr. Meigs not only holds the view that the doctrine is beneficent, but declares:

"And when it is remembered that (as has

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been shown) the colonists had been accustomed to looking upon their laws as possibly void, because of violating some fundamental charter; that it had been judicially held in at least five states before the Convention that a state law violating the state constitution was void and would be refused enforcement, and that these decisions were well known to members and several times referred to in the Convention: that judicial decisions grew apace after the Convention (generally with public approval and with no single decision that I can recall denying the power), while hosts of leading men in various walks of life, and not a few of whom had taken an active part in the Convention, recognized the existence of the judicial right in general and expressed their belief in its wisdom; it cannot be doubted that the evidence from surrounding circumstances that the framers directly intended the doctrine which has been recently miscalled 'the great usurpation' is immensely strong. Add to this, too, that in the leading series of papers intended to defend the Constitution and explain it to the public, Hamilton wrote (as already quoted) 'Limitations of this kind [specified exceptions to the legislative authority] can be preserved in practice no other way than through the medium of the courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the Constitution void.' Could language be plainer?

"But there is no need to rest the case even upon such overwhelming evidence of probability from surrounding circumstances. The language of the Constitution is express. Mr. Coxe, who examined the subject with absolute impartiality long before Professor Trickett had discovered and denounced 'the great usurpation,' reached this conclusion, and the language of the Constitution cannot be satisfied otherwise. 'The judicial power . . . shall extend to all cases . . . arising under this Constitution' is not a mere rhetorical phrase but has a very definite meaning, the nature of which is shown clearly enough in the debates."

CONSTITUTIONAL LAW (Regulation of Corporations). A sketchy but suggestive article in the November *Columbia Law Review* (V. vi, p. 485) by Frederick R. Coudert discusses "Constitutional Limitations on the Regulation of Corporations." The author thinks that the present anti-corporation agitation is part of a general world movement due to changed economic conditions and that the extent of regulation is one of expediency. He cannot "believe that the restrictions of our national Constitution representing the ideas of former generations will seriously interfere with any sound solution of present problems." . . . The important thing to remember is that what may be unconstitutional in the case of men doing business as mere individuals, may be quite proper when they adopt the form and privilege of incorporation. It is utterly impossible to lay down any theoretical criterion which can help us much in arriving at a solution. Fortunately for us our Supreme Court has been singularly free from all mere doctrinarianism and has as each case arose adopted a practical view. The law has thus been elastic and expansive even if by no means certain and we have been prepared to meet new conditions as they arose without the necessity for constitutional amendment.

CONSTITUTIONAL LAW (The Railway Rate Law). "Concerning the Constitutionality of the Law Regulating Interstate Railway Law," by D. Walter Brown, in the November *Columbia Law Review* (V. vi, p. 497), says that the constitutionality of the law will probably be attached on these three grounds:

"1. Congress lacks power to fix rates in interstate railroad transportation. 2. Admitting that Congress has such power, yet its bestowal upon the Interstate Commerce Commission is a delegation of legislative powers which cannot be constitutionally made. 3. The giving of general power to fix rates to the Interstate Commerce Commission amounts to, or necessarily involves, the giving of a preference to the ports of one state over those of another, in violation of Section 9 of Article 1 of the Constitution."

Mr. Brown has no doubt whatever that the law will be upheld, although particular acts of the commission may turn out to be invalid.

CONSTITUTIONAL LAW (Taxation). "What is Equal Protection of the Laws as Applied to Tax Laws?" by C. R. Skinker, *Central Law Journal* (V. lxiii, p. 318).

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CONTRACTS. "Risk in Goods during Transit under a 'C. I. F.' Contract," by J. Meillon, *Commonwealth Law Review* (V. iii, p. 241).

CONTRACTS (Sales). "The Law of Usury as Affecting Transactions Between Factors or Commission Companies and Their Customers or Clients," by J. E. Cobbey, *Central Law Journal* (V. xvi, p. 302).

CORPORATIONS. "The Liability of the Associates in a Defective Corporation," by Thomas H. Breeze in the November *Yale Law Journal* (V. xvi, p. 1), suggests, as coming within the reason of the law, a rule that to secure the members the limited liability of shareholders all acts which the legislature has provided shall be done for the purpose of protecting the public in its dealings with the future corporation must be substantially done.

CORPORATIONS (Railroads). "A Criticism of the Railroad Corporation Law of Pennsylvania," by Morris Wolf in the September and October numbers of the *American Law Register* (V. liv, pp. 501, 582), examines the Pennsylvania statutes and pleads for a thorough revision and correction.

CORPORATIONS (see Constitutional Law).

CRIMINAL LAW. "Accomplices in Thefts," by "M. L. T.," *Criminal Law Journal* (V. iv, p. 73).

CRIMINAL LAW. "Justice and Crime in Abyssinia," by Maynard Shipley, *American Law Review* (V. xl, p. 721).

ECCLESIASTICAL LAW. "A Curiosity in Ecclesiastical Law," by Rev. Samuel Hart in the November *Yale Law Journal* (V. xvi, p. 40), tells of the church trial in 1837, of Dr. Benjamin B. Smith, Episcopal bishop of Kentucky.

EDUCATION. "The Function of the State University Law School," by Alexander A. Bruce in the November *Michigan Law Review* (V. v, p. 1), pleads for the recognition of such schools as schools of citizenship, rather than factories for producing lawyers, and protests against the idea that the law department alone of a state university must be self-supporting.

ESSAYS. "Stray Notes of Parsons and Religion," by R. Vashon Rogers, *Canadian Law Review* (V. v, p. 384).

ESSAYS. "In and Out of Court," by Charles Morse, *Canadian Law Review* (V. v, p. 377).

EVIDENCE (Witnesses). "Uncontradicted Testimony of Interested Witnesses," by "C. C. M.," *Law Notes* (V. x, p. 147).

EVIDENCE (Criminal Law). "Testimony of Witness, Since Deceased, on Former Trial of Criminal Case," Anon., *Virginia Law Register* (V. xii, p. 515).

EVIDENCE (Declarations). "Admissibility of Declarations of the Insured Against the Beneficiary," by Albert M. Kales, November *Columbia Law Review* (V. vi, p. 509).

EXECUTORS AND ADMINISTRATORS (see Partnership).

HISTORY. "The Growth, Aggressiveness and Permanent Character of Anglo-Saxon Laws and Institutions," by A. W. Gaines. A paper read before the Tennessee State Bar Association, August 10, 1906, *American Law Review* (V. xl, p. 694).

HISTORY. "Reminiscences of Gasglow Sheriff Court," by "G. B. Y." *Scottish Law Review* (V. xxii, p. 316).

HISTORY (Crime). "The Case of Sir Edmund Berry Godfrey," by John Pollock, *Law Quarterly Review* (V. xxii, p. 431).

HISTORY (Johnson Impeachment). Under the title of "Decisive Battles of the Law," Frederick Trevor Hill in an interesting style describes, "The Impeachment of Andrew Johnson," in the November *Harper's* (p. 827). The discussion of the legal issues involved in the impeachment is very brief but shows that the author is emphatically of the opinion that the attempt of the House to punish the President was unjustifiable. The account of the procedure of the trial and the descriptions of the counsel on each side are the parts of the article that will chiefly interest lawyers, though the description of the scene from the point of view of the spectators will interest all.

HISTORY. "The Declaration of Independence; Its History," by John H. Hazleton, Dodd, Mead & Co., N. Y., 1906, is in form a compilation rather than a treatise, being a collection of extracts culled from the correspondence and other fragmentary writings of the time, with but little from the author's own pen and that little as a rule explanatory and

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connective in its nature. In one or two places only, as for instance in the treatment of the so-called "Mecklenburg Declaration," and of the question as to the signing of the original declaration, does the author attempt to add to the literature of the subject, and even then it is merely by way of a simple statement of his conclusion after an elaborate exposition of its basis. These flashes of the author himself disclose him in such light as to make the reader wish that he appeared more often.

