Law Notes

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Court of Appeals Decision on New York Alien Labor Law.

The New York Court of Appeals, reversing the decision of the Appellate Division of the Supreme Court, holds that the New York alien labor law, which prohibits the employment of alien labor on public works, is constitutional. The effect of this law, the court holds, is neither to deprive the excluded aliens of their liberty without due process of law nor to deny to them the equal protection of the laws. Nor is the law invalid as in conflict with treaties between the United States and foreign nations. The decision is rested principally upon the theory that the state, as a proprietor, has the power to control the construction of its own works and the distribution of its own moneys. The law is also upheld as a legitimate exercise of the police power of the state. "The moneys of the state," says the court, "belong to the people of the state. They do not belong to aliens. The state, through its legislature, has given notice to its agents, that in building its public works, it wishes its own moneys to be paid to its own citizens, and if not to them, then, at least, to citizens of the United States. The argument is made that in thus preferring its own citizens in the distribution of its own wealth, it denies to the alien within its borders the equal protection of the laws. The people, viewed as an organized unit, constitute the state. (*Penhallow* v. *Doane's Adm.*, 3 Dallas 54, 100; *Texas* v. *White*, 7 Wall. 700, 720.) The members of the state are its citizens. (*United States* v. *Cruikshank*, 92 U. S. 542, 549; *Minor* v. *Happersett*, 21 Wall. 162.) Those who are not citizens are not members of the state. Society thus organized is conceived of as a body corporate. Like any other body corporate, it may enter into contracts, and hold and dispose of property. In doing this, it acts through agencies of government. These agencies, when contracting for the state, or expending the state's moneys, are trustees for the people of the state. (*Illinois* v. *Illinois Central R. Co.*, 146 U. S. 387.) It is the people, i. e., the members of the state, who are contracting or expending their own moneys through agencies of their own creation. Certain limitations on the powers of those agencies result from the nature of the trust. (*Illinois* v. *Illinois Central R. Co., supra.*) Since government, in expending public moneys, is expending the moneys of its citizens, it may not by arbitrary discriminations having no relation to the public welfare, foster the employment of one class of its citizens and discourage the employment of others. It is not fettered, of course, by any rule of absolute equality; the public welfare may at times be bound up with the welfare of a class: but public welfare, in a large sense, must, none the less, be the end in view. Every citizen has a like interest in the application of the public wealth to the common good, and the like right to demand that there be nothing of partiality, nothing of merely selfish favoritism, in the administration of the trust. But an alien has no such interest, and hence results a difference in the measure of his right. To disqualify citizens from employment on the public works is not only discrimination, but arbitrary discrimination. To disqualify aliens is discrimination indeed, but not arbitrary discrimination, for the principle of exclusion is the restriction of the resources of the state to the advancement and profit of the members of the state. Ungenerous and unwise such discrimination may be. It is not for that reason unlawful."

The effect of this decision will be most seriously felt in New York City, as it will mean delay in the completion of the dual subway system. It is estimated that at the time the Court of Appeals decision was handed down there were about twenty thousand men employed on subway construction in the city, one-half of whom were aliens. The case has been taken to the United States Supreme Court on a writ of error, and that Court has suspended the operation of the law in question pending the appeal. There is a strong sentiment in favor of the immediate repeal of the law, and the Supreme Court may not have occasion to pass upon its validity. There is, however, now pending in the Supreme Court of the United States the appeal of the State of Arizona from the decision of the Arizona Federal District Court holding unconstitutional the Arizona statute forbidding any corporation to have less than eighty per cent native or naturalized citizens among its employed laborers. So that even if the New York law is repealed before the United States Supreme Court has an opportunity to pass upon it, we shall nevertheless soon have the judgment of our highest tribunal upon the validity of this sort of legislation.

Constitutionality of Alien Labor Laws.

Alien labor legislation and judicial consideration of it are not new in New York. In 1895 the alien labor law of 1870 (Laws N. Y. 1870, c. 385, § 2), as amended by Laws 1894, c. 622, which made it a crime for a contractor with a municipal corporation for the construction of public works to employ an alien as a laborer on such work, was held invalid by one of the lower New York courts as being repugnant to both the state and federal constitutions, and to the treaty between the United States and the King of Italy by which it was provided that resident Italians in the United States should enjoy the

same rights and privileges in respect to person and property as were secured to our own citizens. See *People* v. *Warren,* 13 Misc. 615, 34 N. Y. S. 942. The courts in California have had occasion in a number of cases to pass upon this species of legislation, and have quite uniformly condemned it. In the case of *In re Tiburcio Parrott,* 1 Fed. 481, a provision of the California constitution, and the legislative act passed to enforce it, prohibiting the employment of Chinese or Mongolians by corporations, were held to be in conflict with the fourteenth amendment to the Federal Constitution, and with the treaty between the United States and China which provides that "Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence as may there be enjoyed by the citizens or subjects of the most favored nation." Similarly, in the case of *In re Ah Chong,* 2 Fed. 733, a California statute which prohibited all aliens incapable of becoming electors from fishing in the waters of the state, was declared violative of the fourteenth amendment and of our treaty with China. In *Ex. p. Kuback,* 85 Cal. 274, 24 Pac. 737, 20 Am. St. Rep. 226, 9 L. R. A. 482, an ordinance of the city of Los Angeles which made it unlawful for any contractor when having labor performed under any contract with the city to employ Chinese labor thereon, was held to be unconstitutional and void. The court in this case quotes with approval from Mr. Cooley's work on constitutional limitations (5th ed., p. 745), in which that learned author says: "The general rule undoubtedly is, that any person is at liberty to pursue any lawful calling, and to do so in his own way, not encroaching upon the rights of others. This general right cannot be taken away. It is not competent, therefore, to forbid any person or class of persons, whether citizens or resident aliens, offering their services in lawful business, or to subject others to penalties for employing them."

The only discordant note in the judicial utterance in California upon the subject under consideration appears to be the case of *People* v. *Naglee,* 1 Cal. 232, 52 Am. Dec. 312, wherein a statute was upheld which required aliens to pay a license fee for the privilege of mining gold in the state, the court saying that the state having the inherent power to tax all persons within its territorial jurisdiction, the limitation and extent of the power must, as to subject matter, persons, amounts, and times of payment, rest in the discretion of the government of the state; and if the state, enacting laws in pursuance of this acknowledged power, sees fit to impose the burden of taxation upon a portion of the persons within the sphere of its jurisdiction, and specially exempt others, its legislation, even though it may be inadequate and unjust, is yet no infringement of the Constitution of the United States. This case, however, was decided before the adoption of the fourteenth amendment to the Federal Constitution.

Alien labor legislation has been the subject of judicial review in several other jurisdictions. In Pennsylvania, in the case of *Fraser* v. *McConway & Tarley Co.,* 82 Fed. 257, a statute was held to be obnoxious to the fourteenth amendment which imposed on every employer of foreign-born unnaturalized male persons over twenty-one years of age a tax of three cents per day for each day such persons might be employed, and authorized the employer to deduct the prescribed tax from the wages of the employee. In Michigan, in the case of *Templar* v. *State Board of Examiners of Barbers,* 131 Mich. 254, 90 N.W. 1058, 100 Am. St. Rep. 610, a statute prohibiting an alien barber from obtaining a certificate to carry on his trade was held to be violative of the fourteenth amendment. In *State* v. *Montgomery,* 94 Me. 192, 47 Atl. 165, 80 Am. St. Rep. 386, it is decided that a statute which forbids peddling except under a license, and which provides that citizens of the United States may be licensed, and that aliens shall not be, is a denial of the "equal protection of the laws." A different conclusion, however, was reached in *Commonwealth* v. *Hana,* 195 Mass. 262, 81 N.E. 149, wherein it was held that the legislature, in the exercise of the police power, might make citizenship a requirement as to the qualifications of applicants for a peddler's license. This appears to be an unwarranted extension of the approved doctrine that where the calling or occupation is one that is subject to governmental regulation the state, under its police power, may limit it to its own citizens and deny it to aliens. This doctrine is illustrated in such cases as *Trageser* v. *Gray,* 73 Md. 250, 25 Am. St. Rep. 587, wherein it is held that a statute denying to persons not citizens of the United States the right to obtain licenses to sell spirituous liquors is a valid and constitutional enactment.

The Law of Consulates.

An interesting question in international law has been raised by the incident at Hodeida of the Ottoman authorities having, despite the protest and resistance of the Italian Acting Consul, forced out of the Italian Consulate and arrested the British Consul, who had taken refuge in that Consulate when his arrest had been ordered. The Italian Government, conceiving the act to be a violation of the Italian Consulate, has sent instructions to the Embassy at Constantinople to obtain proper reparation from the Porte. Whether the act was a violation of the Consulate must depend upon the character and status of consulates in the Ottoman Empire. As the London *Law Times* points out, if a similar incident had occurred with reference to a consulate in the Christian countries in the West, it could scarcely be described, in the absence of a specific treaty, as a violation of a consulate. "Consuls in Christian countries," says the *Law Times,* "as mere commercial agents, possess neither the diplomatic character nor the consequent immunities for themselves, their families, their houses, or their property. The fiction of extraterritoriality does not apply to them, and a consul's house, over whose door he may place the arms of his nation, is liable to domiciliary visit and search, although the papers and archives of the consulate are, as a rule, exempt from seizure or detention." This appears to accord with the law upon the subject as it has been declared by the courts. A consul has been defined as a mercantile agent of the sovereignty by which he is appointed to protect the commercial interests of its citizens or subjects in a foreign state. By virtue of his office, he is clothed only with authority for commercial purposes. He is not to be considered as a minister or diplomatic agent of his government, intrusted with authority to represent it in negotiations with foreign states, or to vindicate its prerogatives. *Seidel* v. *Peschkaw,* 27 N. J. L. 427. See also *Viveash* v. *Becker,* 3 Maule & Selwyn 284; *The Anne,* 3 Wheat. (U. S.) 435. By the law of nations consuls stand upon a very different footing from ambassadors and ministers. The

latter are not amenable to either the civil or criminal jurisdiction of the country to which they are deputed; not so, however, the former. On the contrary, according to the rule of international law, a consul is subject civilly and criminally, like other residents, to the tribunals of the country in which he resides. *United States* v. *Trumbull,* 48 Fed. 94; *In re Iasigi,* 79 Fed. 751. He is approved and admitted by the local sovereign. If guilty of illegal or improper conduct, the *exequatur* which has been given him may be revoked, and he may be punished, or sent out of the country, at the option of the offended government. *Coppell* v. *Hall,* 7 Wall. (U. S.) 542.

A marked distinction, however, has always been made between consuls to Mohammedan and other non-Christian states and consuls to Christian countries, both in the powers intrusted to them and in the duties with which they are charged. "The full reciprocity," says the court in *Mahoney* v. *United States,* 10 Wall. (U. S.) 62, "which, by the general rule of international law, prevails between Christian states in the exercise of jurisdiction over the subjects or citizens of each other in their respective territories, is not admitted between a Christian state and a Mohammedan state in the same circumstances; and in our treaties with Mohammedan powers, express stipulations are made for the enjoyment by our citizens of certain extraterritorial rights with respect to their persons and property. Whilst, therefore, in Christian countries consuls are little more than mere commercial agents, in Mohammedan countries they are clothed with diplomatic and even with judicial powers. Consuls to Christian countries are often allowed to engage in business; but consuls to Mohammedan countries are restricted to the duties of their offices, are paid a stated salary, and are prohibited from entering into commercial transactions." To like effect is the language of the *Law Times* in its comment on the Hodeida incident:

"Fundamentally different from their regular position is that of consuls in non-Christian states with the single exception of Japan. In their efforts to withdraw their citizens from the jurisdiction of local magistrates in Mohammedan and other non-Christian states not fully within the pale of international law, the civilized nations have so extended and developed the offices of consul by special conventions as to clothe consuls with both diplomatic and judicial functions when exceptional powers and immunities are made necessary by the absence of stable and responsible local governments. In Mohammedan countries custom and treaties have secured to consuls inviolability, extraterritoriality, ceremonial honors, and miscellaneous other rights, so that there is no doubt that their position is materially the same as that of diplomatic envoys. From the Mohammedan countries this position of consul has been extended and transferred to China, Korea, Persia, and other non-Christian countries, but in Japan the position of consuls shrank in 1899 into that of consuls in Christian states. There is no doubt that the present position of consuls in non-Christian states is in every point an exceptional one which does not agree with the principles of international law otherwise universally recognized."

With this distinction in the status of consuls in Christian and Mohammedan countries in mind it will readily be seen that an incident like that at Hodeida might easily lead to serious international complications. In the particular case the proceedings against the English Consul—so far as concerns his representative capacity—are unimportant, in view of the existing state of war between Turkey and England. But if there was a violation of the Italian Consulate a case is presented for adjustment between Italy and the Ottoman Porte that may require delicate diplomatic handling, lest Italy also be drawn into the maelstrom of war that is now devastating Europe.

Waiver of Right of Accused in Capital Case to be Present at Rendition of Verdict.

THE Supreme Court of the United States, in the Leo M. Frank case, will for the first time determine whether, on a trial for murder in a state court, the due process clause of the Federal Constitution guarantees the defendant a right to be present when the verdict is rendered. Frank's petition for a writ of habeas corpus alleged that on his trial public feeling against him was so great that the presiding judge advised his counsel not to have him present in the courtroom when the verdict was returned, and that his involuntary absence, under such circumstances, when the verdict was received, deprived him of a hearing to which he was entitled under the Constitution and rendered his conviction void. It is claimed on behalf of Frank that the right to be present at the rendition of the verdict was jurisdictional, and that he had not waived and could not waive his constitutional right to be present when the verdict of guilty was returned into court.

It is a well-established general rule that in a felony case the accused must be present during the entire trial, or at least up to and including the rendition of the verdict; and no valid judgment can be predicated upon a verdict received in his absence. See the note to *Fight* v. *State,* 28 Am. Dec. 629. In felony cases less than capital, however, it has generally been held that the accused may waive his right to be present when the verdict is returned. In capital cases the law is not so clear. It is squarely held in *Sherrod* v. *State,* 93 Miss. 774, 47 So. 55, that in a capital case the accused must be present in court when the verdict is rendered, and he cannot waive his right to be present. In this case the court as a result of an exhaustive examination of the authorities announced the following conclusions: "First. In the trial of all felonies, not capital, where the defendant is on bond, and has been present throughout the delivery of the testimony, up to the rendition of the verdict, but is absent at the rendition of the verdict voluntarily, he will not be permitted to avail himself of his own wrong in being thus voluntarily absent, but the verdict may be properly received in his absence. In other words, he may waive the right to be present when the verdict is received, which is not, as seems popularly supposed, a constitutional right, though a very sacred right, secured by the common law as well as by statute. Second. Wherever the charge is a capital one, the courts have held uniformly, *in favorem vitae,* that the defendant cannot waive his right to be present, and that whether he be in jail, subject to the power of the court to produce him, or on bond, it is fatal error to receive the verdict in his absence. Third. Even in felonies not capital, if the defendant be in jail when the verdict is received, it is fatal error. Fourth. In cases not capital, the right of the defendant, where he is on bond, to waive his own presence when the verdict is received, is strictly his personal right, and no such waiver can be exercised for him by his own counsel. These

four propositions are clearly sustained by an overwhelming weight of authority. Indeed, we have found no case anywhere holding that, where the charge is a capital one, the defendant's failure to be present at the time the verdict is rendered is not fatal error, whether he be in jail or whether he be on bond."

In a recent Arkansas case, however, the court reaches a different conclusion from that arrived at by the court in *Sherrod* v. *State, supra.* In *Davidson* v. *State,* 108 Ark. 191, it is held that the accused may, even in a capital case, after the trial has commenced, waive his personal presence at a step in the progress of the trial such as receiving the verdict, and that where his presence has been duly waived, the supreme court will not reverse a judgment on account of his absence upon his own consent, unless it appears that he was prejudiced in some way by such absence. In this case the court, after reviewing a number of cases tending to support its decision, said: "It is true that none of these was a capital case; but we do not perceive any difference when it comes to the question of the power of the accused to waive some of the privileges that are guaranteed to him by the Constitution and laws. It is the duty of trial courts, in that class of cases, to guard more carefully the rights of accused persons and to see that their rights are not prejudiced; but, after all, the test of the power of the court in a capital case with respect to the presence of the accused is the same as in any other felony case. Our laws make no distinction. . . . In this case the court did no more than grant the request, conveyed to the court through defendant's counsel, that he be removed from the court and from the county for his own safety from threatened mob violence. If he and his counsel conceived it to be necessary for his own safety that he should be absent from the county during the further progress of the trial, he cannot now complain that the verdict was returned in his absence."

The nearest approach to deciding the point in question that the Supreme Court of the United States has made appears to be in the case of *Hopt* v. *Utah,* 110 U. S. 574. It was therein held that the right of the accused in a capital case to be present before the triers was not waived by his failure to object to their retirement from the court-room and trying the grounds of challenge out of the presence as well of the court as of the defendant and his counsel. "We are of opinion," said the Supreme Court, speaking through Mr. Justice Harlan, "that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, 'cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow creatures, merely upon their own authority.' 1 Bl. Com. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life or liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to unauthorized methods. The great end of punishment is not the expiation or atonement of the offense committed, but the prevention of future offenses of the same kind. 4 Bl. Com. 11. Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony, that he shall be personally present at the trial, that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the Constitution."

PROPERTY IN PRIVATE LETTERS.

Repeated decisions of the courts have crystallized into definite principles of law the proposition that the property in private letters is in the writer, and the corollary proposition that he has the right to have their unauthorized publication enjoined. The case of *Pope* v. *Curl,* 2 Atk. 242, decided in 1741, appears to be the earliest reported case upon the subject. In that case it seems that some unknown person had possessed himself of a large number of private and familiar letters which had passed between Pope and his friends, Swift, Gay, and others, and had printed them secretly in Ireland, in a book entitled "Letters from Swift, Pope, and others." Pope had obtained an injunction restraining the defendant, a piratical bookseller in London, from vending the book, and it was upon a motion to dissolve this injunction that the case came before Lord Hardwicke, who continued the injunction as to the letters written by Pope. It was contended by the defendant's counsel that the sending of letters is in the nature of a gift to the receiver, and therefore that the writer retains no property in them. Lord Hardwicke, however, said: "I am of opinion that it is only a special property in the receiver; possibly the property of the paper may belong to him; but this does not give a license to any person whatsoever to publish them [the letters] to the world, for at most the receiver has only a joint property with the writer."

In the case of Lord Chesterfield's letters to his son (*Thompson* v. *Stanhope,* Ambl. 737) decided in 1774, the doctrine of the proprietary interest of the writer in private letters was carried further, even, than in *Pope* v. *Curl, supra.* The executors of Lord Chesterfield filed a bill against the widow of his natural son, to whom the celebrated letters had been addressed, to restrain her from printing and publishing them and to have the originals delivered up, upon the ground that they remained the property of the testator and were a part of his estate. The motion to dissolve the injunction was made on the ground that Lord Chesterfield had himself given the letters to the widow—a fact that seems to have been admitted. But it was contended, on the part of the plaintiffs, that there being no proof of an express authority to publish, none could be implied from the gift, and that consequently the exclusive right to control the publication remained in Lord Chesterfield, and had passed to his representatives. The Lord Chancellor (Lord Apsley) was of this opinion, and continued the injunction.

That a writer has a right of property in his letters, superior to that of a party to whom the letters are sent, was also affirmed in the case of another eminent man of letters. In 1804 the Court of Sessions in Scotland, at the instance of the children of Robert Burns, interdicted the publication of the manuscript letters of the illustrious Scottish bard. See 1 Bell's Com. 116n. The general doctrine of the proprietorship of the writer in private letters is also well buttressed by the following cases: *Gee* v. *Pritchard,* 2 Swanst. 402; *Ashburton* v. *Pope,* [1913] 2 Ch. 469; *Rice* v. *Williams,* 32 Fed. 437; *Grigsby* v. *Breckenridge,* 2 Bush (Ky.) 480; *Woolsey* v. *Judd,* 4 Duer (N. Y.) 379; *Eyre* v. *Higbee,* 35 Barb. (N. Y.) 502. In *Eyre* v. *Higbee, supra,* some emphasis is given to the doctrine by the holding therein that private letters are not assets in the hands of the receiver's administrator, and cannot therefore be sold by him, in the course of administration, to pay debts.

In a few cases the courts have made a distinction between letters of a distinct literary character and those of a social or business nature, and have refused to restrain the publication of private letters which possess none of the attributes of literary composition. See *Wetmore* v. *Scovell,* 3 Edw. Ch. 515; *Hoyt* v. *Mackenzie,* 3 Barb. Ch. 320. This view is most strongly combated by Mr. Justice Story in *Folsom* v. *Marsh,* 2 Story 100, which involved the question of the invasion of Mr. Sparks's copyright on the private letters of George Washington. Upon the point in question Justice Story said: "Then as to the supposed distinction between letters of business, or of a mere private or domestic character, and letters which, from their character and contents, are to be treated as literary compositions, I am not prepared to admit its soundness or propriety. It is extremely difficult to say what letters are or are not literary compositions. In one sense, all letters are literary, for they consist of the thoughts and language of the writer reduced to written characters, and show his style and his mode of constructing sentences, and his habits of composition. Many letters of business also embrace critical remarks and expressions of opinion on various subjects, moral, religious, political and literary. What is to be done in such cases? Even in compositions confessedly literary, the author may not intend, nay, often does not intend them for publication; and yet, no one on that account doubts his right of property therein, as a subject of value to himself and to his posterity. If subsequently published by his representatives, would they not have a copyright therein? It is highly probable, that neither Lord Chesterfield, nor Lord Orford, nor the poet Gray, nor Cowper, nor Lady Russell, nor Lady Montague, ever intended their letters for publication as literary compositions, although they abound with striking remarks, and elegant sketches, and sometimes with the most profound, as well as affecting, exhibitions of close reflection, and various knowledge and experience, mixed up with matters of business, personal anecdote and family gossip."

In *Woolsey* v. *Judd,* 4 Duer 379, will be found an illuminating discussion of the present subject by Judge Duer. He agrees with Justice Story upon the particular point noted, and deduces from the early case of *Pope* v. *Curl, ubi supra,* certain definite propositions as established law upon the subject under consideration. "What, then," says Judge Duer, "are the propositions which Lord Hardwicke, by his decision in *Pope* v. *Curl,* established as law? It seems to us, that by the plain and necessary interpretation of his language, they are these: First, that the receiver of letters has only a special or qualified property, confined to the material on which they are written, and not extended to the letters as expressive of the mind of the writer. Second, that neither the receiver thereof nor any other person has any right to publish the letters without the consent of the writer. And, lastly, that the property which the writer retains gives him an exclusive right to determine whether the letters shall be published or not; and when he forbids their publication, makes it the duty of a court of equity to aid and protect him by an injunction. It appears to us equally certain that these rules are laid down, and were meant to be laid down, as universal in their application, as embracing all letters, whether intended to be published or not, and whatever may be the subjects to which they relate. Not only was there no intimation that there is any distinction between different kinds or classes of letters, limiting the protection of the court to a particular class; but the distinctions that were attempted to be made, and which seem to be all that the subject admits, were expressly rejected as groundless."

MINIMUM WAGE

In Debate at the Annual Dinner of the National Retail Dry Goods Association, Hotel Knickerbocker, New York, February 10, 1915, *between Mr. Norman Hapgood, of New York (Affirmative) and Mr. Rome G. Brown, of Minneapolis (Negative).*

NEGATIVE ARGUMENT BY MR. BROWN.

As Mr. Hapgood has intimated, there is a subject which I have studied longer than that of the Minimum Wage, and which I would much prefer to debate with him. No one doubts Mr. Hapgood's humanitarianism or the sincerity of his endeavors, as an editor and as a citizen, to promote the welfare of mankind. Our differences are not at all as to the objects to be accomplished, but are only as to the methods best adapted for our common purpose. I assume that all of us are interested in the welfare of women workers, and of workers of all classes, and that we desire to promote their general welfare, health and comfort, and to co-operate in any effort by which their efficiency may be increased and by which the compensation paid for their work may be raised to the highest point at which it can reasonably be maintained.

I am not, none of us are, opposed to high wages. We are in favor of a minimum wage, and that, too, a wage which is not merely commensurate with the bare cost of living, but, so far as reasonably possible, one which will supply to every worker health, comfort and happiness in the broadest sense of those terms.

What I am opposing is the compulsory legislative minimum wage in private employment; because such legislation is against the interests of both employer and employee and, further, because it is based upon a theory which is not susceptible of legislative enactment under our form of government.

When I oppose the minimum wage, therefore, I mean the statutory minimum wage. Its advocates forget that it is not for the general welfare that a temporary or local interest of one class be selected as the subject of artificial stimulation through special legislation. They forget that ultimately the prosperity of the worker is coincident with, and depends upon, the general prosperity of the community and that that general prosperity means

industrial development. It means, in short, the prosperity of the employer.

FALLACIES OF THE MINIMUM WAGE.

It is one of the fallacies of the minimum wage that wages can be measured out by a fixed rule, which does not take into consideration the element of efficiency. Wages must depend upon, at least must have some substantial relation to, the compensation rendered by the worker in return. Now you can not legislate efficiency. When you compel an employer to pay a wage which is fixed regardless of the worker's efficiency, you are legislating a forced gratuity to the worker, no matter that the wage be measured by the cost of living of by any other standard which disregards its fair worth. If its theoretical object of increasing the wage of the inefficient worker were practicable, the minimum wage would have the same effect upon such worker as would a pension. It would destroy initiative and ambition and deprive her of incentive toward raising her standard of efficiency; it would be a drag upon her development as a wage-earner and as a citizen. But, in practice, it can not increase the wage of the inefficient worker. It simply renders her jobless, and this, without any compensating benefits, either to her or to the working class or to the community.

All wages are not what they should be, but as a rule they are higher in this country than anywhere else in the world. Betterment of existing wage conditions is advancing, and it may be further advanced by co-operative effort, by enlightenment of both employer and employee. The main reason for our present higher wages, as compared with those in foreign countries, is the higher standard of labor here, and the recognition by the employer of the higher efficiency of the American worker. There are some economic facts which can not be changed by legislative fiat. Wages must depend, to some degree at least, upon wage-worth. That fact may be denied by the terms of a statute; but no statute can make it not a fact.

The abstract basis of the living wage is largely that of benevolence, but you can not create benevolence, nor the exercise of any other virtue, by legislative enactment. There are certain precepts of morals which are not susceptible of statutory enforcement. The observer of the Golden Rule shows morality only in so far as he acts voluntarily. His action ceases to be virtuous or moral when once you have enacted into a statute the precept of the Golden Rule and when its observance is enforced under the threat of fine and imprisonment. Actions otherwise virtuous,—of benevolence, of charity, of neighborly love,—are deprived of all elements of morality when performed under compulsion. Compulsion stifles the humanitarian motive. It sets a hard and fast limit to the otherwise voluntary effort for the general welfare of the worker, and makes the artificially increased standard of wages an object of hostility and attack, instead of a goal to be reached by voluntary, co-operative, moral endeavor.

MINIMUM WAGE DEFINED.

Such is the difference between the ethical minimum wage and the legislative compulsory minimum wage. For, note this: The minimum wage statute provides that, as a condition of employment, the employee must demand for her work and the employer must pay—regardless of the efficiency of the employee, or of the worth of her work to her employer, or of the ability of the employer to pay—at least such a wage as shall equal an amount necessary to furnish to the worker the cost of living in health and comfort; and this, under penalty of fine or imprisonment for the employer failing to meet the requirements. In other words, the employer is compelled to contribute to the individual, who happens to be upon his pay-roll, the difference between what that individual earns and what it is deemed that it should cost her to live. It is a forced gratuity as to every cent above the reasonable worth of the worker; because the need for which the difference is supplied is one which is purely individual and does not arise out of the fact or nature of the employment. Such statutes have been passed in Oregon, California, Washington, Colorado, Wisconsin, and Minnesota, where the cost of living is determined by a commission; and in Utah, where the statute fixes the wage arbitrarily without reference to the cost of living or any other consideration. In these states no provision is made for even considering the financial condition of the occupation or of the employer, or the efficiency of the employee. These statutes apply to women workers, and also in some states to minors and apprentices. As to these statutes, Mr. Hapgood does not disagree very much with my position, but he says that, under the Massachusetts statute, the compulsory feature is eliminated, and apparently he would have New York, as did Nebraska, follow the example of Massachusetts.

THE MASSACHUSETTS STATUTE OBNOXIOUSLY COMPULSORY.

Now, I have had this week further opportunity to look into the Massachusetts situation, and I find that, no matter what the terms of the Massachusetts statute, in its practical effect it is most obnoxiously compulsory. Although, in terms, it affords the employer a hearing on the question of the reasonableness of the wage fixed and of his ability to pay, in practice those provisions are without effect. The State Commission and its Wage Boards are, and have been, mere instruments for carrying out the demands of the employees. Official reports of facts are ignored if they conflict with a preconceived notion as to what the wage in any occupation investigated should be. When the wage is promulgated by the Commission, although there is no fine or imprisonment for the employer, if he fails to comply he is published throughout the state as an unreasonable recalcitrant. Indeed the statute makes it a crime for any newspaper publisher to refuse thus publicly to blacklist one who may be his own relative or his best paying advertiser—or even himself. This is an attempt to legalize an official blacklist or system of boycotting. It was deemed that a penalty of fine or imprisonment for non-compliance by employers was illegal because, as was rightly assumed, non-compliance could not constitutionally be made a crime. Now, our Federal and state laws make it illegal, and the subject of heavy fine and imprisonment, for anyone, even in secret, to establish or publish a blacklist, or to organize a boycott, against any individual or any class of individuals, either of employers or employees, and this, too, whether the object is to retaliate for either lawful or unlawful action or refusal to comply with some demand. The penalties for such a boycott are more severe than any penalty ever written into a minimum wage statute; and this for the very reason that, independent of the nature of the grounds alleged for the boycott, the organized blacklisting or boycotting of a business or an individual is, of itself, so drastic, so susceptible of damage to its victim, that the law has wisely made it a criminal offense and a ground for heavy civil damages. And yet the Massachusetts statute holds over the employer a method of official blacklisting and boycotting which is more severe and mo damaging than any private boycott ever attempted to be established. It is absurd, in one instance, to make a certain action by individuals a heinous crime and, at the same time, in another instance, to attempt to legalize precisely the same sort of action by or under the sanction of the state. The motive is, in law and in reason, just as immaterial in the one case as in the other.

A DISCRIMINATING AND ENCROACHING PROCESS.

In Massachusetts also, as in other states attempting to enforce these statutes, different standards of living are recognized for

employees in different occupations, as shown by the different wages established for the various occupations in the same state and even for different classes of employees in the same occupation, but even if each worker has a right to a living wage, whence the right of one worker to a living wage greater than that of another? More than that, the wage fixed at one time is only a step to a higher wage subsequently to be fixed. Theoretically computed on the cost of living, it is not in the end computed at all. It is fixed for each class, and from time to time, as the various Boards are influenced by the demands of the employees. One encroaching step leads to another. Even now in Massachusetts the legislature is asked to add to the inquisitorial powers of the Wage Commission and to make fine and imprisonment the penalty for non-compliance.

PUTS AN EMBARGO ON HOME INDUSTRIES.

The statutory minimum wage is objectionable both from an economical viewpoint and from a legal viewpoint. In the first place it creates an artificial competition with the industry upon which the minimum wage is imposed. With the increased facilities for transportation, industries to-day compete not alone in their intrastate trade. Their markets are extrastate; their business is nation-wide, and often world-wide. Many of you have 50%, 70%, 80%, and even more, of your trade outside the limits of your state. Mr. Hapgood has said that this disturbance of business adjusts itself because the effect of the statute goes to every similar occupation or industry in the state. This is not true, either as to your interstate or your extrastate trade. Outside the state you have to meet competitors whose cost of production is not increased by an unnatural wage-cost. They, therefore, can sell at a profit outside your state, where your margin of profit is cut down by the wage you must pay in excess of its worth to you. More than that, your intrastate trade is, in the same way, destroyed by your competitors who send goods into your state, which are produced in states where wages are fixed with some consideration of the ability of the employee to earn and of the employer to pay. Prices at which you must sell are fixed, not by the markets of the state, but by the markets of the nation—indeed, by the markets of the world. By the Federal tariff, you may, to some extent, be protected against the competition of foreign producers whose wage-cost, and, therefore, whose prices, are below yours. But no tariff is possible between the states, and in the markets of this nation your own state, through a minimum wage statute, puts an embargo upon your industry in favor of your extrastate competitors.

INCREASES UNEMPLOYMENT.

Another evil effect is, that it increases the number of unemployed. There is no problem of labor so disturbing, and especially at the present time, as that of unemployment. Workers whose standard of efficiency is even above that of a minimum wage are without work; and, with them, are the hoards of jobless inefficients. The minimum wage statute says to the latter: "You shall not work for what you can earn, although there are jobs waiting you with fair pay for what you are able to do." The employer will not keep upon his pay-roll those whose standard of efficiency is much below the fixed wage standard. Many a woman worker who, from lack of skill, is prevented from earning more than her fair cost of living, is glad to obtain work at a wage commensurate with her ability, and thereby to supplement perhaps other means of existence or to help her parents or family to a common fund for support; or, perhaps, while earning less than a full living wage, to acquire the practical experience and skill which will enable her to demand and receive that and more. All this class are driven from their present employment and kept jobless for a long time and perhaps forever. This possible effect upon the employee is admitted by the most ardent advocates of the statutory wage. Experience has demonstrated this effect. The only industry against which a statutory minimum wage has, as yet, been enforced in this country is the brush industry in Massachusetts. One brush concern, since the minimum wage for brush makers took effect, has discharged over one hundred of its unskilled employees and has reorganized its methods of work so that its less skilled labor is done by those who also perform more skilled work; and at a total wage which is $40,000 a year less than that paid formerly. In self-defense against the arbitrary interference of the state with its business, it is now forced to figure its wage-scales on a selfish basis, and with less liberality for its employees. If the state dictates for the worker, the employer must look out for himself. So this brush concern in Massachusetts now exacts, more than ever before, from all its workers all the units of work commensurate with the total wages it is compelled to pay.

IT TENDS TO LEVEL ALL WAGES.

This leads to another point. As illustrated in this very brush factory in Massachusetts, the minimum wage established by statute has the effect to lessen the advantages and the wages of the higher skilled employees. In other words, the minimum wage tends to become the maximum wage. This is by reason of the very fact of arbitrary legislative interference with wages. The only remedy for this result is, of course, that by further legislation all wages be fixed by statute and that, too, for both men and women.

IT PLACES THE BURDENS OF THE STATE ON ONE CLASS.

And why should this contribution over what is earned be paid by the employer, simply for the reason that the individual who is on his pay-roll needs this excess over what she is able to earn? These statutes are based upon the purely ethical theory that each individual human being has a generic right to live in health, comfort and happiness and to have all that is necessary for that purpose. The obligation to furnish these is an obligation of the community as a whole. Upon what theory does the community as a whole shirk its burden and by legislation place the obligation upon the employer—the employer who pays toward that cost of living all that the employee is capable of earning, and who gives her the opportunity to turn her real efficiency into a fund for her support? If that fund measured by her efficiency is not sufficient for her proper support, then why should the employer contribute the difference any more than any other class? The duty to supply it is that of the community as a whole. But, if you are going to place that obligation upon a class, then why not level down the cost of living by compelling the farmer to produce and sell for less price the necessaries of life; or the merchant, who has bought from the farmer, to sell at lower prices? The employee is no more entitled to receive his cost of living, as such, from the employer than the employer is entitled to receive his cost of living or the cost of the living of his industry, as such, from the employee. Both are entitled to live, but neither is entitled to receive the cost of living, as such, from the other.

IT IS BASED ON THE THEORY OF DIVISION OF PROPERTY.

The statutory minimum wage is objectionable upon legal grounds, some of which have already been indicated. I shall not here review the constitutional questions. But let me bring home to you, in a practical way, some of the constitutional points involved. The statutory minimum wage is based theoretically, and, in fact, by its very terms, upon the theory of division of property between those who have and those who have not. Furthermore, this compulsory division is attempted to be justified upon the

theory that those benefited are entitled to their share, for the very reason that they have not; and that those whose property is divided should be compelled to divide, for the very reason that they have. The statutory minimum wage means, first, a forced contribution to be paid out of profits, so long as it can be paid out of profits, and no matter to what small margin of profit the employer may be forced. If it takes all of, or more than, his profits, then, so long as the employment continues, he must still make this contribution and that, too, of course, out of his capital. If he refuses, or is unable to pay it out of capital, then he must resort to the only other alternative, and that is that he must go out of business and be entirely eliminated as a "parasite" on the community. This statute, therefore, is based upon a theory which is repugnant to our social system and to our system of government; for it is the theory of the elimination of private property rights and of a division of all private property among and for the benefit of all individuals. It is based, in other words, upon the theory of socialism.

REGULATION OF HOURS A DIFFERENT QUESTION.

Mr. Hapgood, as other advocates of a statutory wage, refers to the Federal decisions, enforcing regulation of hours and other working conditions, and particularly those in favor of women workers, as precedents in support of these wage measures. Let me impress upon your mind the difference. When the Supreme Court sustained the Oregon statute fixing maximum hours in certain manufacturing establishments for women workers, it held that such regulation might be reasonably enacted, because greater hours were dangerous to women in those particular employments, and because more dangerous to women than to men. The fixing of maximum hours for men had been upheld only because the occupations so regulated presented, from their very nature, hazards to the workers if longer hours applied.

In every case of the regulation of hours, the protection to the worker has been against a hazard or need which arose out of the employment in question and which was peculiar to such employment. So the Factory Acts compel the employer, at his own expense, to protect the employee against the hazards of unsafe machinery, and of unsanitary conditions of work; in other words, to protect employees against hazards which are peculiar to the employment in question and which arise out of the fact of the employment. So the Workmen's Compensation Acts, at the expense of the employer, protect the employee against casualties arising out of and because of the hazards of the employment. Those needs and hazards protected against are the needs and hazards, not individual to the employee, but peculiar to the occupation regulated and are confined to those which arise out of the employment. Such regulations are upheld only for that reason; and for that reason alone it is held that the legislature, under the police power of the state, can make and enforce such regulations.

But that is not the case of the minimum wage regulation. The need of the employee for an amount above what he earns, to make up the necessary cost of living, is a purely individual need; it is peculiar to him in his individual capacity as a human being. It exists before employment, it exists afterwards, just as much as, and even more than, during employment. It does not arise out of the employment. There is, therefore, no warrant in law, under our system of government, to compel the employer to contribute to the worker's cost of living as such. There are other individual needs which might quite as well be supplied,—sick benefits for the employee and his family, old age and non-employment pensions. These are all needs worthy of consideration and invite the most careful and conscientious effort of benevolent people. We may admit that the obligation to furnish them is one which rests upon the community, or upon the state; but that fact is no basis, either in law or reason, for the community or the state to compel one class of individuals to furnish these benefits for another class.

Even Father Ryan, in his published writings, admits that the minimum wage problem can not be solved in this country by compulsory legislation without amendments to the Federal Constitution and to the state constitution. Yet in Boston, the other night, he intimated that the Federal Supreme Court would stultify itself if it did not hold the Oregon minimum wage statute consistent with the Federal Constitution as it is now written. Though he is an avowed antagonistic of socialism, he is so obsessed with this minimum wage fallacy that he would have the Supreme Court of the United States, regardless of the Constitution, change this system of government, from one which is based upon the sanctity of private property, to a form of government which is based upon the doctrine of the destruction of both the right of private property and the liberty of contract.

LEADS TO PATERNALISTIC INTERFERENCE.