On the other hand, the self-restraint and love of his subject which has buried him from sight in his own work has accomplished the useful and perhaps intended result of giving us an understanding of the contemporary attitude unspoiled by the introduction of a modern view. And this we think is the real value of the book. While its most apparent merit is its thoroughness, its greatest virtue is that, with almost the intimacy of a diary, it enables us to live over with the sages of that day the real problems and conditions which confronted them. The Declaration of Independence has too often seemed to a thoughtless posterity an obvious step, chiefly remarkable for its literary quality. To its signers it was much more than this. Comparatively unaccustomed as the world then was to the conception of popular government, what to-day are but happy phrases of oratory were then daring expressions of novel opinion. The Declaration of Independence was not the work of the reckless or radical, but was debated for months by men who had much at stake personally, and who felt the weight of a grave political responsibility as well. These months were marked not by timid hesitation but by conscientious deliberation; for as the letters show us, the Declaration of Independence was an explanation to the world, a definition of the whole revolutionary movement. The American Revolution was mental as well as martial, and the Declaration of Independence was the decisive victory in the struggle waged in the minds of the colonists; and the heroes of that struggle were worthy of their task. In their private daily writings we see never self-interest or short sightedness, but always a spirit of large and liberal statesmanship.

All this Mr. Hazleton has made vivid as it could have been done in no other way and in this lies the vindication of his method. The interest is enhanced by the fine reproductions of original manuscripts and documents and the book enriched by a full appendix and notes which might better, by the way, have been included in the text. Except for this fault of arrangement, which detracts somewhat from its fluency, the book is an interesting and highly commendable work.

HISTORY (Year Books). In the October *Law Quarterly Review* (V. xxii, p. 360), W. S. Holdsworth gives the second and final installment of his article on "The Year Books." He concludes that they represent the initial stage of the purely professional development of the common law, and show that the strength and weakness of such development is much the same then as now.

"Its strength is the logical grouping of confused facts under general principles, the application of those principles in detail to new states of fact, the ingenuity with which old principles and old remedies are restricted or extended to meet the new needs, physical, commercial, or moral, of another age. We see these qualities most strikingly displayed in the gradual development of new principles of delictual liability, and new principles of contract, in the recognition of the interest of the lessee for years and the copyholder. Its weakness is caused largely by the very defects which are inherent in its virtues. It cannot take large views as to the state of this or that branch of the law. It can only advance step by step from precedent to precedent. It cannot disregard the logical consequences of its principles, though in practice their strict application may be inconvenient. It is loath to admit new principles, and will not do so unless compelled by such considerations as the loss of business consequent upon the competition of a rival court. If once a rule or a set of rules have become established they cannot be removed, however great a hindrance they become. They can only be explained or modified; with the result that the rule with the modifications and exceptions added becomes a greater nuisance than the original rule itself. We can see from 'The Year Books' that a purely professional development is not good for the health of any legal system."

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INSURANCE (see Maritime Law and Evidence).

INTERNATIONAL LAW. The *Yale Law Journal* for November (V. xvi, p. 25) prints Dr. F. Sieveking's paper on "The Harter Act and Bills of Lading Legislation" at the Berlin Conference of the International Law Association in October, 1906. He reviews the fruitless efforts to secure a general bill of lading, but thinks good will be done by keeping the subject on the program of the International Law Association.

INTERNATIONAL LAW (Boundaries). In the September-October *American Law Review* (V. xl, p. 750), Hannis Taylor discusses "National Boundaries" giving the general rules of definition and the coast line rule as defined by international law. A recent Supreme Court decision, Louisiana *v.* Mississippi, 202 U. S. 1–59, whereby contrary to the rules long settled by the State Department, Mississippi Sound is held to be "an arm of the sea" and not open sea, is criticised as an unexplained departure by the court from its own rule, long promulgated, that the "Judiciary takes executive view as to national boundaries. The day will surely come when the conflict of view thus established as to the principles by which the extent of our territorial waters are to be determined will seriously embarrass us in matters to be determined by international tribunals. If we shall be charged in a certain case by a foreign nation with a failure to discharge our neutral duties within our territorial waters, and the political department replies that the waters in question are a part of the open sea and not territorial, it will be confronted with the decision in the case in question adjudicating such waters to be territorial. The political department will then rejoin with the obvious answer that the Supreme Court attempted to settle a matter over which it had no jurisdiction."

JUDGMENTS. "Res Judicata," by J. D. Dikslut, *Bombay Law Reporter* (V. xviii, p. 257).

JURISPRUDENCE. The October *Law Quarterly Review* (V. xxii, p. 416) gives the second and final installment of A. H. F. Lefroy's scholarly article on "The Basis of Case Law." This second part discusses public policy and other "practical considerations, which can hardly be said to be of the dignity implied by the term 'public policy,'" as the basis of the law. Summing up, he says:

"Thus we have seen that a great mass of case-law is purely judge-made law, based upon considerations of justice, morality, common sense, public policy, and convenience, and other practical considerations. But these are in truth the grounds — perhaps, indeed, the only grounds — on which any law can properly be made, whether by judges or by parliament; and it may certainly be claimed that judges make their law with a more single eye to these considerations than any parliament can be expected to do. And if the subject with which these articles have attempted to deal could be worked out with entire accuracy and completeness, we should have a portrayal of the legal mind of England, as it has developed and established itself during centuries of judicial work and thought, so far as regards the proper balancing and harmonizing of these legitimate bases for law."

LEGAL ETHICS. Of especial importance, in view of the project of the American Bar Association to codify professional ethics, is a contribution by Judge David J. Brewer to the November *Atlantic* (V. xcviii, p. 587) on "The Ideal Lawyer." After meeting the common thrusts at our profession by showing that the lawyers sustained prominence in our public affairs, and indeed the very overcrowding of the profession itself by youth of ability, prove that lawyers have ideals, he defines the elements of the best in his profession. He first insists upon honesty, showing that self-interest compels the lawyer to be honest with his client and the court and jury. His relations to the public are apparently more difficult, especially when they conflict with his obligations to defend criminals. The author cites the example of the defenders of the murderer of McKinley as an example of the measure of the duty in such cases. Mere honesty, however, will not make the ideal lawyer. He must be a constant student, must be familiar with the affairs of modern life and in spite of specialization this becomes an increasingly difficult task. Careful preparation of cases is essential but in addition to knowledge of the law he must have the mental power that en-

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ables him to apply his knowledge. "No place in life," he says, "calls for a more frequent manifestation of that uncommon possession, common sense." By way of illustration the author then gives a few examples of good and bad cross-examination.

In reply to the accusation that commercialism is destroying the character of the profession he says, "While it must be confessed that the spirit of commercialism has touched the profession as it has touched all other kinds of business, yet, there is an active aggressive movement on the part of the members of the Bar to counteract its demoralizing influence and to make the profession an abiding place of men of the highest personal character."

In conclusion, Judge Brewer reminds us of our duty to the Republic, not only with reference to our own individual conduct, but also the influence of our example resulting from the position of the lawyer in the community.

LEGISLATION. "Review of Legislation, 1905," New York State Educational Dept., Albany, N. Y., 1906.

LEGISLATION. "An Index of Comparative Legislation," by W. F. Dodd, *American Political Science Review* (V. i, p. 62).

MARITIME LAW. "Marine Insurance — The Sue and Labour Clause," by H. Birch Sharpe, *Law Quarterly Review* (V. xxii, p. 406). An inquiry into the origin, object, and effect of this clause.

MARITIME LAW. "The Latest Chapter of the American Law of Prize and Capture," by Charles O. Chauncey Binney reviews the decisions occasioned by the Spanish war. September *American Law Register* (V. liv, p. 537).

MARITIME LAW. (Treaty). In the September-October *American Law Review* (V. xl, p. 671), Frederick Cunningham writes of "The Proposed Treaty on Collision," which, as a result of international conferences at Brussels in 1905, is now before our government for executive and legislative action.

"If adopted, the treaty on collision will make two important changes in our law.

"First. Where both vessels of treaty making powers are at fault the damages will not be equally divided as they are now, but will be apportioned between the two vessels in proportion to the gravity of the fault of each vessel.

"Second. Where both vessels of treaty making powers are at fault, owners of cargo or personal effects which have been lost or injured, will not have, as they do now, a remedy against the non-carrying vessel for the whole of their loss; that vessel's liability to them will be limited to a part of the loss in proportion to the gravity of her fault; but the cargo owner will have, what under the Harter Act he does *not* have now, a remedy against the carrying vessel for that proportion of the value of his cargo for which the non-carrying vessel is not liable. He will be reimbursed in full, but will have to proceed against both vessels in fault, instead of against the non-carrying ship alone."

Mr. Cunningham argues that the United States should join in the proposed action.

MASTER AND SERVANT (see Torts).

MILITARY LAW. "Amenability of Military Persons to the Laws of the Land," by Charles E. Smoyer in the November *Michigan Law Review* (V. 1, p. 12), reviews at length with many citations the rules governing the treatment of military persons in United States, state and military courts, in both civil and criminal matters. The doctrine that the illegal order of a superior, which a soldier is bound to obey, is no defense even if the soldier is ignorant of its illegality and acts in perfect good faith, is severely criticised.

MUNICIPAL CORPORATIONS (Home Rule Charters). Minnesota by a recently adopted constitutional amendment and statutes, has done away with the necessity of communities going to the legislature for city charters; each community is given the power to draw up its own. An article by Charles P. Hall in the *Michigan Law Review* for November (V. 1, p. 6) on "Constitutional and Legislative Limitations of the Home Rule Charter in Minnesota," points out that there is a string attached to the power by the clause in the constitution allowing the legislature to provide general laws relating to the affairs of cities applying equally to all cities of given classes, "which shall be paramount while in force to the provisions relating to the same

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matter included in the local charter herein provided for."

At present the legislature has little tendency to meddle with the affairs of cities having home rule charters, but under the above quoted clause it unquestionably has the power.

PRACTICE. In an address entitled, "The Quest for Error and the Doing of Justice," delivered before the Minnesota State Bar Association in April, 1906, printed in the September-October *American Law Review* (V. xl, p. 681), Hon. Charles F. Amidon declares "The fundamental defect of our legal administration is the doctrine that, where error is found, prejudice will be presumed." This produces an endless crop of new trials and as a result great uncertainty, expense, and injustice. Arguing from English experience he seeks to have established in our statutes and practice this rule:

"No judgment shall be set aside or new trial granted in any cause, civil or criminal, on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure unless, in the opinion of the court to which the application is made, after an examination of the entire cause, the error complained of has resulted in a miscarriage of justice."

PRACTICE. "The Causes of Popular Dissatisfaction with the Administration of Justice," a paper read by Roscoe Pound before the American Bar Association in August, and printed in the *American Law Review* (V. xl, p. 729), says at the outset: "Dissatisfaction with the administration of justice is as old as law. . . . But we must not be deceived by this innocuous and inevitable discontent with all law into overlooking or underrating the real and serious dissatisfaction with courts and lack of respect for law which exists in the United States to-day."

The paper groups the causes of dissatisfaction under four main heads: "(1) Causes for dissatisfaction with any legal system, (2) causes lying in the peculiarities of our Anglo-American legal system, (3) causes lying in our American judicial organization and procedure, and (4) causes lying in the environment of our judicial administration."

In the third head, "we come upon the most efficient causes of dissatisfaction with the present administration of justice in America. For I venture to say that our system of courts is archaic and our procedure behind the times. Uncertainty, delay, and expense, and above all the injustice of deciding cases upon points of practice, which are the mere etiquette of justice, direct results of the organization of our courts and the backwardness of our procedure, have created a deep-seated desire to keep out of court, right or wrong, on the part of every sensible business man in the community."

Like other investigators Mr. Pound declares emphatically that "the worst feature of American procedure is the lavish granting of new trials."

"Reviewing the several causes for dissatisfaction with the administration of justice which have been touched upon, it will have been observed that some inhere in all law and are the penalty we pay for uniformity; that some inhere in our political institutions and are the penalty we pay for local self-government and independence from bureaucratic control; that some inhere in the circumstances of an age of transition and are the penalty we pay for individual freedom of thought and universal education. These will take care of themselves. But too much of the current dissatisfaction has a just origin in our judicial organization and procedure. The causes that lie here must be heeded. Our administration of justice is not decadent. It is simply behind the times. Political judges were known in England down to the last century. Lord Kenyon as Master of the Rolls sat in Parliament and took as active a part in political squabbles in the House of Commons as our state judges to-day in party conventions. Dodson and Fogg and Sergeant Buzzfuz wrought in an atmosphere of contentious procedure. Bentham tells us that in 1797 out of 550 pending writs of error, 543 were shams or vexatious contrivances for delay. Jarndyce and Jarndyce dragged out its weary course in chancery only half a century ago. We are simply stationary in that period of legal history. With law schools that are rivaling the achievements of Bologna and of Bourges to promote scientific study of the law, with active Bar associations in every state to revive profes-

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sional feeling and throw off the yoke of commercialism, with the passing of the doctrine that politics too is a mere game to be played for its own sake, we may look forward confidently to deliverance from the sporting theory of justice; we may look forward to a near future when our courts will be swift and certain agents of justice, whose decisions will be acquiesced in and respected by all."

PRACTICE (Contracts). "Splitting up Causes of Action on Contract," by Raymond I. Thurber, *Bench and Bar* (V. vii, p. 13).

PARTNERSHIP. "Partners may by contract displace some of the legal consequences of death, but not all of them. They can agree that the representatives of the dying partner shall not for a certain time be entitled to insist upon a liquidating sale and an accounting. They can agree that immediately upon the grant of letters the executor may associate himself as a partner with the survivors, or they can agree that the survivors shall continue to trade as if death had not occurred and that a share of the profits shall be paid to the executor of the dead partner. Similar provisions may be made in the will of a partner instead of in the articles. In the latter case, the testator is powerless to commit the survivors to any course of conduct not acceptable to them, but the survivors may make a contract with the executor upon the lines laid down in the will."

In "The Liabilities of a Partner's Executor," in the September-October *American Law Register* (V. liv, p. 565), George Wharton Pepper discusses the legal consequences of the taking of any of the above steps.

PROPERTY. "Protected Life Estates: A Suggestion," by W. J. Leofric Ambrose, *Law Quarterly Review* (V. xxii, p. 401).

PROPERTY (Future Interests). Prof. Albert M. Kales has Part II of his article on "Future Interests in Land," in the October *Law Quarterly Review* (V. xxii, p. 383). Part I has previously been noticed at length; Part II considers vested and contingent remainders, along three different lines of distinction: (*a*) the modern or non-feudal, (*b*) the feudal or common-law distinction, (*c*) a line of distinction peculiar to some states, especially Illinois; second, the significance of these apart from any connection with the rule against perpetuities; finally, which line of distinction between vested and contingent interests is to be used where the application of the rule against perpetuities is concerned.

Professor Kales concludes: "The objection to the usual attempted distinction between vested and contingent remainders (assuming it to avoid the error of suggesting that it is fundamentally a distinction between contingent and non-contingent interests after a particular estate of freehold) is that the language used bears on its face absolutely no suggestion of a reason for the distinction described. One may even read Professor Gray's exposition, which appears to the writer to be one of the most illuminating, and yet come away without the slightest idea of the reason for making the distinction indicated. If the inquirer has any preconceived idea that he is approaching a distinction between contingent and non-contingent interests, he is at the outset warned that this is not so by the hint that 'the word "vested" had originally [that is from the feudal point of view] no reference to the absence of contingency.' Then he is brought face to face with the following definition of a vested remainder: 'A remainder is vested in *A*, when, throughout its continuance, *A* or *A* and his heirs have the right to the immediate possession, whenever and however the preceding estates determine.' This formula, it is believed, so far as appears from its face, gives no hint of the rationale of the distinction. The reader may look in vain for an explanation of the reason upon which it is based. It is no excuse to say that the definition is the result of feudal conceptions, for even feudal rules have a reason which can be understood to some extent to-day. It is believed that a greater clearness of ideas can be obtained by a comparatively slight shifting of the point of view. It should be indicated with some emphasis that the distinction developed under the feudal or common law of land, and that the vested remainder is the future interest limited by act of the settler to a stranger after a particular estate of freehold, which the feudal land law always recognized as valid, while the contingent remainder is precisely the future interest after a particular estate of freehold limited by act of the settler to a stranger,

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which the common law at first refused to recognize and afterwards did so only upon particular terms. The moment, then, that it is determined upon what principle the feudal system recognized the validity of one class of future interests and refused recognition of the other, you have the rational principle upon which the distinction between vested and contingent remainders is to be drawn. The distinction, then, between vested and contingent remainders was actually set out when in Part I it was determined what future interests the common law always recognized and what ones it at first refused to recognize, but afterwards accepted upon particular terms. It has only remained in Part II (after distinguishing certain modern and exceptional notions of what remainders are vested and what contingent) to point out that what we have always called vested and contingent remainders correspond exactly to these two classes of interests. This method of exposition has, it is believed, not only given the distinction an historically rational basis for existence, but has resulted in more clearly divorcing the distinction itself from questions of construction and expressing the distinction in terms of a formula as mathematical and certain as the rule in Shelley's case or the rule against perpetuities."