If the legislature can fix a minimum wage, it can fix a maximum wage. If it can forbid an employee to contract for a wage commensurate with his ability, it can compel that employee to work for a wage which is less than is commensurate with his ability. If it can and does legislate minimum wages, it can and must legislate all wages, and for all occupations and for all classes of workers. If it can legislate wages, it can legislate prices,—the prices of goods produced by the farmer, the prices of goods produced by the manufacturer, the prices of goods sold by the merchant, retail or wholesale. This would introduce a paternalism in governmental affairs which would reach every detail of your private business and every transaction of trade and commerce. As American citizens you are not ready for that; but that is precisely what is meant by this sort of legislation.

NO RELATION BETWEEN WAGES AND MORALS.

The claim that the wages and morals of the worker have any real connection has been abandoned. The Wisconsin legislative committee, in its recent report, asserts that there is no connection between wages and morals. Judge Catlin of Minnesota, in declaring the minimum wage statute of that state unconstitutional, and recognizing its result as depriving of employment women who are otherwise able to get employment, said, that if there was any connection between wages and morals, the statute in question was a statute to promote immorality.

EXPERIENCES IN OTHER COUNTRIES MISLEADING.

My time permits only a word as to the conclusions suggested by Mr. Hapgood from the history of the minimum wage statutes in New Zealand, Victoria and England. Those statutes apply generally to both men and women. They are confined to comparatively few industries and apply to a comparatively small number of workers. This point of difference has been forcibly presented to you this evening by Mr. Straus. The British expert, Mr. Aves, who examined conditions in Australasia after ten years' experience there with the minimum wage, reported that the experiment in those countries could not justify its adoption in England, much less its adoption as a compulsory measure. He said that the benefits which had been reached were primarily those of increased co-operation on the part of the employer and through voluntary action. As administered there it was not drastic nor offensive to either employer or employee.

But these experiences under a form of government different from ours are not precedents for us. In England and in Australasia the legislative discretion is comparatively unlimited. It

may have the effect to confiscate property or to restrict the liberty of contract. Not so here. The limitations existing upon the powers of legislation in this country are those very restraints which were intended to protect, and have, in fact, protected, the rights of life, liberty and property in this country more fully than under any other government. Violence of these restraints upon legislation means violence to the very protective features of our form of government. It is a violence destructive of the security, which you and I and every citizen enjoy, that our fundamental rights shall not be divested or infringed upon by the passing whim of majorities.

The statutory minimum wage establishes a system of legislative interference with individual rights of property and of contract, repugnant to the rights and interests of both employer and employee. The employer who has studied the measure rightly regards it as an unwarranted menace to his business. Employees and their representatives, who appreciate its real significance, perceive the fact that a compulsory wage leads necessarily to compulsory employment; in the words of Samuel Gompers, it tends toward slavery. Intelligent students of industrial problems —President Wilson, for example—recognize its ultimate tendency of lowering high wages, instead of raising low wages; and they view it as promotive of injury, rather than of welfare, to the community.

I conclude, therefore, that, as a social welfare measure to be worked out by organization, co-operation, enlightenment and education, the object of the minimum wage is beneficent and worthy of our united and hearty support. When, however, it is enacted into a statute, either directly or indirectly compulsory, it becomes a measure which is repugnant to the interests of both employer and employee. It becomes a measure which is unworkable and fundamentally vicious. Its enactment is a long step toward the establishment of socialism.

JUDGE LAMM ON SUNDAY OBSERVANCE

"Tracing the public policy, evidenced by the Constitution and the laws we have been considering, to its ultimate sources, it becomes certain that our Constitution and statutes only tend to outline, preserve and aid such public policy; they in no sense create the public policy of recognizing God and religious worship, and of setting Sunday apart from secular and business days. They are but unmistakable tokens, symbols, signs, evidence of a public policy coming down to us by inheritance in a long line of descent from our fathers—a policy hallowed by time and a thousand sacred memories, tenderly cherished in the hearts of our people, so old, so omnipresent, so persistent as to admit of being personified. It now sits and always sat or should sit by the household fire of every Missourian's home 'sipping from his cup and dipping in his dish.' To ignore or impugn that policy by statute, to my mind, is to cut every patriotic Missourian to the bone. It seems as clear as the noonday sun to me that the statutes and constitutional provisions named are the creatures of, they sprang from, that public policy, as the children of its loins. Surely, withal, before they were, it was. Human nature itself, with an exceeding bitter cry, cries out for rest one day in seven. Observe, too, there is exceeding high and very old authority for rest from toil one day in seven, and not only so but for making that day of rest a sacred day, commemorative of and associated with a divine event. Witness: Remember the Sabbath day, to keep it holy. Six days shalt thou labor, and do all thy work. But the seventh day is the sabbath of the Lord thy God: in it thou shalt not do any work, thou, nor thy son, nor thy daughter, thy manservant, nor thy maidservant, nor thy cattle, nor thy stranger that is within thy gates; for in the six days the Lord made heaven and earth, the sea and all that in them is, and rested the seventh day: Wherefore the Lord blessed the sabbath day, and hallowed it. The ancient pious Hebrew was not alone in that view. There is good heathen authority for the existence of a worldwide public policy in former times connecting and associating a day of rest with a day devoted to sacred rites. Says Strabo 'The Greeks and barbarians have this in common, that they accompany their sacred rites by festal remission of labor.' Nor is it an overstatement to affirm that a state that borrows the motto on its great seal, as does Missouri, from the twelve tablets of heathen Rome, may, without serious question, be allowed to borrow the basis of its public policy against secular labor on Sunday, as does Missouri, from the Ten Commandments of the living God. The time was when the dry letter of the commandment quoted was interpreted and construed, *ex cathedra*, by one who spoke as having authority and thereby its soul and sense were made to shine through its mere letter. (Vide Matt. xii:1-13; Mark ii:23 *et seq.;* Luke xiii:14 *et seq.;* Id. xiv:5.) That interpretation when read into its letter shows that the interdiction of the commandment at bottom was not levelled at daily offices of necessity springing from hunger and thirst, nor at works of charity for the benefit of man. Therefore being hungry we could appease our hunger (e. g., pluck ears of corn to eat). So the afflicted may be healed on the Sabbath day; so, a sheep or ox fallen into a pit could be lifted out on that day. The controlling and root ideas, as announced, are: The Sabbath was made for man and not man for the Sabbath. [Mark ii:27.] It is lawful to do well on Sabbath days. [Matt. xii:12.] All of which, further interpreted, means that the commandment is not, in and of itself, the *end* to be attained, but is a *means* of attaining an end, namely, a help towards realizing the greater ideal in the mind of the law-giver, viz., Love to God as well as love to men. Nay, love to man, in a true and lofty sense, is love to God. So runs the immortal dream of Abou ben Adhem—and so said the Master: Therefore all things whatsoever ye would that men should do to you, do ye even so to them; for this is the law and the prophets. The exemption in our statutes defining sabbath breaking (Sec. 3801, supra), whereby one is allowed to perform labor and work in the 'household offices of daily necessity,' or other work of necessity or charity on Sunday, but embodies these sacred precepts, and gives effect to the interpretation by the Master of the commandment He was charged with violating. It but transferred His interpretation over into our written law."—See *State* v. *Chicago, etc., R. Co.*, 239 Mo. 322.

A BILL TO REGULATE EXPERT TESTIMONY

The American Institute of Criminal Law and Criminology at its meeting in Washington, D. C., on October 22, 1914, unanimously approved the following bill, which was presented by the committee on insanity and criminal responsibility.*

* The membership of the committee is as follows:
Edwin R. Keedy (professor of law in Northwestern University), *Chairman.*
Adolf Meyer (professor of psychiatry in Johns Hopkins University), Baltimore.
Harold N. Moyer (physician), Chicago.
W. A. White (superintendent Government Hospital for the Insane), Washington.
William E. Mikell (dean of the Law School of the University of Pennsylvania), Philadelphia.
Albert C. Barnes (judge of the Superior Court), Chicago.
Morton Prince (physician), Boston.

Section 1.—*Summoning of Witnesses by Court.* Where the existence of mental disease or derangement on the part of any person becomes an issue in the trial of a case, the judge of the trial court may summon one or more disinterested qualified experts, not exceeding three, to testify at the trial. In case the judge shall issue the summons before the trial is begun, he shall notify counsel for both parties of the witnesses so summoned. Upon the trial of the case, the witnesses summoned by the court may be cross-examined by counsel for both parties in the case. Such summoning of witnesses by the court shall not preclude either party from using other expert witnesses at the trial.

Section 2.—*Examination of Accused by State's Witness.* In criminal cases, no testimony regarding the mental condition of the accused shall be received from witnesses summoned by the accused until the expert witnesses summoned by the prosecution have been given an opportunity to examine the accused.

Section 3.—*Commitment to Hospital for Observation.* Whenever in the trial of a criminal case the existence of mental disease on the part of the accused, either at the time of the trial or at the time of the commission of the alleged wrongful act, becomes an issue in the case, the judge of the court before which the accused is to be tried or is being tried shall commit the accused to the State Hospital for the Insane, to be detained there for purposes of observation until further order of court. The court shall direct the superintendent of the hospital to permit all the expert witnesses summoned in the case to have free access to the accused for purposes of observation. The court may also direct the chief physician of the hospital to prepare a report regarding the mental condition of the accused. This report may be introduced in evidence at the trial under the oath of said chief physician, who may be cross-examined regarding the report by counsel for both sides.

Section 4.—*Written Report by Witness.* Each expert witness may prepare a written report upon the mental condition of the person in question, and such report may be read by the witness at the trial. If the witness presenting the report was called by one of the opposing parties, he may be cross-examined regarding his report by counsel for the other party. If the witness was summoned by the court, he may be cross-examined regarding his report by counsel for both parties.

Section 5.—*Consultation of Witnesses.* Where expert witnesses have examined the person whose mental condition is an element in the case, they may consult before testifying, with or without the direction of the court, and may prepare a joint report to be introduced at the trial.

Section 1 applies to civil and criminal cases.

The purpose of this section is to secure the testimony of disinterested witnesses which may go to the jury along with the testimony of the witnesses for the prosecution and defense. Under the present system, a criminal trial where expert testimony is employed generally resolves itself into a contest between the opposing witnesses, whose contradictory opinions often confuse, rather than enlighten, the jury. Such divergence of opinions must exist in the very nature of the case, for each party calls only those witnesses whose opinions are in accord with the theory of that side. The situation in this respect has been well described by Sir George Jessel, Master of the Rolls, in *Thorn* v. *Worthing Skating Rink Co.*, L. R. 6. Ch. Div. note 415, 416: "Now in the present instance I have, as usual, the evidence of experts on the one side and on the other, and as usual, the experts do not agree in their opinion. There is no reason why they should. As I have often explained, since I have had the honor of a seat on this bench, the opinion of an expert may be honestly obtained, and it may be quite different from the opinion of another expert, also honestly obtained. But the mode in which expert evidence is obtained is such as not to give the fair result of scientific opinion to the court. A man may go, and does sometimes, to half a dozen experts. He takes their honest opinion; he finds three in his favor and three against him; he says to the three in his favor, 'will you be kind enough to give evidence?' He pays the ones against him their fees and leaves them alone; the other side does the same. It may not be three out of six, it may be three out of fifty. . . . I am sorry to say the result is that the court does not get the assistance from the experts, which, if they were unbiased and fairly chosen, it would have a right to expect." A similar statement was made by one of the medical members of this committee in the *New York Medical Journal*, in July, 1908. It is suggested that the proposal in section 1 will tend to counteract the evils of the system described above.

Section 2 applies to criminal cases only. This section will enable witnesses for the prosecution, who at present, in most cases, are limited to opinion evidence, to testify as to the actual condition of the defendant. In this way the necessity for the much-abused and much-criticised hypothetical question will be considerably lessened. It is submitted that section 2 does not violate the constitutional provision against self-incrimination. (See Wigmore on *Evidence*, § 2265.) In *People* v. *Kemmler*, 119 N. Y. 580, 584, the Court of Appeals of New York said: "It is urged that the court erred in permitting the physicians, called as witnesses for the people, to testify as to the mental condition of the prisoner. The argument is that either the relation of patient and physician existed, or else the prisoner was compelled to furnish evidence against himself. These physicians were sent to the jail by the district attorney to make an examination of the prisoner's mental and physical condition. On the stand they were not inquired of as to the conversation had with him, or as to the transactions in the jail. Their testimony was simply their opinion of his mental condition, as they saw him in his cell and in the court room, but they gave no evidence of his statements of his physical condition. Such evidence is quite unobjectionable."

Section 3, which is applicable to criminal cases only, does not present a new idea. Maine, New Hampshire, Massachusetts and Vermont have statutes providing for the commitment of a defendant, who is relying upon mental disease as a defense, to a hospital for purposes of observation. According to the language of the Maine and Vermont statutes, the report of the superintendent is final on the question of the defendant's condition, for they provide that the accussed shall be detained and observed " that the truth or falsity of the plea (of insanity) may be ascertained." The Virginia legislature at its last session (1914), enacted a statute providing that the trial judge may commit an accused person to a hospital for purposes of observation. The statute also empowers the judge to appoint qualified experts to examine the accused before this commitment and to report the results of their examination to the judge. The establishment in large cities of psychopathic institutes, such as the one recently started in Chicago in connection with the Municipal Court, would facilitate greatly the examination and study of persons mentally diseased or deficient.

Section 4, which covers both civil and criminal cases, will enable the expert witness to present a much more accurate and connected description of the defendant's mental condition, particularly with reference to the symptoms of his disease. Under the present system, by which the opinion of the witness must be drawn out by a series of questions put up by counsel, witnesses often feel that they are unable to present an adequate diagnosis of

defendant's condition, and to express a full and convincing opinion regarding his powers of judgment and decision. Such a plan as is proposed in section 4 has worked successfully in Scotland. The medical witness in a Scottish criminal trial, after an examination of the defendant, prepares a written report which he files with the clerk of the court. At the trial, after the witness has been sworn and has qualified as an expert, he reads his report to the jury. The counsel for the party which has called the witness may ask any explanatory questions, and the witness is then cross-examined by the counsel for the other side.

Section 5, which is applicable to both kinds of cases, is simply for the purpose of saving time and eliminating any possibility for misunderstanding, where the experts are able to agree in their opinions.

DIFFERENCE BETWEEN INVESTMENT AND SECURITY

When persons use the expression "investment" or "security" they should bear in mind that they are words of ambiguous meaning. A mortgage of land is both an investment and a security; land itself prima facie is an investment, but not a security. Again, a share in a company prima facie is not a "security," though it may bear that meaning. In *Ogle* v. *Knipe*, 8 Eq. 434, under a bequest of "all my money and securities for money of every description," it was held by James, V.C., that bank stock and canal shares did not pass. But in Re Rayner; *Rayner* v. *Rayner*, 89 L. T. Rep. 681; (1904) 1 Ch. 176, where a testator by his will declared that "all moneys liable to be invested under this my will may be invested in such securities as my trustees in their absolute discretion shall think fit, and I authorize my trustees to continue or leave any moneys invested at my death in or upon the same securities," it was held by the Court of Appeal that the context was sufficient to show that "securities" meant "investments," and included stocks and shares in railway and other companies. In that case doubts were expressed whether at the then present day the word "securities" in a legal document, in the absence of context, did not include stocks and shares as well as mortgages on land and other property. As appears from the argument in that case, the word "investment" is defined in Murray's Oxford English Dictionary (5*b*) as "some species of property from which an income or profit is expected to be derived in the ordinary course of trade or business" as distinguished from speculation; and (5*c*) as "a form of property viewed as a vehicle in which money may be invested." No doubt the word "investment" would include all securities, but the word "securities" would not necessarily include all investments. In the case of in re Price; *Price* v. *Newton*, 93 L. T. Rep. 44; (1905) 2 Ch. 55, under a bequest of "pecuniary investments," it was held that money on deposit with a testator's bankers did not pass. Mr. Justice Farwell in the course of his judgment said that the distinction between depositing moneys with a bank and investing moneys on security was really plain. The money which is deposited with your banker awaits investment. The fact that it earns interest does not make it an investment, because banks sometimes allow interest on current accounts if they exceed a certain amount. In *Legge* v. *Mordan*, 92 L. T. Rep. 488; (1905) 1 Ch. 515, where a testator bequeathed the residue of his estate to trustees on trust to invest the same on government securities "or upon freehold ground rents, or upon leasehold ground rents not having less than sixty years unexpired and held direct from the freeholder," and the trustees were to receive "the dividends, rents, and annual income thereof," and divide the same as therein mentioned, it was held by the Court of Appeal that the above clause authorized the trustees to invest the residue in the purchase of freehold ground rents or of leasehold ground rents of the character specified. As pointed out by Lord Justice Stirling, it is not as if the words were "on the security of freehold ground rents." A question of the kind has recently come before Mr. Justice Eve in Re Sudlow; *Smith* v. *Sudlow*, 138 L. T. Jour. 58. There a testator gave his residuary estate to trustees for conversion, and, after payment of debts and testamentary expenses, at the discretion of his trustees to invest, with power to vary such investments, and to pay the income to his wife for life, and after her death to divide the residuary estate among certain other persons. And the testator declared "that any moneys liable to be invested under this my will may remain invested as at my death," or might be invested as therein mentioned. Part of the testator's estate consisted of £2900 on deposit with a firm of wholesale druggists in whose employment the testator was. It carried interest at 5 per cent, and could be withdrawn only on notice. The question was whether the trustees were authorized to retain such deposit with the wholesale druggists. It was held that the testator had used the word "investment" in its primary and true meaning, and that he could not treat this money on deposit as money invested at the death of the testator, and accordingly that the trustees could not retain it on such deposit.—*Law Times* (London).

Cases of Interest.

Temporary Use of Gasoline Engine in Insured Barn as Forfeiting Insurance Policy.—The Maine Supreme Court holds in Bouchard *v.* Dirigo Mut. Fire Ins. Co., (Me.) 92 Atl. 899, that the temporary use of a gasoline engine in an insured barn, to drive threshing machinery, does not forfeit the policy under a clause providing that it shall be void if combustible fluids shall be kept or used on the premises, since the word "kept" implies continuance and duration, not mere temporary possession, and "used" imports employment customary or habitual, not merely temporarily or casually. The opinion of Judge Cornish who speaks for the court shows that the decision is supported by authorities in other states. Thus he says: "A careful definition of 'kept or used' is found in the recent case of Springfield F. & M. Ins. Co. *v.* Wade, 95 Tex. 598, 68 S. W. 977, 58 L. R. A. 714, 93 Am. St. Rep. 870, where the words of prohibition were 'kept, used, or allowed,' and they were held not to cover a case where a gallon of gasoline was brought onto the premises for temporary use, although such act in fact caused the destruction of the property. 'It is not enough,' say the court, 'that hazardous articles are upon the premises. They must be there for the purpose of being stored or kept. . . . As the word "kept" means that the prohibited article must not only be upon the premises, but must be there for keeping or storing, and not merely upon a temporary occasion for a different purpose, it follows that there must be some degree of permanency in its continuance there. The word implies all this. The word "used" is employed in immediate connection with the word "kept," in order, we think, to extend the provision so as to exclude the idea that the article must be stored or deposited on the premises. But the purpose in the use of each word is to provide against the same danger, viz., that which would arise from the habitual, constant, or continued exposure of the property through the presence or use of the article. One word forbids the permanent or habitual keeping of the dangerous thing, and the other a like use of it, without the actual depositing or storing of it.'"

"Deadly Weapon" as Including Unloaded Revolver.—In State *v.* Quail, (Del.) 92 Atl. 859, the facts showed that at the

trial of the defendant on the charge of unlawfully carrying concealed a deadly weapon namely a revolver, the state proved the carrying of an unloaded revolver whereupon counsel for accused asked the court to instruct the jury to return a verdict of not guilty because of a variance between the proof and the allegation in the indictment, in that the indictment charged the accused with carrying concealed a deadly weapon, namely, a revolver, while the proof showed that he carried concealed an unloaded revolver, which was not, in that condition, a deadly weapon. The instruction was refused. The court after quoting the statute on the subject commented on it as follows: "The manifest policy and intent of this law is to prevent carrying concealed a revolver or other weapon which may be used for a deadly purpose. We think it quite immaterial whether the revolver be loaded or not, because such an instrument is commonly regarded as a deadly weapon without regard to its condition. If the absence of bullets would make the weapon a harmless one, then any condition that would prevent its being used at the time injuriously, would have a like effect. For example, the mainspring might be out of order, and according to the defendant's contention this would make the instrument not deadly within the meaning of the statute. If we should sustain the contention of the defendant we fear that many persons would carry a pistol unloaded but at the same time have bullets secreted upon their person to be used if desired. As we have said the law was intended to discourage and prevent, so far as possible, the carrying of weapons that are commonly and rightfully regarded as deadly. We think that a revolver, even though unloaded or in such a defective condition that it could not be fired, cannot be lawfully carried in this state concealed upon the person. The motion of the defendant is refused."

Injury by Third Person to Land in Possession of Life Tenant as Waste.—In the exceedingly interesting case of Rogers *v.* Atlantic, Gulf & Pacific Company, (N. Y.) 107 N. E. 661, the New York Court of Appeals considered the subject of waste, and its application to the facts therein set forth, which showed a permanent injury to land in the possession of a life tenant committed by the negligent act of a stranger. The conclusion was reached after a historical consideration of the subject that the injury was not waste for which the life tenant was liable to the remainderman, and that while the life tenant had a cause of action against the stranger, and could recover damages for the injury to the remainder as well as for that to the life estate, his right was based on the theory not that waste had been committed, but of trusteeship. The court said: "There is no binding decision of this court upon the point whether an injury by the negligent acts of third parties is waste, for which the tenant is liable to the reversioner of remainderman, and the consequences of holding such a doctrine would be too serious to justify us in resting the right of the plaintiff to recover upon it. The doctrine has only been invoked in this state to permit the tenant to recover from the wrongdoer. . . . The tenant has not only possession, but an interest in the premises, in this case a life estate, and there is equal, if not greater, reason for allowing a full recovery by him as for allowing a depositary, who has no interest, but only possession, to recover for the conversion of, or an injury to, the deposit. A bailee, though not liable to the bailor, may recover for the wrongful act of a third party resulting in the loss of, or injury to, the subject of the bailment. . . . If the bailee recovers, he holds the recovery as trustee for the bailor. A recovery by either bailor or bailee will bar an action by the other. . . . The principle is the same as that applied in Madison Square Bank *v.* Pierce, 137 N. Y. 444, 33 N. E. 557, 20 L. R. A. 335, 33 Am. St. Rep. 751, in which it was held that the payee might recover from the maker the full amount of a promissory note, notwithstanding an indorser had paid part; the plaintiff in such case becoming trustee for the indorser of so much of the recovery as represents the amount paid by the latter."

Use of Gasoline Sold as Kerosene to start a Fire as Negligence.—The recent case of Standard Oil Co. *v.* Reagan (Ga.) 84 S. E. 69, supports the proposition that where gasoline sold as kerosene is used in starting a fire, by one who believes it to be kerosene, and it explodes when so used, its use for that purpose is not such negligence per se as will bar a recovery from the seller for resulting injuries to the persons so using it; and that whether kerosene oil can or cannot be used with safety in a particular manner in starting a fire is a question for the jury. The court used language as follows: "The precise issue . . . raised by the demurrer was that as a matter of law it is contributory negligence, amounting to a failure to exercise ordinary care, for one to attempt to build a fire with kerosene oil. In order to sustain this view, we would be compelled to hold that according to common knowledge, practically so universal as to amount to judicial notice, kerosene oil is a substance so highly explosive and so dangerous, when brought into close proximity to fire, that any person using and employing it to kindle a fire would be properly chargeable with the natural injurious results liable almost certainly to flow from such a reckless and negligent employment of so dangerous an agency. To the contrary, kerosene oil of the quality permitted under our statutes is in such general use for the purpose of kindling fires that the court might almost be prepared to hold as a matter of law that its use for such a purpose and under certain restrictions is not dangerous, but ordinarily is entirely safe. However, in the determination of this question we are not required to go so far, or in fact to go further than to hold that the employment of kerosene oil in starting a fire is not such negligence per se as would bar a person injured by an explosion thereupon resulting from a recovery, upon proof that the grade of oil was too low or that the substance sold as, used for, and supposed by such person to be kerosene oil, was not in fact kerosene oil at all, but a more dangerous substance altogether."

Expenditure for Monument as Funeral Expense.—In the case of In re Lester's Estate, (Ia.) 150 N. W. 1033, it was held that an expenditure for a monument was not strictly a funeral expense entitling it to precedence over a claim for nursing the decedent during his last sickness. In an opinion collecting the authorities on the subject Judge Preston said: "Our statute provides that, as soon as the executor or administrator is possessed of sufficient means over and above the expenses of administration, he shall pay off the charges of the last sickness and funeral of deceased, and, next, any allowance made by the court for the maintenance for the widow and minor children. Code § 3347. Under this statute it has been held by this court, in Crapo, Ex'r *v.* Armstrong, 61 Iowa 697, 17 N. W. 41: 'That a tombstone is a proper expenditure to be made by an executor as pertaining to the funeral expenses,' and that 'such expenditure may be made without any direction by will, and notwithstanding the estate may be insolvent. . . . We think that, in the absence of any statutory provision upon the subject, the propriety of obtaining tombstones or monuments, and the amount to be expended therefor, may very properly be left to the circuit court having the supervision of the settlement of the estate.' . . . There can be no question as to the propriety of the allowance of such a claim. Some of the cases outside of Iowa, while holding that the cost of a monument is proper funeral expense, do not decide the point that they are such so as to be a preferred claim ahead of other creditors, and none of the Ohio cases so

hold. The Crapo case, supra, seems to hold, inferentially at least, that such a claim would not come under the statute quoted. We are of opinion that, while such an expenditure pertains to the funeral expenses, it is not such strictly, and so as to come within the provisions of the statute referred to. But we think it may be made so by the court within its sound discretion. $156 of Mrs. Mead's claim, being for nursing, would be a preferred claim as expense of the last sickness, under the statute. The court did not err in requiring the administrator to pay that much of her claim before using any of the funds in his hands to erect a monument."

Validity of Statute Prohibiting Employers from Requiring Employees to Agree Not to Belong to Labor Unions.—A Kansas statute was declared unconstitutional in Coppage *v.* Kansas, 35 Sup. Ct. Rep. 240, which provided as follows: "It shall be unlawful for any individual or member of any firm, or an agent, officer, or employee of any company or corporation, to coerce, require, demand, or influence any person or persons to enter into any agreement, either written or verbal, not to join or become or remain a member of any labor organization or association, as a condition of such person or persons securing employment, or continuing in the employment of such individual, firm, or corporation. Any individual or member of any firm, or any agent, officer, or employee of any company or corporation violating the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not less than fifty dollars, or imprisoned in the county jail not less than thirty days." The reason for declaring the statute invalid was that the rights of personal liberty and property were restrained without due process of law. The case was decided on the authority of Adair *v.* U. S., 208 U. S. 161, and the decision reversed a judgment of the Kansas Supreme Court upholding the validity of the statute. Mr. Justice Holmes wrote a strong dissenting opinion wherein he said: "I think the judgment should be affirmed. In present conditions a workman not unnaturally may believe that only by belonging to a union can he secure a contract that shall be fair to him. . . . If that belief, whether right or wrong, may be held by a reasonable man, it seems to me that it may be enforced by law in order to establish the equality of position between the parties in which liberty of contract begins. Whether in the long run it is wise for the workingmen to enact legislation of this sort is not my concern, but I am strongly of opinion that there is nothing in the constitution of the United States to prevent it, and that Adair *v.* United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 Ann. Cas. 764, and Lochner *v.* New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 Ann. Cas. 1133, should be overruled. I have stated my grounds in those cases and think it unnecessary to add others that I think exist."

Validity of Statute Fixing Time for Payment of Wages by Employer and Making Failure to Obey Statute a Misdemeanor.—The California District Court of Appeals in the case of Ex p. Crane, 145 Pac. 733, had before it the question of the validity of a statute fixing the time for the payment of wages by an employer and making his failure to obey the statute a misdemeanor punishable by a fine. The case was before the court on an application for a writ of habeas corpus, the petitioner having been arrested, charged with the commission of a misdemeanor in that he violated the statute. It was the contention of the petitioner that the act above quoted was unconstitutional because it in effect permitted an imprisonment on mesne process for debt. This contention was declared sound and the petitioner was discharged. The court said: "Section 15 of article 1 of our state constitution provides in part that: 'No person shall be imprisoned for debt in any civil action, on mesne or final process, unless in cases of fraud.' . . . It will be noted that the statute in controversy does not involve the element of fraud as an essential of the offense defined therein. True, the statute does not provide imprisonment as the penalty for the failure of an employer to pay a debt due to his employee. The statute, however, is silent as to the process by which the magistrate before whom complaint is made of an alleged violation of the statute may obtain jurisdiction of the person of the offender. In the case at bar jurisdiction was attempted to be obtained by a resort to the provisions of sections 812 and 813 of the Penal Code, which authorized the issuance of a warrant of arrest when the magistrate is satisfied from the deposition presented to him that the offense complained of has been committed, and that there is reasonable ground to believe that the party charged has committed it. By this process and under our system of procedure a defendant unable to give bail is jailed and restrained of his liberty until such time as a hearing can be conveniently had of the charge made against him. It will thus be seen that the statute in controversy was attempted to be enforced by the issuance and execution of a mesne process which, in the case at bar, resulted in the temporary imprisonment of the petitioner, and the cause of his imprisonment is to be found primarily in the fact that he is unwilling or, perchance, unable to discharge a debt which was not conceived or contracted in fraud of his creditor. To this extent the arrest of the petitioner necessarily is in conflict with the fundamental law of the state, and therefore illegal."

Right of State to Prescribe Reasonable Rates for Carriage by Water.—In Wilmington Transportation Company *v.* Railroad Commission of California, 35 Sup. Ct. Rep. 276, the facts showed that the Wilmington Transportation Company, a corporation organized under the laws of the state of California, was engaged as a common carrier of passengers and goods by sea, between San Pedro, on the mainland, and Avalon, on Santa Catalina island, both places being within the county of Los Angeles, in that state. Merchants at Avalon, insisting that the rates charged for this transportation were unreasonable, presented their complaint to the railroad commission of the state of California, and asked that reasonable rates be fixed under the Public Utilities Act of 1911, Stat. (Cal.) 1911, Ex. Sess. p. 18. The Transportation Company challenged the authority of the commission upon the ground that the business was subject exclusively to the regulating power of Congress. The commission overruled the contention, and its authority to prescribe reasonable rates between these ports of the state was sustained on writ of review by the state court. 166 Cal. 741, 137 Pac. 1153. The case was then brought to the United States Supreme Court on error where the judgment was affirmed. Mr. Justice Hughes for the court said: "The vessels of the plaintiff in error, in their direct passage between the ports named, must traverse the high seas for upwards of twenty miles. Adopting the statement of the commission, the supreme court of the state puts the case thus: 'They do not touch at any other port, either of the United States or of any foreign country. They do not transfer their passengers or freight to any other vessel, or receive the same from any other vessel in their course. They do not on the voyage take on or put off any article of commerce. While a portion of the voyage is on the high seas, the navigation thereof is merely incidental to the real purpose of the voyage, which is to ply between two ports, both of which are located in the same county in this state.' Relying upon Lord v. Goodall, N. & P. S. S. Co., 102 U. S. 541, 26 L. ed. 224, the plaintiff in error contends that transportation over the high seas is 'commerce with foreign nations' in the constitutional sense.

. . . But if it be assumed for the present purpose that the power of Congress extends to the subject of this controversy, the fact remains that the power has not been exercised. The provisions of the Federal statutes relating to vessels do not go so far, and the Interstate Commerce Commission has not been authorized to prescribe rates for water transportation unconnected with transportation by railroad. 36 Stat. at L. 539, 545, ch. 309, Comp. St. 1913, § 8563. In this aspect, the question is whether the mere existence of the Federal power, that is, while it is dormant, precludes the exercise of state authority to prevent exorbitant charges with respect to this traffic which has its origin and destination within the limits of the state." The question was answered in the negative on a consideration of the authorities.

Woman Allowing Herself to Be Unlawfully Transported in Interstate Commerce for Purpose of Prostitution Whether Guilty of Conspiracy.—In the United States *v.* Holte, 35 Sup. Ct. Rep. 271, the United States Supreme Court lays down the unique proposition of law that a woman can be guilty of conspiring to have herself unlawfully transported in interstate commerce for purposes of prostitution. The facts are stated in the opinion of the court as follows: "This is an indictment for a conspiracy between the present defendant and one Laudenschleger that Laudenschleger should cause the defendant to be transported from Illinois to Wisconsin for the purpose of prostitution contrary to the act of June 24, 1910, ch. 395. . . . As the defendant is a woman, the district court sustained a demurrer on the ground that although the offense could not be committed without her, she was no party to it, but only the victim. The single question is whether that ruling is right. We do not have to consider what would be necessary to constitute the substantive crime under the act of 1910, or what evidence would be required to convict a woman under an indictment like this; but only to decide whether it is impossible for the transported woman to be guilty of a crime in conspiring as alleged. The words of the Penal Code of March 4, 1909, ch. 321, § 37 . . . are 'conspire . . . to commit any offense against the United States;' and the argument is that they mean an offense that all the conspirators could commit; and that the woman could not commit the offense alleged to be the object of the conspiracy. For although the statute of 1910 embraces matters to which she could be a party, if the words are taken literally, for instance, aiding in procuring any form of transportation for the purpose, the conspiracy alleged, as we have said, is a conspiracy that Laudenschleger should procure transportation and should cause the woman to be transported. Of course, the words of the Penal Code could be narrowed as we have suggested, but in that case they would not be as broad as the mischief; and we think it plain that they mean to adopt the common law as to conspiracy, and that 'commit' means no more than bring about. For, as was observed in Drew *v.* Thaw (Dec. 21, 1914) [235 U. S. 432, 35 Sup. Ct. Rep. 137], a conspiracy to accomplish what an individual is free to do may be a crime . . . and even more plainly a person may conspire for the commission of a crime by a third person. We will assume that there may be a degree of co-operation that would not amount to a crime, as where it was held that a purchase of spirituous liquor from an unlicensed vendor was not a crime in the purchaser, although it was in the seller. . . . But a conspiracy with an officer or employee of the government or any other for an offense that only he could commit has been held for many years to fall within the conspiracy section, now § 37, of the Penal Code. . . . So a woman may conspire to procure an abortion upon herself when, under the law, she could not commit the substantive crime; and therefore, it has been held could not be an accomplice. . . . So we think that it would be going too far to say that the defendant could not be guilty in this case. Suppose, for instance, that a professional prostitute, as well able to look out for herself as was the man, should suggest and carry out a journey within the act of 1910 in the hope of blackmailing the man, and should buy the railroad tickets, or should pay the fare from Jersey City to New York—she would be within the letter of the act of 1910, and we see no reason why the act should not be held to apply. We see equally little reason for not treating the preliminary agreement as a conspiracy that the law can reach, if we abandon the illusion that the woman always is the victim."

Admissibility of Dying Declarations Where Preceded by Inquiry Based on Questions Contained in Printed Form.—In People *v.* Kane, (N. Y.) 107 N. E. 655, it was held that certain dying declarations admitted in evidence in the court below were properly admitted, but Chief Judge Willard Bartlett of the Court of Appeals in his opinion affirming the judgment of the trial court took occasion to comment on the practice which prevailed among coroners in New York to prepare printed forms containing questions to be asked persons from whom dying declarations were sought, and to caution those who used the forms not to ask the questions in a perfunctory manner. The language of the Chief Judge on this subject was as follows: "The only other point which requires notice refers to the admission of the dying declaration of Anna Klein, taken by the coroner. It appears from the evidence in the present case, and from the records in several other capital cases which have recently come before us, that a new custom has come into vogue among coroners in reference to dying declarations of victims of crime. A printed form is prepared by these officers for use in obtaining such declarations upon which the first question is: 'Do you now believe that you are about to die?' Then follow these questions: 'Q. Have you any hope of recovery from the effects of the injury that you have received? Q. Are you willing to make a true statement as to how and in what manner you came by the injury from which you are now suffering?' This method of interrogation by reference to printed questions is not necessarily objectionable in itself provided the questions are put, not in a perfunctory manner, but in such a way as to impress the injured person with their true character and meaning. On the other hand, if the initial inquiry in reference to the patient's apprehension of death is slurred over and we have nothing but a careless assent, perhaps expressed only by a nod to the question, whether the patient now believes that he is about to die, there is an utter absence of the clear and unequivocal expression of the certain conviction of impending death which the law has always demanded as an essential prerequisite to the admission of unsworn declarations of fact which may be used to deprive a human being of his life. We do not say that the necessary emphasis was lacking in the present case. On the contrary, if those who testified to the dying declaration here may be believed the victim declared in express words that she felt she would die and that she had no hope of recovery from the effects of the injury which she had received. These statements afforded ample ground for the reception of the statement which followed as to the circumstances of the fatal shooting. We deem it proper, however, to call attention to the untoward effects which may follow the use of printed forms, such as we have mentioned, unless extreme care is taken by the interlocutor to impress upon the wounded person the character of the preliminary inquiries relating to the anticipation of death. As we have already intimated, if these are treated as merely formal and unimportant, without taking any pains to make sure that the injured person understands them, the safeguard

which the law exacts in such cases may be entirely wanting—in the absence of certainty that the patient looks upon death as an inevitable consequence of the injury and will therefore be as likely to tell the truth under the influence of that apprehension as he would be under the sanction of an oath calling God to witness that what he is about to say is true. In the case at bar the coroner who took the dying declaration, after testifying that he had a printed form and he took the questions from that form, said he had used as many as twenty of them for the purpose of taking dying declarations within the six months preceding the trial. His habit was to take the printed slip containing five printed questions out of his pocket and put the questions to the patient just as they were on the slip. It can readily be understood that a practice of this kind will be likely to degenerate into a mere perfunctory form; and we deem it proper to refer to the matter in this way as a warning to those whose duties may call upon them to attend dying victims of crime. The precaution which the law prescribes to insure the existence of a state of mind on the part of the declarant which will be equivalent to the state of mind produced by the administration of a solemn oath cannot be too carefully observed. If they are disregarded in the slightest degree, the evidentiary value of the declaration is wholly destroyed."

New Books.

Public Utilities Reports, Annotated. Containing Decisions of the Public Service Commissions and of State and Federal Courts. Number 1. Pages 1 to 128, advance sheets, Lawyers Co-operative Publishing Company, Rochester, N. Y. 1915.

With the multiplication of public service commissions throughout the country some serial publication has been needed to collect the widely scattered decisions and make them readily accessible to the bench and bar. This need has apparently been realized by the enterprising Rochester publishers, and it has been met by the pamphlet at hand. Indeed the profession is to be congratulated on the fact that a work of such importance has been undertaken by publishers and editors so competent to carry it on. In the words of the publishers, "this is the beginning of the first volume of Public Utilities Reports, Annotated. These reports will include the important decisions of the Public Service Commissions under slightly differing names that are now established in nearly all the states. This pamphlet is merely the temporary Advance Part of Volume One. The permanent bound volume will consist of about 1200 pages, with an index constituting a complete syllabus digest of the volume, and a complete table of all the cases in the volume alphabetically arranged, and, in addition to that, separate lists of the cases from each of the Commissions. As this series begins with cases decided in 1915, and most of the Commissions had no final decisions in January cases ready at the beginning of the month, it took a little time to get well started, but the pamphlet advance parts which will follow hereafter at intervals of about two weeks will be very much larger than this first one. Annotations to the cases will give careful reference to prior pertinent decisions of either commissions or courts, and the importance of this feature will increase as the series goes on." The one hundred and twenty-eight page pamphlet before us contains decisions emanating from something like a dozen different state commissions. The decisions are preceded by carefully prepared syllabi and introductory statements, and are followed by helpful annotations. A table of cases and an index to the points decided furnish ready aids to persons using the pamphlet. The mechanical features are all that one could ask. We doubt not that the opportunity to get in a single series of reports the decisions pertaining to the law of public utilities, a most important body of law, will be eagerly grasped by the profession, and that "Public Utilities Reports" will be found to be indispensable to all whose business has to do do with quasi-public corporations.

The Law of Wills and the Administration of Estates. Enlarged Edition. By William Patterson Borland of Kansas City Bar, Representative in Congress, Lecturer on Wills in Faculty of Kansas City School of Law, Dean of Kansas City School of Law 1895 to 1909. Kansas City, Mo., Vernon Law Book Company. 1915.

The first edition of Borland on Wills and Administration was published in 1907, and consisted of lectures on the subject delivered yearly to the senior class of the Kansas City School of Law. The present edition is a revision and an enlargement of the former edition. Mr. Borland's work was then mainly confined in its citations to the law of Missouri and Kansas, but it now includes all of the leading cases in this country and England. The author states that it will be found of especial value to the Western lawyer and student, as it cites every case and discusses every rule embodied in the common or statute law of the following group of states: Missouri, Arkansas, Nebraska, Oklahoma, Texas, Wyoming, Colorado, New Mexico, Arizona, Utah, Nevada, and California. It cites also every case bearing upon the subject decided in the Federal Courts, including the Supreme Court of the United States, the Circuit Courts of Appeals, the Circuit and District Courts, the Territorial courts, and the courts of the District of Columbia. The volume is intended as a text book both for the lawyer and the student, and while the discussion is necessarily somewhat brief, care has been exercised in its preparation to make every page count. The principles are stated in concise and clear language and are well supported by authority. It can be recommended as a one volume work of merit.

News of the Profession.

The Alabama Bar Association will hold its annual meeting at Montgomery, Ala., on July 9 and 10.

The Commercial Law League of America will hold its 1915 session at Pasadena, Cal., on August 2, 3, 4 and 5.

The District Attorneys' Association of California met in annual session on February 23 and 24, at Oakland, Cal.

Georgia Bar Association.—The annual meeting of the Georgia Bar Association will be held on St. Simon's Island, Ga., on June 3, 4 and 5.

Resigns as County Judge.—County Judge Clyde E. Stone, of Peoria county, Ill., has resigned from the bench to become a candidate for Circuit Judge.

New Federal Attorney for Alaska.—Col. James A. Smiser of Columbia, Tenn., has been appointed by President Wilson as United States district attorney for Alaska.

The Kentucky Bar Association will meet at Frankfort, Ky., on June 8 and 9. It is expected that United States Senator John K. Shields, of Tennessee, will be the chief speaker.

New Judge in Wyoming.—E. C. Raymond, of Sundance, has been appointed judge of the Seventh judicial district of Wyoming, a new district recently created by the state legislature.

Death of Kentucky Judge.—Former Judge James D. White died at Bardwell, Ky., on February 5. Judge White was a member of the Kentucky Court of Appeals from 1899 to 1905.

Tennessee Chancellor Appointed.—W. B. Garvin of Chattanooga has been appointed by Governor Rye of Tennessee as Chancellor of the Chattanooga division, succeeding Chancellor T. M. McConnell.

Resumes Private Practice.—Mr. William J. Youngs, for the past twelve years United States Attorney at Brooklyn, N. Y., has opened an office for the general practice of law at 215 Montague street, that city.

Made District Attorney at China.—Chauncey P. Holcomb, deputy collector of internal revenue at Wilmington, Del., has been appointed by President Wilson as District Attorney of the United States court at Shanghai, China.

Named Circuit Judge in Arkansas.—Deane H. Coleman of Batesville has been appointed by Governor Hays of Arkansas to fill the vacancy on the bench of the Third judicial circuit caused by the resignation of Judge Robert E. Jeffrey.

Appointed to Bench in California.—W. T. O'Donnell, for a number of years City Attorney of Vallejo, has been appointed by Governor Johnson of California to succeed the late Judge A. T. Buckles on the Superior Bench of Solano county.

Appointments in Mississippi.—Chancellor John Morgan Stevens of Hattiesburg, Miss., has been appointed to the bench of the Mississippi Supreme Court, and will succeed Justice Reed on May 1. W. M. Denny, Jr., of Pascagoula, will succeed Judge Stevens.

Made Federal Judge.—President Wilson has appointed Martin J. Wade of Iowa City, Ia., to be federal judge for the southern district of Iowa, to succeed the late Judge Smith McPherson. Judge Wade was the Democratic national committeeman for Iowa.

Former Federal Judge Dead.—Henry Clay Caldwell, 83 years old, a Civil War veteran and former United States judge, died at Los Angeles, Cal., on February 16. Judge Caldwell served 27 years as United States district judge in Arkansas and 12 years as judge of the United States Circuit Court of Appeals.

Retires from Bench in Pennsylvania.—Judge Robert N. Willson, for thirty years a member of the Court of Common Pleas, No. 4, of Philadelphia, tendered his resignation to Governor Brumbaugh recently, to become effective March 31. Judge Willson is 76 years old and retires because of failing health.

Ohio Judge Gets Appointment.—On the refusal of James B. Ruhl of Cleveland to accept the appointment, Governor Willis of Ohio has named Judge Frank Taggart of Wooster as State Superintendent of Insurance. Judge Taggart was an unsuccessful candidate for chief justice of the Ohio Supreme Court last fall.

Minnesota Jurist Dies.—Philip E. Brown, associate justice of the Minnesota Supreme Court, died suddenly at St. Paul on February 6. Judge Brown was fifty-nine years old. Prior to his elevation to the Supreme bench in 1910, he had served eighteen years as judge of the Thirteenth Judicial District.

Texas Judicial Appointments.—Governor Ferguson of Texas has filled several newly-created places on the bench by the following appointments: Emmet W. Nicholson to be judge of the recently created District Court at Wichita Falls; A. S. Fisher of Georgetown to be judge of the criminal court for Williamson and Travis counties; Ballard Coldwell of El Paso to be judge of the sixty-fifth district court.

Appointed to Illinois Supreme Bench.—Albert Watson of Mt. Vernon has been appointed to the bench of the Illinois Supreme Court to succeed the late Judge Alonzo K. Vickers. Justice Watson is fifty-eight years of age and has been in the active practice of the law for thirty-five years. He will serve until next June, when a member of the court for the full term of six years will be elected.

Federal Judge Dies in California.—Judge William H. Seaman of the United States Circuit of Appeals, Seventh Circuit, died suddenly at Coronado Beach, Cal., on March 8, aged 72. Judge Seaman's home was in Sheboygan, Wis. He was appointed a federal judge in Wisconsin by President Cleveland and was promoted by President Roosevelt to the Circuit Court of Appeals. He was president of the Wisconsin State Bar Association from 1893 to 1905.

Changes Among Federal Assistant Attorneys.—David D. Stansbury, assistant United States District Attorney at Chicago, resigned on March 1.—John A. Gordon has been appointed assistant to United States attorney Harry B. Tedrow at Denver, Colo.—Vance T. Higgs of Caruthersville, and William H. Woodward of St. Louis, have been appointed second and third assistants, respectively, to United States Attorney Arthur L. Oliver of the Eastern District of Missouri.

Minnesota Judicial Appointments.—Governor Hammond of Minnesota has made the following appointments to the bench: Albert Schaller, former state senator from Hastings, to be judge of the Supreme Court, to fill the vacancy caused by the death of Judge Philip E. Brown; R. T. Daly of Renville, to be judge of the Twelfth judicial district, succeeding Judge Gorham Powers, recently retired; James C. Michael, formerly corporation attorney of St. Paul, to be district judge of Ramsey county, a newly created judgeship.

The Oklahoma Negro Bar Association held its annual meeting at Tulsa, Okla., on February 13 and 14. Papers were read on "The Lawyer as a Business Man," by John R. McBeth of Eufaula, "Uniform Divorce Laws," by H. A. Guess of Tulsa, and "The Lawyer as a Fraternal Man," by E. I. Saddler of Guthrie. The following officers were elected for the ensuing year: President—E. I. Saddler of Guthrie; first vice-president—E. S. Peters of Boley; second vice-president—John R. McBeth of Eufaula; secretary—J. C. Evans of Okmulgee; treasurer—W. H. Twine of Muskogee.

The Bench and Bar of Montreal united on February 25th to honor Charles Peers Davidson, who has just retired from the Superior Court Bench, of which he has, of late years, been chief justice, and for nearly 30 years a judge. On behalf of the Bar Association of Montreal, the batonnier of the bar, F. De Sales Bastien, presented Sir Charles with an address, and in the evening the retiring chief justice was banqueted at the St. James Club by his former associates on the bench.

Appeal for Subscriptions in Aid of Refugee Lawyers.—The attention of the Executive Committee of the American Bar Association having been directed to the critical position of European lawyers who have been impoverished and rendered homeless by the present war and are without occupation and in dire personal need, a Special Committee of the Association has been constituted to solicit voluntary subscriptions in aid of these professional brethren from the members of the American Bar Association and from kindred organizations in the United States. Individual subscriptions of any sum from $1 to $5 are invited. The Secretary and Treasurer of the Association will act ex-officio for the Special Committee, and the Treasurer will receive any funds which may be transmitted to him by members of the Association, and the same will be distributed under the direction of the Special Committee. The Secretary of the Association is George Whitelock of Baltimore, Md., and the Treasurer is Frederick E. Wadhams of Albany, N. Y. Joseph H. Choate of New York City is the Chairman of the Special Committee.

South Dakota Bar Association.—At the recent annual meeting of the South Dakota Bar Association, officers for the current year were elected as follows: President—F. A. Warren of Flandreau; first vice-president—P. F. Loucks of Watertown; second vice-president—W. F. Bruell of Redfield; secretary—J. H. Voorhees of Sioux Falls; treasurer—L. M. Simons of Belle Fourche; executive committee—first circuit, J. E. Payne of Vermillion; second circuit, Tore Teigen of Sioux Falls; third circuit, John H. Hanten of Watertown; fourth circuit, James Brown of Chamberlain; fifth circuit, F. G. Huntington of Aberdeen; sixth circuit, C. E. DeLand of Pierre; seventh circuit, O. E. Sweet of Rapid City; eighth circuit, James Hodgson of Deadwood; ninth circuit, A. E. Taylor of Huron; tenth circuit, P. C. Morrison of Mobridge; eleventh circuit, C. W. Bartine of Oacoma; twelfth circuit, A. O. Stanley of Bison. The next meeting of the Association, which will be the seventeenth annual meeting, will be held at Watertown, South Dakota, on September 1, 2 and 3, 1915.

Deaths.—In addition to those heretofore mentioned, the following recent deaths in the profession have been noted: February 6, at Los Angeles, Cal., George H. Smith, aged 81, formerly judge of the District Court of Appeals, Southern California district; February 6, at Cleburne, Tex., J. M. Hall, aged 87, formerly judge of the Eighteenth District Court of Texas; February 9, at Dallas, Tex., James Carroll Roberts, aged 56, formerly judge of the Fourteenth and Sixty-eighth District Courts of Texas; February 10, at Bryan, Tex., Thomas S. Reese, aged 69, until a few weeks ago one of the associate justices of the Texas Court of Civil Appeals, First Supreme Judicial District; February 15, at Elgin, Ill., John W. Ranstead, aged 73, former county judge and probate judge of Kane county, Illinois; February 16, at Rothdrum, Idaho, Robert S. Anderson, formerly attorney general of the territory of Idaho; February 17, at Tappahannock, Va., Thomas Blakey, aged 61, judge of the Twelfth Virginia Circuit Court; February 18, at New Decatur, Ala., W. H. Simpson, aged 59, for a number of years one of the chancellors of Alabama; February 19, at Chicago, Ill., Thomas Collier Clark, judge of the Superior Court of Cook county, Illinois; February 23, at Columbus, Ohio, Herman Brann Albery, aged 88, formerly probate judge of Franklin county, Ohio; February 27, at Dayton, Tenn., Valentine C. Allen, aged 72, chancellor of the Twelfth Chancery Division of Tennessee; March 1, at Kansas City, Kan., Thomas P. Anderson, aged 71, the first judge of the Wyandotte County Court of Common Pleas and until four years ago department commander for Kansas of the Grand Army of the Republic; March 3, at Buffalo, N. Y., Charles F. Tabor, former attorney general of New York State.

English Notes.

Judicial Appointments.—Sir John Eldon Bankes has been appointed one of the Lords Justices of Appeal, succeeding the late Lord Justice Kennedy. Sir Frederick Low, K. C., has been appointed to the King's Bench, to fill the vacancy caused by the promotion of Mr. Justice Bankes. Sir Frederick Low was born in 1856, and was educated at Westminster. At the age of twenty-two he was admitted a solicitor, and twelve years later he was called to the Bar by the Middle Temple. He took silk in 1902.

Solicitors Who Have Become Famous.—The appointment of Sir Frederick Low, K. C., to a judgeship of the High Court of Justices will add yet another name to the list of high judicial dignitaries who, having begun their professional careers, as in the case of the new judge, as members of the solicitors' profession, subsequently joined the ranks of the bar. The leading illustrations of the brilliant success at the bar and on the judicial bench of former solicitors are those, as every one knows, of Lord Truro and Lord Russell of Killowen. Lord Truro, the famous Mr. Serjeant Wilde of the early thirties of the last century, was bred as a solicitor, and, commencing practice at the bar at the comparatively late age of thirty-five years, became successively Lord Chief Justice of the Common Pleas, Lord Chancellor of England, and a peer of the realm. Lord Russell of Killowen was for some years before his call to the English bar a practicing solicitor in Ireland. Sir Samuel Evans, the learned president of the Probate and Matrimonial Division, who was for years a practicing solicitor, at a dinner given in his honor by the Welsh Parliamentary party on his appointment to the Solicitor-Generalship, recounted with delight that he, when a solicitor, had "briefed" in many cases the leader of that party, the Right Hon. Sir D. Brynmor Jones, K. C., now a Master in Lunacy. Among former solicitors whose names are memorable in forensic and judicial annals are Lord Field, Mr. Justice Manisty, and Lord Fitzgerald of Kilmarnock, a Lord of Appeal in Ordinary, who had for two-and-twenty years been one of the justices of the Queen's Bench Division in Ireland. In one solicitor's office Lord Chancellor Hardwicke; Strange, Master of the Rolls in England; and Lord Jocelyn, Lord Chancellor of Ireland, worked as pupils together. The present Solicitor General for Ireland, Mr. James O'Connor, K. C., is a former practicing solicitor. With Sir Frederick Low's promotion, therefore, the Bench of the Supreme Court has now no fewer than five ex-solicitors among its members, those being Lord Justice Swinfen Eady, Sir Samuel Evans, Mr. Justice Horridge, Mr. Justice Bailhache, and Mr. Justice Low. Of the Scottish Court of Session, one of the judges—Lord Cullen—practiced for some years as a writer to the signet before his call to the bar.

Aircraft and Neutrals.—The semi-official statement published at The Hague, that the Netherlands Government has instructed its representative at Berlin to ask the German Government to make inquiries as to the alleged passage of German airships across Dutch territory on the 19th and 20th of January, must refer to the very circumstantial allegation that after the East Coast raid at least one German airship crossed North Holland *via* Amsterdam, thus taking a short cut over Holland on its way to Germany after its visit to England. The doctrine which forbids the passing of belligerent troops through neutral territory has been maintained without violation since 1815, when the allies forced the Federal Council of Switzerland to grant permission for the passage of troops across its territory on their way to invade the southern portion of France. The opinion of publicists of repute, that the right of passage of belligerent troops through neutral territory no longer exists, has been fully vindicated by recent practice. The neutrality of the air of neutral territories, on which Switzerland has recently insisted, must be regarded as a corollary of the doctrine of the inviolability of the neutral territories themselves. The case of belligerent airmen is indistinguishable from that of belligerent land forces. In 1870 the Government of Switzerland refused to permit bodies of Alsatians enlisted for the French army to cross her frontiers, although they were traveling without arms or uniforms. In the same year Belgium thwarted an attempt of the Germans to send their wounded home over her railways even when the privilege was asked in the name of humanity, and with some difficulty assent was given at the Brussels Conference to art. 55 of the military code then drawn up, providing that the neutral state may authorize the transport across its territory of the wounded and sick belonging to the belligerent armies, provided that the trains which convey them do not carry either the personnel or the

material of war. It is difficult to see how a distinction can be drawn between the violation of neutral territory and the violation of its atmosphere, regard being had to the similarity of the results in both cases and to the well-known maxim, *Cujus est solum ejus est usque ad coelum.*

The Advocate's Library, Edinburgh, which, according to the curator's report submitted at the recent annual meeting of the Faculty, received during the year 1914 an addition of 44,204 items, including some interesting gifts of manuscripts, such as various volumes of opinions given by Lord President Blair while still at the Bar, is the one library in Scotland entitled to claim a copy of each British publication under the Copyright Acts. Its commencement dates from about 1673, but it was in 1683 that it was formally inaugurated by an oration of Sir George Mackenzie, who, although an extremely learned lawyer, and one of the first Scots to write English with purity, is chiefly remembered by the name popular hatred fastened upon him by reason of his prosecution of the Covenanters—that of "Bluidy Mackenzie." The library which this strange personality did so much to foster contains many rare volumes and interesting manuscripts, among the latter being several of Sir Walter Scott's works which are there fittingly preserved, Sir Walter having spent much of his time in exploring the treasures of the great library. During its history it has had several distinguished librarians, among these being Thomas Ruddiman, the learned grammarian for whom Dr. Johnson expressed high regard; David Hume, the historian; and David Irving, who, though less generally known than his predecessors, did much excellent work as a writer on Scottish subjects. Mr. W. K. Dickson, the present librarian, is a member of the Bar, who worthily maintains the traditions of his important office. As the library is in the same building as the Court of Session, it is, of course, of immense value to the Scottish advocates, who have all its resources ready to their hand. In this connection the story may be recalled of a former Lord of Appeal expressing to the late Lord Young, of the Scottish Bench, his admiration, and, indeed, envy, of the magnificent library possessed by the Faculty of Advocates. "We at the House of Lords," he continued, "have no library to speak of." "Ah," said Lord Young in his sarcastic style, "that accounts for some of your law."

Bequest of "All" in a Will.—The word "all" is prima facie an adjective, or adverb, but it is occasionally used as a noun, as, for instance, in the familiar expression "I have lost my all." Judging from the number of columns devoted to it in the Oxford Dictionary, it is a word with many significations. The meaning of it in a will was considered in the old case of Bowman *v.* Milbanke, 2 Lev. 130, where the words were: "I give all to my mother, all to my mother," and the court said "'All' is altogether uncertain and not sufficient to disinherit an heir," and it was decided that lands did not pass. But at that day testamentary gifts were more frequently held to be void for uncertainty than at the present day which (according to Jarman on Wills, vol. 1, p. 454, 6th edit. by Mr. Charles Sweet, the eminent conveyancer, assisted by Mr. C. P. Sanger), "is owing probably in part to the more matured state of the doctrines regulating the construction of wills which have now assigned a determinate meaning to many words and phrases once considered vague and insensible, and in part to the more practiced skill of the courts in applying those doctrines." Vice-Chancellor Malins, in referring to Bowman *v.* Milbanke in the case of Smyth *v.* Smyth, 38 L. T. Rep. 633, 8 Ch. Div. 561, said: "If those words did not pass all the testator had, I cannot conceive what they did pass. However, such a decision as that cannot be considered an authority now." A similar question came before Mr. Justice Eve in the comparatively recent case of Re Shepherd; Mitchell *v.* Loram (1914) W. N. 65. There a testator, who was an illiterate man, and who died in 1911, by a will, partly printed and partly written, after appointing executors and directing payment of his debts and funeral and testamentary expenses, proceeded as follows: "I give and bequeath unto all the undermentioned names all to be divided in equal parts" (then a number of beneficiaries were indicated) with a direction in one case to pay to trustees. There was also a direction that the rent of a cottage should be paid to a certain person, but the testator had no interest in such cottage. The question was whether there was an intestacy as to the real estate, and the learned judge held that there was not. He pointed out that in Bowman *v.* Milbanke the court seemed to have proceeded on the footing that the word "all" was used in that will as an adjective, and therefore was inoperative to disinherit the heir; but that in the will before him the word "all" was used as a noun, and accordingly that the real estate passed.

Accident to Workman while Intoxicated.—The accident to the workman in the recent case of Williams *v.* Llandudno Coaching and Carriage Company Limited, occurred through his being in a state of intoxication at the time. In following the decision of the Court of Session in Scotland in Fraser *v.* John Riddell and Co., (1914 S. C. 125), and in giving the go-by to the decisions of the Court of Appeal in this country in Frith *v.* Steamship Louisianian (106 L. T. Rep. 667; 1912 2 K. B. 155) and Nash *v.* Steamship Rangatira (111 L. T. Rep. 704), a considerable modification of opinion would, at first sight, seem to have been evinced by the Court of Appeal concerning accidents caused by intoxication. This being so, it is of much importance to contrast the views that were expressed in those cases in order to ascertain whether or not such an apparent change has in reality taken place. In Frith's case (ubi sup.), a seaman was brought on board his ship so much under the influence of drink that he fell overboard and was drowned. A fatal consequence, in circumstances not altogether dissimilar, happened to a seaman in Nash's case (ubi sup.). Those decisions, said the Master of the Rolls (Lord Cozens-Hardy) in the Williams case (ubi sup.), are binding upon the Court of Appeal even if the court in Scotland had taken a different view of the law. And, inasmuch as those decisions left a somewhat general impression that intoxication would prove an effectual bar to any claim for compensation in respect of an accident that had befallen a workman by reason of it, the contrary decision of the Court of Session in Fraser's case (ubi sup.) created some disturbance of preconceived notions on the point. In that case, an engine driver, who was intoxicated, fell off the footplate and was fatally injured. The standpoint from which the Court of Session, departing from the decision pronounced by the arbiter, regarded the position of the workman was that he was performing the duty which he was employed to perform —namely, driving the engine—although he was guilty of "serious and wilful misconduct" within the meaning of sect. 1, sub-sect. 2 (c) of the Workmen's Compensation Act 1906 (6 Edw. 7, c. 58). But that consideration became immaterial owing to the death of the workman having resulted from the accident. So, also, in the Williams case (ubi sup.). He died through an accident occasioned by his drunken condition in the course of performing his duties. Consequently, the Court of Appeal did not see any inconsistency between the decision in Scotland and those in England. And if an accident brought about by intoxication when coming on board a ship is not to be truly treated as an accident occurring in the performance of the duty of a seaman while under the influence of drink, the difficulty in distinguishing the authorities entirely vanishes.

Blockades.—The German manifesto proclaiming the blockade of Great Britain, beginning on February 18, will recall irresistibly the Berlin and Milan decrees of Napoleon unwarrantably reviving the restrictions of blockade in all their ancient severity.

By these decrees, says the *Law Times,* France declared the British Isles to be in a state of blockade, despite the fact that she dared not send a single squadron to sea for fear of capture by the British navy, and Great Britain placed in the position of blockaded ports all places from which her commercial flag was excluded. The assault made upon paper blockades by the First Armed Neutrality of 1780 was embodied in the provision that blockades to be effective must be maintained by vessels stationary and sufficiently near to produce evident danger in entering; and in the Second Armed Neutrality in 1800 that definition was repeated, with the additional statement that no lawful capture could be made unless the peccant vessel attempted to enter after notice from the commander of the blockading squadron. These inadmissible principles were replaced by the provisions of the Declaration of Paris of 1856, by which "blockades, in order to be binding, must be effective—that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy." Lord John Russell, writing on the 1st Feb. 1863, as Secretary of State for Foreign Affairs, to Mr. Mason, the American Minister, as to the meaning of that Declaration, said it was in truth directed against what were once termed "paper blockades"—that is, "blockades not sustained by any actual force, or sustained by a notoriously inadequate naval force, such as an occasional appearance of a man-of-war in the offing, or the like. . . . The interpretation, therefore, placed by His Majesty's Government on the Declaration was that a blockade, in order to be respected by neutrals, must be practically effective." The most satisfactory explanation of the difficult term "practically effective" is to be found in the case of The Franciscа, 10 Moore's Privy Council Cases, p. 58; Spinks' Prize Cases, p. 115, where it was said that, in order to maintain a proper blockade, a place must be "watched by a force sufficient to render the egress or ingress dangerous, or, in other words, save under peculiar circumstances, as fogs, violent winds, and even necessary absences, sufficient to render the capture of vessels attempting to go in or come out most probable." While English and American judges and text-writers incline to this view of what constitutes an effective blockade, a majority of Continental publicists so construe the principle embodied in the Declaration of Paris as to revive that contained in the First Annual Neutrality of 1780. The substance of their contention is that the immediate entrance to a port must be so guarded by stationary vessels as to render ingress practically impossible, or at least to expose any ship attempting to pass to a cross-fire from the guns of two of them.

Injured Workman's Capacity for "Light Work."—On the subject of the burden cast on the employer of a workman who has been injured by "accident arising out of and in the course of" his employment, of proving the workman's capacity for "light work" there are three oft-cited and much canvassed decisions of the Court of Appeal. In the first—that of Proctor and Sons *v.* Robinson [1911] 1 K. B. 1004—it was laid down that the employer ought to show what particular light work the injured workman is capable of performing, and that he can obtain it in his present condition. Then came Cardiff Corporation *v.* Hall, 104 L. T. Rep. 467; [1911] 1 K. B. 1009, wherein it was held that if the physical condition of the injured workman is such as to leave open to him the whole field of light labor, it is sufficient to prove that only. The third case was that of Anglo-Australian Steam Navigation Co., Limited, *v.* Richards, 4 B. W. C. C. 247. There it was held that where an injured workman is capable of doing light work, but has never attempted to obtain it, and, although there is no evidence of an offer of light work or that it is obtainable, a diminution of the weekly payment to the workman can be ordered. It is seen, therefore, that the last named decision was not absolutely in harmony with the two earlier ones. And the existence of these conflicting authorities in the reports occasioned some hesitation in the recent case of Silcock and Sons *v.* Golightly concerning the proper decision to be pronounced. So strongly was this felt, that the Master of the Rolls (Lord Cozens-Hardy) was moved to give utterance to the statement that he "should not be otherwise than glad if the ultimate tribunal should have the opportunity of settling the law on this branch of it." Nevertheless, his Lordship and the other members of the Court of Appeal—Lords Justices Swinfen Eady and Phillimore—did not allow the irreconcilability of the authorities to preclude them from holding that compensation ought to be reduced in the circumstances of that case. A workman who has lost his right arm as the result of an injury to it by accident, but who is otherwise in all respects sound and healthy, can scarcely be regarded as such an "odd lot"—to quote the expression that is frequently used in cases of this type—in the labor market as to be incapable of obtaining some one or other of the many forms of light work that a busy commercial city has to offer. At any rate, he is not entitled to stand by and make no attempt whatever to procure employment of that nature. To rest content to live as a pensioner on the weekly payment that is allowed to him by his employers is evidently not what it was contemplated that he would be justified in doing when the Workmen's Compensation Act 1906 (6 Edw. 7, c. 58) was passed. The decision that the county court judge is entitled to take advantage of his local knowledge as to the opportunities for getting work is extremely useful.

Obiter Dicta.

Suing for Pew Rent.—Pew *v.* Price, 251 Mo. 614.

Striking out Matty.—Teaz *v.* Chrystie, 2 E. D. Smith 621.

Which Wife?—Solomon *v.* Solomon, 140 Ga. 379 (action for divorce).

Fought a Good Fight.—The plaintiff in error in Fight *v.* State, 7 Ohio 181, fought the state zealously but in vain.

Suiting the Action to the Word.—In Rogers *v.* Foote, 109 Me. 564, Foote was sued for maliciously kicking the plaintiff.

Notable Instances of the Law's Delay.—State *v.* Christopher Columbus, 74 Wash. 290; Isaiah *v.* State, 176 Ala. 27.

Not a Horse Case, but a Breach of Promise Suit.—"On these racy issues the case was tried, and the jury found for the defendant." See Wilson *v.* McCarty, 156 Iowa 662.

Supererogatory.—"Mankind, as a rule, does does not walk under open umbrellas in dry weather, nor light lamps in build-

ings nor carry lighted lanterns around in daylight." See Schock *v.* Cooling, 175 Mich. 325.

Personal or Judicial Knowledge?—"The purchaser of drinks over the counter of a barroom seldom knows or is told what he is getting, or if he is told it soon becomes a matter of indifference to him." See W. A. Gains & Co. *v.* Rock Spring Distilling Co., 202 Fed. 995.

A Warning not Often Heeded.—"It may be true, as the Scriptures have it, that 'in the multitude of counsellors there is safety,' but it is also true that in a multitude of assignments of error there is danger." Per Mr. Justice Brewer, in Fidelity, etc., Co. *v.* L. Bucki, etc., Lumber Co., 189 U. S. 138.

Taking the Law in One's Own Hands.—"There is a couplet running this way:

'Who to himself is law, no law doth need,
Offends no law, and is a king indeed.'

But the notion outlined thereby is of no value in jurisprudence. In the eye of the law no one can successfully build a superstructure of rights on his own wrong." Per Lamm, J., in Greene County *v.* Lydy, 172 S. W. 385.

Peck's Bad Boy, Incorporated.—In Peck Bros. & Co. *v.* Peck Bros. Co., 113 Fed. 291, the court said: "Upon the evidence in this case, we think we are warranted in saying of this defendant . . . that it was conceived in sin and brought forth in iniquity, that wrong attended at its birth, and that fraud stood sponsor at its christening, imposing upon the corporate child a name to which it was not entitled, and which it had no right to bear."

We Concur.—At the recent meeting of the Negro Bar Association of Oklahoma a paper was read on "The Lawyer as a Business Man." A press account of the meeting quotes that paper as having made the following among other recommendations: "As a primary rule for the guidance of all practicing lawyers, a real appreciation and familiar acquaintance with the greatness of a magnitude composed of units, that they may be express in the terms of the doctrines of law and equity jurisprudence."

They Are Paid to Doubt.—Speaking of the provision in the Ohio constitution that "municipalities shall have authority to exercise all powers of local self-government," Judge Wanamaker of the Supreme Court of that state said in a comparatively recent case: "Any farmer, workingman, business man, banker, physician, clergyman or any layman with average intelligence in English, understands the clear, comprehensive and complete grant of power included in the above words. Some lawyers and judges seem to have serious doubt about it." See Fitzgerald *v.* Cleveland, 88 Ohio St. 362.

Horse Sense.—The case of Baumgartner *v.* Hodgdon, 116 N. W. 1030, was an action for damages for assault. The defendant justified on the ground that the plaintiff provoked the attack by speaking slightingly of the defendant's horse. The trial court charged that the words used by the plaintiff did not constitute a justification for the assault, and speaking to this point the Minnesota Supreme Court said: "We have no difficulty in concurring in the view of the learned trial judge, whichever version of the plaintiff's language—'a thing of a horse,' or 'the damnedest looking horse'—be adopted. The language contains nothing whatever to prompt a person possessed of ordinary common sense and judgment to commit a breach of the peace. The most that can be said of it is that it was disrespectful to the horse; but the horse was not present, and there was no horse trade on. Moreover, we have the right to assume that the animal was endowed by nature with the usual amount of 'horse sense,' and that, had the remark been overheard by him, he would have dismissed it without reply as the opinion of one not competent to speak on the subject."

On the Authority of Shakespeare.—An ordinance of the city of Albany, Oregon, requiring every one selling or dealing in soft drinks or bottled goods within the city to close his place of business at midnight, was upheld in Churchill *v.* Albany, 65 Oregon 446. The nature of the matter in hand provoked the following from the Supreme Court: "It was the intention of the council to compel all such places to close at midnight. The council very likely believed that 'soft drinks' and 'bottled goods' were not as 'soft' as the unsophisticated may believe them to be, and concluded that compelling dealers in such 'goods' to close at midnight would be promotive of good government in the city. Under the grant of power in the charter to regulate business houses, the city had the power to close such places at midnight or earlier. Perhaps it was fitting that such places should close at 'midnight,' as Shakespeare says:

'"Tis now the very witching time of night;
When graveyards yawn and hell itself breathes out
Contagion to this world.'"

The Longest Law Firm Name.—Replies to our challenge of last month with respect to the longest law firm name have come from all sides and in abundance. Publications of these replies in full is prohibited by their number and length, a fact to be regretted since many of them make interesting reading. A tabulation of the names submitted is the best we can do. It should be noted that some of the firms are no longer in existence, also that Canada seems to be in the van. We trust that the good work will continue and that we may receive more information of the same kind. The list up to date follows:

Beatty, Blackstock, Nesbitt, Chadwick & Riddell, of Toronto, Canada;

Head, Dillard, Smith, Maxey & Head, of Sherman, Texas;

Loud, Collins, Brown, Campbell & Wood, of Miles City, Montana;

Machray, Sharpe, Dennistoun, Locke & Crawley, of Winnipeg, Canada;

Olin, Butler, Stebbins, Curkeet & Stroud, of Madison, Wisconsin;

Short, Cross, Biggor, Sherry & Field, of Edmonton, Canada;

Short, Ross, Selwood, Shaw & Mayhood, of Calgary, Canada;

Taylor, Harvey, Grant, Stockton & Smith, of Vancouver, Canada;

Winkler, Flanders, Smith, Bottum & Vilas, of Milwaukee, Wisconsin;

Meredith, Macpherson, Hague, Holden, Shaughnessy & Heward, of Montreal, Canada;

Munton, Morris, King, Gavin, Duffy & Co., of London, England;

Perron, Taschereau, Rinfret, Genest, Billette & Plimsoll, of Montreal, Canada;

Aikins, Fullerton, Foley & Newcombe, Aikins, Loftus & Aikins, of Winnipeg, Canada;

Mackenzie, Brown, Thom, McMorran, MacDonald, Bastedo & Jackson, of Regina, Canada.

Law Notes

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CONTENTS

Penalizing Profanity.

A BILL has been introduced into the Missouri legislature making it a misdemeanor to swear. Each year, according to the provisions of the bill, every man must appear before the court clerk and make affidavit as to the number of times he has used profanity during the year, and fines or taxes are to be imposed according to the returns so made. Punishment for perjury can be inflicted for false returns. If this bill is enacted into law its effect as a deterrent of profanity will have to be somewhat discounted by the no inconsiderable amount of "swearing off" that will be done before the clerks of court. It is not likely, however, that the bill will be reported out of committee. Not that there will be any lively consciousness on the part of the Missouri legislators as to the futility of attempting to legislate morality into people, but rather that the bill obviously attacks a cherished privilege of the legislators themselves. Their reformatory energies will doubtless be directed into other and less personal channels. They will be apt to

> "Compound for sins they are inclined to,
> By damning those they have no mind to."

A Unique Experiment in Penology.

THE statement made by Henry Ford, the automobile manufacturer, before the Industrial Commission, that he could reclaim and make men of prison convicts by putting them to work in his plants, is being given a practical test. A Cincinnati judge has taken advantage of Mr. Ford's offer to allow the sentencing of men to work in his shops, and has recently sent a young man convicted of non-support of his wife and child to the Detroit plant instead of to jail. This seems like an eminently sensible disposition of the particular case. A job at good wages is much more likely to insure a man's meeting of his family obligations than is a jail sentence. Many infractions of the law are directly traceable to lack of useful employment. It can hardly be doubted that society would be economically the gainer if its moral derelicts, instead of being shunted off to prison, were set to work in some such place as the Ford motor works, where they would not only have an opportunity, under wholesome and helpful conditions, to work out their own salvation, but would also be able to provide for the support of those dependent upon them—those who, after all, are the greatest sufferers under the present prison system. It is not to be expected, however, that any such lenient method of treating those who have transgressed the law will receive much encouragement so long as the idea persists that punishment rather than reclamation is the end and aim of the criminal law.

Federal Employment Bureau.

THE government at Washington has apparently become alive to the danger that lurks in an unemployed citizenry. A federal employment bureau has been established in connection with the Department of Labor by which employers of labor and employment seekers throughout the country will be brought together. Both the Post-office and Agricultural Departments are assisting in the plan, which aims at putting employees and employers in touch with each other without cost to either. Agents of both departments throughout the country have been provided with blanks so that applications may be made in any locality. In a circular letter calling attention to the plan, which was mailed particularly to industrial establishments, Secretary Wilson describes its purpose as the development of the welfare of wage earners and affording to employers a method of obtaining help through distribution branches in various parts of the nation. Attention will be paid to fitness in the selection of applicants, the announcement says, so that employers may get the particular kind of labor their needs demand.

The federal bureau seems destined to render a distinct service in the labor world. There never has been a dearth of private employment agencies in the large centres of the country; but these have been, as a rule, glaringly inefficient, and ofttimes dishonestly conducted. Municipal employment agencies have been a step in advance; but even these, for obvious reasons, cannot accomplish the work of a government bureau. When the bureau is thoroughly organized and in running order the distressing and ever pressing problem of unemployment should be in a fair way for satisfactory settlement.

Eugenic Legislation in New York.

A EUGENICS bill has been introduced into the New York Assembly. The bill provides that no license to marry may be issued "unless each applicant therefor shall present to and file with such town or city clerk a certificate duly verified by a physician licensed to practise medicine in this State that such applicant is free from any physical or mental disease or infirmity which is likely to be contagious, communicable or hereditary." The New York propagandists of this species of reform have doubtless been encouraged by the recent decision of the supreme court of Wisconsin upholding the Wisconsin eugenics law. See *Peterson* v. *Widule,* (Wis.) 147 N. W. 966, wherein the law was held to be a valid exercise of the police power of the state, albeit by a divided court. Whatever encouragement, however, the advocates of eugenic legislation may reasonably take from this legal sanction of it, they can hardly be much

gratified over the result of the attempts to enforce the law in Wisconsin. From all accounts such attempts have failed miserably. And it is not to be doubted that if the New York Assembly bill is enacted into law and the law passes the constitutional test in the courts, public opinion will not support its enforcement. A law that cannot be enforced should not be on the statute book. Eugenic marriage unquestionably is highly desirable, but it is an ideal that will be reached, and can be reached, only through the diffusion of education and the betterment of social and industrial conditions; it will not be brought about through any hot-house forcing process of legislation.

Principles and Precedents.

In a recent Tennessee case (*Southern R. Co.* v. *Terry*, 2 Tenn. Civ. App. 445) the court concludes its opinion in this language: "We regret our inability to discuss the numerous cases referred to by learned counsel as absolutely controlling upon the questions debated. These authorities are inaccessible to us. But sometimes it is all very well that this is so, notwithstanding the invaluable aid which well considered authorities always afford. Courts and lawyers are sometimes too prone to rely upon adjudged cases instead of looking squarely at the facts of the controversy in hand, with the view of obtaining justice for the parties immediately concerned in accordance with fundamental principles and fundamental law."

The first effect of the reading of this passage is to set one mildly wondering how it was that in these days of wide distribution of law books the authorities which the industry of counsel had collected should have been inaccessible to the court. Of greater significance, however, is the confidence expressed by the court in its ability to reach a just decision in the case without the aid of the adjudged cases. In some quarters such an idea will seem little short of absurd. The law, it will be said, is in the cases; how can the law be determined except from the cases? "How will you reason without a knowledge of logic?" asked the university instructor of Dean Swift in his undergraduate days. "I do reason," was Swift's rejoinder. It is quite conceivable that a judge by close concentration of mind upon the facts of the particular case before him may reach a just conclusion therein without wandering through a labyrinth of cases. Judges as well as lawyers are too prone to let the cases do their thinking for them. We would have better briefs and better opinions if there were less reliance upon the adjudicated cases and more thorough-going independent thinking. It is not likely that we shall ever have a complete codification of the law. Some relief from the deluge of cases may, however, come when judges will be studious to find a sanction for their decisions not so much in the wilderness of precedent as in the fundamental principles of the law.