PUBLIC POLICY. "State Legal Aid for the Poor," by J. P. Coldstream, *Law Times* (V. cxxi, p. 603).

TORTS (Injunction). "A Study in the Law of Torts," by A. Inglis Clark *Harvard Law Review* (V. xx, p. 46), is a closely reasoned article suggested by a complicated case from which "it seems that the owner of a reversionary interest in any land that is leased for a term of years to a tenant, and which is substantially injured by the aggregate operations of several persons who have acted independently of one another, cannot join any two or more of such persons as defendants in a single action for damages, and is therefore without a remedy in the nature of an action for compensation, if he cannot prove that an appreciable portion of the injury done to his land has been caused solely by the conduct of the single defendant in any action he may bring to obtain compensation for the loss he has sustained."

Can the owner of the reversion in such a case obtain an injunction to restrain the several independent persons? There is much judicial authority for the proposition that the equitable remedy of injunction is always a concurrent remedy for a wrong actionable under the common law.

"But in a jurisdiction in which the same tribunals take cognizance of both legal and equitable rights, and administer simultaneously legal and equitable remedies, there does not seem to be any sufficient reason why a substantial injury to a reversionary interest in land should not be regarded as a remediable wrong, although it may be produced by the simultaneous conduct of a number of persons in circumstances in which the separate conduct of each of them is not an actionable invasion of any present right of the reversioner, if the separate conduct of each of the contributors to the injury to the reversioner's interest in the land is an actionable invasion of a legal right of the person in immediate possession of it."

TORTS. In "Voluntary Assumption of Risk," I, in the November *Harvard Law Review* (V. xx, p. 14), Francis H. Bohlen begins a study of that doctrine, declaring it but one of the expressions of the fundamental doctrine of the common law that *volenti non fit injuria*, due to the individualistic tendency of that law and its idea that each man must be left free to work out his own destinies. Assumption of risk is carefully distinguished from the related defenses of consent and contributory negligence, and a beginning is made on the treatment of the subject in relation to the law of master and servant.

TORTS (Damages). "Delayed Telegraph Messages — Mental Anguish," by Graham B. Smedley, *Central Law Journal* (V. lxiii, p. 340).

WILLS. "Exécution Testamentaire," par Ph. Bandouin, *La Revue Legale* (V. xii, p. 381).

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NOTES OF THE MOST IMPORTANT RECENT CASES COMPILED BY THE EDITORS OF THE NATIONAL REPORTER SYSTEM AND ANNOTATED BY SPECIALISTS IN THE SEVERAL SUBJECTS

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

CARRIERS. (**Refusal to Ship Goods in Regular Course.**) **Mich.** — In Harrison Granite Co. *v.* Pennsylvania R. Co., 108 Northwestern Reporter, 1081, it appeared that a monument manufacturer had agreed to furnish and set up a soldiers' monument for which an association was to pay $1500. A day was set for the public dedication of the monument, and the manufacturer was notified thereof and an understanding reached that the dedication could and would be made on such date. The manufacturer, a few days before the date for the dedication, delivered the monument to a railroad company for transportation to the point of destination via several other railroads. One of these carriers in carrying the monument rendered special services pursuant to an agreement with the association which had become apprehensive that the monument would not be delivered in time, but it appeared that this carrier could have delivered the monument in time by rendering the regular service and that the manufacturer objected to the special arrangement. Furthermore, evidence showed that the carrier had knowledge of all the facts and knew that the rendition of the special services was unnecessary and would result in converting to it a large sum which would otherwise have been paid to the manufacturer. On receiving the monument, the association paid the carrier $1500 and the latter retained for its special service $700. The charge for regular service would have been only a fraction of this amount. The court held that these facts would warrant a recovery by the manufacturer from the carrier of the $700, based on a breach of duty of the carrier and a wrongful interference with the rights of the manufacturer. Furthermore it was held that the fact that the carrier transported the property of the manufacturer as it was bound to do and delivered it in good order did not afford a complete answer to the manufacturer's claim for damages.

This is a novel and interesting application of public-service law. The same principle which prevents the carrier from limiting his liability by contract — the fact that the parties do not stand on an equality, but the carrier already owes a duty to the shipper — leads to the result in this case. The consideration for the promise to pay extra compensation was the doing by the carrier of what he was already bound to do, and the contract was, therefore, void. J. H. B.

CHATTEL MORTGAGES. (**Oral Mortgage of Stock in Trade.**) **Vt.** — The doctrine that one, who has loaned money to another with which to go into business and who has taken an oral chattel mortgage on the stock to secure the loan, may, as against the debtor's creditor, take possession of the goods, is reiterated in Mower *v.* McCarthy, 64 Atlantic Reporter, 578. This, the court says, has been its holding in former cases, and it finds no occasion to depart from it though the court in many of the states maintain a different doctrine.

The court in this case lays down, inter alia, the following proposition:

1. An oral chattel mortgage is good at common law at least between the parties to it. Of this there can be no serious doubt. 6 Cyc. 989.

2. A mortgage on property to be acquired and having no potential existence at the time of the mortgage, becomes subject to the mortgage upon the mortgagee taking possession of it under a power in the mortgage. This is the general rule on the point. Jones, Chattel Mortgages, 4th Ed. §§ 160–164a. A novus actus inter veniens, such as will pass the legal title to the after-acquired property, has never been very accurately defined so far as the writer is aware. But taking possession by the mortgagee by authority from the mortgagor is certainly such a new act.

3. Retention of possession by a mortgagor, where the mortgage is oral and unrecorded because the recording acts of the state do not apply to oral chattel mortgages, does not render it invalid or voidable as to creditors. Many, perhaps most, cases hold that retention of possession by a vendor is "legal fraud," i.e., does invalidate the sale as to creditors and purchasers. 19 Harv. L. Rev. 569–70. It is obvious, however, that this doctrine must not be transferred to mortgages without a new consideration of it. On a sale the possession naturally passes; on a mortgage it is almost invariably retained by the mortgagor. The conflict in the authorities referred to by the court is not surprising. It is the old question of

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how far creditors and purchasers shall be protected against outstanding interests that they could not readily discover. It is the conflict between the desire to protect property interests and the desire to render transactions in property easy, i.e., to aid commerce. Since the recording acts cover almost all cases of this particular kind, concerning chattel mortgages, the question does not often arise. Possibly on the whole the court is right. Let the legislature extend the recording acts to all chattel mortgages if relief is necessary.

4. Taking possession of goods in accordance with a mortgage on future-acquired goods, the mortgage having been made more than four months before the bankruptcy proceedings, but the possession being taken within the four months, is not a preference. As an original proposition this seems wrong. Before the taking of possession the mortgagee, according to the Vermont law, has no lien which is valid, as against creditors. By taking possession he acquires such a lien. That is gaining a distinct preferment and without the four months. But the United States Supreme Court has held that such a taking of possession is not a preference. Thompson v. Fairbanks, 196 U. S. 516. That makes argument useless. See on the whole subject a careful discussion by Professor Williston in 19 Harv. Law Rev. 557.

C. B. Whittier.

CONTRACTS. (Competition Bidding — Lowest Responsible Bidder.) N. J. — The Supreme Court of New Jersey construing the provisions of the Laws of 1904, requiring a municipal board of education to award contracts for school supplies to the lowest responsible bidder, holds in the case of Jacobson *v.* Board of Education, 64 Atl. 609, that the board cannot arbitrarily reject certain bidders as not being responsible, but must give notice of their action to such bidder and afford him an opportunity to be heard. The court states that in the present case the evidence indicates that the board would have been justified upon proper proceedings in adjudging that the lowest bidders were not proper persons to have the contract, because it arouses suspicions of fraudulent acts on the bidder's part in previous dealings with the board, but it is held that a determination against the responsibility of the bidder is a judicial matter requiring notice to him and an opportunity to be heard.

CONSTITUTIONAL LAW. (Equity Jurisdiction.) N. J. — The validity of a rather novel statute was questioned in Mayor, etc., of Borough of Metuchen *v.* Pennsylvania Railroad Co., 64 Atlantic, 484. By Public Laws, New Jersey, 1903, p. 660, § 29, it is provided that if a railroad company shall neglect to construct and maintain bridges or highway crossings properly, as required by law, it sh ll be lawful for the governing body of a township or municipality to proceed by suit in equity to compel the specific performance imposed by law, and the court shall prescribe the crossing to be constructed or the repairs to be made. This section, it was contended, was unconstitutional on the ground that the legislature has no power to confer on the court the right and power to give to a municipality compulsory remedy by way of compelling specific performance, by a railroad company, of its duties as to the construction and maintenance of highway crossings as contradistinguished from its power to give it a preventative remedy. But the court considered that the question was settled in favor of the validity of the statute by Palmyra *v.* Pennsylvania Railroad Co., 63 N. J. Eq. 799, 52 Atl. 1132, and Eckert *v.* Perth, Amboy & Woodbridge Railroad Co., 65 N. J. Eq. 777, 57 Atl. 438, wherein a statute providing for compulsory proceedings to establish gates or bars across a railway was upheld.

CONSTITUTIONAL LAW. (Game Laws.) Ark. — Laws passed for the preservation and protection of game have been recently construed in a number of states, the game law of Arkansas having been previously referred to in this department. One of its provisions is that it shall be unlawful for any person or corporation to ship or carry beyond the lines of the state certain kinds of game, and that any express company so receiving the same for shipment shall be guilty of a misdemeanor. In Wells-Fargo Express Co. *v.* State, 96 S. W. 189, the express company was prosecuted and convicted for receiving a shipment of game for transportation beyond the state in packages marked as containing furs. The express company had no knowledge of the fact that the packages did not contain furs but contained game. The court holds, however, that this fact can be no defense to a prosecution under this statute, saying that it is competent for the legislature to make the receipt of game an offense irrespective of knowledge or intent as to the contents of the package. In support of this holding the court cites its own decision in State *v.* Lancaster, 36 Ark. 55, which was a conviction for a sale of liquor to a minor irrespective of ignorance of his minority, and also cites Judge Cooley in People *v.* Roby, 52 Mich. 577, 18 N. W. 365, as follows: "Many statutes which are in the nature of police regulations, as this is, impose criminal penalties irrespective of any intent to violate them; the purpose being to require a degree of diligence for the protection of the public which shall render violation impossible." The court also passes on the ques-

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tion as to whether such a statute is constitutional, in view of the fact that the statute affects game killed within the state and also game killed without the state which is being shipped in. Whatever question may have existed as to the right of the state to make such a regulation has been answered by the police power delegated to the states by Congress in the Lacey Act, passed in aid of the states in the enforcement of their game laws by rendering them equally applicable to game imported within the state as to game killed within the state. The application of this act is discussed in People *v.* Hesterberg, 76 N. E. 1032, noted in our July number and cited with approval by the Arkansas court.

Before the handing down of the decision in Re Rahrer, 140 U. S. 545, the constitutionality of the Lacey Act would itself have been seriously questioned. The Lacey Act is in all particulars, with the exception that it applies to game instead of liquor, similar to the so-called Wilson Act. These two acts are the only acts in which Congress has sought to remove the impediment to the enforcement of state laws in respect to the original package of bona fide commerce, created by the interstate commerce clause of the Constitution. In the case of Re Rahrer, the Supreme Court expressly repudiated the suggestion that Congress, by means of the Wilson Act, was relinquishing any of its powers or delegating them to the states. On this subject, the court said: "The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraint. Therefore, it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several states. . . . Inasmuch as interstate commerce . . . is national in its character and must be governed by a uniform system, so long as Congress did not pass any law to regulate it specifically, or in such way as to allow the laws of the state to operate upon it, Congress thereby indicated its will that such commerce should be free and untrammeled, and, therefore, that the laws of Iowa, referred to, were inoperative, in so far as they amounted to regulations of foreign or interstate commerce. It followed, as a corollary, that when Congress acted at all, the result of its action must have been to operate as a restraint upon that perfect freedom which its silence insured. Congress has now spoken, and declared that imported liquors shall, upon arrival in a state, fall within the category of domestic articles of a similar nature. It does not admit of argument that Congress can neither delegate its own powers nor enlarge those of a state. Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the states — or to adopt state laws. It has taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in state laws in dealing with such property. . . . Congress did not use terms of permission to the state to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part."

These cases are important, as it is by no means improbable that the inhibition on state action, imposed by the commerce clause of the Constitution will, from time to time, be sought to be lifted on other articles, oleomargarine, cigarettes, trust-made articles, etc. **Andrew A. Bruce.**

The court considers the question of constitutionality only with reference to the freedom of interstate commerce. This question, as is pointed out in the above note, is set at rest by act of Congress.

The question of liability irrespective of knowledge is treated simply as matter of construction. It is a grave constitutional question whether the state can punish for an act the criminal character of which could not have been ascertained with the greatest care, and which if innocent could not have been absolutely prohibited. While there is no direct authority against the exercise of the power, the doubts expressed by the United States Supreme Court in 169 U. S. 613, p. 635 are in point. The strongest authority in favor of the power is Ford v. State (85 Md., 465), a case concerning possession of lottery tickets. There the court intimated that a nominal penalty without costs might be imposed if the possession were shown to be innocent; but the Arkansas statute provides for a minimum fine of one hundred dollars.

In view of the fact that the penalty is imposed upon a common carrier who is ordinarily bound to carry, attention should be called to the following provision of the Arkansas statute, which the court does not mention. "Common carriers may refuse any package which they may suppose contains fish or game designed for export, and may cause said package to be opened or may satisfy themselves in any other way that said package does not contain game or fish." **E. F.**

CONSTITUTIONAL LAW. (Inheritance Tax.) Wis. — The doctrine that the right to take property by devise or descent is a creature of law and not a natural right is strongly disapproved in

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Nunnemacher *v.* State, 108 Northwestern Reporter 627, which is a case involving the Collateral Inheritance Tax Law of Wisconsin. The court holds that the right to take property by will is a natural right protected by the constitution, which cannot be wholly taken away or impaired by the legislature. Judge Winslow writing the majority opinion says that he is fully aware that the contrary proposition has been stated by a great majority of the courts of this country, including the Supreme Court of the United States, but the unanimity with which it is stated is perhaps only equalled by the paucity of reasoning by which it is supported. He then takes up and criticises Magoun *v.* Bank, 170 United States 283, 18 Supreme Court 594, 42 L. Ed. 1037; Eyre *v.* Jacob, 14 Grat. (Va.) 422, 73 Am. Dec. 367, and Pullen *v.* Commissioners, 66 N. C. 361. The right to inherit is traced from the earliest times down to the present. But though the court holds that the right to take property by descent is natural and inherent, it is, nevertheless, of the opinion that the principle of inheritance taxation may be justified under the power of reasonable regulation and taxation of transfers of property. In a separate concurring opinion Judge Marshall waxes eloquent in his approval of the doctrine announced by Judge Winslow, that the right to inherit is a natural and inheritant one.

The dictum on this point even of a sound lawyer like Judge Winslow, will hardly outweigh history and authority. **J. H. B.**

CONSTITUTIONAL LAW. (Liberty — Dipsomaniacs.) Neb. — The force and effect and validity of a Dipsomaniac Law, now quite common in some of our western states, comes in for consideration in *ex parte* Schwarting, 108 Northwestern Reporter, 125. The general provisions of the law providing for the treatment of dipsomaniacs in a hospital for insane, is upheld on the broad principle that as jurisdiction is assumed to take care of the property of a person who has become incompetent to care for the same by reason of the excessive use of intoxicants and narcotics, jurisdiction may likewise be assumed of the person of such inebriate, but a section of the law providing that an inebriate when discharged as cured shall be discharged only on parole, is held unconstitutional on the ground that it violates the right to personal liberty.

The court maintains that the legislature has no power to impose restraint on the personal liberty of an individual after he has been restored to health and to the control of his appetites. When he is cured he stands upon an equality with all other citizens, therefore he cannot be required to make report of his behavior to the superintendent of the hospital, nor can he be returned without further proceedings when he fails to make such report, or to fulfil the conditions on which he is discharged.