Loans to Law Students.

Lawyers in Texas have started a fund to be loaned to needy law students at the University of Texas. This is a highly commendable act and one that is worthy of emulation elsewhere. Aids of one kind and another to needy and deserving students in the academic departments of our colleges and universities are quite generally provided; law students, however, have usually been compelled to shift for themselves. No one who has not, either as student or otherwise, been brought into touch with our law schools can have any conception of the hardships and privations to which many of the students are subjected in their ambition to complete the course and qualify themselves for the practice of the law. The health of many has been permanently impaired by these privations, and many, again, have given up the unequal struggle and fallen by the wayside. A few hundred dollars would have richly supplemented the slender resources of these students and enabled them to prosecute their studies in comfort to the end of the course. Those who have the means to make donations for educational purposes could devote a fund to no better purpose than in aid of poor but worthy law students. For who will contend that an educated and high-minded bar is not of inestimable benefit to any community? An amount sufficient to provide for the education of one law student would, in the course of an ordinary lifetime, educate seventy-five or a hundred students, since those who have used the fund will begin to return it soon after leaving the law school. For students who are making sacrifices to obtain an education are not the ones, as a rule, to default on their obligations. They are well typified by such men as James A. Garfield, who in his student days was obliged to negotiate a loan in order to complete his studies. He immediately insured his life and assigned the policy to his creditor. "If I live," said Garfield, "I will pay you; if I die you will not lose."

Proposed New Judiciary System for New York.

There will be laid before the New York Constitutional Convention which convenes shortly at Albany a proposed judiciary article for the new Constitution which embodies a new judiciary system for the state. The scheme is put forth by a group of well-known members of the New York bar, and the summary of principles embodied in the proposed article is thus stated by the group itself:

1. A single court: thus abolishing the anomalies of concurrent, conflicting, and limited jurisdictions.

2. A chief justice elected for a short term who shall himself appoint the justices of this court: thus preserving the immediate relation to the people of the judiciary, the executive, and the legislative, yet preserving their relative independence.

3. This appointive judiciary to hold office for life or during good behavior and with a prospect of retirement on a reasonable pension.

4. The rules of court and procedure, the creation of terms, the assignment of judges, the adaptation of the judicial machinery to developing conditions, all to be controlled by a judicial board: thus relieving us of our cumbersome code, our constant legislative interference, and the inelasticity of our present system.

5. Masters who shall dispose of all interlocutory or procedural matters: thus leaving the judges free to try issues and—it is hoped—greatly reducing the volume of appellate business.

6. A committtee of discipline having power over bar and bench alike: thus insuring a uniform standard of professional conduct throughout the State.

7. The preservation of a probate officer legally accessible in every county for unlitigated matters.

In its most important features the proposed system is in line with the recommendations of the committee of the National Economic League, whose report on "Efficiency

in the Administration of Justice" was discussed in a recent issue of LAW NOTES. One of the contentions of that committee was that effective administration of justice in the urban communities of to-day requires a unification of the judicial system whereby the whole judicial power of the state shall be vested in one organization, of which all tribunals shall be branches or departments.

The proposed judiciary article would effect so radical a change in the legal machinery of New York, that it will undoubtedly meet with strong opposition in the constitutional convention. Nevertheless that machinery is now so complicated and cumbrous that suggestions for its simplification are certainly not out of place, and the convention may well give a tentative ear to the present proposals.

Big Business in Personal Injury Suits.

THE way of the ambulance chaser is going to be made hard in Minnesota if certain bills now pending in the legislature of that state are enacted into law. By one bill the soliciting of personal injury cases by means of paid runners or solicitors or by printed circulars is forbidden and the attorney offending made liable to suspension or disbarment. Another bill prohibits contingent fee agreements and allows the court to fix attorneys' compensation in case of settlement, but no fees may be allowed if it is shown that the case was solicited. A third bill is directed against the trial in Minnesota courts of personal injury cases arising in other states. It provides that no suit against a foreign corporation by a nonresident of Minnesota shall be tried in a state court unless the cause of action has arisen in the state. A fourth bill provides that an injured person may repudiate a release or settlement of a claim within thirty days after it is made, the money received to be refunded. The proposed legislation has been prepared and submitted by a committee of the state bar association selected pursuant to a resolution adopted at the annual meeting of the association held at St. Paul in August last. The investigations of this committee have disclosed a surprising state of affairs in connection with the prosecution of personal injury suits in Minnesota. The committee reports that salaried solicitors are employed by certain personal injury lawyers, one firm alone having on its payroll in this capacity no less than forty-five railroad employees. Hospital and medical staffs are provided by these attorneys to give medical treatment for nonresident injured persons while awaiting trial of their cases. Lecturers are employed and literature distributed to railroad employees to advertise that the courts of Minnesota are the most desirable forum in which to try personal injury cases, the reasons given being that juries here are more liberal than elsewhere, that five-sixths of a jury may find a verdict, and that results can be reached more quickly than in other states. Among the documents exhibited by the committee was a stenographic report of a lecture given in Chicago. The lecturer is said to have described fully the virtues of the lawyers he represented, the elaborateness of their offices and the distinction of their corps of surgeons. Photographs of checks used in making settlements, and advertising pamphlets were passed around, and one photograph exhibited was of a successful client receiving his pay in thousand-dollar bills!

It seems almost a pity that legislative checks should be placed upon such enterprise. Reputable lawyers, however, will be justified in regarding such methods as unfair competition. While ready to make some concessions to the commercial spirit of the times they will balk at a cart-tail exploitation of the law, and at its sale over the counter like a bushel of potatoes or a sack of flour.

Legal Education in America from a Foreign View Point.

THE New York *Evening Post* in a recent issue gives a review of the interesting monograph of Prof. Josef Redlich, of the University of Vienna, on "The Common Law and the Case Method in American University Law Schools." Prof. Redlich, who is a distinguished teacher of law, made a special visit to the United States for the purpose of studying the system of legal education in this country, and the present monograph is the result of his investigations. "He finds legal education much more highly developed here than in England," says the *Evening Post,* "and speaks in the highest terms of American schools and individuals with whom he came in contact. Linking the case method on one side with Eliot's reform of the American college, and on the other side with the unsystematic and transitional condition of the law in this country, he finds that it has proved itself eminently successful in the training of practitioners. This success is partly accounted for by the favorable conditions under which the method has been carried on in the past. In this connection the increasing size of the classes constitutes an element of danger.

"Dr Redlich finds the essential reason for its success, however, in the fact that Anglo-American law is still almost entirely a law of adjudicated cases, and that accordingly the principal task which the practitioner, under existing conditions, has to perform, is to discover from these scattered sources what the law actually is. The older lecture and text-book schools, while far superior to the original unsystematic training in law offices, taught the law as they imagined it to be, rather than exercised the student in finding it out for himself. The case-method schools, on the other hand, he says, by training the student's reasoning power, as they have more and more tended to do, render a service that will be of more practical assistance to him in his future profession.

"While fully recognizing the value of the case method, Professor Redlich suggests that an exaggerated importance may be attached to it. In particular he takes direct issue with those who would banish from the curriculum any form of lecture or other dogmatic instruction. Both at the beginning and at the end of the curriculum he recommends lecture courses, covering phases of legal instruction which can be satisfactorily imparted in no other way. These courses, the scope of which he explains in detail, are of a sort to benefit the future practitioner by assisting him to coördinate the necessarily scattered information to which the analytic method leads; and also they would contribute to the growing movement in favor of legal reform in the United States. Opportunity would thus be afforded to the students to become acquainted with the law of other countries, with the general principles that underlie all law, and with the concrete suggestions toward reform that have already been made in this country. Opportunity would thus also be afforded to the instructors to prepare, in connection with these lectures, extended works in the field of legal scholarship. In order to make room for these additions, he recommends the lengthening of the already overburdened law course to four years, with a corresponding diminution of the time required to be spent in college.

"In conclusion, Professor Redlich discusses the grounds upon which the case method may be considered genuinely scientific, finding these not in the specious analogy between law and the physical sciences, but in the complete adaptation of this method to the purpose and subject-matter of legal instruction in this country. In a sketch of the development of law and legal instruction on the European continent, he shows how advance has always been accompanied by a return to the sources, and points out that it is to the American university law school, rather than to England, that the common law must look for a remodelling comparable to that which the similarly undeveloped law of Rome obtained at the hands of Italian, French, and German scholars. A brief account of the development of private legal instruction in modern Germany and Austria is added, to show that unscientific legal instruction in American schools outside of the universities need not be regarded as a menace by these latter."

LEGAL ETHICS *

THE subject of legal ethics and the determination to hold lawyers to account for their administration of their office, has had a great impetus in this country and particularly in our own state, since the opening of the twentieth century. And probably no state or county pretending to civilization needed it more, and no city needed it more than New York. An unquestioned commercial spirit, the idea that professional success is measured by its pecuniary rewards, the vast inroads of people with different or no ethical standards, the struggle for existence, the loss of individual identity with its consequent loss of a sense of self-respect, the unmitigated ambition of some practitioners, the vastness of the Bar destroying the possibility of wide acquaintance or much personal contact among its members, the congested condition of the business of the courts, the relative indifference of Bar and courts to the misdeeds of lawyers and the petty practices fostered by a detailed statutory procedure, and practising for costs, all contributed to produce a horrible, if not unspeakable, condition among those instruments of justice, the lawyers. If a man were a gentleman anyway he could hold and observe his individual ideas, but he got little encouragement from what he saw and knew. And if a man had no ideals, or base ideals, there was scarcely anything in his practice at the Bar or his experience in the community to indicate to him that he might not do absolutely as he pleased, so far as his tenure of office was concerned, unless actually convicted of felony.

But happily, as I perceive the atmosphere, the situation has changed, the Appellate Division has shown a determination to hold accused lawyers to strict accountability according to high professional principles, it has encouraged and sympathized with the efforts of the grievance and discipline committees of the two local Bar Associations, it has enunciated and applied principles of legal ethics in disciplining lawyers; the Bar Associations themselves have been extremely active in investigating and prosecuting flagrant offenders; and the appreciation of the principles of legal ethics has become very widespread. From my position as Chairman of the Committee on Professional Ethics of the New York County Lawyers' Association I am greatly impressed with this fact; and probably no position in the entire community affords such an opportunity to observe and measure the actual interest in the subject. Scarcely a day ever passes that in that capacity I am not consulted by those who are anxious to know, and to measure their own conduct by, principles of recognized legal ethics, or to call others to account for their breach. To my mind this shows a most hopeful awakening from a condition of apathy or worse, as a result of a campaign of publicity in respect to the existence of legal ethics, as an active and restraining force upon lawyers in the administration of justice, and as occupants of a life office conferred upon them by the people pursuant to law.

The sources of legal ethics are not all conventional; its principles are not derived wholly from the philosophical reflections of such men as Hoffman, Warren and Sharswood; some of its principles have been distinctly laid down as law, in judicial decisions; others are specifically the subject of statutory enactment.

For instance, the promissory oath required of lawyers upon their admission to the Bar in New York is prescribed by statute, and conforms with the constitutional requirement in respect to members of the legislature and all officers, executive and judicial, to support the Constitutions of the United States and of the State of New York, and faithfully to discharge the duties of their office according to the best of their ability. The duties of the office are to some extent prescribed by statute law. For instance, during the incumbency of certain official positions, such as judge of a superior court, clerk of a court, or sheriff, deputy sheriff, coroner, crier or attendant of a court, the attorney may not practice as attorney or counsellor in any court; he is now liable to censure, suspension or removal from office for any professional misconduct, fraud, deceit, malpractice, crime or misdemeanor or for any conduct prejudicial to the administration of justice, and his admission is liable to be revoked for any misrepresentation or suppression of any information in connection with his application for admission to practice.

He is liable to a forfeiture of treble damages and to conviction for a misdemeanor if guilty of any deceit or collusion, or for consenting to any deceit or collusion, with intent to deceive the court or a party. He is liable to a forfeiture of treble damages for wilfully delaying his client's cause with a view to his own gain, or for wilfully receiving money, or an allowance for or on account of money which he has not laid out or become answerable for; he is liable to a forfeiture for permitting one not his general law partner or a clerk in his law office to sue out a mandate or to prosecute or defend an action in his name; he is not to buy, directly or indirectly, or to be interested in buying, certain classes of claims or anything in action, for the purpose of bringing an action thereon; he is not to promise or give, or procure to be promised or given, a valuable consideration as an inducement to placing or as consideration for having placed, in his hands, or the hands of another, a demand of any kind for the purpose of bringing an action thereon, or of representing the claimant in the pursuit of any civil remedy thereon (this, however, does not apply to a division of compensation between attorneys and counsellors); if his law partner is attorney-general, a district attorney, or other public prosecutor, he shall not directly or indirectly advise, aid or take part in the defense of any litigation prosecuted by such partner; and if such attorney-general, district attorney or public prosecutor, he must at all times thereafter so refrain, and refrain from receiving any fee, gratuity or reward in relation thereto or to the prosecution or defense thereof.

Whether there is an express prohibition of the specific act or not, the provision of the penalty therefor implies the prescription of the duty and the prohibition of the act.

* From the address of Charles A. Boston, at the Law School of Cornell University.

Likewise, in the statutory as well as the common law of evidence, it is prescribed that an attorney and counsellor-at-law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon.

The much debated question of the propriety of a lawyer's concealing such communications . . . is not only accepted by the profession at large as a principle of legal ethics, but it is a statutory duty imposed by law in New York, and therefore one of the duties which the lawyer is sworn to observe, as a condition precedent to his being entrusted with his office.

But the statutory duties are not the sole duties of the office; there are certain duties which have been recognized by judicial decision, and for a violation of which lawyers have been disciplined. Occasionally, punishment for such an offense is the first authoritative announcement that the correlative duty exists. For instance, in the Matter of Schapiro, 144 App. Div. 1, the lawyer was disbarred for agreeing with an expert witness to compensate him contingently out of any recovery based upon his testimony, and permitting the witness to testify that he had no interest in the recovery without calling the court's attention to the truth. I am advised that as the complaint was presented to the Appellate Division by or in the name of a Bar Association. the respondent was charged with flagrantly violating his agreement with the witness. The court, however, so far from rebuking him for not keeping his agreement, disbarred him for reasons which included his having made it; and this, although the lawyer himself is expressly authorized by statute to make a contingent agreement for his own compensation and is afforded statutory means of enforcing it.

It is in this business of contingent fees for lawyers that the formerly well-recognized principles of professional ethics have given way before the commercial spirit of the age, under the guise and pretense of offering protection to the poor and impecunious. Every effort made by lawyers to modify the law to accord with more conservative principles of legal ethics has signally failed. This statutory allowance of the contingent fee, enforcible by summary process in favor of the officer of the court, has probably done more to debase the practice of the profession in New York State, and to invite to its ranks men devoid of ordinarily decent professional standards, than any other legislative act I know of; it is responsible for the *genus* ambulance chaser, and for the frequent unseemly squabbles wherein the lawyer seeks and gets the aid of the court in turning its process against his own client, thus destroying in a large measure the sense of devotion to the client's cause, which is one of the foundation stones of legal ethics as formerly understood, and substituting for it the lawyer as the independent contractor prosecuting a prosperous business in other people's woes, and fighting his client whenever it best suits his own contractual interests.

No one step that I know has done so much to degrade the profession in the public esteem as the flagrant abuses which have grown out of the statutory permission of the contingent fee and the enforcement of the attorney's lien upon the right of action. For several years the New York State Bar Association had a committee upon the abuses of the contingent fee; these were clearly and elaborately pointed out in the committee's reports, but, in apparent despair of any legislative relief, the committee, I believe, was finally discharged in 1914.

At an earlier period the professional standards recognized and enforced by judicial authority were certainly different, if not higher. In Matter of Bleakley, 5 Paige Ch. 310 (A.D. 1835) Chancellor Walworth compelled a solicitor in chancery to disgorge money which he withheld from his client upon an agreement for a contingent fee, and threatened to disbar him if he did not comply immediately with the direction.

The canon of the American Bar Association upon the contingent fee is as follows:

"Contingent fees, where sanctioned by law, should be under the supervision of the court, in order that clients may be protected from unjust charges."

I am advised that the form of this canon provoked more debate than any other in the committee and upon the floor of the meeting of the Association which adopted it. And . . . the Boston Bar Association has refused to accept it, substituting the following:

"'XIII. Contingent fees. A client may have a meritorious cause of action and yet have no other means with which to pay the fees of counsel. In such a case it is proper for a lawyer to agree that he will make no charge for his services unless the litigation proves successful. To this extent contingent fees may properly be contracted for. But it is not proper for counsel to contract with the client either at the time he is retained or subsequently that he shall receive for his services a certain fractional part or per cent of the amount recovered. The evil tendencies of such dealings with the client are plain. They tend to promote litigation and to degrade the practice of the law from an honorable profession to a money-getting trade; they involve a transaction between counsel and client in which their interests are opposed, in which the lawyer's knowledge and experience give him an advantage, and in which he is tempted to over-reach the client; a speedy settlement may yield the lawyer a return out of all proportion to the labor expended, and this may tempt him to advise such a settlement for his own benefit and against the real interest of his client; moreover, the lawyer becomes to all intents and purposes a party in the cause, which impairs his capacity to advise wisely and exposes him to all the temptations to which parties are exposed to be unfair or dishonorable in the preparation and trial of their cases."

It seems to be commonly admitted that the legal profession has lost caste, prestige and esteem in recent years. Personally, I have no doubt that the spirit engendered by the contingent fee and its statutory protection is very largely responsible for this fact. I commend the subject to your attention, in order that when you come into your sphere of influence you may give some consideration to the subject in an effort to restore the fallen standards of a nobler Bar.

But I am still upon the subject of the judicial declaration of principles of legal ethics. In Matter of Percy, 36 N. Y. 653, the Court of Appeals decided that as a good moral character was a statutory prerequisite to admission to the Bar, its retention was a condition for continued practice, when its loss or satisfactory evidence of its loss was brought to the attention of the court by way of formal charges.

In a most interesting case, which in its several ramifications has compelled a great deal of attention in Ohio, Matter of Thacher (89 N. E. R. 39; 93 N. E. R. 895) the Supreme Court of that state disbarred an attorney for taking the stump and as an elector addressing himself in circulars to his fellow electors, by abusing a sitting judge in his canvass for re-election. Here you will note that there was possibly a conflict between the attorney's rights as a citizen and elector to express his views of the fitness of a candidate, and his duties as an officer of the court. The legislature (Ohio Act 1912, Senate Bill No. 186) apparently cared more for his protection as an elector than for the observance of the judicially declared duty of respect which he owed to the judiciary, for it directed his restoration to practice. I am told that he was finally restored by act of the court itself, on a change of the identity of some of the judges, without, however, admitting the power of the legislature to coerce the courts.

Here was a case where the principles of professional ethics, as judicially declared, became the occasion of a substantial battle about the principles of civic right and duty.

In our own state, the Appellate Divisions and particularly that in the First Judicial Department whose activities in this line, for good reason doubtless, exceed all the rest, have gone on announcing with great diligence the judicial view of legal ethics, thus expounded as a substantial law of the state, in many cases. For instance, the duties of honesty; integrity; to abstain from unduly stirring up litigation; to avoid the mingling of a client's funds with one's own; to avoid crimes or deceit or imposition or fraud upon a court or client; to maintain at all times the respect due to courts of justice and judicial officers; to abstain from inducing witnesses to leave the jurisdiction or to disobey process; to abstain from the payment or employment of canvassers to obtain professional employment; to avoid deceitful abuses in the use of a firm name; to abstain from improper threats or collusion or bad faith to secure advantages; to avoid undue delay or excessive demands in remitting to or settling with clients; to avoid contingent agreements for the payment of witnesses; to avoid advising a client to forfeit bail; to call the attention of the court to testimony given by a witness called by him, which he knows to be false; to avoid the payment of money to influence witnesses or the administration of justice; to avoid the suppression of material information, or the giving of false or misleading information, upon securing admission to the Bar; to avoid permitting a disbarred attorney to practice in his name; to avoid all irregularities in acting in an official capacity; to avoid advising bribery, or the deceit of a public official; to avoid deceitful and misleading methods of securing employment; to avoid plotting to secure the commission of an offense against law or morals; not to influence witnesses by preparing their written answers in advance; to avoid reckless or careless statements in affidavits; to avoid wilful disobedience to a client's rightful instructions; to avoid obstructing the service of legal process; to avoid permitting others to use his name for improper or unlawful purposes; to avoid instituting criminal charges as a means to force the settlement of a civil dispute; to avoid appearing for an incompetent on the employment of his adversary, without fully disclosing all of the facts for the information of the court; to avoid improper inducements to withdraw criminal charges; to advise clients fully of their legal rights, as understood by the attorney; to enforce a client's rights with reasonable diligence; to avoid interposing contradictory affidavits from the same affiant in two different proceedings; to avoid entering judgments containing unjustified provisions.

And so we may confidently expect, as the years go by, to see the principles of legal ethics, as announced by philosophic writers, having no lawmaking power, gradually enunciated as the law of the state, through the adoption and application of these principles by judicial authority, under their statutory power to maintain supervision over the conduct of a lawyer in his office.

And in some far off golden age, we may even expect that the unnecessary brow-beating of witnesses, marked discourtesy to opposing counsel, and petty and mean tricks of advocacy may take their place among offenses which, already contemned by honorable men, will be then regarded as such conduct unbecoming an officer and a gentleman as to call for judicial rebuke.

I have referred thus, casually, to certain recognized canons of legal ethics, some having the support of statute, some of judicial decision and others still only the opinion or tradition of the profession, or of philosophic writers in the profession. I have not attempted to enumerate all of the accepted canons or principles. It seems to me that in a talk of this kind that would be impracticable. They can be readily obtained, in so far as they have been formulated by the American Bar Association. And before you are admitted to the Bar of New York you must, under the rules of the Court of Appeals, familiarize yourselves with them. Philosophically considered they fall into such categories as the duty of the lawyer to the state, his duty to the court and its judges, the duty to his client, to his adversary, toward jurors, toward witnesses, toward others, toward himself and his profession, and in judicial position and in other public office.

Upon examination you will find that the several canons, though not arranged precisely in this form, treat of his duties in these several categories, with the single exception of judicial duties. I regret to say that the American Bar Association has not felt prompted to adopt any canons of judicial ethics; the Pennsylvania Bar Association has, however, done so, by supplementing the canons of the American Bar Association.

The canons of the American Bar Association present a voluntary code, the principles of which, if learned and observed, will probably keep a practitioner in the paths of rectitude all of the days of his life.

If any of you are more deeply interested in the subject, there are at least three recent books devoted to it, the works of Marvelle, Williams and Archer, while Sharswood and Warren are accessible in law libraries. And those who desire to consult Hoffman and the other materials that I have mentioned, will find them published in connection with the reports of the committee in the annual volumes of the American Bar Association between 1905 and 1908. A valuable contribution to the subject, which was only privately and confidentially circulated for the use of the members of the committee, and consisting of many extracts from the views of prominent lawyers of the present day, is known as the Committee's Red Book, of which a few copies are extant, but not readily accessible. I chance to have two in my own somewhat voluminous collection of material bearing upon the subject.

I have thus in the manner which the short time at my command permits, hastily reviewed the general subject of legal ethics as it presents itself to my mind, without going to any great extent into its specific rules of conduct.

But I do not feel that I should close without making a short reference to a very practical activity in legal ethics which is now very rapidly developing in this country. I have already referred to the Committees on Ethics of the New York County Lawyers' Association, the Cleveland Bar Association, the Allegheny County (Pittsburgh) Bar Association, the Mississippi State Bar Association and the St. Louis Bar Association. So far as I am advised they are all formed on the same model, and have for their prototype the activities of the General Council of the Bar in England; in short, they give advice in legal ethics. The methods of the General Council of the Bar are explained in Thomas Leaming's most entertaining book, "A Philadelphia Lawyer in the London Courts." They have been adopted and extended by the committee of the New York County Lawyers' Association, of which I have been Chairman ever since it acquired this power. I have seen the committee feel its way to its present method of procedure, and have seen its methods adopted by the Associations above mentioned. My connection with this committee has satisfied me of the real difficulty in the application of recognized principles of legal ethics to exceptional situations. I once heard a man facetiously say, when he looked at Story on the "Conflict of Laws," "Why, I supposed all law books had for their subject the Conflict of Laws!"

So, also, the occasions are not rare when specific situations present, apparently at least, a call for the application of con-

flicting principles of ethics. My clerical critic . . . was perhaps unaware, when he denounced a majority of the legal profession and the whole of legal ethics, that he had merely fallen foul of a conflict of principles, where he thought one was so strong as to render the other grossly immoral, while the accepted view of the legal profession is to consider that the alleged immoral principle is the stronger of the two, and is really in its last analysis not inconsistent with the other, but really a corollary of it.

The cleric's unformulated thought was that the duty of a lawyer to the state completely overthrew his fancied duty to his client; whereas, as a matter of fact, the state itself has through its lawmaking body emphatically imposed upon the lawyer as his supreme duty the duty of preserving his client's confidences and his advice given thereon. So when the cleric denounced two lawyers by name to me for advancing such views, he was actually denouncing them for declaring as the law of the state what the legislature has solemnly enacted as law.

But it is not all cases of conflict of ethical principle which are so easily solved, nor is it always easy to see that a given situation calls for the application of ethical principle. On our committee in the New York County Lawyers' Association are 21 men, chosen by the President of our Association, presumably because they are supposed to have some acquaintance with accepted principles of legal ethics. Some of the questions submitted to us have occupied several meetings; we frequently pass a question, after debate, from one meeting to another. Happily, the most of our answers ultimately receive the unanimous approval of the members present, but to get them into a shape where they receive such approval is frequently a work of considerable skill. In giving such answers a committee must have regard not only to its center, but to its right and left, to its flanks and its rear; to avoid saying something which will be misconstrued; to avoid implied approval of some reprehensible practice which is not expressed, but which may be read between the lines; to avoid laying down as a general principle some proposition which may be subject to extensive exception; to avoid being so idealistic as to become impractical—all of these things have to be studied and are studied with great care, and in a multitude of counsels there is wisdom, or at least we think so.

In one question the committee came to a deadlock over a supposed or fancied public policy embodied in the divorce law, and the actual contrary construction of that law as repeatedly announced by the Court of Appeals; the majority of the committee gave as much consideration as it conscientiously could to the views of a substantial minority, and announced the views of both majority and minority.

Frequently members who come to the meeting prepared to apply one principle are convinced after debate that another controls or modifies the first. Our experience also satisfies us abundantly that there are numerous members of the profession seeking light; our committee gets only a fraction of the questions which are propounded to its Chairman; many an inquirer expresses himself as satisfied with the Chairman's unofficial views and withdraws his question from consideration by the committee; others ask their questions in the first place of the Chairman without any expectation or desire that they shall be put before the committee; others insist that their questions shall go before the committee, which in some instances has been criticised for entertaining and answering frivolous questions, or questions whose answer is obvious; but the critics do not know that the inquirer was insistent and perplexed and craved an answer from the committee.

When a matter strikes us as obvious, we are too apt to overlook that it may present a real problem to another mind. My clerical friend was so impressed that it is morally wrong to protect the secrets of a client, when he thought that they ought to be exposed, that he was ready to rush into print and denounce the whole legal profession and the whole of legal ethics for the contrary view, although if he had been fully advised he would have known that the express law of the state, the oath exacted from the lawyer, and the age-long practice of the common, the civil and the ecclesiastical law all support the practice approved of most lawyers, and that only the most impractical idealists support their own views.

You may be interested to know the general character of the questions answered by our committee. Without going into any details I will merely enumerate them as including questions concerning professional advertisements; the annulment of marriage; bankruptcy; collection agencies; collections; compensation of and by an attorney; creditor's committees; demand of damages; disciplinary measures; division of fees; divorce; acceptance of employment; inconsistent employment; gratuitous services; permitting a guaranty of honesty or efficiency as a means of procuring employment; judicial ethics; judges; law lists; marriage; firm names; patent attorneys; privileged communications; receivers, referees; relations to a client; relations to other attorneys, including friendly relations; foreign attorneys; adverse relations; attorneys of other states, and employers; relations to the courts; to a former preceptor; to third persons; of third persons to attorneys; salaries; solicitation; students of law; threats; trade organizations and witnesses.

I have referred at length to the work of this committee because it is, at present, the most active agent I know in the field of legal ethics. Its example led, I know, to the formation of the committees in Cleveland and St. Louis. I suspect that the committees in Mississippi and Pittsburgh were formed in consequence of its activities. Its widespread influence has been due to its liberal propaganda. The decisions of the General Council of the Bar in England are published in "The Annual Practice." When our committee was formed we had this example; it was decided that the beneficial force of the advice would be multiplied if the committee should publish it; in order to do so, it was deemed necessary to have the specific question reduced to writing, and to answer in concise and sententious form, always, however, directing attention to the principle of professional ethics considered by the committee to be controlling. The next question was where and how to publish. Our resources were very meager, and the Association's news is published only in a few pages of a local monthly legal magazine, necessarily of limited circulation. The committee gladly availed itself of this medium of publicity, but naturally that was largely of merely local circulation. So finally the committee used its small appropriation in printing about 300 copies, now increased to 500, of its answers given each month, and mailing them to every legal periodical and every law school in the United States and Canada. The legal periodicals have done the rest. We get inquiries now from many parts of the United States; they have come from Maine, California, Arkansas and Michigan; they come through the editors of legal magazines, who publish our answers; they come from local lawyers and from lawyers in the country districts. But better still, they have awakened an interest in the law schools themselves. The latest evidence of this was a request from the dean of one of the large schools in a western city, for a complete set of the questions and answers for every man in his senior class. Several deans and lecturers on legal ethics have notified us of their utilization of our questions and answers in

their class instruction. as practical problems, which awaken actual live intellectual interest as object lessons in ethics.

I have, perhaps, wearied you with my account of the procedure and efforts of one local committee, but to my mind it ves to illustrate that legal ethics is not a valley of dry bones, but is a subject of vital present interest, not only to the legal profession but to the whole public, as the body of principles which governs that large class in the community to whom they have committed, under the judiciary, the practical administration of justice.

I trust that the coming generation of lawyers, of whom you will form a part, will not suffer the awakened interest in this subject to lag, or to return to that state of lethargy in which in many communities it was buried when the committee of the American Bar Association began its labors.

POWER AND AUTHORITY OF GOVERNOR AND MILITIA IN DOMESTIC DISTURBANCES*

A Brief by HENRY J. HERSEY.

IN 1903, the Western Federation of Miners ordered a strike of the metalliferous miners in the Cripple Creek and Telluride districts in Teller and San Miguel Counties.

Thereupon, armed forces of miners engaged in open resistance to the enforcement of the laws of the state, overpowering the civil authorities and destroying property and life until the sheriffs and other public officers and citizens of the respective counties were compelled to petition the governor to order out the National Guard for the enforcement of the laws and the protection of life and property. By these petitions, as well as by personal appeals, the governor was informed that the civil authorities were wholly unable to enforce the laws, or to provide safety to persons and property, or to suppress the armed forces of the strikers and their sympathizers. An insistent demand was made upon the governor that he perform his constitutional duty to enforce the laws, suppress the insurrection, restore peace and order and protect life and property by sending the militia into these districts for those purposes.

After due consideration the governor issued his proclamation declaring the county of San Miguel, where Telluride is situated, to be in a state of insurrection and rebellion, and ordered the adjutant general to proceed to that county with the necessary troops and use such means as he might deem right and proper, acting in conjunction with or independently of the civil authorities of said county, as in his judgment and discretion the conditions demanded, to restore peace and good order and to enforce obedience to the constitution and laws of the state.

In pursuance of such executive order by the governor, as commander-in-chief of the militia, the adjutant general proceeded with the troops to San Miguel County, and as a necessary means, in his judgment, of suppressing the insurrection and rebellion and of enforcing obedience to the constitution and laws and restoring peace and order in said county, he caused the arrest of C. H. Moyer, who was the president of the Western Federation of Miners, because, in his judgment, Moyer was an important factor in fomenting disorder, lawlessness and insurrection.

I may digress here to say that previous to the arrest of Moyer, three other persons had been arrested and detained in the Cripple Creek district by the military authorities, where the militia had been sent some months previous, under the proclamation and orders of the governor for the same purpose as they were subsequently sent into the Telluride district. Each of these three persons was represented in their attempts to secure release from military custody by the aid of writs of habeas corpus, by the general attorneys of the Western Federation of Miners, Richardson and Hawkins, who appeared as the personal attorneys of each of these persons. The first two arrested and detained by the military authorities were Victor Poole and A. G. Paul. Each of them applied on the same day—Dec. 16, 1903—to the supreme court of the state of Colorado for a writ of habeas corpus against the military authorities, which writs were granted. The final result in each case, however, was the dismissal of the proceedings. The other of the three persons arrested and detained by the military authorities in the Cripple Creek district was one Sherman Parker. Evidently his attorneys, who had failed to get release for their former clients, Poole and Paul, in the state supreme court, thought they would fare better in the United States court, so on the 19th day of January, 1904, they presented Parker's petition for a writ of habeas corpus to Judge Hallett of the United States circuit court at Denver. I appeared for the state (being deputy attorney general during all this period) and resisted the application. Judge Hallett took the matter under advisement and the next day denied the petition for the writ and dismissed the proceeding. Judge Hallett's opinion has never been officially published, but in the course of his opinion he fully sustained the power of the governor and the military authorities to do all that they had done in arresting and detaining the petitioner and held that it was entirely legal.

The arrest of Moyer by the military authorities at Telluride occurred on the 29th day of March following, some two months later than the Parker case, and the same attorneys appeared again, this time for Moyer, and applied for a writ of habeas corpus to Judge Stevens of the district court at Ouray, Colo., a county adjoining Telluride.

The writ was issued and served on the adjutant general and the captain of the militia at Telluride, and upon the return day thereof the attorney general and myself appeared before Judge Stevens at Ouray and by proper motions and pleadings resisted the application of Moyer for release upon habeas corpus.

In the answer or return to the writ, we set forth the proclamation and executive orders of the governor above referred to, and the existence of a state of insurrection and rebellion so proclaimed and declared by the governor, and that it was the intention of the military authorities, at the earliest day practicable and consistent with the administration of justice in the suppression of the insurrection and the restoration of order and peace, to turn Moyer over to the civil authorities and civil courts, but that under existing conditions it was unsafe to do so; the answer also stated

* The United States Commission on Industrial Relations invited Mr. Hersey to contribute to its work by preparing for it a brief or analysis of the Moyer decision rendered by the Colorado Supreme Court in 1904 and the decisions preceding and following it upon the same lines, and in response to that invitation he prepared this brief. Mr. Hersey was Deputy Attorney General of Colorado during the labor strike in that state in 1903 and 1904 and represented the state in the numerous habeas corpus cases during that period which grew out of the arrest and detention of the labor leaders by the military authorities.

The Moyer case (reported in volume 35 of the Colorado Supreme Court Reports beginning at page 159) is the leading case upon the powers and duties of the governor and the militia, acting under his orders, in domestic disturbances. The decision in that case has since been approved by the United States Supreme Court and by the courts of other states where similar cases have arisen.

The accompanying brief is the result not only of Mr. Hersey's work in the Moyer cases, but also of further work in the ten years since those cases were decided.

that they had been commanded by the governor, as commander-in-chief of the militia, to decline to produce the body of Moyer before the court.

In the answer or return we also contended that, under the facts shown by the return, the court had no further jurisdiction to proceed with the cause.

Judge Stevens declined to permit us to present authorities or to be heard in defense of the state's position, and notwithstanding the supreme court and the United States circuit court had, previously, in the three cases above referred to, under similar circumstances denied similar petitions for habeas corpus, yet Judge Stevens immediately, without even hearing us, fined the adjutant general and captain of the militia five hundred dollars ($500) each, for not producing Moyer in court, and ordered the sheriff to arrest and imprison them without bail until they should obey the writ of habeas corpus, and also ordered that they pay the fines to said Moyer.

The military authorities, however, declined to recognize the order of the court and refused to be arrested by the sheriff, to pay the fines or to release Moyer. Notwithstanding the three previous decisions of the state supreme court and the federal court had established the legality and soundness of the position of the governor and the military authorities, yet desiring that the questions involved should be still more thoroughly tested in the courts, upon the advice of the attorney general and myself, Adjutant General Bell sent out a writ of error from the supreme court to the district court of Ouray County for the purpose of reviewing Judge Stevens' orders and judgment.

We applied to the supreme court, in behalf of the military officers, for a supersedeas to stay the orders and judgment, above referred to, which supersedeas was unanimously granted.

At the same time, Moyer's attorneys applied in his behalf to the supreme court for a new writ of habeas corpus, setting forth all the proceedings in Judge Stevens' court, as well as the refusal of the military authorities to obey the district court's orders.

Simultaneously with the filing of Moyer's petition for a writ of habeas corpus, he applied to the supreme court for an order admitting him to bail, to secure his release from the custody of the military authorities pending final hearing. Elaborate arguments were made by counsel for Moyer for his release upon bail and opposed by us, after which the supreme court unanimously denied Moyer's application for release upon bail. The opinion was rendered by Mr. Justice Steele, and will be found in volume 35, Colorado Supreme Court Reports, page 154. Upon the refusal of the supreme court to admit Moyer to bail, he was by order of that court remanded to the custody of the military authorities pending the final hearing and determination of his case.

The writ of habeas corpus was issued, however, and served upon the adjutant general and captain of the militia; and later, when the case was before the supreme court for oral argument upon the final hearing, Moyer was produced in court by the military authorities and remained present during all the time his case was being heard, but, of course, he was attended by the adjutant general and the captain of the militia, in whose custody he was and who were respondents or defendants in the habeas corpus proceedings.

Previous to the oral argument of the case, however, the adjutant general, following the usual course in habeas corpus proceedings, made his answer or return to the writ, in which he set forth the proclamation of the governor, above referred to, declaring San Miguel County to be in insurrection and rebellion, and also the executive order of the governor, above referred to, ordering the adjutant general to proceed to San Miguel County and suppress the insurrection.

The answer or return also stated that in the judgment of the governor and military authorities it was necessary to arrest and detain Moyer in order that the insurrection might be suppressed and peace and order restored and obedience to the constitution and laws enforced. To this return was appended a certificate by the governor asserting the truth of the facts stated in the return or answer of the adjutant general and, in addition thereto, advising the supreme court fully of the gravity and seriousness of the situation, even giving the court a portion of the evidence submitted to the governor before he issued his proclamation and orders, among which was the statement of the sheriff and others as to the lawless conditions in San Miguel County and the total inability of the civil authorities to protect life and property, and their request to and demand of the governor that he immediately order the National Guard into active service in that county. The governor also certified to the supreme court that the insurrection and rebellion, declared in his proclamation to exist, had not been fully suppressed, owing to its magnitude and the number of lawless persons aiding and abetting the same, and that the ordinary civil authorities were wholly powerless to cope with the situation.

Moyer, through his attorneys, sought to take issue with the facts set forth in the answer or return of the adjutant general and the certificate of the governor by formal reply thereto, denying the existence of the facts stated by the adjutant general and the governor.