CONSTITUTIONAL LAW. (Police Power — Child Labor.) Ore. — Laws regulating the hours of labor and the conditions under which labor may be performed have been passed upon recently in many of the states, and regulations as to the employment of children are a particularly interesting branch of this general subject. The Supreme Court of Oregon, in the case of State *v.* Shorey, 86 Pac. 881, upholds a provision of the laws of 1905 prohibiting the employment of a child under 16 years of age for a longer period than ten hours in any one day, nor more than six days in any week, and also provided that not less than thirty minutes should be allowed for meal time at noon, and that such time must not be included as part of the work hours of the day. The law was attacked because it was claimed to be in conflict with the fourteenth amendment to the federal constitution, and also of section 1, article 1, of the constitution of Oregon, which reads: "We declare that all men when they form a social compact are equal in rights." The court takes the position that these two constitutional provisions do not limit the power of the state to interfere with the parental control of minors, or to regulate the right of a minor to contract, or of others to contract with him. The court affirms the doctrine that it is competent for the state to forbid the employment of children in certain callings merely because it believes such prohibition to be for their best good, although the prohibited employment does not involve any direct danger to morals, decency, or of life or limb, and points out that such regulation is on a different basis from laws prohibiting the employment of adults for more than a certain number of hours per week. These latter regulations are always founded upon the protection of the public health, safety, morals, or general welfare, and the right of an adult to work on such terms as may be agreed between him and the employer is recognized as guaranteed by the fourteenth amendment of the federal constitution. But in emphasizing the distinction between adults and minors, the court says: "They are not *sui juris*, and can only contract to a limited extent. They are wards of the state and subject to its control. As to them the state stands in the position of *parens patriæ* and may exercise unlimited supervision and control over their contracts, occupation, and conduct, and the liberty and right of those who assume to deal with them. This is a power which inheres in the government for its own preservation and for the protection of the life, person, health, and morals of its future citizens." "The supervision and control of

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minors is a subject which has always been regarded as within the province of legislative authority, and how far it shall be exercised is a question of expediency and propriety which it is the sole province of the legislature to determine. The judiciary has no authority to interfere with the legislature's judgment on that subject unless perhaps its enactments are so manifestly unreasonable and arbitrary as to be invalid on that account." The additional provision of the statute that no child should be permitted to work before the hour of seven in the morning or after the hour of six at night is not passed upon by the court, as the defendant was not accused or convicted of violating this provision of the statute.

This case is in accord with all of the authority as yet to be found upon the subject. From an early date, indeed, and, as far as the courts are concerned, from the time that the Supreme Court of Masaschusetts sustained, in the year 1819, an indictment against the inhabitants of Dedham for neglecting to keep and support a grammar school, it seems to have been universally conceded that although parental rights must, as far as possible, be protected, the child, both as a future citizen and as one who, on account of his weakness, is in need of protection, is primarily a ward of the state and entitled to its guidance and care. There are but few cases upon the subject, because but few have cared to contest laws of the class in question.

Even in the case of Ritchie v. People, 155 Ill., 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315, which is commented on elsewhere in this department, and in this issue, the Supreme Court of Illinois, which has gone farther perhaps than any other court in its antagonism to laws which have sought to regulate the contract of employment, took care to say: "We do not wish to be understood by anything herein said that Section 3 would be invalid if it was limited in its terms to females who are minors." Andrew A. Bruce.

CONSTITUTIONAL LAW. (Police Power — Hours of Labor.) Ore. — The validity of a law prohibiting the employment of women in factories, laundries, or mechanical establishments for more than ten hours a day was attacked in State *v.* Muller, 85 Pacific Reporter, 855. The court concedes that the right to labor or employ labor on such terms and conditions as may be agreed upon by the interested parties is not only a liberty but a property right, guaranteed to every citizen by the 14th Amendment to the Federal Constitution which cannot be arbitrarily interfered with by the legislature, but holds that the amendment was not designed or intended to limit the right of the state under its police power to prescribe such reasonable regulations as might be necessary to promote the welfare, peace, morals, education, or good order of the people, and that, therefore, the hours of work in employments which are detrimental to health may be regulated by legislation, citing in support thereof; Holden *v.* Hardy, 169 U. S. 366, 18 Sup. Ct. 383, 42 L. Ed. 780. As a result, the court comes to the conclusion that the statute involved in the case is a reasonable exercise of the police power of the state. Furthermore, the court calls attention to the fact that similar statutes have been upheld in Massachusetts, Nebraska, and Washington. See Commonwealth *v.* Hamilton Mfg. Co., 120 Mass. 383; Wenham *v.* State, 65 Neb. 394, 91 N. W. 421, 58 L. R. A. 825, and State *v.* Buchanan, 29 Wash. 602, 70 Pac. 52, 59 L. R. A. 342, 92 Am. St. Rep. 930. The only case holding a contrary doctrine is that of Richie *v.* People, 155 Ill. 98, 40 N. E. 454, 29 L. R. A. 79, 46 Am. St. Rep. 315. But though that case is well considered and ably presented, the court is nevertheless of the opinion that it is borne down by the weight of authority and sound reason. A further contention that the statute was invalid as being an arbitrary and unwarranted discrimination against persons engaged in the particular businesses or employments specified is met by the argument that nearly all legislation is special in the object sought to be obtained or in its application, and the general rule is that such legislation does not infringe the constitutional right to equal protection of the laws when all persons subject thereto are treated alike under like circumstances and conditions. In support thereof is cited *In re* Oberg, 21 Ore. 406, 28 Pac. 130, 14 L. R. A. 577 and *Ex parte* Northup 41 Or. 489, 69 Pac. 499.

It was this erroneous theory as to what constitutes class legislation which largely influenced the court in the case of Ritchie v. People, referred to in the above statement as the one dissenting case to the doctrine announced.

"Women," the court said in the Ritchie case, "employed by manufacturers are forbidden to make contracts of labor longer than eight hours in a day, while women engaged as saleswomen, in stores, or as domestic servants, or as bookkeepers, or stenographers, or typewriters, or in laundries, or any other occupations not embraced under the head of manufacturing, are at liberty to contract for as many hours of labor in a day as they choose."

This theory of class legislation practically requires all police laws to be omnibus in their character. If adhered to it would put a stop to almost all sane police legislation. It is not supported by the better authority. The test in all cases should

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be reasonableness and whether the persons affected are unjustly hampered in their competition with others, not whether all other workers, even those in other industries not competing with them, are included within the law.

See opinion in People v. Smith, 66 N. W. Rep. 382; Lockner v. New York, 25 Sup. Ct. Rep. 539; Missouri, Pacific Ry. Co. v. McKay, 127 U. S. 205, 210; Article on the True Criteria of Class Legislation, Central Law Journal, Vol. 60, page 425.

Andrew A. Bruce.

CRIMINAL LAW. (Disturbance of Public Assembly.) Ga. — A rather ingenious contention was raised in Tanner *v.* State, 54 Southeastern Reporter, 914. Defendant was prosecuted for disturbing divine worship. By law it is provided that the person who shall in any manner interrupt or disturb a congregation or persons lawfully assembled for divine service, and until they are disbursed from such place of worship, they shall be guilty of a misdemeanor. Defendant in this case had gone to a church sometime before the congregation arrived and sat upon the doorsteps; she had remained there and refused to allow anyone to enter, and by force and violence had kept the people out who had assembled for the purpose of divine worship. It was contended that there could be no violation of the statute unless the persons assembled having failed to enter had conducted services on the outside of the church before dispersing. But this contention the court disposed of by holding that the protection of the law not only extended to persons engaged in divine service, but it begins as soon as they have assembled at the place of holding it and until they have dispersed therefrom. In support thereof the court cites Minter *v.* State, 104 Ga. 744, 30 S. E. 989.

CRIMINAL LAWS. (Stealing gas.) Ill. — It is notorious that people who are otherwise honest have no scruples over attempting to outwit the custom house officers and that beating public service corporations is not so serious an offense as "just plain stealing." In Illinois the occupant of a building lighted and heated by gas arranged by means of rubber hose connections to have the gas flow from the supply pipe around the meter without passing through. When the agent of the gas company was expected he would replace the meters and allow them to remain in position until they had been read. This plan worked so satisfactorily that he afterwards discarded the rubber pipe and took gas direct from the main by means of stopcocks and pipes concealed in the walls of the building. This proceeding was discovered and prosecution begun. Woods *v.* People, 78 N. E. 607. The Supreme Court of Illinois adopts previous holdings of other courts to the effect that gas used for illuminating and heating purposes may be the subject of larceny. Commonwealth *v.* Shore, 4 Allen (Mass.) 308; State *v.* Wellman 25 N. W. 395, and Regina *v.* White, 6 Cox C. C. 213 are cited. The contention was made that prosecution should be brought not for larceny but under that section of the Criminal Code which makes it an offense for persons to tamper with gas meters. The section referred to does not undertake to punish one for unlawfully abstracting gas, but was passed with a view to protect gas, water, or electric meters from being tampered with or false connection being made, so that gas, etc., might be consumed or utilized without passing through or being registered by the meter. The contention is rejected, however, and it is pointed out that one might be guilty of a violation of this section without obtaining any gas from the company.