As both the facts, out of which this case arose, and the legal questions involved and decided therein, have been misstated, not only by some persons who have testified before your commission at its hearings in Denver, but also from time to time in the public press and in public meetings, it is most important to remember that the proposition of law for which we contended and which the courts have sustained was this:

That when the answer or return of the military authorities has been filed and presented to the court showing that the governor, in pursuance of his constitutional power and duty to enforce the laws and suppress insurrection, *had issued a proclamation declaring a portion of the state to be in insurrection and rebellion* and that the governor had ordered the militia into the field to suppress such insurrection and enforce obedience to the constitution and laws and to restore peace and order, *and when such return also showed that as a means thereto, the military authorities,* acting under the governor's orders as governor and commander-in-chief, *had deemed it necessary to arrest and detain any person* or persons in their judgment aiding and abetting the insurrection and had arrested and detained such persons *that thereupon the jurisdiction of the court immediately ceased.*

That is quite different from the proposition that either the writ or the privilege of the writ of habeas corpus was or could be suspended by the governor; that proposition was not involved in the Moyer case and neither was the question of martial law involved; so I shall not discuss them here. I only mention them because it has been erroneously stated that those matters were involved.

It is also important to know that we contended that the governor and military authorities in acting as they did were as fully and truly within the constitution and laws of the state as are the civil authorities when upon filing of a criminal complaint the court issues a warrant and the sheriff arrests the person charged with the crime and puts him in jail; in other words, *if the governor in obeying the express command of the constitution* to "take care that the laws be faithfully executed," and "to suppress insurrection," *finds it necessary to arrest and detain a person, that is as truly a legal act and a legal arrest and detention, and also as definitely required by the constitution and stat-*

utes, as is an arrest and detention *by a sheriff* upon a criminal warrant.

The former is a summary procedure to effectively meet extreme cases and conditions threatening the very life of the state, while the latter is a more common and familiar procedure to meet the ordinary and usual violations of law not striking at the very existence of the government.

The above proposition was not only sustained by the Colorado supreme court in the Moyer case, but by the United States circuit court in two cases (*In re Sherman Parker,* . . . and *Moyer* v. *Peabody, infra*), but later by the United States supreme court in *Moyer* v. *Peabody, infra.*

Briefly stated the first and fundamental proposition involved in the Moyer case was:

(1) *That under the constitution and statutes of the state of Colorado, it is the duty of the governor to determine as a fact when such conditions exist as constitute an insurrection and which require him to call out the militia to suppress it, and that his determination of that fact cannot be disputed, and is conclusive upon all other departments of government and upon all other persons whomsoever.*

That proposition, the supreme court of Colorado in the Moyer case held was sound, and in so holding it followed the law as it has existed in this country from the earliest times to the present day, as we shall now see.

Under the constitutions of our several states, as well as under the federal constitution, our state and national governments are divided into three separate departments each distinct and supreme in its own sphere, neither of which can encroach upon the other and none of which can control any of the others in the exercise of its special functions.

The provisions of the Colorado constitution upon the matters now under discussion are in no essential particulars different from the constitutions of other states.

The constitution expressly imposes upon the governor certain important executive powers and duties, namely:

"The supreme executive power of the state shall be vested in the governor, who shall take care that the laws be faithfully executed."—Colo. Const., Sec. 2, Article 4.

It also provides that the governor "shall be commander-in-chief of the military forces of the state" and that "he shall have power to call out the militia to execute the laws, suppress insurrection or repel invasion."—Colo. Const., Sec. 5, Article 4.

These are the positive and express commands by the whole people to the governor, embodied in their constitution, and neither the judicial nor the legislative department can usurp any of these powers nor interfere with them. All that either of the other two departments can do, and what they must do under the constitution, is to aid the governor and not hinder or prevent him in performing his constitutional duties.

The legislature of Colorado to aid the governor, early in its history, passed a National Guard act which has since been amended from time to time. When the Moyer case arose, and for some years prior thereto, the National Guard act provided as follows:

"*The National Guard* of Colorado *shall be governed by the military law of the state,* the code of regulations, *the orders of the governor,* and wherever applicable by the regulations, articles of war, and customs of the service in the United States Army."—Colo. Session Laws, 1897, page 198, Sec. 1.

The same act also provided that:

"When an invasion of or insurrection in the state is made or threatened, the governor shall order the National Guard to repel or suppress the same."—Colo. Session Laws, 1897, p. 204, Sec. 2.

These statutes show not only the purpose of the legislative department to aid the executive department in the performance of the latter's constitutional duties, but also clearly evidence the intention of the legislature to eliminate all possible question or controversy that *"the orders of the governor"* to the National Guard *are as much the law of the state* when the militia is called out by the governor to aid him in the enforcement of the laws, or in suppressing an insurrection, *as are the orders of any court* in matters properly before it.

The duty therefore having been imposed upon the governor by the constitution to "take care that the laws be faithfully executed" and "to call out the militia to execute the laws, suppress insurrection or repel invasion" *as the exclusive duty and function of the executive department of the government* it follows, under our theory and form of government, that *neither the legislative nor judicial department can encroach upon that exclusive jurisdiction,* or function, of the executive department *by interfering with, or controlling, the discretionary exercise of his constitutional powers and duties.*—14 American and Eng. Ency. of Law (2d Ed.), 1106; 6 American and Eng. Ency. of Law (2d Ed.), 1006 (1); 1008 (*b*); 1010 (2*a*); 1012 (*c*); 1014 (title, "Governor").

For a very able opinion, out of many, upon the above proposition, I refer to the following rendered in 1839 by the supreme court of Arknsas.—*Hawkins* v. *Governor,* 1 Arkansas 570, 589-596.

In other words, where the governor under the constitution and statutes has a duty to perform he is required to exercise his discretion, and, when he has determined the existence of the facts necessary to call into exercise that discretion, no court has jurisdiction to inquire into the truth or falsity of the facts, for the governor alone is the sole judge.

Perhaps the earliest case in the United States where this proposition was announced was the celebrated case of *Marbury* v. *Madison,* decided by the supreme court of the United States in 1803, wherein that great chief justice, John Marshall, said for the court that

"By the constitution of the United States the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character and to his own conscience."—*Marbury* v. *Madison,* 1 Cranch (U. S.), 137, 165-166.

The court then, immediately after the above quoted sentence, discussed the act of Congress authorizing the President to appoint certain officers to act by his authority and under his orders and held that their acts are the President's acts, adding,

"And whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion."

And the court further held that

"The acts of such an officer, as an officer, can never be examinable by the courts."—Idem, 166.

We see, therefore, that the first and fundamental proposition involved in the Moyer case was decided to be the law in this country over one hundred years before the Moyer case was decided.

The next case was decided by the supreme court of New York in May 1814. In that case it was necessary to determine the question of the President's powers under an act of Congress approved Feb. 28, 1795, which gave to the President authority to call forth the militia "to execute the laws of the Union, suppress insurrections, and repel invasions" (it should be noted that the language of this act is practically identical with the Colorado constitution and statutes which I have quoted above).

The supreme court of New York in that case held that *the*

President of the United States alone is made the judge of the happening of the event which requires the calling out of the militia, and that in such case the President acts upon his own responsibility, under the constitution.—*Vanderheyden* v. *Young*, 11 Johnson's Reports (N. Y.), 150, 158.

The same act of Congress, and the same question, was before the United States supreme court in 1827, and that learned tribunal followed the New York case and held, in an opinion by Mr. Justice Story,

"That *the authority to decide whether the exigency has arisen, belongs exclusively to the President, and that his decision is conclusive upon all other persons.*"—*Martin* v. *Mott*, 12 Wheaton (U. S.), 19, 30.

In our briefs in the Moyer case we cited the foregoing cases, as well as others, among them another case decided by the United States supreme court in 1849, growing out of Dorr's Rebellion in Rhode Island, wherein the supreme court of the United States again held to the same effect.—*Luther* v. *Borden*, 7 Howard (U. S.), 1, 43-45.

All these cases were considered by the supreme court of Colorado and followed in the Moyer case.

We find, therefore, that the fundamental proposition involved in the Moyer case has always (and necessarily so under our theory and form of government) been the unquestioned law in this country.

In our briefs and arguments in the Moyer case, we cited numerous other cases in support of the various propositions involved, among others, an Idaho case growing out of the Cœur d'Alene strike, where the supreme court of Idaho went much farther than the supreme court of Colorado was asked to go, or did go, in the Moyer case. In that case, the supreme court of Idaho held not only that the facts set forth in the governor's proclamation could not be disputed and would not be inquired into, or reviewed, by any court, but also held that the privilege of a writ of habeas corpus might be suspended by executive action.—*In re Boule*, 6 Idaho 609.

But, as I have before stated, the governor of Colorado did not suspend the privilege of the writ of habeas corpus in the Moyer case and so that proposition was not involved, and I, therefore, do not discuss it here.

The next question involved in the Moyer case, and the really practical question, was this:

(2) Were the arrest and detention of Moyer under the facts narrated, illegal?

The answer to this question, we shall now see, must be in the affirmative.

Of course, to answer this question correctly the fundamental proposition which I have just discussed and which was briefly stated in the paragraph I have numbered (1) above, had to be first answered; and perhaps I should have made this second question the first, but as I consider the other more fundamental and as rather leading up to this practical question, I have discussed it here first.

It is an elementary rule of constitutional and statutory construction (as was held in the Moyer case) that

"When an express power is conferred, all necessary means may be employed to exercise it which are not expressly or impliedly prohibited."—*In re Moyer*, 35 Colorado Supreme Court Reports, 159, 166; citing 1 Story on the Constitution, Sec. 434.

The constitution having, therefore, by its express commands imposed upon the governor the duty to "take care that the laws be faithfully executed," and having expressly made him "commander-in-chief of the military forces of the state" and also commanded him "to call out the militia to execute the laws, suppress insurrection," etc., it necessarily follows, that he may and can employ all the means which, in his judgment, are necessary to be used to execute the laws and to suppress insurrection.

It also necessarily follows from the foregoing that the executive (being the President in the case of the national government and the governor in the case of the state government) when he has called out the militia to enforce the laws or to suppress an insurrection and has determined that it is necessary to arrest and detain any person, and has made such an arrest and detention, has done a perfectly lawful act, and his decision cannot be questioned or interfered with, or set aside, by the courts, or any other department of government.

Ultimate authority must rest somewhere, and, under both our federal and state constitutions in such cases and under such conditions as we are now considering, *it rests with the Chief Executive* of the nation, or state, according to whether it is a national or state matter.

The law as to ultimate authority was well stated by that eminent constitutional jurist, Judge Cooley, in rendering the opinion of the supreme court of Michigan, where the court held that

"The law must leave the final decision upon every claim and every controversy somewhere, and when that decision has been made, it must be accepted as correct. The presumption is just as conclusive in favor of executive action as in favor of judicial."—*People Ex rel. Sutherland* v. *Governor*, 29 Mich. 320, 330-331.

In the recent strike of the coal miners in Colorado it became necessary for the President of the United States to send the federal troops into Colorado, and I have yet to hear that anyone, lawyer or layman, has had the temerity to even suggest that the President's action was illegal, or that the courts could inquire into the necessity of such act, or in any way interfere with it. To state the proposition is to make its absurdity immediately apparent.

The constitution and statutes having vested the governor with the exclusive powers and duties above referred to, and all the courts (beginning with *Marbury* v. *Madison, supra*, decided by the United States supreme court in 1803) having uniformly sustained the power and duty of the Chief Executive in the premises and having also decided that he is the sole and exclusive judge of the existence of facts calling into operation his executive powers and duties and that he cannot be controlled or interfered with in the performance of such duties by any other department of the government, it naturally followed that the supreme court of Colorado, when the Moyer case came before it, in obedience to the constitution was compelled to decide, as it did decide:

(a) That where the governor has called out the militia to suppress an insurrection the militia has authority to arrest and imprison any person participating in, or aiding, or abetting, such insurrection and to detain such person in custody until the insurrection is suppressed:

(b) That under such circumstances the military authorities are not required to turn such arrested persons over to the civil authorities during the continuance of the insurrection, but can detain them until the insurrection is suppressed, when they should be turned over to the civil authorities to be tried for such offenses against the law as they may have committed:

(c) *And as a further logical conclusion, that where the* militia is engaged in suppressing an insurrection and has arrested a person for aiding and abetting such insurrection, *his arrest is legal, and his detention in the custody of the military authorities* until the insurrection is quieted *is also legal*, and the court will not interfere to release such person upon a writ of habeas corpus.—*In re Moyer*, 35 Colo. Supreme Court Reports, 159.

The foregoing propositions have all been sustained, since the Moyer decision, by the federal courts in litigation instituted and

prosecuted by Moyer after peace and order had been restored and Moyer had been released from military custody by the military authorities.

After the strike was over Moyer's attorneys, Richardson and Hawkins, brought a suit for him in the United States court at Denver against Governor Peabody, the adjutant general and the captain of the militia at Telluride, claiming that because of his arrest and detention by the military authorities, acting under the orders of the governor, Moyer's constitutional rights had been violated and that he had been damaged in the sum of one hundred thousand dollars ($100,000) and asked for body execution. In that suit Moyer claimed in substance that the Colorado supreme court's decision in the habeas corpus case, above discussed, had violated the federal constitution by depriving him of his liberty without due process of law. In this case the same questions were again involved and argued as were involved and argued in the habeas corpus case, and again Moyer was defeated in his contentions. Judge Lewis, who sat in the trial of the case, dismissed the case and in his opinion fully sustained the power and duty of the governor and military authorities in the premises and followed the decision of the supreme court of Colorado in the Moyer case.—*Moyer* v. *Peabody et al.*, 148 Federal Reporter, 870.

Moyer then took the case to the United States supreme court and in January, 1909, that learned tribunal, in an able opinion by Mr. Justice Holmes, unanimously reached the same conclusions as had five years before been reached by the Colorado supreme court and fully sustained the power and duty of the governor to do all that was done in the Moyer case.—*Moyer* v. *Peabody et al.*, 212 U. S. Supreme Court Records, 78.

I shall not quote the learned opinion in full, hoping that the commission will read it from the official report above cited, but I feel it important to give a few extracts therefrom.

It is interesting to know from the opinion in that case, that Moyer and his attorneys had, during the intervening years, learned that they could not lawfully dispute the facts of the governor's declaration or proclamation, for the United States supreme court says in its opinion,

"It is admitted, as it must be, *that the governor's declaration that a state of insurrection existed, is conclusive of that fact."* —*Idem* 83.

The court, after discussing other familiar summary proceedings such as in tax matters and executive decisions for exclusion of aliens from the country, and the Colorado constitution and statutes involved, and referring to the arrests by the military authorities as a means of suppressing insurrection, says,

"Such arrests are not necessarily for punishment, but are by way of precaution, to prevent the exercise of hostile power."—*Idem* 84-85.

The supreme court of the United States later in the opinion shows clearly that such arrest and detention is perfectly legal and as truly so as is the arrest and detention under the ordinary process of the civil courts, when the court said,

"When it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of individuals must yield to what he deems the necessity of the moment. Public danger warrants the substitution of executive process for judicial process."—Idem 85.

And thereby the United States supreme court held that the arrest and detention of Moyer by the military authorities was perfectly legal and sustains the proposition that I announced earlier in this letter that if the governor in obeying the express commands of the constitution to "take care that the laws be faithfully executed," and "to suppress insurrection," finds it necessary to arrest and detain a person, that is as truly a legal act and detention, and also as definitely required by the constitution and statutes, as is an arrest and detention by a sheriff upon a criminal warrant.

Since these several Moyer cases were decided by the supreme court of Colorado and the federal courts, similar cases have arisen in the states of West Virginia and Montana, each of which states has followed the decision of the Moyer cases in the supreme court of the state of Colorado and in the federal courts.

The first of these cases was before the supreme court of appeals of West Virginia, several habeas corpus cases being heard and decided together. Among them was one in which it appears that Mary Jones (who has also figured in the recent Colorado coal miners' strike, and is commonly known as "Mother" Jones) who had been arrested and imprisoned by the military authorities of West Virginia, acting under orders of the governor of that state, sought release therefrom by a writ of habeas corpus.

Similar questions were involved in that case as were involved in the Moyer case, and the same conclusion was reached by that court as had been previously reached by the supreme court of Colorado and the United States supreme court; and the cases cited in the opinion of that case, in support of its decision, were also cited and presented to the supreme court of Colorado for its consideration in the Moyer case.—*In re Jones* (and three other cases), 71 West Virginia, 567; Ann. Cas., 1914 C., page 31.

That case was decided March 21, 1913, and just one year thereafter, on March 31, 1914, another case involving similar questions was before the supreme court of appeals of West Virginia. In the latter case, that court issued its writ of prohibition against one of the circuit courts of that state prohibiting it from entertaining jurisdiction in a certain action there pending brought against the governor of the state, as governor and commander-in-chief of the military forces and certain officers of the National Guard, acting under the governor's orders, who had suppressed and destroyed a Socialist newspaper, as a means of suppressing an insurrection existing in said state.

The basis of the decision, prohibiting the lower court from hearing the case, was that the governor could not be held to answer in the courts in an action for damages resulting from the carrying out of his orders issued in the discharge of his official duties and that his proclamation, warrants and orders made in the discharge of his official duties are as much due process of law as the judgment of a court. In this decision the supreme court of appeals of West Virginia again followed the decisions in the Moyer cases above referred to and the other cases which the Moyer cases followed.—*Hatfield* v. *Graham* (West Virginia), 81 Southeastern Reporter 533.

The Montana case, to which I have referred, was one in which the militia had arrested and detained the petitioners who sought their release from military custody by habeas corpus upon the same grounds as did Moyer in the Colorado case. The supreme court of Montana rendered its decision on October 8, last. In that case, following the Moyer case in Colorado, and the other cases above referred to, the supreme court of Montana held that the governor had authority to proclaim a state of insurrection to exist in a county of the state and to detail the militia of the state to suppress it and that his determination of the existence of an insurrection was conclusive and binding upon the court and all other authorities.

The Montana supreme court in specifically referring to the Moyer cases decided by the Colorado supreme court and the United States courts after quoting extensively from them said,

"The reasoning of these cases, properly understood and strictly confined to its proper sphere, *we take to be unanswerable,* and to be entirely applicable to the right and duty of the governor

and the militia, under our constitution and laws."—Ex Parte McDonald et al. (Montana), 143 Pacific Reporter 947, 949, 951.

In the foregoing analysis, I have by no means exhausted the adjudicated cases upon the questions involved, for to do so would prolong this brief beyond all reasonable limits. What I have endeavored to do is to show that the opinion and judgment of the supreme court of Colorado in the Moyer case is based upon the positive and express mandates of the constitution; that it is not an isolated case, but on the contrary is one of many cases upon similar propositions decided by the highest courts of our country, beginning with Chief Justice John Marshall's decision in *Marbury* v. *Madison* in 1803 down to the present time.

For the supreme court of Colorado to have rendered any other decision than it did would have been an encroachment by the judicial department upon the exclusive functions of the executive department and to have been a deliberate violation of the constitution.

Cases of Interest.

POWER OF MUNICIPALITY TO ESTABLISH WOODYARDS.—In Jones *v.* City of Portland (Me.) 93 Atl. 41, a statute was held constitutional which authorizes cities and towns to establish permanent woodyards to sell fuel at cost. The court declared that though the money to purchase the property was to be raised by taxation the statute was not void as working a deprivation of property without due process of law contrary to the Constitutions of the United States and Maine.

ADMISSIBILITY IN EVIDENCE OF RADIOGRAPH.—In Doyle *v.* Singer Sewing Mach. Co. (Mass.) 107 N. E. 949, which was an action for damages for injuries to the plaintiff's nose, it was held that a radiograph was properly admitted to prove to the jury the existence of certain physical defects in and about the bony structure in the front of the plaintiff's head, around the eyes and upper part of the nose. The court said: "The evidence was relevant to the issue before the jury. The radiograph was taken by Dr. Liebman, who testified that he was clinical assistant at the Massachusetts Charitable Eye and Ear Infirmary; that he had been connected therewith since 1910, and had charge of the X-ray department; that he took four negatives of the plaintiff's head; that they were correct representations of the condition of the bones in the front of the plaintiff's face and of the sinus as it was on May 27, 1914. The judge admitted the evidence of the negatives and the defendant duly excepted. The record does not show that the defendant questioned the qualifications of Dr. Liebman to take the radiographs, or so much as asserted to the judge that the position of the negative with reference to the camera was improper, unfair or fraudulent. Nor is there anything to indicate that the judge's preliminary ruling was biased or not governed by rules of law. The evidence was properly admitted and the exception must be overruled."

VALIDITY OF STATUTE LIMITING HOURS OF LABOR OF WOMEN IN CERTAIN OCCUPATIONS.—The United States Supreme Court in Bosley *v.* McLaughlin, 35 Sup. Ct. Rep. 345, has decided that the California statute limiting the hours of labor of graduate women pharmacists and women student nurses to eight in one day or forty-eight in one week is not invalid as denying to them the freedom of contract guaranteed by the United States Constitution. Mr. Justice Hughes, writing the opinion of the court, says: "As to liberty of contract.—The gravamen of the bill is with respect to the complainant Nelson, a graduate pharmacist, and the student nurses. As to the former, it appears that a statute of California limits the hours of labor of pharmacists to ten hours a day and sixty hours a week. Stat. Cal. 1905, p. 28. In view of the nature of their work, and the extreme importance to the public that it should not be performed by those who are suffering from over-fatigue, there can be no doubt as to the legislative power reasonably to limit the hours of labor in that occupation. This, the appellants expressly concede. But this being admitted to be obviously within the authority of the legislature, there is no ground for asserting that the right to contractual freedom precludes the legislature from prohibiting women pharmacists from working for more than eight hours a day in hospitals. The mere question whether in such case a practical exigency exists, that is, whether such a requirement is expedient, must be regarded as a matter for legislative, not judicial, consideration. The appellants, in argument, suggest a doubt whether the statute is applicable to the student nurses, but the bill clearly raises the question of its validity as thus applied, and urges the serious injury which its enforcement would entail upon the hospital. Assuming that these nurses are included, the case presented would seem to be decisive in favor of the law. For it appears that these persons, upon whom rests the burden of immediate attendance upon, and nursing of, the patients in the hospital, are also pupils engaged in a course of study, and the propriety of legislative protection of women undergoing such a discipline is not open to question. Considerations which, it may be assumed, moved the legislature to action, have been the subject of general discussion, as is shown by the bulletin issued by the United States Bureau of Education on the 'Educational Status of Nursing.'"

OPERATION OF FREIGHT CARS ALONG HIGHWAY AS ADDITIONAL SERVITUDE.—In Percy *v.* Lewison, etc., R. Co. (Me.) 93 Atl. 43, it was held that for a street railway company authorized to carry freight to transport it in ordinary railroad cars imposes no additional servitude on the highway. The court said: "The doctrine that the grant of the power to construct and operate a street railroad along a highway imposes no additional servitude for which the abutting owner is entitled to additional compensation is not denied by the plaintiff. This doctrine has been thoroughly elucidated in the modern cases of Briggs *v.* Railroad, 79 Me. 363, 10 Atl. 47, 1 Am. St. Rep. 316, and Taylor *v.* Railway, 91 Me. 103, 39 Atl. 560, 64 Am. St. Rep. 216, and the reasons for the doctrine need not be repeated here. But it is suggested in argument that the rule is, or ought to be, different, when a street railroad company is authorized to transport freight in freight cars, especially in the freight cars of a steam railroad company. We do not think so. The reasons given in the Briggs and Taylor cases why the changed methods of transportation of passengers do not result in an additional servitude apply with equal force to changed methods in transporting property. The right of public travel includes the right to transport property in drays and wagons. To transport it in cars is but another, and more modern, way of transporting it. And in the Taylor case the court said it is 'no matter whether the vehicle carries passengers or freight, or passes intelligence along its contrivance.' So that we think the right to haul freight in cars, if the right exists, imposes no additional servitude upon the land in a street over which the railroad runs, and affords no reason for saying that the legislative grant of the right is unconstitutional, as impinging upon the constitutional provision which forbids the taking of private property for public uses without just compensation."

IMPUTATION THAT WHITE WOMAN WAS COLORED AS LIBEL.—In Jones *v.* R. L. Polk & Co., (Ala.) 67 So. 577, the facts showed

that the appellant sued appellee in an action of libel for that appellee falsely, maliciously, and with intent to defame her, published of and concerning her in a book known as "Selma City Directory" that appellant was a colored person, etc. The proof was that on page 180 of the directory printed by appellee appellant's name was printed with an asterisk before it. On page 87 of the same book it was shown that an asterisk before a name denoted that the person named was colored. Appellant's name was printed in the same column with a dozen or more Joneses, some of whom were properly designated as colored. Appellant was of pure Caucasian descent. On these facts the judgment of the court below for the appellee was affirmed. Judge Sayre said: "The general statement that a person is 'colored' imputes no crime, no misconduct, no mental, moral, or physical fault for which one may be justly held accountable to public opinion; and yet in the peculiar social conditions prevailing in this jurisdiction, to publish of and concerning a white woman that she is colored, meaning that she is a negro, or has negro blood in her veins, is libelous within the definition of libel commonly found in the books. Flood *v.* News & Courier Co., 71 S. C. 112, 50 S. E. 637, 4 Ann. Cas. 685. Whether, then, such a publication is libelous in any particular case depends upon circumstances. Here then is room for innocent mistakes. Appellee offered evidence that this asterisk got in front of appellant's name by mistake of the printer hired by it to print its directory, and that immediately upon discovery of the error it was corrected, and on this evidence, under the charge of the court stating the law of the case, the jury acquitted appellee. Appellee's evidence made a case on which it was proper to leave it to the jury to find whether appellee's publication came within the saving of the following principle of the law of libel: The publisher of matter, in its nature calculated to defame and injure another, but not necessarily libelous, must be presumed to have intended to do that which the publication is calculated to bring about, and so must be presumed to have made the publication with malice, unless he can show the contrary; and it is for him to show the contrary. In other words, appellee was properly allowed to acquit itself by satisfying the jury that it made the publication complained of neither recklessly nor with knowledge that the same was libelous."

VALIDITY OF STATUTE PROHIBITING CARRYING OF INTOXICATING LIQUORS INTO SOCIAL CLUB.—The case of State *v.* Phillips, (Miss.) 67 So. 651, involved the validity of a statute as follows: "That no intoxicating liquor within the meaning of this act shall be kept in any locker or other place in any social club or organization for use therein, and all persons carrying such liquor to such club or locker for use therein or keeping the same for such use shall be guilty of a violation of this act." In the court below the statute was held invalid, but the judgment of the court below was reversed by the Supreme Court, which said: "The Supreme Court of the United States has uniformly held that the adoption of the fourteenth amendment of the Constitution did not have the effect of denying to the state power to prescribe 'regulations to promote the peace, health, morals, education, and good order of the people.' It may be said that the presence and use of intoxicating liquors at a place where a number of people gather for the enjoyment of social intercourse would have a tendency to disturb the peace and quiet of the people there assembled. It is not a stretch of the imagination to assume that one intoxicated man may, and indeed frequently does, annoy, disgust, and offend the moral sense of a large number of other people engaged in the discussion of serious and important social questions. The affectionate, or the bellicose, inebriate can do much to arouse the ire and invite the active resentment of his victims. And so the legislature deemed it wise to protect the members of social clubs, and thus promote the public peace by preventing the carrying of intoxicants into the clubrooms—to be kept or used there—to the discomfort of sober members and to the peril of the public peace. This thought was no doubt in the legislative mind, in so far at least as the statute might apply to the class of social clubs organized and conducted for the encouragement of social intercourse, and for the improvement and enjoyment of their fortunate members. There was another thought which probably prompted the legislation in question. It is well known to those familiar with the enforcement of the laws against the sale of intoxicants that many schemes, artifices, and devices have been originated for the purpose of evading the law. Clubs and lodges have been organized for no other purpose than to sell intoxicating liquors. The conscienceless promoters often select names for their club or lodge which suggest to the uninitiated that these organizations have no purpose other than to assist the moral and religious element of the community in every movement having for its purpose the moral welfare of the community. To check the pernicious and cunning activities of the professional criminal—the man who, once a blind tiger, is always a blind tiger—the legislature adopted a broad classification to cover any and all social clubs. This was necessary to make the statute at all efficient."

VALIDITY OF STATUTE PROVIDING FOR CENSORSHIP OF MOTION PICTURE FILMS.—An Ohio statute creating a state board of censors to pass on motion picture films before their exhibition in the state, was declared valid in the Mutual Film Corporation *v.* Industrial Commission of Ohio, 35 Sup. Ct. Rep. 387. It was the opinion of the court that the statute was not an unlawful burden on interstate commerce; nor was it in violation of the Ohio Constitution guaranteeing freedom of speech and publication. Mr. Justice McKenna, in support of the decision, used language in part as follows: "The censorship . . . is only of films intended for exhibition in Ohio, and we can immediately put to one side the contention that it imposes a burden on interstate commerce. It is true that, according to the allegations of the bill, some of the films of complainant are shipped from Detroit, Michigan, but they are distributed to exhibitors, purchasers, renters, and lessors in Ohio, for exhibition in Ohio, and this determines the application of the statute. In other words, it is only films which are 'to be publicly exhibited and displayed in the state of Ohio' which are required to be examined and censored. It would be straining the doctrine of original packages to say that the films retain that form and composition even when unrolling and exhibiting to audiences, or, being ready for renting for the purpose of exhibition within the state, could not be disclosed to the state officers. If this be so, whatever the power of the state to prevent the exhibition of films not approved,—and for the purpose of this contention we must assume the power is otherwise plenary,—films brought from another state, and only because so brought, would be exempt from the power, and films made in the state would be subject to it. There must be some time when the films are subject to the law of the state, and necessarily when they are in the hands of the exchanges, ready to be rented to exhibitors, or have passed to the latter, they are in consumption, and mingled as much as from their nature they can be with other property of the state. . . . It cannot be put out of view that the exhibition of moving pictures is a business, pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, nor intended to be regarded by the Ohio Constitution, we think, as part of the press of the

country, or as organs of public opinion. They are mere representations of events, of ideas and sentiments published and known; vivid, useful, and entertaining, no doubt, but, as we have said, capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition. It was this capability and power, and it may be in experience of them, that induced the state of Ohio, in addition to prescribing penalties for immoral exhibitions, as it does in its Criminal Code, to require censorship before exhibition, as it does by the act under review. We cannot regard this as beyond the power of government. It does not militate against the strength of these considerations that motion pictures may be used to amuse and instruct in other places than theaters,—in churches, for instance, and in Sunday schools and public schools. Nor are we called upon to say on this record whether such exceptions would be within the provisions of the statute, nor to anticipate that it will be so declared by the state courts, or so enforced by the state officers."

CRIMINAL ASSAULT BY AUTOMOBILE.—In a case of first impression decided by the Supreme Court of New Jersey, namely, State *v.* Schutte, (N. J.) 93 Atl. 112, it was held that a criminal assault may be committed with an automobile driven along a public street at an excessive rate of speed that endangers the safety of other persons and actually results in such an injury, and that the driving of an automobile at an excessive rate of speed is a wilful act likely to inflict injury from which the malice and intention to inflict injury, which are the essentials of a criminal assault, may, if the circumstances so warrant, be implied. Judge Garrison for the court said: "The industry of counsel has not furnished, nor have I been able to find, a decided case in which the assault was committed with an automobile, a comparatively modern appliance, but the principles involved are as old as the criminal law itself. Indeed, counsel for the plaintiff in error does not seriously controvert these principles, but, on the contrary, bases his argument, as I understand it, upon his other contention, viz., that a mere act of negligence will not sustain a conviction for assault and battery. For this proposition, which needs no external support, he cites as authority the dictum of Mr. Justice Dixon in State *v.* Thomas, 65 N. J. L. 598, who in commenting upon the case of State *v.* O'Brien, 32 N. J. L. 169, said: 'Certainly if death had not ensued from his negligence, but only personal injury, a charge of assault and battery could not have been sustained.' The case of State *v.* O'Brien was a conviction of manslaughter under an indictment that charged that offense based upon the negligence of the defendant in the tending of a railroad switch, and State *v.* Thomas was a review of a conviction for assault and battery under an indictment for manslaughter which it was held as a matter of pleading did not distinctly set forth the offense of which the defendant was convicted. The dictum quoted went, therefore, far beyond the decision in that it dealt hypothetically with the substantive criminal law, whereas the decision was rested solely upon the degree of certainty required by the rules of criminal pleading. The line of reasoning on which this dictum rested was that manslaughter based upon negligence and excluding malice had nothing in common with assault and battery, which necessarily includes malice. With the soundness of this reasoning we are not now concerned, since it has no foundation in fact in the case before us in which we are not dealing with an indictment for manslaughter or with an assault and battery that resulted from negligence. On the contrary, we are dealing with a wilful act done under circumstances that rendered likely the infliction of such an injury as that which actually resulted from it. In such a case, to argue from the assumed premise that, if death had occurred, the crime would have been manslaughter is a complete begging of the question. In the very case referred to (i. e. State *v.* O'Brien), Mr. Justice Dalrymple was careful to say: 'If the defendant's omission of duty was wilful, or, in other words, if his will concurred in his negligence, he was guilty of murder.' The running of a car at a high rate of speed is an act in which the will of the driver concurs, and hence is clearly a wilful act, as distinguished from merely negligent conduct, when considered with respect to the state of mind of the offender, which is what the criminal law considers. The civil law, on the contrary, disregards this distinction in awarding compensation in damages, and, as is pointed out in Evers *v.* Davis, 90 Atl. 677, groups together both wilful and negligent acts in its effort to compel tortfeasors to make compensation for injuries without regard to the state of mind with which they are inflicted. The civil action of negligence, therefore, throws no light upon the distinction made by the criminal law between a wilful and a negligent act. With this misleading test and the fallacious hypothesis of manslaughter out of the way, it requires neither argument nor illustration to show that the excessive rate of speed at which an automobile is driven is a product of the will of its driver and not the result of his mere inattention or negligence. The two cannot be confused any more than the hurling of a baseball bat into a crowd of spectators could be confused with its accidentally slipping from the hand of the batter. If a blow inflicted in the former manner would constitute an assault, so must a blow inflicted by a wilful act applied to a much more dangerous agency, since it cannot be that what would be a crime if done with a plaything weighing a few ounces ceases to be a crime if committed with an engine weighing thousands of pounds driven by many horse powers of force. It has often been held that responsibility increases with the likelihood of injury, but never the reverse, that I am aware of."

New Books.

The American Year Book. A Record of Events and Progress. 1914. Edited by Francis G. Wickware, B.A., B.Sc., with Co-operation of a Supervisory Board Representing National Learned Societies. New York and London: D. Appleton and Company, 1915.

The American Year Book was established in 1910 by conferences of members of national learned societies, acting officially or unofficially in behalf of their societies, and organized as a Supervisory Board. In 1911 the Supervisory Board was incorporated as the American Year Book Corporation, the president of which is Professor Albert Bushnell Hart of Harvard University. In general the Year Book of 1914 follows the lines of the issue of 1913, but the Editor states in his preface that two departments, "Population and Immigration" and "Prevention, Correction, and Charity," have been consolidated with the department, "Social and Economic Problems." The order of the remaining departments is unchanged. The scope of the work is the same as defined in the preface to the first issue as follows: "The American Year Book is intended for the needs of writers and searchers of every kind. Because of its inclusion of scientific subjects, it has been necessary to limit the political and statistical material which is the staple of many annual handbooks; the book does not aim to treat everything that could be useful, but throughout to select from the enormous mass of details those things which, in the judgment of experts in each field, are most significant,

most permanent in value, most likely to answer the searchers' questions." The volume before us is arranged in thirty-three departments in which are grouped articles on related subjects. The departments include American History, Popular Government, International Relations, Foreign Affairs, The National Administration, State and County Government, Municipal Government, Territories and Dependencies, Law and Jurisprudence, Public Resources and Public Works, Public Services, Military and Naval, Chemistry and Physics, Manufactures, The Biological Sciences, The Medical Sciences, Psychology and Philosophy, Mathematics and Astronomy, Religion and Religious Organizations, Chronology and Necrology, Literature and Language, etc. One hundred and twenty-two contributors have co-operated in the preparation of the present issue, and they include men of national and international reputation in the various fields of human endeavor. As an epitome of the important happenings of the year 1914 this book stands alone. There is nothing like it that we recall, and its use should be general. It cannot be too highly commended.

News of the Profession.

The Iowa State Bar Association will hold its annual meeting at Fort Dodge, Ia., on June 25 and 26.

Florida Judge Resigns.—J. Emmett Wolfe resigned as judge of the first judicial circuit of Florida on April 1.

The Texas Bar Association will hold its annual meeting at San Antonio, Tex., during the first week in July.

Joint Bar Convention.—The state bar associations of Oregon and Washington will meet in joint convention at Portland, Ore., early in August.

Honolulu Judge Appointed.—Judge Tom Stuart of Denver, Colo., has been appointed by President Wilson judge of the United States Circuit Court at Honolulu.

The County Attorneys of Kansas held a conference at Topeka, Kan., on April 30, to discuss the new laws of state importance passed at the recent session of the legislature.

Appointment to Bench in Indiana.—Governor Ralston of Indiana has appointed George D. Sunkel of Rockville to the bench of the newly established Parke County Circuit Court.

New Judge in Texas.—V. W. Taylor of Alice has been appointed district judge for the seventy-ninth Judicial District of Texas, recently created by an act of the legislature.

First Chief Justice of Utah Dead.—Judge Charles S. Zane, the first chief justice of Utah and at one time a law partner of Abraham Lincoln, died at Salt Lake City, Utah, on March 29, aged 84.

New County Judge in Brooklyn.—Harry E. Lewis of Brooklyn has been appointed county judge of Kings county by Governor Whitman. The appointment was made under a new law increasing the county judges of Kings from four to five in number.

Appointed Chief Justice of Court of Claims.—A. Mitchell Palmer of Pennsylvania has been appointed by President Wilson to the position of chief justice of the United States Court of Claims to succeed Judge Charles B. Howry, who resigned on April 1.

New Circuit Judges in Missouri.—Thomas L. Anderson and Glendy B. Arnold of St. Louis have been appointed by Governor Major of Missouri as circuit judges under the recent state statute giving St. Louis two additional circuit judges.

Resignation of Illinois Judge.—Henry Vardum Freeman, judge of the Chicago Superior Court, has resigned from the bench on account of ill health. Judge Freeman is 72 years of age and in point of service was one of the oldest judges in Illinois.

Changes in Pennsylvania Courts.—William H. Shoemaker has been appointed a Common Pleas judge in Philadelphia.—President Judge Joseph Hemphill, of the Chester County Court of Common Pleas, resigned from the bench on April 1, after twenty-five years of service.

Resigns as Special Attorney.—B. F. Welty of Lima, Ohio, who has been for some time special assistant to the attorney general of the United States in the prosecution of ani-trust cases in Iowa and other states, tendered his resignation to the department on March 31.

Supreme Court Commission Named.—The Supreme Court of Missouri has reappointed Reuben F. Roy of New London, Stephen S. Brown of St. Joseph, Robert T. Railey of Harrisonville and Fred Williams of St. Louis commissioners for the court for the ensuing four years from April 10.

The Illinois State Bar Association will meet in annual convention at Quincy, Ill., on June 11 and 12. The annual meeting of the State's Attorneys' Association of Illinois will be held at the same time and place, and the Institute of Criminal Law and Criminology will also meet at Quincy on June 10.

Georgia Judge Dies in New York.—Judge Leonard S. Roan, of Atlanta, Ga., who sentenced Leo Frank to death for the murder of Mary Phagan, died at New York City on March 23, aged 66. After the Frank trial, Judge Roan was appointed to the bench of the Georgia Court of Appeals, but at the end of his term did not stand for re-election.

Tennessee Judicial Appointments.—Governor Rye of Tennessee has made the following judicial appointments: Frank L. Lynch of Winchester, to be judge of the new Eighteenth judicial district; Judge Foster H. Mercer of McMinnville to be chancellor of the Twelfth Chancery division, to succeed the late Chancellor V. C. Allen; J. N. Adams of Mt. Juliet to be the new county judge of Wilson county.

Judicial Appointments in Montana.—Daniel L. O'Hern of Glendine has been appointed by Governor Stewart judge of the newly created Sixteenth Judicial District of Montana, which is made up of Custer, Fallon and Wibaux counties. Judge F. N. Utter of Glasgow, formerly of the Twelfth judicial district, has been appointed judge in the Seventeenth District, composed of the counties of Valley, Sheridan and Phillips.

New Law Firm in Oklahoma.—John H. Burford, for twelve years Chief Justice of the Supreme Court of Oklahoma Territory, J. B. A. Robertson, late Judge of the District Court of the Tenth Judicial District and for three years a member of the Supreme Court Commission, and Roy Hoffman, late Assistant U. S. District Attorney and also ex-District Judge of the Tenth Judicial District, have formed a partnership for the general practice of law at Oklahoma City, Okla.

New Chief Justice of Quebec.—Mr. Justice Archibald, who has succeeded Sir Charles Davidson as Chief Justice of Quebec, has been a judge for twenty years, and has had a distinguished career. He is a governor of McGill University, where he was formerly professor and gained two prize medals. Two of his sons are following him in the legal profession. Mr. Samuel G.

Archibald was formerly vice-principal of the Khedival Law School at Cairo, and more recently has been practicing in Paris, where he was engaged in the trial of Madame Caillaux. The other, Mr. J. G. Archibald, was the first Rhodes scholar from Quebec. He is an M.A. of New College and Fellow of All Souls. He gained the certificate of honor of the Council of Legal Education, and for a time has relinquished his practice in London to work in the new War Trade Department.

English Notes.

THE NATURALIZATION RECORD.—A return has been issued from the Home Office giving the names of all aliens to whom certificates of naturalization or readmission to British nationality have been issued during the year ending December 31 last. It appears that 1149 aliens from European countries were naturalized and sixty-two from other countries, including fifty-three from the United States of America, making a total of 1211, as against 1709 in 1913. Of Europeans, the largest number, 449, came from Russia, but 293 came from Germany, eighty-nine from Austria Hungary, and twenty-four from the Ottoman Empire. The number of alien seamen, serving in British ships, who are included in the figures, was 189. The number of Germans naturalized was smaller than in any year since 1908.

THE UNITED LAW SOCIETY'S BELGIAN REFUGEE LAWYERS' COMMITTEE, formed to alleviate the distress among Belgian lawyers, has been able to do much good work. In all 380 members of the various branches of the legal profession in Belgium who have had to leave that country have been helped, and are now earning a living in England. These include 181 avocats, 136 notaires, fourteen avoués (official solicitors), eleven law students, who have been placed at Cambridge, and twelve officials of the courts. A Federation of Belgian Notaires has been formed, and a room allotted them in the Royal Courts of Justice. The various Inns of Courts have also helped by allowing the free use of their libraries, reading rooms, and common rooms. In the City a suite of offices near the Belgian Military Legation has been secured, where legal advice is given to Belgian refugees.

WOMEN AND LEGAL LITERATURE.—Although ladies are debarred from the practice of the legal profession, they are able to add something to the literature of law. Mr. A. W. Soward, C.B., the secretary of the Estate Duty Office, acknowledges in the new edition of his work on the law and practice of the estate duty the assistance of his daughter, Miss E. D. Soward. "The book is the better for her intelligence and accuracy." It may be permitted to wish for her as distinguished a career as that of Miss Evelyn Underhill, who began by assisting her father and then produced a charming legal work on her own account. Now, of course, she is known as one of our foremost writers on the difficult subject of mysticism, and for some years, by her marriage with Mr. H. Stuart Moore, has been connected with other legal and literary associations.

ADDISON'S TOUR IN THE EAST.—Almost exactly eighty years ago Charles Greenstreet Addison, whose name is familiar to every member of the profession as the author of the companion treatises on the Law of Contracts and the Law of Torts, visited Smyrna and the Dardanelles, places which in these days have acquired a fresh interest for Englishmen. Then a young man, Addison was on an extensive tour in the East before settling down to his legal studies, and one result of the expedition was his two volumes on Damascus and Palmyra, a work to which an added value is lent by the fact that the illustrations are by no less distinguished a person than William Makepeace Thackeray, who, just about that time, was hesitating between the career of an artist and that of a littérateur. While at Smyrna, Addison had an opportunity of seeing the rough-and-ready penal system there in vogue and of contrasting it with that which he was soon to see in force in the criminal courts of his own country. He witnessed several men bastinadoed by having the soles of their feet battered with a flat piece of deal, and he adds that one of the sufferers, having cursed the official inflicting the punishment, was subjected to a fresh series of savage blows. In subsequently passing through the Dardanelles, Addison noted the fortifications, and adds: "A British fleet has passed them, and would do so again, but some half-moon batteries beyond appear more formidable and would be awkward customers if well managed"—a remark curiously topical at the present moment. Addison's book was published in 1838, three years after the tour which it recounts; in 1842 he was called to the Bar, and in 1845 he issued the first part of his Law of Contracts.

EXTRA-PROFESSIONAL ENERGIES OF LAWYERS.—Seeing on the title-page of a new edition which has just been issued of a standard law book the name of Mr. Greig, of the Chancery Bar, who is not only a K. C., but is in command of one of the battalions of the London Scottish, serves to remind one that not a few notable lawyers, besides those who at various times have been connected with the Inns of Court Volunteers, have had military leanings. Lord Chancellor Erskine served for a time in the army before entering the profession of the law; the present Lord Justice-Clerk of Scotland—Sir J. H. A. Macdonald—has taken a most active interest in military matters, upon which he has written with the knowledge of the expert; and, as everyone knows, both branches of the legal profession have given generously of their members during the present war. Participation in military affairs has not by any means, however, been the sole outlet for the lawyer's extra-professional energies. Literature has attracted a large number of lawyers, philanthropic and religious work has appealed to others, while art also has claimed its legal votaries. Among the latter was Sir Robert Collier, successively Solicitor-General, Attorney-General, judge for a few days of the Court of Common Pleas, paid member of the Judicial Committee of the Privy Council, and then, not long before his death, raised to the peerage as Lord Monkswell. A skilled artist, Sir Robert exhibited many of his pictures at the Royal Academy and the Grosvenor Gallery, and it is interesting to note that his artistic proclivities were handed on to his son, Mr. John Collier, whose pictures have proved one of the features of the exhibitions for several years.

RECIPROCITY IN INTERNATIONAL LAW.—To the student of the trend of the development of international morality, Mr. Asquith's speech in the House of Commons on March 1, announcing the drastic measures adopted by the Allies for the prevention of all commodities from reaching or leaving Germany, is a treasure-house of learning. The following words, which might casually be regarded as the repudiation of cardinal principles of international law, are, when rightly understood, a clear enunciation of the doctrine of reciprocity on which international law is based: "In the retaliatory measures," said Mr. Asquith, "we propose to adopt, 'blockade' and 'contraband' and other technical terms do not occur; and advisedly, in dealing with an opponent who has openly repudiated all the restraints of law and humanity, we are not going to allow our efforts to be strangled in a network of juridical meshes." The position thus assumed is unassailable. "International law," writes J. Hannis Taylor, "is based on reci-

procity even of evil, if that be practiced by the enemy." Heffter emphatically declares that a war against hordes and bands who recognize no law of humanity is necessarily lawless. If war is to be carried on against nations who deliberately put themselves outside the pale of international law by atrocities committed by themselves, that war must at least be carried on in a manner or on a plane which they can appreciate and understand. The principle seems scarcely distinguishable from that which admits of white troops trained in a different school from so learning the methods of their savage foes as to grapple with them effectually, although exercising a severe self-restraint in the use of these methods. For a war carried on by one of the belligerents with a systematic violation of all the conventions and practices by which international agreement has sought to mitigate and regularize the clash of arms, retaliation tempered by humanity and honesty on the part of the other belligerents is the only course.

House of Lords as Champion of Popular Liberty.—Mr. Goldstone, in debate recently on the Defense of the Realm Amendment Bill, warmly praised the House of Lords for its consideration of the ancient privilege of trial by jury. It was not, he said, the first time that the country had to look to the House of Lords for a justification of the liberties that had been wrung by hard struggle in its history. Mr. Goldstone's remark was so unusual and calculated so deeply to interest the public by recalling an all but ignored episode in history that it was reported in the *Times* under the heading of "Labor Tribute to the Lords." The late Sir William Anson some years ago, speaking in debate on the Parliament Bill, made a similar remark, and, on being asked for the evidence on which he based his judgment, immediately referred his questioner to the part taken by the Lords in the Revolution of 1688. The record of the Lords as champions of popular liberties in abatement of what Edmund Burke called the distempers of monarchy are of an early date. The Great Charter was won by the barons, but they did not confine it to a demand for new aristocratical privileges; it guaranteed the legal rights of all freemen, and the ancient customs and liberties of cities, prohibited every kind of arbitrary imprisonment, compelled the barons to grant their sub-vassals mitigations of feudal burdens similar to those which they themselves obtained from the King, and even accorded special protection to foreign merchants in England. The Revolution of 1688, which founded on a secure basis the liberties of England, was chiefly aristocratic, and from the time of the Revolution till the reign of George III. the Whig Party almost predominated in the House of Lords and used its influence in the nomination boroughs for the return of men of Whig principles to the House of Commons. The House of Lords delayed or mitigated the persecuting legislation directed under Anne against the Dissenters, and strictly upheld the Protestant succession at the period of its greatest peril.

Internment.—The statement in the lay press that the *Prinz Eitel Friedrich*, which requires to be repaired, will be "interned" in the neutral port into which it has entered cannot be regarded as correct. The rule forbidding the land forces of belligerents to enter neutral territory, whose infraction is visited by internment, is greatly relaxed in its application to the entry of warships into neutral ports. If there be no prohibition the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports and to remain in them, while allowed to remain, under the protection of the government of the place. Only, however, in the event of a vessel being driven by stress of weather or by unseaworthiness to seek shelter can it demand as a matter of strict law the right of asylum and hospitality in a neutral port. While in a neutral port such supplies and equipments alone may be purchased as are necessary to sustain life and to carry on navigation. If the ship be in need of repairs, she may procure whatever is needful to put her in a seaworthy condition. But she cannot make such structural changes as will increase her efficiency as a fighting machine either of offense or defense. She may take in such provisions as she needs, and, if a steamer, she may purchase enough coal to enable her to reach the nearest port of her own country. The idea that the *Prinz Eitel Friedrich* is likely to be interned in an American neutral port has probably arisen from a misconception of the twenty-four hours' rule. The old rule permitting a vessel of war to enjoy the security of neutral waters for as long a time as it seemed good to her began to be limited in the last half of the eighteenth century by the establishment of regulations fixing hours of sojourn of belligerent vessels within such places, and interposing definite intervals between the sailings of such craft as were likely to come into hostile contact with each other. In 1861 France undertook to redefine both aspects of the rule by providing that a belligerent vessel should neither be permitted to remain in a port of that country for more than twenty-four hours, except in the case of exhaustion of necessary provisions, injuries, or stress of weather, nor to sail therefrom until the lapse of twenty-four hours after the sailing of a possible opponent. Like regulations were afterwards adopted by Great Britain, Spain, and Brazil. In order to prevent the recurrence of virtual blockades of the ships of one belligerent by the ships of the other, as in the cases of the *Nashville* at Southampton and the *Sumter* at Gibraltar, Great Britain by Order in Council of the 31st June, 1862, made a series of neutrality regulations providing, among other things, that, while hostilities continued, any war vessel of either belligerent entering a British port "should be required to depart and put to sea within twenty-four hours after her entrance into such port, except in cases of stress of weather or of requiring provisions or things necessary for the subsistence of the crew or repairs." In either of such contingencies the authorities of the port were commanded "to require her to put to sea as soon as possible after the expiration of such period of twenty-four hours." The restrictions upon belligerent vessels in neutral waters adopted at the time of the American Civil War by the European neutral powers were repeated by the United States at the outbreak of the war between France and Germany in 1870, and since that time either wholly or in part by other powers. The second Peace Conference by Convention XIII. has made the twenty-four hours' rule general.—*Law Times.*

Obiter Dicta.

Down with the Demon!—Lynch *v.* Brewer, 16 La. 247.

A Paradox.—Succession of Virgin, 18 La. Ann. 42.

Death to the Mighty.—Dart *v.* Hercules, 57 Ill. 446.

And He Did.—The defendant in State *v.* Dye, 44 Utah 190, was convicted of murder and condemned to die.

To Eat the Rice?—The case of State *v.* Black, Bird and Rice, 162 N. Car. 637, was a prosecution of the defendants named for conspiracy.

Even after Death.—"Men usually owe debts and die owing them. The doctor levies his toll, the undertaker takes his share." —Per Lamm, J., in Hynds *v.* Hynds, 253 Mo. 39.

HOW COULD HE HELP IT?—In Bellamy *v.* State, (Fla.) 47 So. 868, it was held not to be reversible error for the trial judge to smile when "Ananias Goodwin" was called as a witness for the defendant.

IRISH IMMIGRANTS EXCEPTED.—"The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."—Per Holmes, J., in McAuliffe *v.* New Bedford, 155 Mass. 220.

SICKLY.—Speaking of an adverse possession claimed by the defendant in Terry *v.* Rodahan, 79 Ga. 282, Chief Justice Bleckley thus characterized it: "His possession was exceedingly sluggish and indolent; of the remittent, if not also of the intermittent, type, its general characteristic being typhoid."

NOT A WALL STREET TRANSACTION.—Referring to certain stock speculations engaged in by the plaintiff, the court, in J. J. Quinlan & Co. *v.* Holbrook, 162 Fed. 272, said: "The plaintiff recovered all the profits and stood none of the losses—a result so without precedent in stock speculation that it seems almost a pity to disturb it." It should be added, as a bit of information, that the transactions referred to took place in Vermont.

NO DISCRIMINATION IN FAVOR OF PEACE AND RELIGION.—An illustration of the mysterious workings of Providence may be found in Simmons *v.* Shelton, 112 Ala. 284, wherein the court, referring to the testimony of a certain witness, said: "He also swore that he had known D. W. Peace about ten years, but not intimately; that he knew him in Crawford, Mississippi, where they both resided before removing to Birmingham; that Peace was a religious man, and he, Wyatt, was in the saloon business, next door to him, and they both were burned out there."

OYSTERS AND JUDGES.—"The writer knows from experience on the circuit bench that it is sometimes very difficult for a judge to refrain from making comments on a case during the progress of the trial, and especially where an apparent injustice seems to have been perpetrated; but after a reversal or two, occasioned by this practice, he concluded to go, not to the ant, but to the meek and lowly oyster, to 'consider its ways and be wise,' and to keep the judicial mouth shut. He commends the example of the silent oyster to all trial judges." Per McBride, C. J., in Edwards *v.* Mt. Hood Construction Co., 64 Oregon 315.

MIXED METAPHORS.—We are indebted to an Oklahoma correspondent for the following extract from a brief filed recently in the Supreme Court of that state: "It is too easy for a man to pick up figureheads and dummies and create a separate entity to be used by him as an engine of wrong for his own private gain. The road should be made rough and narrow for such pirates." Possibly the inability of the author to steer a true course through the sea of metaphor may be due to the fact, suggested by our correspondent, that Oklahoma is five hundred miles from navigable water.

EASY MONEY.—As a place where money is easy, we recommend Mississippi to interested inquirers. In that state not long ago, a railroad ticket agent said "Damn" to a prospective purchaser, and the latter got $500 from the railroad company for being obliged to stand and listen to it. (See Illinois Central R. Co. *v.* Dacus, 103 Miss. 297.) Who wouldn't listen to cuss words indefinitely at five hundred per? At about the same time, a woman rode a short distance in a Pullman car containing three fellow passengers of the negro race. The jury gave her $15,000, but the stingy court cut the verdict to $2000. (See Alabama, etc., R. Co. *v.* Morris, 103 Miss. 511.) Even at that, such trips would be joy rides to most people.

THE LONGEST LAW FIRM NAME.—A few contributions to our list of long law firm names have been received since last month's publication. We note that Canada still leads and also that seven names seems to be the limit. Are there no firms with eight names? The additions to our list follow:

Casgrain, Lavery, Renaud, Chauveau & Marchand, of Quebec, Canada;

Choquette, Galipeault, St. Laurent, Mitayer & Laforte, of Quebec, Canada;

Drouin, Drouin, Sevigny, Drouin & Grenier, of Quebec, Canada;

Foster, Martin, Mann, McKinnon & Hacket, Canada (city not given);

Rose, Hemingway, Cantrell, Loughborough & Miles, of Little Rock, Ark.;

Smith, Markey, Skinner, Pugsley & Hyde, of Montreal, Canada;

Taschereau, Roy, Canon, Parent & Fitzpatrick, of Quebec, Canada;

Laurendeau, Archambault, Lavallée, Damphousse, Butler, Jarry & St. Pierre, of Montreal, Canada;

Russell, Macdonald, Hancox, Farris, Russell, Mowat & Wismer, Canada (city not given).

A PRIMA FACIE CASE FOR PLAINTIFF.—In Hoxie *v.* Pfaelzer, 167 Ill. App. 79, the plaintiff sued to recover $1600 which he claimed he had loaned to the defendant. The latter denied the borrowing. The jury believed the plaintiff and gave him a verdict. On appeal, one of the defendant's contentions was thus disposed of by the court: "The claim of appellant that the verdict was the result of passion and prejudice is based on the fact that one witness improperly answered one question by saying, 'Who can forget that countenance?' referring to the countenance of appellant, in connection with the further fact asserted by the attorney for appellant in his argument that appellant 'was not a very prepossessing looking man,' . . . and this we are asked to assume so inflamed the passions of the jury as to cause them to return a verdict against appellant. . . . This is essentially a cosmopolitan country, and it would be a severe commentary on our prated claim that all men stand equal before our laws, if a court should hold that a man of any nationality, though

> 'Deformed, unfinished, sent before (his) time
> Into this breathing world, scarce half made up,
> And that so lamely and unfashionable,
> That dogs bark at (him),'

could not, on account of these facts, get justice at the hands of men qualified to be jurors."

LABOR (?) LAWS.—It seems that men have been shunning work ever since the days of the Old Testament—this, on no less an authority than the Mississippi Supreme Court. In upholding a ten-hour law not long since, that court went back almost to the creation to find justification for man's desire to get along with as little work as possible. Said the court: "Laws regulating

the time when men shall labor are not new. The changed conditions during recent years in the business and affairs of the people have brought the discussion of such laws and their apparent necessity fresh to the minds of the present-day thinker; but if we will look back through the ages we will find such regulations in the laws of the nations. Particularly, we see them in the statutes governing Jehovah's ancient people, Israel. The greatest lawmaker, who received his inspiration to prepare the ordinances for the government of his people direct from Jehovah, and whose laws have always been admired and approved, wrote special statutes regulating the time in which the people should work, and regulating the use of their property. Exodus 23:10, 11, is as follows: 'And six years thou shalt sow thy land, and shalt gather in the increase thereof; but the seventh year thou shalt let it rest and lie fallow, that the poor of thy people may eat; and what they leave the beast of the field shall eat. In like manner thou shalt deal with thy vineyard, and with thy oliveyard.' And notice the provision in Exodus 23:12, limiting the time in which the laborer shall work: 'Six days thou shalt do thy work, and on the seventh day thou shalt rest; that thine ox and thine ass may have rest, and the son of thy handmaid, and the sojourner, may be refreshed.' In the ordinances contained in the Pentateuch, which follow the fundamental law known to us as the Commandments, are many other provisions similar to those above mentioned, and intended to regulate and limit the conduct of the people of Israel. It hardly seems to us to be an unreasonable limitation upon the rights of the people to provide that ten hours should be enough for a day's work, especially when it is coupled with a proviso, so this time may be exceeded in cases of emergency or when public necessity requires."—See State *v.* J. J. Newman Lumber Co., 100 Miss. 833.

PLAYING THE JOKER IN THE GAME OF POLITICS.—A bill introduced in the New York Senate on March 23, 1915, and referred to the Committee on Agriculture, deserves special mention in this column.

An Act to amend the agricultural law, in relation to prices of produce, use of safety devices and employment of hired men.

Section 1. The agricultural law is hereby amended by adding after Sec. 318, nine new sections, to be Sections 319, 320, 321, 322, 323, 324, 325, 326, 327, to read as follows:

§319. Only one price for a given commodity shall be lawful. A farmer desiring to change a price shall file a schedule thereof with the state agricultural department, which shall go into effect thirty days thereafter, unless suspended by the commissioner at the instance of any consumer.

No prices shall be increased, however, except upon due proof, the burden whereof shall be upon the farmer, that existing prices are confiscatory of his goods and gear. In its discretion the commission may refuse to permit any such increase until a valuation by its engineers and accountants shall have been taken. In such valuation the farmer shall have no credit for past profits invested in new fields or improved structures, but shall be allowed only original cost plus borrowed money invested.

"Commodity," as used herein, includes all grains, vegetables, live stock, dairy articles, excepting sand, gravel and manure.

§320. Every hired man shall work eight hours only a day, not including the Sabbath, and shall not recommence work unless he has completed a period of not less than eighteen hours' absolute rest and quiet. He shall not work on the Lord's day nor on legal holidays nor on Jack Love's birthday.

§321. Every farmer shall hire one more hired man than his work requires.

The only permissible exceptions to the two foregoing sections shall be periods of stress resulting from earthquake, Halley's comet or European invasion.

§322. All wagons and all poles and double trees shall be provided with couplers, coupling by impact, so that the hired man need not go between the wheels of the wagons and the heels of the horses.

All wagons shall be supplied with suitable brakes, grabirons, stirrups, and platforms of standard dimensions to be fixed by the commission.

§323. All bulls, when moving on the highways or in unfenced areas, shall be equipped with a bell of not less than fifty pounds weight, a steam whistle, and an electric headlight of at least one thousand candle power.

§324. Sheds shall be built over all fields where hired men have to work in summer.

§325. All field engines and machinery shall be fenced in, all belting shall be encased in metal housings, and all grindstones, churns, hay-cutters, bull's horns, and other moving parts shall be strongly encased in sheaths for the protection of the hired men.

§326. All barns, sheds, and other outbuildings shall in cold weather be adequately heated and at all times shall be well lighted and policed.

If a calf is delayed in arriving or is born dead the farmer shall instantly provide another cow whose calf shall be born that day.

The commission's inspectors shall weekly inspect all gasoline automobiles. If a cylinder is missing the farmer must find it before he runs on the road again.

§327. The right to mortgage real estate is a franchise reserved to the state. No farmer shall make any mortgage nor incur any indebtedness extending over a period of more than one month without the written approval of the commissioner obtained upon petition and hearing and upon paying the state treasurer ten cents for each one hundred dollars of such indebtedness. Indebtedness incurred without such consent shall be void.

To enforce this act a commission of five persons shall be selected by the governor with a view to placating as many shades of political opinion as possible. No commissioner shall, however, be deemed disqualified by lack of previous political or other experience.

§2. This act shall take effect immediately.

STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC.,

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Sworn to and subscribed before me this 22nd day of March, 1915. George Babcock, Notary Public [SEAL]. Suffolk County, N. Y. (My commission expires March 30, 1917.)

Law Notes

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CONTENTS

Force of International Law.

PUBLICISTS, professors, statesmen and students have been accustomed to devote much time to a discussion of the principles of international law. They approach their subject in the most deliberate manner and express their thoughtful and reasonable conclusions with the greatest seriousness. For the most part this "law" is based upon the custom of nations, although at times the writers run on ahead of actual experience and essay to decide moot cases. The code of rules that goes by the name of International Law embodies quite a number of different matters, but the most important part relates to the rights of belligerent and neutral nations in time of war. If one were to judge only by the quantity of writing on the subject the conclusion quickly would be reached that the rules of international law must be as definite and certain and as firmly established as any other sort of law. Quite recent developments on the Continent of Europe and in European waters give rise to some doubt on the point,—indeed almost lead one to the conclusion that the writers have been wasting their time. From the view-point of some persons and nations International Law is in much the same situation as the ghosts of which the small boy said, "There ain't none."

International Law has existed these many years; it has been consulted and referred to by statesmen and courts; and it has generally been supposed to be the code for the guidance of nations. It does not rest entirely in unenforceable theory; and it may be doubted whether many of its doctrines and principles are not fixed in the hearts of the people of all civilized nations. The basis of the rules of international law relating to warfare is humanity, decency and civilization, as opposed to lawlessness, savagery and barbarity that reigned before the light of modern culture. It is difficult to believe that the world generally or the principal part of the people of any enlightened nation will tolerate a repudiation of these doctrines. To be somewhat more specific: no rules of international law have been more firmly fixed than those relating to blockade and capture. The captor according to the established custom summons, stops and seizes a merchantman, and places on board a prize crew who navigate the vessel to a port where she may be adjudged by a prize court. If the vessel is an enemy ship or carries contraband she may be sunk under circumstances of necessity, as in case she is no longer seaworthy, or recapture is threatened, or in case a port of the captor is not within reach. But in case of the destruction of a ship whether enemy or neutral it is the duty of the captor to save the lives of the persons on board. No one in modern times has ever countenanced a destruction of life under such circumstances. While it often has been said that when in war necessity conflicts with humanity the former must prevail, yet this does not mean that the whole fabric of international law is destroyed, as for example the principle denouncing the employing of poison.

Now a belligerent nation has found it to be beyond her naval strength to operate in the customary manner in the matter of maintaining a blockade or effecting captures. But she has discovered a means of destroying vessels without greatly risking her own warships, officers and seamen. She cannot take a merchantman, but she can sink it. And this has been done. A vessel of American registry, flying the American flag, has been attacked on the high seas, and the deaths of American citizens have been compassed. Furthermore, an enemy merchantman has been sunk without effort to capture and without warning, no opportunity being afforded to passengers to save themselves in small boats. Many American citizens, some of national prominence, have been lost. Thus we have a breach of rules of international law which have been relied upon by our citizens to safeguard their lives. These passengers supposed that our government guaranteed them the protection of the rules under consideration. And so the status of these principles is fairly drawn in question. Is the American nation going to insist upon the integrity of the rules of international law, or are we going to concede that they are only "scraps of paper"?

Bar Examinations in Massachusetts.

IN the face of the general tendency in practically all of the states to raise the standard of admission to the bar, the Massachusetts legislature has passed a bill which takes from the supreme court the control and regulation of this standard, and in effect lowers the educational prerequisites of applicants desiring admission to the bar, to a two-years course in a night high school. Aside from the merits or rather demerits of the bill, the inquiry naturally arises why the legislature should attempt to regulate this matter at all, otherwise than to require that candidates for admission to the bar should be examined on their intellectual fitness by some board or body of men peculiarly fitted because of their special training and membership in the profession to pass on their qualifications. No doubt there are gentlemen in the legislature of a high degree of culture and scholarly attainment, and some of them are lawyers,

but it would certainly seem that the supreme court of the state, to whom is intrusted the final arbitration of the most vital interests of its citizens, is better qualified by experience and special training to define the educational needs of the prospective lawyer and to safeguard the interests of the public from the dangers of an ignorant bar in so far as the possession of such attainments may be a guaranty of faithful and capable service. It might well be asked, why stop with the two-years high school course? If the legislature thinks it knows better than the supreme court the degree of intellectual fitness the members of the bar should possess, why not go further and formulate the legal examination itself? It is not so much the details of the requirements which the legislature has adopted, as the fact that it attempts at all to regulate something so peculiarly within the purview of the supreme court of the state, that causes criticism. The *Boston Herald* goes to the seat of the matter when it says:

"With all their experience in listening for years to lawyers, both good and bad, in the trial and argument of cases, and with all their knowledge of the bad results of an uneducated bar, it seems too clear for discussion that the judges of the supreme court are the persons to be trusted with the regulation of this matter, as they have been trusted in this state hitherto; and their rule, carefully considered and deliberately approved, should be supported. The legislature should leave it alone."

The danger is not so great, however, as some would have us believe, as it is safe to assume that any candidate possessed of sufficient ambition to prepare himself for membership in one of the leading and most learned of professions, and who has acquired a sufficient knowledge of the history and principles of the law and their application, would incidentally and necessarily have acquired a fair general education. Such a man, if not already possessed of sufficient general education to pass the examination as authorized by the board of examiners, could easily prepare himself, and it cannot be called a hardship to require him to do so. The subjects upon which an applicant is required to stand examination are classified in four groups as follows: English grammar, composition and literature; Massachusetts history, American history and English history; arithmetic, bookkeeping, algebra and geometry, only two of which are required, the applicant being allowed to choose those he wishes to be examined on. And group four contains seventeen subjects, the applicant being allowed his choice of any five on which to be examined. In this list are geography, civil government, economics, general history, shorthand and typewriting, Latin, French, German, Italian, Spanish, Greek, ancient history, physiology, physics, botany, chemistry and zoology. The legal profession is peculiar in that it demands a larger general knowledge of men and affairs than almost any other, and the active practitioner is forced to acquire a general education whether he would or no. It cannot be said that the examination the bar examiners proposed to give is either unfair or too difficult, but it is to be doubted whether the adoption of the new standard as embodied in the bill just passed will be followed by the direful and disastrous results predicted by the Boston papers. The *Boston Transcript* in an editorial headed "To Make the Bar a Laughing Stock" says:

"A college man who could not pass the proposed examinations after two weeks' review ought to tear up his diploma as a lying document full of all untruth as to his educational attainments. A man who has really done the equivalent of about three years' high school work should be equally ashamed to say he could not pass them. And now it is proposed to waive the tests in all cases except of men who have had less than two years in a high school, however poor! The standards for admission to the bar examinations are already lower in Massachusetts than in many Western States which have but half our number of high schools. It cannot be that the Senate of our Great and General Court will further lower those standards at the expense of making Massachusetts a laughing stock among her sister commonwealths, to the promotion of ignorance among the members of our bar, to the detriment of all clients' interests, and to the lasting postponement of any desirable progress toward legal reform in this State."

Raising the Standard of Bar Examinations.

IT is fortunate, however, that the tendency throughout the country is the reverse of that now prevailing in the Massachusetts legislature. In nearly all the states the conduct of the bar examinations, the educational prerequisites and the general fitness of the applicant are left to the bar itself, certainly the best judge of the mental equipment and qualification which should be required of those seeking to enroll themselves as members of their profession. In many states the supreme court defines the requirements and formulates the examinations; in others, and it would seem to be the preferable method, the whole matter is left to an examining board composed of members of the bar who are appointed by the supreme court for their fitness and ability. But whatever the method to-day, there are few states in which a man may be admitted to the legal profession without first demonstrating his educational fitness to the satisfaction of the courts or their appointees through comprehensive written examinations. The days when a pleasant social chat with the local judge, termed by courtesy a bar examination, was all that was necessary for entrance to the profession have passed. While the tendency has been toward more rigid and comprehensive examinations as to the knowledge of the law possessed by the applicant, there is one requirement usually included in the rules for admission to the bar that might well be enforced more thoroughly. It is usually required that some evidence of the moral character of the applicant be produced. The importance of such a requirement cannot be too greatly emphasized when it is remembered that to the members of the bar are confided matters of the highest importance and of the most sacred nature. The records of disbarment cases, few though they be in comparison with the large number in the profession, would seem to show that the greatest danger to the public through the legal profession has its source in the moral rather than the intellectual unfitness of some of its members. It is required in many of the states that the candidate procure a certificate from a judge of one of the nisi prius courts, within whose jurisdiction he resides, setting out that the applicant is a man of good moral character and standing in his community. On the bar itself can be placed the blame for the practical failure of this requirement to accomplish its purpose, as it is on such testimony and not on his own personal knowledge, that the judge grants the certificate. Men are too prone to accede to a request to testify to one's good character where there can be no immediate evil results and they can avoid the unpleasantness attending a refusal. But

if the lawyers would conscientiously do their duty in this matter there would seldom be heard criticisms of the standard of the bar.

Better Days for Young Lawyers.

"There's a good time a-comin',
It's almost here."

So, although it may seem to some, remembering their early days of struggle and privation, to have been "a long, long time on the way," would appear to sing from the mountain-tops of professional eminence and success Louis D. Brandeis to the host of young students who, eager for fame and fortune, annually enter the legal arena, undeterred by oft-reiterated statements that the legal profession is vastly overcrowded. To these courageous souls Mr. Brandeis, in an address delivered recently before the students of the Harvard Law School, brings glad tidings. There is to-day, he says, a better chance for them to make a living than there was a few years ago, and, we are told, the condition in this respect is steadily improving. This is because corporations and large business houses are nowadays building up their own legal departments instead of relying, as formerly, on a single attorney or firm of attorneys for counsel and direction. While these legal departments are usually under the direction of one or more able and experienced lawyers, the clerks and assistants, who attend to the routine work, are younger men. They receive salaries. On such a staff as is now a common appurtenance of a great corporation, there is room for many young lawyers, who will be able to gain experience and do a lot of work, while at the same time they will receive a living wage.

We would not wish to snatch from a drowning man the solitary plank whereby he may be enabled to keep his head above water, nor would we desire to dispel into the inky darkness of night any cheering sunbeam that may serve to guide the young novitiate on his way or to ease his ofttimes thorny and difficult ascent. Doubtless the course indicated by Mr. Brandeis may enable many a young lawyer to escape starvation until such time as, gathering strength, he may kick from under him this temporary support and embark on an independent and triumphant career. Nevertheless we cannot refrain from suggesting that the easiest road to a living is not always the safest and best, and we see many dangerous snares and pitfalls besetting the path of him who adopts this course.

The aim of the young law school graduate, we take it, is to practice law. Legal departments of large corporations are many steps removed from this goal and represent a distinct departure from the old professional ideal of what constitutes a lawyer. Those serving therein have no clients, receive no fees, are not at liberty to accept or decline a case, are engaged usually in only one kind of work, and not often in all of that, and are in effect but subordinates, clerks,—a mere appanage of a business man's office. Though the compensation paid may be a "living wage" it is no more, and often not as much as that received by other skilled clerks. The young law school graduate, emulous of attaining professional distinction, who enters such a department, will, it is augured, after serving some years, find himself as far off from a clientele and an independent practice as before. He has merely postponed the time for launching forth and making the necessary beginning. Meanwhile, if, as often happens, his responsibilities have increased, he may find himself still less able than formerly to divorce himself from a weekly pay check. To the young champion entering the lists, therefore, we would say that now as of old he must be willing "to scorn delights and live laborious days" if he wishes to attain the fair guerdon of professional renown, and that, if great sacrifices are to be made, youth is the best time to afford the price demanded for success. Otherwise he may, after stilling his temporary pangs of hunger, awaken only to realize that he has, like Esau of yore, sold his heritage for a mess of pottage. At all events it can scarcely be questioned but that those who at present lament the striking change in the relation of the modern lawyer to his clients as contrasted with that of the lawyer of olden times will look upon this pronouncement of better times for the beginner with a somewhat doubting eye.

Nonpartisan Judges.

THE decision of the Supreme Court of Illinois, in *People* v. *Sweitzer,* 107 N. E. 902, that the judicial nominations for the election to be held on June 7 next could not be made under the Primary Election Act of 1910 (Laws Ill. 1909-10, Sp. L. Sess. p. 47, § 1), accents interest in the general question as to the best method of choosing the judiciary. The popular demand in many states for a nonpartisan judiciary is merely an awakening of the public to a realization of the necessity of securing able, fit, conscientious men for public office in general, and judicial offices in particular; but the question may be said to be an open one, whether the nonpartisan primary is the most efficient method of selecting the best possible judicial candidates to submit to the electorate. A voice from Ohio, with an echo in New York, is heard to say that real progress has been made there, and also in California, along nonpartisan lines, although it is admitted that there has been some unseemly scramble for office; to which latter might be cited *State* v. *Schmahl,* 125 Minn. 533, wherein the Supreme Court of Minnesota was called on to declare that under a constitutional mandate that judges must be "men learned in the law," one must at least be a lawyer in order to be qualified to run for judicial office. It is not, of course, to be questioned that the choice of judicial officers, and of many others too, should be freed as much as possible from political machinations; but it may fairly be doubted if a progressive people should have a politically colorless judiciary; for what is more futile than beneficent laws hardly won in the legislative halls, where the fruits thereof are blighted by unsympathetic judicial pruning? Thus far, furthermore, it is doubtful if there are not several possible plans as promising in the premises as the nonpartisan direct primary, of which may be mentioned the suggestion that the Chief Justice shall be elected, and he shall appoint his assistants. Of this plan it has been said that to the layman it looks like a device to get the whole thing into the hands of the lawyers, and that this would be worse than the appointive system prevailing in Massachusetts and at Washington. But it might be said in reply, that those courts certainly rank no lower than any others, and of the federal courts that perhaps the only dissatisfaction with them grows out of their lack of sympathy with the policies—which is close to "politics" in the true sense—of the States. And it has been suggested that it would even be best to place not

only the nomination of the candidates, but also the final selection of the judges, in the hands of the lawyers, acting according to duly provided procedure and speaking through bar associations, because, it is claimed, they alone are qualified to select the most capable, and, of all others, must, from every consideration, selfish or otherwise, and do, with a negligible exception, seek to choose the best judges. However, on the record before us we are constrained to doubt if the ruling might not be in favor of nomination and election of judges through the instrumentality of political parties, though it would seem that possibly, on an amplified record, after other methods have been given fair trial, some one or more of the latter might be held more effective in evolving a judiciary that would best stand the trinity test of honesty, ability and industry.

Importation of Prize Fight Films.

UNITED STATES District Judge Hough of the Southern District of New York, in refusing to permit the admission to the United States of films of the Welsh-Ritchie "go," at London, is currently reported to have held that whatever may have been the original significance of the term, a prize fight in modern usage includes every boxing match for a money prize. "Both Ritchie and Welsh," said the judge, "were professionals. If the modern dictionary definitions be accepted, it is impossible for me to say what they did was not a modern prize fight, even though it may be admitted that the wearing of gloves and the limiting of the number of rounds would have prevented its acceptance as a prize fight fifty years ago." We will take editorial notice of the fact that this view is contrary to the accepted usage of the term in sporting circles, and while it is supported by some authority (*State* v. *Olympic Club,* 46 La. Ann. 935) the weight of authority seems to be to the effect that "the word 'fight' implies a purpose to use violence for the purpose of inflicting injury, and the jury alone had the right to determine whether the defendants in fact engaged in a fight, or merely in an innocent contest with no purpose to inflict injury on each other." See *State* v. *Purtell,* 56 Kan. 478, and cases cited. However, it is to be borne in mind that Judge Hough was construing the Act of July 31, 1912 (Fed. Stat. Annot. 1914 Supp. 326) which forbids the importation or interstate shipment of a pictorial representation of any prize fight "or encounter of pugilists under whatever name," and the words quoted may well have been deemed to exclude the distinction theretofore made between "prize fights" and "sparring contests." In conclusion the judge remarked: "It is undoubtedly a somewhat ridiculous result that a thing lawful in many, if not most, of the States cannot be pictorially represented in any State of the Union if such pictorial representation requires interstate or foreign transportation. This, however, is a matter for Congress and not at all for the courts."

The Barnes-Roosevelt Libel Suit.

THE view, which seems to have found some newspaper currency, that the legal issues in the Barnes-Roosevelt libel suit were allowed to become obscured by the political ones, is answered by the briefest statement of what the legal issues were. The defendant asserted in justification that his alleged defamatory statement was true, and was made in good faith and for a legitimate purpose. When it is remembered that the statement in question involved the events of many years of two strenuous lives, it is hard to see how an issue could have been much broader, and yet the court was required to try it as made. Among the many questions of evidence arising on such an issue which have been adjudicated heretofore, one novel point emerges. The qualified privilege which attaches to a publication respecting a candidate for public office is well settled. Is there a like privilege and a like scope in the introduction of evidence of good faith when the publication, made during a political campaign, concerns one who is not a candidate but is the head of a political party? On principle it would seem that the rule governing publications concerning candidates should apply with equal force to one who dictates the nomination of candidates and dominates their official acts in the event of their election. The situation of a respectable candidate nominated and controlled by a corrupt boss is a familiar one, and it would be "sticking in the bark" to deny the right of a citizen to go behind the candidate and hold up to public view an alleged "invisible government" by which he is put forward, under the same limitations as if the criticism had been of the candidate. Of course the fact of such control must be clearly proved to make the justification available.