Another interesting point raised by the case is whether the defendant was guilty of grand larceny, there being a dispute as to whether the evidence showed that the gas taken at any one time amounted to more than $15. The question was whether the amount consumed each day was to be construed as a separate taking, or whether a single offense covered the entire periods in each month during which the appliance for securing the gas was in operation. The court instructed the jury that if they believed that the defendant had been stealing gas for any number of days continuously prior to the time of the discovery, they should add together the various values of gas stolen from day to day during this period in fixing the value of the property stolen. This instruction is approved by the Supreme Court.

CRIMINAL LAW. (Murder in Jail.) Tex. — The question is raised in the case of Brown *v.* State, 95 S. W. 1039, as to whether one who has been previously convicted and is serving a sentence in the penitentiary for a prior murder may be tried and convicted and sentenced to death for a murder committed while in the penitentiary. The court arbitrarily disposes of the contention by saying that it cannot be seriously argued. The court adds that no authorities were cited, and that it is not aware of any provision of law, statutory or otherwise, which would prevent the trial and conviction of a convict for homicide, or for any other offense committed while he was detained as a prisoner by virtue of his prior conviction. In spite of the fact that no authorities were submitted, the question is not a new one, having been passed upon a number of times in several states, and, as a matter of fact, has been previously passed upon by the same court in the case of Coleman *v.*

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State, 33 S. W. 1083, where the same decision is announced. Similar cases are People *v.* Majors, 65 Cal. 138, 3 Pac. 597; Kennedy *v.* Howard, 74 Ind. 87; State *v.* Connell, 49 Mo. 282; *Ex parte* Ryan, 10 Nev. 261; Ruffin *v.* Commonwealth (Va.) 21 Grat. 790. All of these decisions sustain the Texas court in its holding that the second prosecution is not barred by the first.

DIVORCE. (**Condonation — Recrimination.**) **Pa.** — In Talley *v.* Talley, 64 Atlantic Reporter, 523, it was contended that under a law providing that in an action for divorce for adultery if defendant shall prove plaintiff to have been guilty of a like offense this shall constitute a good defense; a husband who has erred and has been forgiven by his wife cannot afterwards obtain a divorce from his wife because she has subsequently committed the same offense. The court, however, said that no such shocking construction could be placed on the statute, as such a construction would mean a license to the condoning spouse.

EQUITY. (**Injunction — Remedy at Law.**) **Mass.** — A case involving some fine points of law is Berry *v.* Friedman, 78 Northeastern Reporter, 305. Plaintiff therein had rented a piano to a tenant of defendant. By reason of the dimensions of the piano, the tenant was unable to move it into her apartments except by enlarging a window which opened into it. Defendant allowed this to be done, and promised his tenant that she might remove the piano in the same way whenever that should be necessary.

The lease on the piano having expired, plaintiff endeavored to remove it, but defendant while insisting that the plaintiff must remove it, refused to allow this to be done in the only way practicable by refusing to allow any opening to be made by which it could be moved, the piano being so constructed that it could not be removed in sections without destruction, or in any other way than that in which it was placed in defendant's house.

Plaintiff thereupon sought the aid of a court of equity to compel defendant to permit him to remove the piano in the way in which it was moved in. It was contended that plaintiff had an adequate remedy at law, but the court was of the opinion that plaintiff could not obtain relief by an action of replevin, as the officer would be under the same difficulty in removing the piano as plaintiff himself. Furthermore, plaintiff could not maintain conversion since defendant did not set up any adverse title to the piano or exercise any control over it, but on the other hand admitted plaintiff's ownership. Though defendant had made no promise to plaintiff that the piano could be removed in the same manner as it was moved in, the court was of the opinion that as defendant had made such promise to the lessee of the piano and therefore contemplated that the piano should be removed by enlarging the opening of the window, plaintiff was entitled to a decree allowing him to do so on giving sufficient security.

EQUITY. (**See Constitutional Law — Torts.**)

LANDLORD AND TENANT. (**Negligence.**) The liability of a landlord to his tenant for injuries by reason of infection of a contagious disease on account of the premises having previously been occupied by a tenant having a contagious disease is discussed in Finney *v.* Steele, 41 Southern Reporter, 976. In this case, however, it was shown that the landlord had intrusted the disinfection of the house to an experienced physician and a trained, experienced, and competent nurse; and while there was testimony by other experts, giving it as their opinion that there were better means of disinfection than those that were used, yet as there was no testimony questioning the experience or competency of the physician and nurse to whom the work of disinfection was committed, the court was of the opinion that the landlord was not liable.

MUNICIPAL CORPORATIONS. (**Change of Grade — Compensation.**) **Ala.** — In Town of New Decatur *v.* Scharfenberg, 41 Southern Reporter, 1024, the Supreme Court of Alabama reaffirms the doctrine that under the Constitutional guarantee a municipal corporation cannot take or injure private property in the exercise of its power to improve its highways without first making compensation, and that the right to injunctive relief in such a case exists without reference to the solvency or insolvency of the municipality and regardless of the consideration that the property owner might recover full compensatory damages in an action of law. Furthermore, the court lays down the doctrine that where no compensation has been made to a property owner for injury to his property, by reason of a change of grade in a street, such property owner may require the city to restore the street to its former condition, as well as to enjoin further acts of damages.

MUNICIPAL CORPORATIONS. (**See Contracts.**)

NEGLIGENCE. (**Master and Servant.**) **N. Y. Sup. App. Div.** — In Creswell *v.* United States Shirt & Collar Company, 100 N. Y. Supp. 497, it was held that an employer was not liable for an injury to an employee caused by a lever on a printing press flying back and startling the employee operating it so that he voluntarily thrust his hand into some of the machinery of the press and was injured, as the injury could not reasonably have been anticipated in the exercise of ordinary care and prudence, since the press had been used for about nine years and no accident therewith had ever occurred, and the lever never flew back prior to the accident. "Failure to guard against

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that which has never occurred and which is very unlikely to occur and which does not naturally suggest itself to prudent men as something which should be guarded against is not negligence," the court said.

NEGLIGENCE. (Municipal Corporation.) Ia. — In Wheeler *v.* City of Fort Dodge, 108 Northwestern Reporter, 1057, the court holds that the stretching of a wire from the roof of a building downward and outward across a street and ending at a pole to which it is fastened, though stretched pursuant to the consent of the municipality and though through most of its course it is high above the heads of people using the walks and carriageways, is a nuisance, because an obstruction of the street, the right of the public to the street extending indefinitely upward. In this case the wire had been stretched for the purpose of an acrobatic performance and a pedestrian walking along the street was injured by the performer on the wire falling and striking such pedestrian. The city was held liable for the injury.

NEGLIGENCE. (See Landlord and Tenant.)

PROPERTY. (Adverse Possession.) Tex. — The Texas statutes state adverse possession to be an actual and visible appropriation of the land, commenced and continued under a *claim of right* inconsistent with and hostile to the claim of another. In the case of Link *v.* Bland, 95 S.W. 1110. Bland settled or squatted upon 160 acres of land which he testified he knew belonged to the Texas & New Orleans R. Co. He further states that it was his intention to hold the land in hostility to the owner and every one else, and admitted that he had no title to the land, that he had never bought it or inherited it, nor had anybody ever given it to him. Knowing that he had no title, he took possession, claiming and intending to claim the land by virtue of his possession, and he continued to occupy it as his home under such claim based upon his possession alone for ten years. The court upholds the defendant's contention that he is entitled to the land by adverse possession in spite of the clause in the statute that the possession must be entered into under a claim of right. It is pointed out that the decisions of Texas, in spite of this statute, do not require that the entry and possession must be upon a claim of ownership and right of possession. The court refers to the decision of the Supreme Court in Charle *v.* Saffold, 13 Tex. 112, and to many other decisions following this leading case. Under this holding the court adds that appellee was a mere possessor, (which is it fair to interpret to mean a squatter), but such persons are clearly within the protection of the statute even where they take and hold possession with the intention of acquiring title, by limitation, to something to which they have no claim otherwise.

PROPERTY. (See Constitutional Law.)