Another interesting question on the evidence is presented by the testimony offered to show that the defendant was himself a political boss and the friend and associate of bosses. Obviously, if the truth of a publication is established, its efficacy as a defense cannot be affected by proof that the defendant had been guilty of like misconduct. The evidence in question has however a legitimate place within the issues as bearing on the question whether the publication was made in good faith and for justifiable ends or whether, though true, it was inspired by personal malice.

It may well be a subject of just pride to the American bar, which has had some reason in the past to shun comparison with foreign legal procedure, that an issue of a political nature between persons of national importance has been litigated without popular excitement and within the established rules of judicial procedure.

Old Judges.

AN interesting question brought to the surface by the approaching Illinois judiciary election is the relative merit of old and young judges. This question, in some quarters at least, is distinctly traceable to politics, for unless the old incumbents are ousted there are far too few places for the youngsters. The chief advocate, in Illinois, of the elimination of old judges, ingenuously confesses that he is not a lawyer, which, perhaps, explains his readiness to make indiscriminate application of the doctrine of Oslerization, which, in turn, is based on an obiter dictum and, as any lawyer knows, is false and misleading by reason of its generality. When, moreover, it is broadly applied to the judiciary, it becomes an absurdity. In this age of hustle-worship, it was naturally accepted in totality by the devotees of so-called executive ability, but as the world moved on it was found that behind the noise, bustle, and hustle of the elect under-forty, there was wisdom born of age and experience, or else miserable failure. Unquestionably the bench is improved by a reasonable injection of young blood, but too liberal application of the Osler doctrine would savor of political eugenics.

Shall we overrule the decree of the ages, that the old men shall be the judges? The simple directness of the savage did not lead him far astray when, in council, he deferred to the experience of age rather than to the impetuosity of youth. From time immemorial the world has been judged by the old men, and the wisdom of the ages is vindicated by the roster of the judges of our courts to-day. Let the young blood come to the bench, but only that it may lend virility to the old, and, in its turn, gather unto itself wisdom as it grows old.

LEGISLATIVE STRICTURES ON CHRISTIAN SCIENCE.

NOT so very long ago in New York, a Christian Science practitioner, regularly engaged in Christian Science healing, was convicted of accepting fees from his patients who were glad to pay for his services, and was sentenced to be punished as a criminal. So subversive of liberty and justice did this seem to the then legislature of the state, that it passed a law the purpose of which was in effect to exempt such persons from similar prosecutions in the future, but at the instance of the doctors the governor vetoed the bill. And now very recently another bill, known as the Thorn bill, intended to exempt Christian Science practitioners from the state law requiring physicians to be examined and licensed, has been defeated, ostensibly on the ground that it would imperil public health by permitting persons to practice healing without being subject to any state regulation or supervision, although it would appear that twenty-seven states have enacted laws exempting such practitioners from the provisions of statutes governing physicians, and we are not aware that sickness or death has as a consequence exacted an added toll therefrom.

It is, however, evident that the result of legislation compelling Christian Science practitioners to take an examination and so to perfect themselves in methods of treatment which they and their religion hold in abhorrence before they can apply their own principles otherwise than gratuitously, is to discriminate directly against them in favor of other means of healing, as well as indirectly to prevent or hinder from doing so those who may desire to resort to them for relief. And the question which concerns us is, Is such discrimination by government in favor of one set system of medicine just, especially in view of the present state of the world's knowledge on the subject of disease and the proper cure therefor? For, be it said, on the testimony of the physicians themselves, medicine is at best but empirical. Nor can we think of the changes in professional opinion since the days of John Hunter without the most painful feelings of distrust in all modes of treatment. In the space of some forty years we have gone through three revolutions of opinion with respect to our treatment of typhoid, a disease of very frequent occurrence and of the most decisive and urgent symptoms. Until quite recently one of the most efficacious remedies for tuberculosis in its milder forms was raw meat, which was given the patient at least once a day, but after a time it was discovered that this had a tendency to generate tapeworms, and as a result the treatment is now practically obsolete. Voicing the sentiment of distrust in the prevailing system of curing disease, Dr. Oliver Wendell Holmes, who was himself a past master in the practice of medicine, said: "Mankind has been drugged to death, and the world would be better off if the contents of every apothecary shop were emptied into the sea, though the consequences to the fishes would be lamentable." The schools of medicine called irregulars have each been compelled to fight their way against the regular school. The old-school doctors, with their powerful political organizations, have persecuted them with a shocking degree of bigotry and intolerance. They have persecuted them through unjust restrictive laws procured by them from altogether too trusting legislative bodies, but in spite of this persecution these new schools of medicine, homeopaths, osteopaths, chiropractics, and others, have been established with more or less success and have gained a greater or less degree of public confidence and favor. Science, as a veritable tyro therein knows, has long recognized the value of suggestion as a curative agency, and our most advanced thinkers recognize that the same agency can produce, if not disease itself, at least the morbid condition of mind and body that invites it. In addition many thousands of adherents of Christian Science testify that it mitigates and ameliorates sorrow and suffering, while countless others believe that it has cured them of so-called incurable diseases. Why then, in the light of these facts, discriminate against the Christian Scientist?

Hon. Edgar M. Cullen, former chief judge of the Court of Appeals of New York, in the annual address before the New York State Bar Association, reported in LAW NOTES, March 1914, speaking on "The Decline of Personal Liberty in America," said by way of emphatic conclusion: "The only way in which our own conduct can be secured against the inroads of paternal or socialistic government is to be alert to protect the conduct of others and to condemn violations of private rights equally whether the violation is of our rights or of those of others." Whenever, therefore, there exists a clear discrimination against one class in the community in favor of another or others, as appears in some states in the case of Christian Science practitioners, it behooves us to raise our voice in protest unless it satisfactorily appears that such distinction is clearly justified by paramount considerations of a public nature.

Undoubtedly the guardianship of the public health is a sacred trust properly residing in government, and to that end it is justified in employing such means as to it seem most effective to prevent the spread of contagion. But does it not seem that otherwise it ought to allow every citizen to be perfectly free to resort to such means of preserving his health as he desires and believes in? If one wants the doctor, whether regular, homeopathic, or of any other school, he has or ought to have just as much of a constitutional right to choose his physical remedy as he has to choose his church. So, if he believes in Christian Science as a means of preventing and healing disease, his right to resort to that remedy ought to be just as sacred in this free country as is the right of the other man to resort to the doctor and his material remedies.

In the address adverted to above, Judge Cullen thus admirably summed up the subject we are discussing:

"Surely there is no nobler, none so charitable and unselfish a profession as that of the physician. Yet the persecution which some of the physicians seek to inflict on the Christian Scientists is discreditable. Personally, when ill, if com-

pelled to make a choice, I prefer the attendance of the physician to that of the minister, but others may entertain a different view. It took centuries of time and untold human suffering to establish the right of a man to be saved or damned in the next world in his own way. And the right of an adult sane person to be cured or killed in this world, in his own way, seems to me to be equally as great, unless his disease, being contagious, endangers others, and even in that case it is difficult to see how the attendance of the Christian Scientist can increase the danger. Doubtless the requirements of technical education and skill prescribed as conditions for a license to practice as a physician are proper. In default of such requirements we would be subject to be imposed upon by impostors and charlatans. But no one, however, can be deceived by the Christian Science reader except as to the extent of the special intervention of the Deity in human affairs. As to that, a man has a right to believe what he chooses, and the further right to act on his belief. In all Christian churches prayers are offered for the recovery of the sick, and all decent Christians, Friends possibly excepted, believe in supporting their clergymen. The Christian Scientist has exactly the same right to be paid for his services. The sect seems to be unpopular and to have few defenders. That is only a greater reason why we should see to it that its rights be respected."

E. P.

THE PHOTOGRAPH AS EVIDENCE

With the growing knowledge and use of the art of photography, it is not surprising to find that the photograph is becoming an increasingly important evidential factor in modern litigation. The danger, however, of accepting the testimony of the "silent witnesses," as they have been called, has been recognized from practically the earliest instances of their use, and it has been realized that evidence which can be mechanically created by man can, by him, be altered and distorted to suit his own ends. Indeed it was said nearly a decade ago, long before the art had reached its present stage of efficiency and accuracy, that "it is common knowledge that as to such matters, either through want of skill on the part of the artist, or inadequate instruments or materials, or through intentional and skillful manipulation, a photograph may be not only inaccurate but dangerously misleading." The court very properly recognized the fact that the same skill which renders a photograph an accurate representation of a particular fact, may, if directed by an unscrupulous person, be the means of creating an inaccurate but apparently perfect picture, and this with but slight chance of detection.

To one who is familiar with the mysteries of the art, and has spent much time in making pictures or observing others in the process, nothing can be more absurd than the oft-repeated statement that photographs, like figures, cannot lie. Given a skillful operator and a very simple equipment, there is nothing short of the fourth dimension that cannot be made to appear on the finished print. In the early days the courts themselves but served to increase the opportunity for fraudulent work by excluding all photographs unless they were made by professionals, but the more recent decisions have broken away from their predecessors and admitted pictures made by amateurs as well as by professionals. And no reason exists why this should not be done, for certainly many amateurs possess far more skill and ability than is exhibited by numbers of those who are pleased to consider themselves as professionals. Certainly there can be no logical reason for the exclusion of pictures taken by the "camera fiend" who is usually on the spot when anything occurs, and while they may not be so artistically correct as those made by his professional brother, they are very apt to be equally accurate pictorial representations of the actual conditions, and there is but slight chance of their having been taken from a studied position in order to obtain a predetermined effect. The accuracy of amateur pictures may likewise be increased by a device which has been applied to small cameras so generally in use, which employ films rather than plates. By means of this attachment the date or any bit of information may be written on the margin of the film after it has been exposed, and appears when the film is developed. After the inscription has been written it is impossible to change it, and where it is shown that an amateur is careful and accurate in keeping on each negative a record of its exposure an entry on the margin should speak for itself in adding to the value of the picture as evidence.

Conceding then, the possibility of the fraudulent manipulation of photographs, the question at once arises whether this extends to all pictures taken under all conditions; and with the possible exception of motion picture films, the question must be answered in the affirmative. Indeed it is doubtful whether even these should be excepted as beyond the possibility of alteration, but their peculiar characteristics certainly render the operation more difficult. But with all pictures taken with the ordinary cameras in daily use, whether contact prints or enlargements, the possibilities of alteration, both on the negative and on the print, are almost limitless. In questions of identity, for instance, nothing can be more misleading than a print from an intentionally retouched negative; the expression of the entire countenance may be changed simply by retouching the eyes, the corners of the mouth, and smoothing out or etching in lines on the face. The addition or removal of a moustache is a comparatively simple matter, while the judicious use of the etcher will transform the iron-gray hair of the middle-aged man to the blackness of the proverbial raven. And this is true likewise of photographs designed to show the health and strength of the subject. Shadows can be penciled in or etched out, the face emaciated and wasted from disease or suffering may be made to appear robust and healthy, while one in perfect physical condition may be made to appear worn and drawn. However, even greater and more misleading changes may be made in photographs designed to show the seriousness of wounds. These are almost universally admitted when offered in evidence unless they violate in some measure the rules of admissibility, but it is a dangerous practice, and one which should not be permitted without due precaution. In the hands of a skillful operator photographs of this nature can, by the use of a little retouching "dope," an etcher, and a hard pencil, easily be altered to augment or diminish the object which they are supposed to portray, or even change its location; and by the ordinary jury, may it not be said, by the court and counsel themselves, the operation can never be detected. The marks of the retouching do not show on the finished print, and can be discovered, except in very

obvious instances, only from an examination of the negative itself. Of course, in the case of pictures very much enlarged, the retouching might be made apparent, but if it is, the use of a tube of color and a camel's hair spotting brush will render them invisible again. It should not be supposed that all photographs of this nature offered in evidence are intentionally altered; on the contrary the absence of judicial expression in the decided cases on this point would indicate that the matter has but infrequently engaged the attention of the courts.

Aside from the actual changes that can be made in the negative itself, there exist innumerable methods of "faking" pictures of all descriptions. It is a comparatively simple matter so to combine or take two pictures that the result will be inaccurate enough to satisfy the most unscrupulous litigant, and sufficiently plausible to satisfy the most skeptical jury. In an instance which failed to reach the courts some years ago, a young lady but a few years married sought her attorney in great indignation, producing a picture of her husband with a woman of none too savory reputation, and which the wife believed had been taken on a certain date. The husband, as the lawyer well knew, had not been near the woman, but argument and persuasion were unavailing. The lawyer then determined to fight the devil with fire, and obtaining from the wife a recent photograph of herself, he requested her to return with her husband in a few days. When she did so, he showed her a picture of herself, apparently taken with a well-known man-about-town. Needless to say the divorce proceedings were dropped, for what could either party say in the face of such convincing evidence against himself? And nothing could be simpler than obtaining a picture of this character. By trimming the photographs of the two persons, gluing them side by side, and making a copy of the whole, there could be secured a negative which, when the lines indicating the edges of the copied prints had been removed, and the whole smoothed over with a pencil and etcher, would yield a print which would deceive anyone except an expert. Yet another method of taking fake pictures is rendered possible by a simple little instrument which slips over the lens of the camera, permitting only half of the plate to be exposed at one time. By this means two persons who have never seen each other may be photographed on the same plate, or one person may be taken in different positions. This method, while simple, is of little practical use for producing misleading pictures, since the opportunity for detection is greater unless the negatives are made under just the proper conditions and with a background that lends itself to the purpose. A mode of producing "fake" pictures which is often used is that of printing through two negatives after they have been suitably prepared, the result being a print showing the features from each negative that it is desired to retain. Indeed there are few commercial photographers who do not have in their stock room a carefully selected series of negatives showing cloud effects, and these are used to produce clouds in what would otherwise be the bare sky of landscape pictures. Using the double negative method the writer has "faked" the picture of an aeroplane over a stream several hundred miles away, the whole being an apparently genuine print.

Perhaps one of the most frequent uses of photographs as evidence is in trials involving the validity of written instruments, and when properly made they are of invaluable assistance. In fact, where a document is to be handled to any extent, it is always best to use a copy in order that the original may not be subject to mutilation through wear. For pictures of this nature a slow plate with a rather small stop is by far the best, and sufficient exposure should be given to bring out clearly all the lines of the document. An appropriate orange or yellow color screen is necessary in order to produce good negatives from some papers, especially blue and violet, and in some instances manila, orange, yellow and a few other tinted papers. Unless the picture is very much magnified, the use of a screen will not interfere with the optical qualities of the lens. An abrasion or the density of the lines on an instrument can sometimes effectually be disclosed by means of a photograph made by transmitted light, that is, with the light shining through an instrument instead of being reflected from its surface. These, however, must usually be magnified before they are of much value. But when properly taken they are invaluable in disclosing water marks, fiber of paper, continuity of strokes or retouching of lines, and all other matters which cannot be observed from a reflected light picture. In certain cases where it is desired to accentuate an unevenness, such as a pencil indentation without color, or an embossed figure, the document may be so placed that the illumination will come from the side of the object. The resultant print will then show the objects in relief. Fraudulent and improper alteration is as possible in the case of photographs of documents as in any other. The negative may be retouched and spotted and the finished print lined. It has been very truly said that the refractive power of the lens, the angle at which the original instrument is inclined to the plate, the accuracy of the focusing, and the skill of the operator, are all to be taken into consideration. By placing the original to be copied obliquely to the sensitive plate that portion of the instrument to be copied which is nearest the plate may be distorted by being enlarged, and the part farthest away may be correspondingly reduced, while the slightest bulging may cause the resulting negative to be blurred. Indeed then, in the matter of taking photographs of this nature, and in the subsequent manipulation of the negative and print, the opportunity for misleading work is exceedingly great. However, the skill required to "doctor" a picture of this kind is such as to render the question of less relative importance. As is said by Mr. Osborn, at page 51 of his work on "Questioned Documents": "If there is any doubt about the accuracy of photographs they can be made by both parties, and in questioned document cases they can easily be verified by comparison with the original paper which is at hand. On account of the latter fact there is not the legitimate objection to photographs of a questioned document that may arise over photographs of a different nature which cannot be compared and verified by judge, jury and opposing counsel."

A correct photographic representation depends much on the position in which the camera is, and the viewpoint from which the exposure is made, especially in pictures of landscapes, the location of crimes and accidents, machinery and the like. As one court has observed, the photographs introduced in evidence by opposing parties sometimes present as great apparent conflict as the testimony of the witnesses. Pictures showing distances are often misleading because of the lack of proper perspective, and do not

necessarily present distances and angles correctly. True, this defect can be remedied to some extent by stereoscopic photographs, and it is rather surprising that these have not come into more general use. Certainly they are of much greater value to the jury. Nothing is simpler than to take an incorrect picture of this class. A roadway with a pronounced grade can be made to appear level by taking a side view with the camera inclined at the same angle and to the same degree as the object, and this is only a single instance of the innumerable cases in which the camera may be made to lie. It must be remembered, too, that the ordinary photograph deals only with chiaroscuro, or light and shade, this very fact rendering it an easy matter to produce an incorrect representation. And it may be observed in passing that this is a comparatively recent achievement, for the Egyptian painters made no use of shadows, but saw only outline of form. However, the photographer having the shadows at his command does not hesitate to use them to produce the desired results. A defect in a bit of machinery, a broken rail, a hole in a roadway, can be made to appear matters of little consequence by placing the camera in such a position that they are in the shadow, and do not get the benefit of direct lighting. But should a mistake be made here, all is not lost by any means. If the picture, by some mistake of the operator, shows more than is intended, the negative can easily be reduced with the aid of a few chemicals and a bit of cotton, the resulting print showing a deep shadow over the part to be concealed. Or should the reverse condition obtain, the negative can be intensified and the detail brought out. These methods are constantly practiced in legitimate work, and the results are certain.

It will be seen, therefore, that all ordinary photographs are of questionable evidential value, except possibly motion picture films. The latter have apparently been but seldom used. In a recent strike in one of the coal fields, motion pictures were taken for trade purposes, and these were subsequently used to identify some of the strikers. But their use must necessarily be limited, because of the fact that only in such instances as this are pictures available, and should they come into more general use it is questionable whether their value would not be greater than photographs taken with ordinary cameras. Owing to the exceedingly small film used, each individual picture being but little over an inch square, it is very difficult, if not impossible, to make any alteration on the film itself that will not show on the screen, although of course the opportunity for making "fake" pictures is even greater with a motion picture machine in the hands of a skilled operator, than with the ordinary type of camera.

The most that can be said then is that too much care cannot be exercised where photographs are introduced as evidence in a case. The prints should be required on glossy paper, since it shows details much more clearly than a matt or studio surface, and if there is the slightest suspicion that the negative has been altered or retouched, it should be called for and examined, that the court and jury may see for themselves that its gelatine surface is unbroken.

L. R. B.

"The peace of mankind, the honor of the human race, the welfare, perhaps the being of future generations must in no inconsiderable degree depend on the sacred observance of national conventions." Iredell, J. in Ware *v.* Hylton, 3 Dallas, 270.

GERMAN EMERGENCY LEGISLATION AFFECTING COMMERCIAL MATTERS.

By C. H. HUBERICH, of the U. S. Supreme Court Bar, Counsellor at Law, Berlin and Hamburg.

DURING the period from 31st July, 1914, to the end of March, 1915, over two hundred fifty laws, ordinances and other enactments have been promulgated in the German Empire. Nearly all of these deal with the special economic and social problems created by the war. The comprehensiveness of the legislation enacted during the first weeks of the war tends to show that the measures had received long and careful consideration. The very complete codes of prize law and prize procedure had been adopted respectively in 1909 and 1911, although their provisions were not published until 3d August, 1914.

It is interesting to note that while in the beginning the legislation reflected the Continental views, it has gradually adopted a number of distinctively common law doctrines, more particularly in reference to the status of alien enemies.

A significant feature in the legislation is the indication that the war has continued for an unexpected length of time. This is particularly observable in the economic legislation that has been framed in the past few months to safeguard food supplies, and which was not particularly dealt with in 1914, where measures relating to this topic were chiefly confined to prohibitions of exports. But this feature is also observable in the commercial legislation. E. g., the earlier enactments relating to postponement of payments of foreign bills of exchange and of debts due to persons domiciled outside the German Empire fixed the date of expiration at 31st October, 1914. These acts were subsequently extended to 31st January, 1915, and later to 30th April, 1915. So too the general period of limitation was extended by an ordinance of 22d December, 1914, for a period of one year by a provision to the effect that periods of limitation expiring on 31st December, 1914, should be deemed to be extended to 31st December, 1915.

German law does not place alien enemies under an incapacity to contract. It is to the economic advantage of Germany to keep her trade, even with the enemy, open. Exports to enemy countries are on the same footing as exports to other foreign countries, but by an ordinance of 22d February, 1915, the importation and transit of certain enemy products, chiefly belonging to the class of luxuries, have been prohibited.

Alien enemies are also under no disability to bring suits. Until 30th September, 1914, even payments of money and the transmission of securities to enemy countries were not prohibited, but by an ordinance of 30th September, 1914, and later ordinances payments to persons resident within Great Britain, France and Russia have been prohibited, subject to certain exceptions in reference to payment of patent fees and the transmission of funds necessary for the protection of German interests in these countries. Business undertakings in Germany, owned or controlled by alien enemies, at first remained free from special control or supervision. On 4th September, 1914, an ordinance was passed authorizing the supervision of enemy undertakings owned or controlled by persons within the enemy territory. By a law of 26th November, 1914, special stringent measures were adopted in respect of French business undertakings. This measure was one of retaliation against the ordinance providing for the sequestration of German property in France. This law provides for the appointment of an administrator to take charge of the French business undertakings (including immovables owned within the Empire) within Germany, with power either to carry on the business or to liquidate it. In the latter event the funds belong-

ing to the undertaking, after the payment of the claims of creditors, are deposited in the Imperial bank until the conclusion of the war. By an ordinance of 22d December, 1914, these provisions were made applicable to Great Britain, and by an ordinance of 4th March, 1915, extended to Russia. Enemy property in the German customs has also been sequestrated.

The German prize law follows largely the provisions of the Declaration of London. Under the terms of the Sixth Hague Convention an arrangement was made in reference to the giving of days of grace to French ships in German ports. Negotiations in respect of the same matter with Great Britain proved abortive, and British ships in German ports are detained under the provisions of articles 1 and 2 of the Sixth Hague Convention. The so-called "blockade" decree of 4th February, 1915, is a military and not a legislative measure, and does not appear in the collection of laws. Few decisions have been rendered as yet by the prize courts of Hamburg and Kiel in the cases there pending. Of the prize decisions thus far rendered, one of special interest to neutral countries is that in the case of the *Glitra,* in which it was held that neutral owners of cargo on board an enemy vessel destroyed by the captors are not entitled to compensation. The case has been appealed. The views announced are contrary to those of the best modern German authorities on this subject, and it is possible that the decision will be reversed.

No general moratorium has been declared in Germany. On 7th August, 1914, an ordinance was passed providing that no suit could be instituted before 31st October, 1914, in respect of any claims arising before 31st July, 1914, and due to any person or corporation domiciled in a foreign country.

This period was subsequently extended to 31st January, 1915, and has now been extended to 30th April, 1915.

Legislation along the lines of the English Courts (Emergency Powers) acts has been passed providing that in appropriate cases the court may grant a stay of execution of not more than three months where the claim upon which it is based arose prior to 31st July, 1914. Where the inability to pay is due to the war the court may order a carrying on of a business under the supervision of the court, in lieu of bankruptcy. Special privileges have been accorded to persons in active military or naval service, but do not apply to registered firms or corporations.

Special laws relating to bills of exchange have been enacted. By ordinance of 10th August, 1914, bills drawn in a foreign country prior to 31st July, 1914, and payable within the German Empire after said date, are extended for a period of three months. Interest at the rate of 6% is added. By ordinance of 22d October, 1914, an additional period of three months was granted, and by an ordinance of 19th January, 1915, a further extension of three months has been granted.

In spite of the moratorium laws in respect of claims of foreign creditors a number of these claims are being paid in advance of the time set for payment, the debtors availing themselves of the present low value of German currency in order to free themselves from their obligations.

It is to be noted that the above laws are not applicable to the territories of Belgium under German occupation. For these special measures have been enacted.

"We are compelled to admit that although Christianity be a part of the common law of the state (of Pennsylvania) yet it is so in this qualified sense, that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public." Story, J. Vidal v. Girard, 2 How. 198.

ACCIDENTS ON TENEMENT STAIRCASES.

THE judgment of the Court of Appeal in the recent case of *Dobson* v. *Horsley* (112 L. T. Rep. 101; (1915) 1 K. B. 634) makes an important addition to the long line of cases on the above subject which have presented themselves for decision in modern times, owing to the greatly increased use of flats and tenement dwellings both for business and for general purposes. It is an essential feature of these premises that the building or block of buildings of which they form part should be served by a common staircase or other means of approach. In some cases this approach is inside the building, whilst in others it is outside. It forms no part of the letting of the floor, flat, or tenement itself, and it nearly always remains under the control and management of the landlord or owner, sometimes by agreement expressed in each letting, and sometimes by mere conduct on his part from which such an agreement can easily be implied.

The facts involved in the case were simple. The defendants were owners of a house let out in rooms, one of which was in the occupation of the plaintiff at a small weekly rent. The house was approached from the street by a flight of steps, which crossed an area of considerable depth. The steps were protected by railings on each side, but these railings were defective, and a portion of them were missing, thus producing a gap through which a young child of the plaintiff, whilst playing on the steps, fell into the area below and sustained injury. The Court of Appeal held that in the above circumstances the defendants were not liable. They were of opinion that the position of the injured person was no higher or better than that of a bare licensee; that as a result the defendants' responsibility extended only to a "trap" or concealed danger, and fell altogether short of that of providing a reasonably safe mode of access to the premises; that the tenant and those who claimed through him took the access in the condition (shown to be a defective one) in which it stood at the time of the letting; and that the matter was in no way altered by the fact that the injured person was a child of tender years, who was incapable of exercising any judgment or care on his own behalf.

The result of this judgment appears to be to whittle away the earlier decision of the same court in the well-known case of *Miller* v. *Hancock* (69 L. T. Rep. 214 (1893) 2 Q. B. 177) in a very serious manner. It is now explained that that case was really decided on the footing that the danger which gave rise to the plaintiff's injuries was in the nature of a trap, for the existence of which on the staircase the landlord was responsible to a stranger who had business with the tenant of one of the floors of the building; and it is also said (and not for the first time) that the case was decided on its own "special circumstances." What those special circumstances were we are not told, any more than we were told on the previous occasion (*Huggett* v. *Miers,* 99 L. T. Rep. 326; (1908) 2 K. B. 278), when the matter was fully discussed by the same court.

It is quite true that the facts, as reported in *Miller* v. *Hancock,* are consistent with the existence of a trap or concealed danger on the staircase. The report merely states that the plaintiff, in descending the staircase, fell in consequence of one of the stairs being in a worn and defective condition, and consequently sustained injuries. Whether the defect complained of was one which was hidden, or one which could have been observed by the exercise of ordinary care, is a question which does not appear to have been raised at all. To say that the "trapping" of the plaintiff by something which he was not bound to anticipate was "the basis of the decision," as Lord Justice Buckley does in *Dobson* v. *Horsley,* seems scarcely justified by the report of *Miller* v. *Hancock.*

The above explanation of the latter case appears to have been first suggested by Mr. Justice Atkin in the case of *Lucy* v. *Bawden* (110 L. T. Rep. 580; (1914) 2 K. B. 318), where it was held that for injuries sustained by the wife of a tenant on a common flight of steps leading to a house occupied in tenements, through the absence of a sufficient railing, the landlord was not liable, when it was shown that the existence of the defect was known to the plaintiff before the accident. In the earlier case of *Huggett* v. *Miers*, just referred to, before the Court of Appeal, there is no trace of such a suggestion. The explanation there given of *Miller* v. *Hancock* is that in that case the court—to use the language of Lord Justice Moulton—treated the landlord, who had, as between himself and the tenants, undertaken the duty of keeping the staircase in repair, as having authorized the tenants for the purposes of their business to invite members of the public to use the staircase on his behalf so as to bind him. In other words, they ascribed to him the invitation given by the tenant by his authority, and based upon that invitation a duty on his part towards those so invited to keep the staircase in a reasonably safe state of repair. The defect complained of in *Huggett* v. *Miers* was one of insufficient lighting and not of repair at all; and the difference between the two cases is very marked, inasmuch as the danger incurred in the former case is obvious to everybody. But it seems clear that the explanation of *Miller* v. *Hancock* there given is not really based on trap or concealment, but on the invitation, given or supposed to be given, to use the staircase provided. And that this was also the view of the case taken in *Hargroves, Aronson, and Co.* v. *Hartopp* (92 L. T. Rep. 414; (1915) 1 K. B. 472) appears from the statement of Lord Alverstone, C. J., that the court in *Miller* v. *Hancock* did assume that the lessor was under a duty to his own tenants, as well as to members of the public coming to the premises on business, to take care to keep the staircase in reasonably safe repair.

Throughout the judgments in *Miller* v. *Hancock* it will be seen that the learned judges say that under the circumstances of the case the implication ought to be made that the landlord was under a duty, to those who had business with his tenants, to keep the staircase in reasonably good repair, and not merely a duty to abstain from laying "traps." The decision itself was based on the analogy of a judgment of the Court of Common Pleas in *Smith* v. *London and St. Katharine Docks Company*, 18 L. T. Rep. 403; L. Rep. 3 C. P. 326). In that case the defendants, in the ordinary course of their business, provided gangways as a means of access to ships lying in their dock, gangways which would to their knowledge be necessary for the use of all persons having business with the ship; and from those facts the court inferred a duty on their part towards such persons, not merely to abstain from traps, but to have the gangways in a reasonably safe condition. It is quite true that the danger in that case was hidden, just as it may have been hidden in *Miller* v. *Hancock;* but this was not the ground of the decision any more than it was the ground of the decision in the latter case. The real ground, as already stated, and as mentioned by all the judges in *Huggett v. Miers*, was the invitation by the landlord to use the mode of access to the premises provided and controlled by him. So much was this the case, that Lord Justice Farwell in the latter case questions the applicability of the decision in *Smith's* case to the facts in *Miller's*, on the ground that it was the dock company itself which carried on the business for the purposes of which they invited persons to use the gangway. And no doubt this is true. But why does this make the analogy fail? The landlord, in the case of tenements, flats, and floors, carries on "business" on the premises. That business is to let them to occupiers. For this he receives a consideration, just as the dock company receives a consideration from shipowners who resort to their dock. He provides a mode of access to the tenements, just as they provide a mode of access to the ships. In both cases it is known that that mode of access will be used by strangers. If there be an "invitation" so to use it in the one case, why should there not be an invitation in the other? And if that invitation entails the result in the one case that a reasonably safe access should be provided, why not also in the other?

It has long been established that the position upon premises of what is called an "invitee" on business is better than that of a mere licensee. As regards the former, it is settled that, using reasonable care for his own safety, he is entitled to expect that reasonable care shall also be used by the owner or occupier to prevent damage from unusual or unexpected danger which he knows or ought to know. It seems beyond doubt that a person who comes directly on business with the owner or occupier of property—as in the common case of a person entering a shop—is distinctly more favored, in the respect now considered, than an ordinary guest or licensee, the reason being that his presence is for the benefit of the invitor. Applying this test, is it not for the benefit of the landlord, whose object, as already pointed out, is to let his tenements, that use should be made of the staircase by strangers? He knows that it must and will be so used. If the tenant has a family, he knows that it must and will be used by the family. He knows that without such user being permitted he could not let his premises at all. No doubt the "business" with him in this case is only indirect and not direct. But why should this make any difference? In *Miller* v. *Hancock* it is true that the person who met with injury had business to transact on the premises. But his business was (directly) with the tenant and not with the landlord. It is conceived that the real reason why the latter was held responsible was, not because of the plaintiff's business with the tenant, but because his presence was for the landlord's benefit, inasmuch as the letting of the offices to the tenant was conditioned on the possibility of such visits to the premises being made.

In Scotland, owing probably to the large number of tenement dwellings in the towns, there have been within the last few years several decisions in the Court of Session on the points here involved; and it seems a matter for regret that none of them were apparently referred to in *Dobson* v. *Horsley*. The law of Scotland differs nothing in these respects from that of England; all the decisions profess to follow that of *Miller* v. *Hancock;* and it has been laid down over and over again that the true principle is that the landlord's obligation towards persons who use the common staircase of tenements under the circumstances of that case is that of keeping it in reasonably safe repair. To go back no further than two years, this will be found to be laid down by the Court of Session both in *Kennedy* v. *Shotts Iron Company* (1913, S. C. 1143) and in *Mellon* v. *Henderson* (1913, S. C. 1207). It is quite true that in both these cases the danger which produced the injury was concealed. But on referring to them it will be seen that in neither of them is stress of any kind laid on this circumstance, but the court enunciates in the broadest terms the general principle above adverted to. It seems quite clear that the Court of Session, at any rate, does not consider that the real ground of the decision in *Miller* v. *Hancock* was the "trapping" of the plaintiff.

Last year the matter again came before the court in the case of *Grant* v. *Fleming* (1914, S. C. 228). The staircase here was alleged to be defective in two respects, in that the balustrade was of insufficient height for the protection of children, and

that one of its uprights was missing. A young child going to visit a friend in one of the tenements was injured by a fall, which took place either through the gap or over the balustrade. On a proceeding analogous to demurrer, it was held by a majority of the Court of Session that there was a *primâ facie* case of liability against the landlord, and that the case must go to trial on the facts. The ground of the decision—based once more on *Miller* v. *Hancock*—was that there was an obligation on him to provide a staircase which should be safe so far as he by reasonable care and inspection could secure.

Two of the three judges who assisted at the hearing of the above case expressed the view that the child had no better right to recover damages for the injuries sustained than an adult. That this is so was actually decided in *Dobson* v. *Horsley,* and in a somewhat summary manner; Lord Justice Buckley saying that he attributed no importance to the point raised in this respect on the child's behalf, and basing his opinion on the short ground that if the place was dangerous the child ought not to have been there without proper protection. Apart from the difficulty—amounting practically to an impossibility—of complying with this condition on every occasion, it would seem that the point did not perhaps receive sufficient consideration. It is quite true that in *Latham* v. *Johnson* (108 L. T. Rep. 4; (1913) 1 K. B. 398), Lord Justice Farwell lays it down in terms that the owner of property incurs no greater liability towards children than towards adults. But Lord Justice Hamilton in the same case appears fully to recognize that the duty which one person owes to another to take reasonable care not to cause him hurt by act or omission is one which is relative to the person injured. Moreover, Lord Atkinson in *Cooke* v. *Midland Great Western Railway of Ireland* (100 L. T. Rep. 626; (1909) A. C. 229) says this: "The principle that the owner of land upon which a licensee enters on his own business or for his own amusement is only responsible for injuries caused to the latter by hidden dangers of which the former knew, but of which the licensee was ignorant, and could not by reasonable care and observation have detected, must, in any given case, be applied with a reasonable regard to the physical powers and mental faculties which the owner, at the time he gave the license, knew, or ought to have known, the licensee possessed. . . . The duty the owner of premises owes to the persons to whom he gives permission to enter upon them must, it would appear to me, be measured by his knowledge, actual and imputed, of the habits, capacities, and propensities of those persons." So, again, Lord Justice Phillimore in the recent case of *Norman* v. *Great Western Railway Company* (112 L. T. Rep. 266; (1915) 1 K. B. 584) points out that, "in analyzing the expression 'reasonably safe,' one must take into account what is called in modern parlance the personal equation; what may not be safe for one person may be safe enough for the persons who frequent particular business premises." And there are many other authorities to the same effect.

On the whole, it seems a little difficult to explain the apparent tenderness with which the landlord has been treated in the class of cases here under discussion. The use of the staircase or other means of approach is absolutely essential to the carrying out of the main and only object of the letting of the flat or tenement. This circumstance is known to the landlord, and must be supposed to be within his contemplation at the time of the letting. It is part of the consideration for which his rent is paid to him. The staircase remains throughout in his possession and under his control. And it would appear only just and fair that he should be under an obligation not short of maintaining it in a reasonably proper condition.—*Law Times.*

Cases of Interest.

"DWELLING HOUSE" AS INCLUDING APARTMENT HOUSE.—A covenant in a deed prohibiting the erection of anything except dwelling houses on the land conveyed was held in Minister, etc., R. P. Dutch Church in Garden St. *v.* Madison Ave. Building Co. (N. Y.) 108 N. E. 444, not violated by the erection of an apartment house. The opinion of the Court of Appeals was in part as follows: "It seems very clear that the simple term 'dwelling house,' used in this covenant, is broad enough to include and permit an apartment house. We require little aid from dictionaries or decisions to enable us to see that, within the ordinary meaning of language, a 'dwelling house' is a house or structure in which people dwell, and such, concededly, are the character and purpose of an apartment house. There is no way in which we can fairly ingraft upon these particular words considered by themselves any further limitations of definition which would make a structure used for ordinary dwelling purposes more or less a dwelling house merely because of the number of people who dwelt in it."

VALIDITY OF ORDINANCE PROHIBITING IMPORTATION OF CITRUS PLANTS INTO STATE.—In State *v.* West, 67 So. 934, the Louisiana Supreme Court declared that an ordinance of the State Board of Agriculture and Immigration, which prohibited the importation into the state of all kinds of citrus plants and parts thereof was invalid as an interference with interstate commerce. Judge Provosty wrote the opinion which states the facts and reasons as follows: "The state has appealed from a judgment quashing the indictment against the accused, which indictment is under an ordinance or regulation of the State Board of Agriculture and Immigration, reading as follows: 'In order to prevent the introduction of the dangerous citrus disease known as citrus canker, prevalent in the principal citrus growing states of the United States, but not found to be prevalent in Louisiana, the importation into this state of any and all kinds of citrus plants and parts of citrus plants from all the states of the United States, its territories and possessions, and from all foreign countries, is hereby prohibited.' The information against the accused is in strict conformity with this ordinance; that is to say, it does not charge that the citrus plants imported by the accused were diseased, but simply charges that they were imported. When the state of Missouri sought to prohibit the driving or conveying of any Texas cattle into the state between certain dates, as a protection against Texas fever, the Supreme Court of the United States held the statute to be void as being an interference with interstate commerce. Railroad Co. *v.* Husen, 95 U. S. 465, 24 L. ed. 527. For the same reason, the ordinance or regulation involved in this case is null."

REGULATION OF LIVERY STABLES AS VALID EXERCISE OF POLICE POWER.—A municipal ordinance making it unlawful to conduct a livery stable business within a designated area was held valid in Reinman *v.* City of Little Rock, 35 Sup. Ct. Rep. 511, as being within the power of the state to authorize. Mr. Justice Pitney for the court said: "The decision of the state court of last resort is conclusive upon the point that the ordinance under consideration is within the scope of the powers conferred by the state legislature upon the city council of Little Rock. It must therefore be treated, for the purposes of our jurisdiction, as an act of legislation proceeding from the lawmaking power of the state; for a municipal ordinance passed under authority delegated by the legislature is a state law within the meaning of the Federal Constitution; and any enactment, from whatever

source originating, to which a state gives the force of law, is a statute of the state within the meaning of Judicial Code, § 237, which confers jurisdiction upon this court. Therefore the argument that a livery stable is not a nuisance *per se*, which is much insisted upon by plaintiffs in error, is beside the question. Granting that it is not a nuisance *per se*, it is clearly within the police power of the state to regulate the business, and to that end to declare that in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and in law, provided this power is not exerted arbitrarily, or with unjust discrimination, so as to infringe upon rights guaranteed by the Fourteenth Amendment."