SUNDAY LAWS. (Slot Machines.) S. C. — A case in which a rather novel point of law was raised is that of Cain *v.* Daly, 55 Southeastern Reporter 110. It was there urged that as a Sunday law merely prohibited the labor of persons on the Sabbath, and as it was penal it could not be so construed as to embrace automatic machines. In answering this contention and holding that sales by automatic or slot machines were included within the statute, the court says that while no case directly in point has been found, the language of the statute is plain and its purpose is to prevent the selling and buying of goods, wares, and merchandise on the Lord's Day, and its intention is to prevent opportunity for buying as well as the act of selling on Sunday. The goods in the slot machines are exposed to sale as effectually as if the owner or operator were present exhibiting the goods and delivering them on receipt of the price, and it would in a large measure annul the Sunday law if such contrivances to evade it should be held successful. It may be, the court says, that the law-makers in 1691 had no conception of such vending machines, but that cannot be affirmed of the law-makers in 1902 when the statute was re-enacted.

TORTS. (Injunction — Boycotts). Cal. — Goldberg Bowen & Company *v.* Stablemen's Union, Local No. 8760, 86 Pacific Reporter 806, was an action for injunction to restrain a labor union from damaging plaintiffs' business by means of pickets. The union had placed representatives or pickets in front of the place of business of plaintiffs, carrying placards or transparencies false in fact, and bearing the words and figures: "Unfair firm; reduced wages of employees 50 cents per day. Please don't patronize," and it was alleged that by means thereof the union had intimidated complainants' patrons.

The union claimed that an injunction was prohibited by an act which provided that no combination between two or more persons to do or procure to be done any act in contemplation or furtherance of any trade dispute between employers and employees shall be deemed criminal nor shall those engaged therein be indictable or otherwise punishable for the crime of conspiracy, if such act committed by one person would not be punishable as a crime, nor shall any restraining order or injunction be issued with relation thereto, provided that nothing in the act shall be construed to authorize force or violence or threats thereof; but the court held that this act did not deprive it of power to restrain a boycott of plaintiffs' business during a strike by means of pickets and persons stationed in front of its place of business, bearing signs and transparencies derogatory to it.

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THE LIGHTER SIDE

Pony Creek. — The recent August election resulted in the election of a new justice of the peace and constable for Pony Creek beat. This community has been unusually quiet the past season, most of the young men and big boys being in school at the college. Last Saturday night at "early candle-lighting" the youth and beauty of the Creek were entertained at the palatial residence of Mr. and Mrs. Boardinghouse and only those fortunate enough to hold tickets were admitted.

The word was passed around among the "unfortunates," and this class decided to have a "carousal." Accordingly half a dozen young men got together, imbibed bust-head till all were fairly "under the proper influence," then proceeded to the bridge on the Creek where they generally hold their midnight "carousals." Their hilarity was very soon in evidence. Oath after oath rent the darkness of the midnight hour. The dignity of the new justice of the peace, who is a very short, stout man, was insulted and his righteous indignation suggested that something must be done to restore order and preserve the honest valley people's reputation against such disturbances. Accordingly he 'phoned the new constable to come at once. When the constable arrived the two held a short consultation at which it was decided that the constable should go quietly to the bridge and arrest the offenders, while, as a precautionary measure, his Honor stood square in the middle of the road and listened for results — it was too dark to see. The officer was right in the midst of the carousers before they were aware of his presence; they, presuming he was one of them, continued their "grand fusillade" of frightful oaths. But when the constable shouted: "You are my prisoners" the confusion that followed was so bewildering that the officer was perfectly amazed and alone; for the boys had flown like a covey of birds when flushed by the huntsman's dog. One of the big ringleaders of the flying party happened to take the middle of the road and, in a twinkling, collided with his justice of the peaceship, when both went tumbling heads, heels, heels and heads to the bottom of a deep gully. Both came out painted all over with a fine specimen of Pony Creek red clay. The big boarding student (for such the boy proved to be), by this time frightened "within an inch of his life," struck the road again as fleet as if no mishap had occurred. The constable, who in the meantime had procured a mule from the "squire's" barn, a pine torch from the kitchen fireplace, thus doubly armed, gave such violent chase that young boarding student was soon run to earth.

The trial was short. Boarding student placed himself on the mercies of the court, who closed the incident in the following opinion: "The law must be executed; the judicial ermine shall not trail in mud while I wear it. My magisterial garments have been soiled and the damage is irreparable. Let the defendant pay a fine of fifteen dollars and costs, all of which may be satisfied by replacing the soiled clothes with a new tailored suit.

"Adjourn the court, Mr. Officer."

Intimate. — *He* — That lawyer seems to be a very intimate friend of yours?

She — Yes; he was best man at my divorce proceedings? — *Yonkers Statesman.*

Coat Identified in Court. — About twenty-five years ago, when the Suffolk county courts held their sessions in the old court house in Court Square, the writer wandered into one of the courts while in session.

There was a young man on trial for stealing revenue stamps. His lawyer, an elderly man, contended that the plaintiff could not identify revenue stamps, and said:

"I remember a case tried in this court some thirty years ago, when a man was convicted for stealing an overcoat, although there were thousands of overcoats just like it. The man who owned the coat was put upon the stand to identify his property. The court asked him if he had any mark on the coat that he could swear to. He replied that his name was in it. The lawyers looked the coat over, but could not find a mark of any kind upon it.

"He then said: 'If some one will give me a pen-knife, I will show you my name.' He cut a small slit in the lower corner of the coat. Taking out two peas, and, putting them in

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the palm of his hand, he turned to the judge and said: 'Yer honer, there is my name. There is pay for Patrick and pay for Powers.'" —*Boston Herald*,

Divorce Law Suggestion. — A clergyman was railing against divorce. "We ought to have the divorce law that was enforced in ancient Greece," he said. "If that old Greek clause was tacked to every separation, I am persuaded that divorces would fall off sixty to seventy per cent.

"This law was that, when a man got a divorce, he could not under any circumstances marry another woman younger than his ex-wife.

"An innocent law, a brief law — not much to look at — but how many divorce suits would be nipped in the bud if all husbands knew that after the separation they could not marry younger women than the wives they had cast off?" — *Philadelphia Bulletin*.

The Perils of Marriage. — "Worried" writes in the Birmingham Post (Monday): — "I married a widow, who had a grownup daughter. My father visited our house very often, fell in love with my step-daughter, and married her; so my father became my son-in-law and my step-daughter my mother, because she was my father's wife. Some time after my wife had a son. He was my father's brother-in-law and my uncle, for he was the brother of my step-mother. My father's wife — *i.e.*, my step-daughter — had also a son. He was, of course, my brother, and also my grandchild, for he was the son of my daughter. My wife was my grandmother, because she was my father's wife's (that is, my mother's) mother. So I am at the same time the husband and grandchild of my wife, and as the husband of a person's grandmother is his grandfather, it seems that I have become my own grandfather."

Next! — The late Ex-Governor Robinson used to tell a story in which he acknowledged that the only witness who ever made him throw up his hands and leave the court room was a green Irishman.

Mr. Robinson, at the time, was counsel for one of the big railroads. A section hand had been killed by an express train and his widow was suing for damages. The railroad had a good case, but Mr. Robinson made the mistake of trying to turn the main witness inside out.

The witness, in his quaint way, had given a graphic description of the fatality, occasionally shedding tears and calling on the saints. Among other things he swore positively the locomotive whistle was not sounded until after the whole train had passed over his departed friend. Then Mr. Robinson thought he had him.

"See here, Mr. McGinnis," said Mr. Robinson, "you admit that the whistle blew."

"Yes, sor, it blew, sor."

"Now, if that whistle sounded in time to give Michael warning, the fact would be in favor of the company, wouldn't it?"

"Yes, sor, and Mike would be testifying here this day." The jury giggled.

"Never mind that. You were Mike's friend, and you would like to help his widow, but just tell me now what earthly purpose there could be for the engineer to blow that whistle after Mike had been struck?"

"I presume that the whistle wor for the nixt man on the thrack, sor."

Mr. Robinson retired, and the widow got all she asked for. — *Boston Herald*.

Items of Needed Legislation. — For instance, there ought to be a law prohibiting the crushing of mint in the compilation of a julep.

There ought to be a law forbidding the use of the doggerel known as "baby" talk, or "goo-goo" talk, to infants, on the ground that it retards the progress of young Americans in the mastery of real English.

It ought to be declared a felony for anyone at the theater to tell his companion "what's coming next."

A law should declare it perfectly proper for a clergyman to say something besides "Fudge" when he hits at a golf ball and plows up a ton of earth.

It should be illegal for a preacher to reiterate his text more than fifty times in the course of one sermon, or to go higher than the "thirtiethly" in his enumeration of points to be made.

It should be against the law for any group of women to discuss the servant problem more than one hour at a time without a change of subject, unless they first obtain a written permission of the President of the United States. — *Louisville Courier-Journal*.

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