STATUTE PROHIBITING SALE OF MORPHINE AS INCLUDING HEROIN.—The New Jersey Supreme Court in State *v.* Norwood, 93 Atl. 683, held that a statute prohibiting the sale of morphine, except upon a physician's prescription, did not include heroin. The reasoning of the court was as follows: "To bring the commission of the offense within the language of the statute the state offered expert testimony to show that 'heroin' is in fact morphine. Expert chemists in behalf of the defendant testified that 'heroin' and morphine are two distinct drugs, the latter being a very old alkaloid, and the former a comparatively recent derivative of morphine, and that each responds differently to recognized chemical tests. It was also in evidence that the two drugs respond differently on the human system, and that 'heroin' may be used with benefit for throat ailments. We do not deem it necessary to say more in the disposition of the case than that the statute in question does not include in its categorical statement of the inhibited habit-forming drugs the drug known as 'heroin.' If it were known and in existence by name, as a habit-forming drug, at the time of the enactment of the prohibiting law, it must be assumed that the legislature purposely excluded it. If it were not known, and not in existence, at that period, it is equally manifest that the legislature did not have it in mind for condemnation in its generic designation of habit-forming drugs. The act is penal in its object and consequences, and under familiar rules of statutory construction cannot be enlarged by judicial construction to include subjects and cases which upon its face are literally excluded."

VALIDITY OF STATUTE REQUIRING ONE DAY OF REST PER WEEK IN CERTAIN OCCUPATIONS.—In People *v.* C. Klinck Packing Company, 108 N. E. 278, the New York Court of Appeals upholds the validity of a state statute requiring that in certain occupations employees shall have twenty-four consecutive hours of rest in every seven days. Judge Hiscock in a long and learned opinion covers the various objections to its constitutionality in a thorough manner. In part he says: "The thought of one day of rest in seven has come down to us fortified by centuries of recognition. It is true that often it has been coupled with and perhaps subordinate to the desire for religious observance. But the idea of rest and relaxation from the pursuits of other days has also been present, and whether we like it or not we are compelled to see that in more recent times the feature of rest and recreation has been developing at the expense of the one of religious observance. I suppose that no one would contend that continued and uninterrupted indoor labor would be good even for an adult man. The laws which have been passed and sustained with general approval in almost every jurisdiction limiting the hours of labor for women and children and for those engaged in especially trying employments, such as mining and the operation of railroads, amply testify to the widespread belief that in certain fields the public health and welfare are subserved by generous opportunities for relaxation and recuperation. A constantly increasing study of industrial conditions I believe leads to the conviction that the health, happiness, intelligence, and efficiency even of an adult man laboring in such employments as those mentioned in this statute will be increased by a reasonable opportunity for rest, for outdoor life and recreation, for attention to his own affairs, and, if he will, study and education."

STATUTE CHANGING PUNISHMENT FOR MURDER AS EX POST FACTO LAW.—That a statute changing the punishment for murder from hanging to electrocution is not invalid as an *ex post facto* law where applied to crimes previously committed is the holding of the United States Supreme Court in Malloy *v.* State, 35 Sup. Ct. Rep. 507. The opinion of Mr. Justice McReynolds who spoke for the court was in part as follows: "The contention in behalf of plaintiff in error most earnestly relied on is this: Any statute enacted subsequent to the commission of a crime which undertakes to change the punishment therefor is *ex post facto* and unconstitutional unless it distinctly modifies the severity of the former penalty. The often-quoted opinion of Mr. Justice Chase in Calder *v.* Bull, 3 Dall. 386, 390, 391, 1 L. ed. 648, 650, summarizes *ex post facto* laws within the intendment of the Constitution thus: '1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender. All these, and similar laws, are manifestly unjust and oppressive.' Further expounding the subject, he adds: 'But I do not consider any law *ex post facto*, within the prohibition, that mollifies the rigor of the criminal law; but only those that create, or aggravate, the crime; or increase the punishment, or change the rules of evidence, for the purpose of conviction.' And to the general doctrine thus announced this court has continued to adhere."

VALIDITY OF STATUTE PROHIBITING SHIPMENT OF IMMATURE CITRUS FRUIT.—A statute of Florida makes it unlawful for anyone to sell, offer for sale, ship, or deliver for shipment, any citrus fruit which are immature or otherwise unfit for consumption, and in Sligh *v.* Kirkwood, 35 Sup. Ct. Rep. 501, the United States Supreme Court declared it to be a valid statute, and such an one as a state legislature could pass under the police power in the absence of any legislation on the subject by Congress. It was held that the statute in question only incidentally and indirectly affected interstate commerce. Mr. Justice Day for the court said: "It may be taken as established that the mere fact that interstate commerce is indirectly affected will not prevent the state from exercising its police power, at least until Congress, in the exercise of its supreme authority, regulates the subject. Furthermore, this regulation cannot be declared invalid if within the range of the police power, unless it can be said that it has no reasonable relation to a legitimate purpose to be accomplished in its enactment; and whether such regulation is necessary in the public interest is primarily within the determination of the legislature, assuming the subject to be a proper matter of state regulation. We may take judicial notice of the fact that the raising of citrus fruits is one of the great industries of the state of Florida. It was competent for the legislature to find that it was essential for the success of that industry that its reputation be preserved in other states wherein

such fruits find their most extensive market The shipment of fruits so immature as to be unfit for consumption, and consequently injurious to the health of the purchaser, would not be otherwise than a serious injury to the local trade, and would certainly affect the successful conduct of such business within the state. The protection of the state's reputation in foreign markets, with the consequent beneficial effect upon a great home industry, may have been within the legislative intent, and it certainly could not be said that this legislation has no reasonable relation to the accomplishment of that purpose. As to the suggestion that the shipment of such fruit may be legitimately made for commercial purposes, for the purpose of making wine, citric acid, and possibly other articles, it is sufficient to say that this case does not present any such state of facts, and of course the constitutional objection must be considered in view of the case made before the court, which was a delivery for shipment of oranges so immature as to be unfit for consumption. Whether such a case as supposed, of shipment for commercial purposes, would be within the statute, would be primarily for the state court to determine, and it is not for us to say, as no such case is here presented."

EFFECT OF DISCONTINUANCE OF LITIGATION BY CLIENT ON RIGHT OF ATTORNEY TO CONTINGENT FEE.—An interesting discussion of the effect of the discontinuance of litigation by a client on the right of his attorney to recover a contingent fee agreed upon as compensation for his conducting the litigation is to be found in Andrews *v.* Haas, (N. Y.) 108 N. E. 423. It was decided that the attorney could not recover the amount agreed upon, but only the value of services rendered up to the time of the discontinuance. Judge Cardozo stating the facts in detail and the reason for the decision said: "The plaintiff is a member of the bar. He complains that the defendants refused to prosecute an action in which they had retained him as their lawyer. The agreement was, he says, that they would sue for $180,000, and pay him twenty-five per cent of the amount recovered. He drafted a complaint for them, but there the action stopped. The defendants refused to go on with it. They were advised and became convinced, as they now allege in their answer, that the action was without merit. Because of their refusal to proceed with it the plaintiff says that they owe him $45,000. In opening his case he declined to prove the value of his services up to the time when the case was halted; he took his stand upon the ground that he was entitled to the profits that would have come to him if his clients had pressed the case to a successful conclusion. At the close of his opening the complaint was dismissed. The employment of a lawyer to serve for a contingent fee does not make it the client's duty to continue the lawsuit and thus increase the lawyer's profit. The lawsuit is his own. He may drop it when he will. Even an express agreement to pay damages for dropping it without his lawyer's consent would be against public policy and void. The law will not imply an agreement which would be illegal if it were express. It will not, under the coercion of damages, constrain an unwilling suitor to keep a litigation alive for the profit of its officers. The notion that such a thing is possible betrays a strange misconception of the function of the legal profession and of its duty to society. When the defendants abandoned the action, they became liable to the plaintiff for the value of the services then rendered. That is the measure of their liability and of his right. We have been referred to cases where clients, after retaining a lawyer for a contingent fee, have continued the litigation through another lawyer, and have been held answerable in damages. We are not required at this time either to approve or to condemn those rulings. They have not passed unchallenged. In those cases, and in others like them, the clients were on with the lawsuit. Here they abandoned it. We refuse to hold that they were bound to pay their lawyer as if they had gone on with it and won it. The plaintiff's claim is without merit. The judgment should be affirmed, with costs."

LIABILITY OF GARAGE KEEPER LETTING AUTOMOBILE FOR HIRE TO UNSKILLFUL DRIVER, FOR INJURIES TO THIRD PERSON.—The case of Neubrand *v.* Kraft (Ia.), 151 N. W. 455, lays down the rule that a garage keeper letting automobiles for hire does not owe a duty to the public to see that those who hire automobiles from him are thoroughly competent drivers, and therefore where an automobile is hired by one who is unfamiliar with the operation of that make of car, and it is negligently run into a spectator at a carnival, the garage keeper is not liable to the spectator for the injuries received. Judge Weaver for the court says: "In an argument for appellant counsel contends that one who lets an automobile for hire is responsible for the proper skill and care of the person to whom he intrusts it. In support of this position we are cited to certain English cases where the owner of a cab is held liable for injuries resulting from the negligence of the driver. But such cases are parallel neither in fact nor in principle with the one now before us. The proprietor of a car or hack stand lets his carriages supplied with drivers of his own selection and in his own employment. While to a certain extent the driver under such circumstances becomes the servant of the hirer, he does not cease to be the servant and representative of the cabowner so far as the immediate care and management of the carriage and its motive power is concerned, and if by his careless or reckless driving a collision occurs upon the street, and a third person is thereby injured without fault on his own part, the owner is very reasonably and properly held to respond in damages. But the owner of a livery stable or garage making a business of letting teams or carriages or motor cars to customers who propose and expect to do their own driving has never been held to any such rule of responsibility by any court so far as the precedents have been called to our attention, and we think there is no general rule or principle necessitating such conclusion. Cases may be imagined, perhaps, where an owner recklessly lets his spirited team or his automobile to an immature child, or to a person who is intoxicated or otherwise manifestly incompetent to manage or control it, with the natural result of a collision upon the public street and consequent injury to others. It may well be that under such circumstances the owner would be held liable in damages, not because the hirer is his servant or because as owner he is required to vouch to the public for the competency of all persons to whom he may let his teams or his cars for hire, but because he knew the incompetency of this particular driver and the imminent peril to which he thereby exposed others who were in the lawful use of the streets, and as a person of ordinary prudence should have refrained from so doing. Nothing of this manifest want of prudence is shown in this case now under consideration."

MEANING OF "ACCIDENTAL MEANS" AS USED IN ACCIDENT POLICY.—The case of Hutton *v.* States Accident Insurance Company, (Ill.) 108 N. E. 296, considers the meaning of the words "accidental means" as used in a policy of accident insurance insuring one against "injuries effected exclusively by external, violent, and accidental means." The appellee was the plaintiff in the court below and the suit was on an accident policy. According to the testimony of the appellee there had been some little difficulty between him and one John Huddlestun prior to November 9, 1911. On that evening he and Huddlestun had a conversation in the city of Newton in reference to their difficulty,

after which appellee went to his office. Having finished his work there, he went to a restaurant in that city to get his supper. As he entered the restaurant from the west, he saw Huddlestun sitting on a stool on the south side of the room, at a lunch counter. Without saying a word to Huddlestun, appellee walked up behind him and struck him a blow with his fist on the side of the face or head, intending, as he states, to hit him so hard that "he wouldn't get up and begin it all over." The blow did not have the desired effect. Huddlestun immediately arose from his seat, whereupon the appellee struck at him again. Huddlestun then pushed or knocked appellee down, breaking his leg. It was uncertain from the testimony of appellee whether his leg was broken in the fall, or whether it was twisted and broken before he fell; but in any event it was broken, according to the undisputed testimony, while he was engaged in the fight with Huddlestun. Appellant contended that, where an accident policy insures against an injury effected exclusively by accidental means, there can be no recovery where such injury is the result of the voluntary act of the insured, although such result may be entirely unexpected and undesigned, and insisted that the evidence did not even tend to prove that the injury was caused by accidental means, inasmuch as appellee had voluntarily engaged in a fight, of which the injury received was but the natural and probable consequence. The contention of appellee was based upon the proposition that his act in assaulting Huddlestun was attended with an unexpected and unusual result—that is, the breaking of his leg—and one which could not have been reasonably anticipated and which he did not intend to produce. The judgment below was reversed, the Supreme Court saying: "We are of the opinion that the position of appellee is not tenable. Where one voluntarily and deliberately engages in a fight or brawl, and places another in a position where he, too, must fight to defend himself, it is a natural result, and one known to all sensible men as likely to follow, that one or both of the combatants will receive more or less serious injury. As to whether the assailant or the one assailed would be the more likely to be injured would depend upon the comparative strength and skill of the antagonists, as well as upon the fortunes of the combat. It is shown in this case that both appellee and Huddlestun were large, powerful men, possessed of more than average physical strength. While appellee testifies that it was his intention to render Huddlestun incapable of defending himself by a single blow, he was bound to take notice of the fact that he might not be able to accomplish that design, and that if he then persisted in the attack the chances were largely in favor of Huddlestun exercising the right to defend himself by all necessary means. Appellee persisted in the assault upon Huddlestun, after having failed to accomplish his purpose in striking the first blow, and continued the same up until the instant that his leg was broken. In the meantime Huddlestun was defending himself solely by the use of his arms and fists. Appellee was a practicing physician and surgeon, thirty-five years of age at the time of the assault, and a man of intelligence and experience. He was bound to know that one of the natural and probable consequences of voluntarily engaging in an assault under such circumstances was that he might be injured, although he could not, of course, foresee the exact form of the injury he might receive, or, indeed, be able to know certainly that he would be injured at all. Such being true, and the assault committeed upon Huddlestun being the deliberate and voluntary act of appellee, the injury which he received as a result cannot be said to have been caused by accidental means. An effect which is the natural and probable consequence of an act or course of action cannot be said to be produced by accidental means."

New Books.

The Law of Electricity. By Arthur F. Curtis of the New York Bar. Albany, N. Y.: Matthew Bender & Company, 1915.

The volume at hand is entitled "The Law of Electricity," but it is more comprehensive than its title would indicate, for not only does it treat of such purely electrical matters as electrolysis, injuries arising out of the use of electricity, and powers and duties of electrical companies, but it enters the realm of eminent domain, taxation, contracts, municipal ownership, abutting owners, franchises, master and servant, street railways, etc., so far as those subjects affect companies using or supplying electricity. The author, Mr. Curtis, is a legal author of long experience, and in this new work, containing over a thousand pages, he has hit upon a branch of the law which has developed within a few years, and which has been slighted by legal writers. The volume is therefore opportune. The text bears evidence of painstaking effort on the part of the author to make it stand the test of rigid examination, and all matters treated seem relevant to a work on electricity. Copious notes aid the text, and prolific citations show a wide search for authorities not only in the United States but in England and Canada as well.

The Law of Bank Checks. By John Edson Brady of the New York Bar. New York City: The Banking Law Journal Co., 1915.

Mr. Brady has written a book entirely given over to the subject of bank checks. This subject is ordinarily treated in comprehensive works on bills and notes and probably for that reason has often received less attention than its importance deserves. While in many respects like a bill of exchange, a bank check differs from it in important particulars and is properly considered by itself. The main headings of Mr. Brady's book relate to general principles, negotiability and form, delivery, consideration, transfer, holders in due course, presentment for payment, notice of dishonor, protest, alterations, forgeries, payment, overdrafts, collection, certification and clearing houses. There is an appendix containing the Negotiable Instruments Law, a table of cases, and an index. The text is well supported by authorities from the various jurisdictions, and the propositions of law are given with conciseness, clearness and accuracy. Besides being of use to lawyers the volume should furnish a handy guide to bank officials.

The Common Law and the Case Method in American Law Schools. A report to the Carnegie Foundation for the Advancement of Teaching. By Professor Dr. Josef Redlich of the Faculty of Law and Political Science in the University of Vienna. Bulletin Number Eight. New York City, 576 Fifth Avenue.

This report has very naturally aroused great interest among persons concerned with law school education. It deals with the early methods of legal instruction, the use of the case method of instruction first taught at Harvard Law School by that famous teacher Christopher C. Langdell, and scholarly comments on its virtues and its defects. The case system of instruction was for years stubbornly fought by many legal educators, and its worth was long questioned, but to-day it is taught pretty generally in the American law schools with perhaps some modifications here and there. It has stood the test of time and experience, and thousands of sound lawyers show the effects of its training. Professor Redlich covers the subject thoroughly and furnishes valuable suggestions for increasing the efficiency of American legal education which he praises highly.

Classics of the Bar. Stories of the World's Great Legal Trials and a Compilation of Forensic Masterpieces. By Alvin V. Sellers. Volume III. Baxley, Georgia: Classic Publishing Co., 1915.

This latest volume in the series dealing with classics of the bar contains the address to the jury of David Paul Brown, counsel for Alexander William Holmes who, as mate of a wrecked ship, threw passengers in a lifeboat overboard that others might be saved, and was indicted for homicide. It also contains the opening speech made in behalf of President Johnson at the time of his impeachment, by that famous lawyer, Benjamin R. Curtis. There is also set out the address of Tom Watson in his own defense when he was on trial for depositing in the mails "certain obscene, lewd, lascivious publications." Another argument is that of Jeremiah S. Black appearing for Lambdin P. Milligan and two others charged with being members of a secret society known as the "Sons of Liberty" and "Order of American Knights," alleged to have been organized for the purpose of bringing about the destruction of the American Government. William H. Seward's plea for justice at the trial of William Freeman, indicted for murder, and the speech of John Philpot Curran for the plaintiff in the case of Mossy *v.* Headfort, the defendant being sued for criminal conversation, complete the volume. Mr. Sellers has on the whole made good selections and has furnished entertaining reading.

German Legislation for the Occupied Territories of Belgium. Official Texts. Edited by Charles Henry Huberich and Alexander Nicol-Speyer. The Hague: Martinus Nijhoff, 1915.

It is stated in the introduction to this little book that the legislation enacted by the German Empire in respect of the occupied territories of Belgium, in addition to the interest attaching to it as emergency legislation attempting to deal with the special social and economic problems arising out of war, is of peculiar interest as legislation enacted by a belligerent in respect of enemy territory under military occupation. The German Government in the exercise of the powers of legislation as the occupying state has enacted a number of ordinances and issued a number of proclamations and notifications, in part extending or modifying the existing Belgian laws, in part containing new provisions designed to carry out the policies of the occupying state. The more important of this legislation is contained in the volume at hand untranslated.

News of the Profession.

THE MARYLAND STATE BAR ASSOCIATION will hold its annual session at Cape May on July 7, 8 and 9.

THE KENTUCKY STATE BAR ASSOCIATION will meet in annual convention at Frankfort, Ky., on July 8.

THE NORTHWEST TEXAS COUNTY JUDGES' ASSOCIATION met in annual convention at Amarillo, Tex., on April 23 and 24.

THE MINNESOTA STATE BAR ASSOCIATION has decided on St. Cloud, Minn., as the place for its next annual meeting to be held on August 6 and 7.

LAW PROFESSOR RETIRES.—Prof. Burr W. Jones of the University of Wisconsin will retire this month after thirty years of service as a member of the law faculty.

FLORIDA JUDGE APPOINTED.—Augustus G. Campbell of De Funiak Springs has been appointed judge of the first judicial circuit of Florida, to succeed Judge Emmett Wolfe, resigned.

OHIOAN HEADS PANAMA MIXED CLAIMS COURT.—D. D. Donovan, of Napoleon, Ohio, has been appointed chief judge of the Panama Mixed Claims commission. The commission consists of four judges, two Americans and two Panamaians.

APPOINTED TO THE BENCH IN WEST VIRGINIA.—Governor Hatfield of West Virginia has appointed Prosecuting Attorney Robert M. Addleman of Wheeling as judge of the First Judicial Circuit, succeeding the late Judge C. C. Neuman.

TEXAS JUDICIAL APPOINTMENT.—Frank B. Willis, a prominent attorney of Canadian, has been appointed district judge by Governor Ferguson of Texas, to fill the vacancy in the thirty-first judicial district caused by the death of Judge Greever.

MINNESOTA JURIST RETIRES.—Judge Arthur H. Snow of Winona, who has been on the bench of the third judicial district of Minnesota for the last eighteen years, has been granted leave to retire from the bench under the judicial retirement act.

MASSACHUSETTS JUDGE DEAD.—Judge Harvey Humphrey Baker, 46 years old, of the Juvenile Court of Boston, known throughout the country for his humanitarian interest in delinquent boys and girls, died on April 10 at his home in Brookline, Mass.

NEW CLERK OF TENNESSEE SUPREME COURT.—Preston Vaughn, a prominent Nashville attorney, has been appointed clerk of the Tennessee Supreme Court for a term of six years, succeeding Joe J. Roach, who has held the position for the past twelve years.

APPOINTED GOVERNMENT ATTORNEY IN PORTO RICO.—Robert W. Perkins, Jr., of Newport News, Va., has been appointed to the staff of the Attorney General of Porto Rico. The appointment was made on the recommendation of Dean Thayer of the Harvard Law School.

JOINT BAR CONVENTION.—The date of the joint convention of the Washington and Oregon State Bar Associations, to be held at Portland, Ore., has been changed to August 23-25. The change was made to suit the convenience of former President William H. Taft, who has accepted an invitation to address the convention.

THE MASSACHUSETTS ASSOCIATION OF WOMEN LAWYERS met in annual session at Boston, Mass., on April 24. Officers for the ensuing year were elected as follows: President, Mrs. Pauline Nelson Hartstone; first vice-president, Mrs. Teresa Crowley; second vice-president, Miss Vera Ryan; secretary, Miss Monica Foley; treasurer, Mrs. Florence Joyce; members of the board of directors, Miss Marion Tyler and Miss Catherine O'Leary.

TENNESSEE BAR ASSOCIATION.—The annual meeting of the Tennessee Bar Association will be held at Chattanooga, Tenn., on June 24 and 25. Among the speakers will be Peter W. Meldrim of Savannah, Ga., president of the American Bar Association, and Alfred P. Thom, of Washington, D. C., general counsel for the Southern Railway Company.

NEW PENNSYLVANIA JUDGE.—Thomas D. Finletter has been appointed to the bench of Common Pleas Court No. 4 of Philadelphia, to fill the vacancy caused by the resignation of Judge Robert N. Willson. This is the second time Mr. Finletter has been sworn in as a judge, he having been one of the judges who held office for one month under the act which increased the number of judges in each of the Common Pleas Courts and which was declared unconstitutional by the Supreme Court of Pennsylvania.

BYNUM BUST PRESENTED TO NORTH CAROLINA.—The bust of Judge William Preston Bynum was presented to the State of North Carolina by the North Carolina Bar Association with formal exercises on May 12. The presentation speech was made by J. Crawford Biggs, president of the State Bar Association, and the bust was accepted for the State by Governor Locke Craig. A feature of the exercises was an address by Thomas Settle on "The Life and Character of William Preston Bynum."

THE LOUISIANA BAR ASSOCIATION held its annual convention at New Iberia, La., on May 7 and 8. On the program were the following addresses: "The Administration of Justice," by Herber Harley, of Chicago, secretary of the American Judicature Society; "System of Taxation," by H. H. White; "Judiciary System for the Country Parishes," by S. McC. Lawrason; "Reform in Legislation," by Walter J. Burke; "Reform in Criminal Procedure," by St. Clair Adams, and "Reform of Judicial System," by Ernest T. Florance.

THE AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY will hold its annual meeting this year, as usual, after the meeting of the American Bar Association, at Salt Lake City. W. O. Hart of New Orleans has again been appointed chairman of the committee on co-operation, through the efforts of which committee in previous years delegates have been appointed by governors and mayors and by many organizations whose work in a way correlates with that of the institute. The work of the institute at its meetings, through its publications and its journal, has been very effective in the reform of criminology and in prison reform throughout the United States.

MISSISSIPPI BAR ASSOCIATION.—The annual meeting of the Mississippi Bar Association was held at Vicksburg, Miss., on May 4 and 5. The official program included the following addresses: "A Plea for the Establishment in Mississippi of a Modern Unified Court," by Sydney M. Smith, president of the association and Chief Justice of the Mississippi Supreme Court; "Some Observations of the Conflict between Moral and Jural Law," by Thos. W. Shelton of Virginia; "Recollections of Eminent Mississippians," by Tim E. Cooper; "Our First Constitution and its Makers," by Gerard Brandon.

DEATH OF NEW YORK JUDGE.—Justice Joseph Arthur Burr of the Appellate Division of the New York Supreme Court died at New York City on April 18, following an operation. Justice Burr was born in Brooklyn, N. Y., in 1850. He graduated from Yale in 1871, attaining the coveted honor of being elected a member of the Wolf's Head Society. After his graduation he was for some time president of the Yale Alumni Association. He was corporation counsel of Brooklyn for a number of years, was appointed to the Supreme Court bench in 1904, and one year later was elected to the same office for a full term of fourteen years. His elevation to the Appellate Division came in 1909.

ILLINOIS STATE BAR ASSOCIATION.—The Illinois State Bar Association will meet in annual convention at Quincy, Illinois, on Friday and Saturday, June 11 and 12, 1915. The general subject for discussion at the meeting will be "Constitutional Revision." Delegates from county bar associations all over the state will be in attendance and speak for their associations, thereby bringing together the views of the leading lawyers of Illinois on this important subject. Judge E. C. Kramer of East St. Louis, the president of the association, will deliver the annual address. His subject will be "Concerning a New Constitution for Illinois." Lawrence Y. Sherman and James Hamilton Lewis have accepted invitations to attend the meeting and take part in the program. It has been many years since the lawyers of Illinois met in the western part of the state, and John F. Voigt, secretary of the association, announces that the Adams County Bar Association is making elaborate arrangements for the entertainment of the visitors. A boat ride on the Mississippi River and an automobile ride along the beautiful bluffs of the river are planned as a part of the entertainment. The meeting will close with a banquet on Saturday night, at which prominent lawyers of the state will speak. The association is now the second largest state bar association in the United States and has a membership of about two thousand.

English Notes.

JUDICIAL CHANGES.—Sir Henry Burton Buckley, the retiring Lord Justice of Appeal, has been created a Baron of the United Kingdom. Sir Henry was called by Lincoln's Inn in 1869, took silk in 1886, was made a Bencher of his Inn in 1891, a judge of the Chancery Division in 1900, and Lord Justice in 1906.—Mr. Justice Warrington has been appointed a Lord Justice of Appeal in succession to Sir Henry Buckley. Mr. Justice Warrington was called by Lincoln's Inn in 1875, took silk in 1895, was made a Bencher of his Inn in 1897, and elevated to the Bench in 1904.—Mr. Robert Younger, K. C., has been appointed one of the Justices of His Majesty's High Court of Justice, in the place of Mr. Justice Warrington. Mr. Younger was called by Lincoln's Inn in 1884, took silk in 1900, and became a Bencher of his Inn in 1907.

SOLDIERS IN PARLIAMENT.—The great enthusiasm in the House of Commons for military men, which had its expression on March 4, when a gentleman wearing khaki took the oath and his seat on election to a constituency whose representation had become vacant by the death of his brother on the battlefield, is in poignant contrast with the dislike to the presence of soldiers in Parliament during the early years of the eighteenth century, when the number of military legislators was the subject of complaint and of some unsuccessful efforts to secure its reduction. Walpole desired to avail himself of the military as of other forms of patronage for the purpose of gratifying his supporters, but George II. steadily resisted him in this matter. Walpole complained bitterly that on every application by him to the King for the smallest commission in the army by which a member of Parliament might be immediately or collaterally obliged, the King's reply all but invariably was: "I won't do that. You want always to have me disoblige all my old soldiers. I will order my army as I think fit. For your scoundrels in the House of Commons you may do as you please. You know I never interfere, nor pretend to know anything of them; but this province I will keep to myself." A bill at this time introduced to prevent any officer above the rank of colonel from being deprived of his commission except by court-martial was defeated by large majorities, which is not surprising, owing to Walpole's corrupt influence; but the bill itself was unpopular and injurious to the interests of the Opposition, by whom it was introduced. The desire to restrict the power of the Government was very strong, but the fear and hatred of military government produced by Cromwell's régime overpowered all other considerations. It was contended that the measure, by relaxing the authority of the civil power over the military system and by aggrandizing that of courts-martial, would increase the independence and strength of standing armies, and in consequence the danger of the establishment of a military despotism.

BANKRUPT'S ADMISSIONS NOT EVIDENCE AGAINST TRUSTEE.—Admissions made by a bankrupt in his answers to questions put to him at his public examination in bankruptcy cannot be used in evidence against the trustee in bankruptcy, who represents the creditors and not the bankrupt. Such was the decision of Mr. Justice Horridge in the recent case of Re Bottomley (March 15, 1915). It was required to be definitely pronounced in that case because there was a proposal before the court to read admissions of that description. Otherwise, it would seem that the point was too clear for argument. All the same, the decision may serve as a very useful reminder to the practitioner. It is because of the intervening rights of creditors that the person by whom they are represented cannot have used against him that which the bankrupt has said at his public examination. What he said before his bankruptcy may be admissible in evidence against himself or anyone claiming through or under him. But it is an entirely different matter when it comes to a proper recognition of the rights of his creditors. The statement, indeed, in Taylor on Evidence (10th ed., vol. 1, s. 294) disposes of any uncertainty on the point. The circumstances in which in the present case it was sought to use the admissions of the bankrupt were these: The liquidator of a company, concerning the bankrupt's transactions and dealings relating to the shares and debentures in which he had been cross-examined at great length at his public examination, lodged a proof against the bankrupt's estate. The claim was for money had and received by the bankrupt for and on behalf of the company for which no consideration had been given by him. The proof was rejected by the trustee in bankruptcy on the ground that there was no evidence to support the same. Doubtless the bankrupt's admissions at his public examination would have assisted in establishing the liquidator's case if they had been permitted to be read. But when the manifestly sound reason for excluding those admissions is borne in mind, the existence of the rule that necessitates their exclusion becomes intelligible enough.

MEDICAL EXAMINATION OF INJURED WORKMAN.—Unusual were the facts on which the question turned that required the decision of the House of Lords in the recent case of Smith *v.* D. Davis and Sons, Limited. Nevertheless, there is seemingly no limit to the possible application of this ruling by the learned Lords. Under section 4 of the first schedule to the Workmen's Compensation Act 1906 (6 Edw. VII c. 58), a workman who is injured by "accident arising out of and in the course of" his employment, within the meaning of section 1 of that Act, and, in consequence, claims compensation in respect thereof, must submit himself for examination by a medical practitioner provided by the employer as often as is reasonably demanded by the employer. The section provides in general terms for such an examination. But nothing is said therein as to its taking place more than once. Nor does that section, when read in conjunction with section 15 of the same schedule, obtain any assistance therefrom. Neither section specifies how often there must be a medical examination, and the regulations of June, 1907, are equally lacking in such information. In the present case, the employers were asked to recommence weekly payments to an injured workman which had been discontinued because of his alleged recovery from the effects of the injuries of which he complained. A happening of that particular nature is nowhere expressly provided for by the Act. But the employers insisted that as a condition precedent to the workman's right to a renewal of his compensation, he should submit himself to a further medical examination, he having already undergone one when he originally gave notice of the accident to him. For the reasons which are fully explained in the opinion that was delivered by Lord Loreburn in the House of Lords, section 14 of the first schedule has no application to the present case. Nor on the same ground could the regulations be relied on. Decision of the case was entirely dependent on the true construction to be placed on section 4. And the conclusion arrived at by the learned County Court judge, the Court of Appeal, and ultimately the House of Lords, was that the right conferred by that section was not confined to a single medical examination. Admitting that the words of the section necessitated a somewhat forced interpretation being given thereto in order to permit of that view being come to, yet it is essentially the one and only view that can give adequate effect to the manifest intentions of the legislature. How any employer could be expected—without being properly advised to do so by his medical practitioner—to renew weekly payments that he had stopped making because the workman no longer required them, passes comprehension. The medical examination is the determining factor in the case.

COMPENSATION FOR ERRONEOUS CONVICTION OF CRIME.—The fact that His Majesty, on the recommendation of the Home Secretary, has been pleased to grant a free pardon to Mrs. Mary Johnson in respect of her conviction at the Surrey Sessions on October 15, 1912, and July 1, 1913, on charges of sending threatening letters, of which she has now been proved wholly innocent, will direct attention to Sir Fitzjames Stephen's well-known scathing criticism of the clumsy contrivance of pardoning an accused person for a crime which he never committed. In this case, as in the case of Adolph Beck in 1905, the Treasury have sanctioned the payment of a substantial sum to the victim of such terrible miscarriage of justice. It is unavoidable, notwithstanding the establishment of a Criminal Appeal Court, that erroneous convictions will sometimes occur, and that circumstances afterwards brought to light will prove that an innocent person has unfortunately been condemned. While the Government are bound to afford every facility to enable one who has unjustly suffered, to re-establish his innocence, the principle has never been acknowledged that such persons are entitled to claim pecuniary compensation either from the Government or from Parliament, although at times, in cases of extraordinary hardship, such claims have been admitted. In 1843 Mr. W. H. Barber was convicted of forgery and transported to Norfolk Island, where it appears he was subjected to extraordinary indignities by the authorities. It was afterwards proved that he was wholly innocent of the charges brought against him, and he was released. He then petitioned the House of Commons, setting forth his sufferings and soliciting redress. On June 15, 1858, with the consent of the Crown, this petition was referred to a select committee "to consider and report whether any and what steps should be taken in reference thereto." The committee unanimously agreed that every allegation in the petition was true, and that Mr. Barber had endured incredible hardships and persecutions which entitled him to the favorable consideration of the Government. Whereupon a sum of £5000 was included in the estimates as a compensation to this gentleman. On April 3, 1879, the Government announced their intention, through the Secretary of State for the Home Department, to propose a supplementary vote for the sum of £1000 to William Habron, who had been convicted of a murder of which he was wholly innocent; and in 1881 W. Galley, who forty years before had been convicted and transported for murder of which it was afterwards proved that he was innocent, and in respect of which he received the royal pardon, was granted £1000 as compensation. Sir George Grey, however, speaking in the House of Commons as Secretary of State for the Home Department in opposition to a motion declaring the strong claims to the favorable consideration of the Crown of a man admittedly

improperly convicted maintained the principle that such claims can be recognized only under very exceptional circumstances.

PASSPORTS.—A recent trial at the Central Criminal Court and certain proceedings now in progress in the United States serve as a forcible reminder that increased stringency has to be applied in connection with the issue of passports during wartime. Passports have been known in England under this name since the sixteenth century, says the *Law Times*, but, as may be imagined, the regulations with regard to their issue have been altered from time to time. They are issued by the Foreign Office to British subjects, either British born or naturalized, but it is noticeable that in regard to the latter class the regulations are somewhat more exacting than in the case of British-born subjects. For example, in the case of a naturalized subject applying for a passport, he must produce his certificate of naturalization, and, further, if he is living in London or the suburbs, he must apply personally, while, if he is resident in the country, his passport is sent, in the first instance, not to himself, but to the person who verified his application. Here we find the State necessarily and properly discriminating between the two classes of citizens —a discrimination of long standing and not without interest in view of some recent assertions that the two classes must for all purposes be treated as on an absolute equality. As has been said, the ordinary British passports are only issued to British subjects, but the late Sir Edward Hertslet, whose long connection with the Foreign Office gave him unusual means of knowledge on all such matters, records a curious and amusing instance where this rule was departed from. This was in the case of a lady of English birth who had married a native of the Ionian Islands during the time those islands were under British protection. After the annexation of the islands to Greece, the husband died, but the lady, now a widow, took no steps to resume her British nationality, although she returned to and took up her residence in England. On applying at the Foreign Office for a passport she became very irate on being informed that one could not be granted her as she had, by her marriage, become a Greek subject. She demanded to see a high official, who explained her legal status, but she only laughed, and said, "Come, come; you really must not talk rubbish to me. I know nothing about your treaties or naturalization laws. All that I know is that I am an English lady, and I demand a British passport." Like the other well-known instance of an importunate widow, she succeeded, her good looks, good temper, and fascinating manner having overcome all official scruples! Cases relating to passports have rarely come before the courts, the best known being that of Rex *v.* Brailsford (93 L. T. Rep. 401), wherein it was decided that a combination of persons for the purpose of obtaining a passport by false statements is an indictable misdemeanor at common law.

NEUTRALS AND BELLIGERENT WARSHIPS.—The naval correspondent of the *Times* on the 19th inst. directs attention to the fact that the *Kronprinz Wilhelm*, which has taken refuge at Newport News, was much damaged by acts of war, and that the repair of such injuries as are caused by these acts cannot be permitted in a neutral port. "By no construction of international law," he writes, "can the rebuilding of a ship in a neutral port be permitted, particularly when the structural repairs have been necessitated by a case of belligerency." This exposition of international neutrality and neutral duty seems to exceed the provisions of art. 17 of Convention XIII. of the Second Peace Conference, by which it is enacted that a neutral must prevent belligerent men-of-war in his ports and roadsteads from carrying out such repairs as would add in any manner whatever to their fighting force. The local authorities of the neutral Power must decide what repairs are absolutely necessary to render these vessels seaworthy, and such repairs are allowed, but they must be carried out with the least possible delay. The correspondent, commenting on the probability that the *Kronprinz Wilhelm* had been converted from a merchantman into a cruiser on the high seas after she had left for New York, writes: "This country, like the United States, has always maintained that such conversion of merchantmen into war vessels must not take place in a neutral port or on the high seas." The chief question on which the Hague Conference of 1907, and after it the Naval Conference of London, found themselves unable to agree, was that of the conversion of merchant vessels into war vessels upon the high seas. In the memoranda drawn up by the Powers represented at the conference of London, the difference of opinion was marked. The British Government could only rely on the general principle that "any further limitation to the security of peaceful commerce or of the freedom of neutral vessels to navigate the sea is opposed to the general interests of nations, while the exercise of belligerent force against neutrals in the manner indicated . . . would almost inevitably lead to friction, with the attendant danger of bringing other nations into war, and on this plea urged that units of the fighting force of a belligerent should not be created except within the jurisdiction of that Power." In default of agreement, it was suggested by way of compromise that the right of conversion on the high seas should be restricted to vessels specifically and publicly designated in advance as suitable for the purpose and entered in the navy lists, and that such vessels when in neutral ports should be subjected to the same treatment as warships. The United States, Japan, and Spain supported the British contention. France and Russia claimed the unfettered right of conversion. Germany, while claiming the right, suggested as a concession that there should be no reconversion during the war. Italy, while supporting the British view, tried to effect a compromise. The question was of necessity left open. The hospitality and asylum afforded to belligerent ships in neutral ports and waters, as illustrated in the case of the German armed cruisers at United States ports, point attention to the fact that the rule forbidding the land forces of a belligerent to enter neutral territory is greatly relaxed in its application to the entry of warships into neutral ports. Chief Justice Marshall has thus expressed that rule: "The rule which is applicable to armies does not appear to be equally applicable to ships of war entering the ports of a friendly Power. The injury inseparable from the march of an army through an inhabited country, and the dangers often—indeed, generally—attending it, do not ensue from admitting a ship of war without special license into a friendly port. If for reasons of state the ports of a nation generally, or any particular ports, are closed against vessels of war generally, or the vessels of any particular nation, notice is usually given of such determination. If there is no prohibition, the ports of a friendly nation are considered as open to the public ships of all Powers with whom it is at peace."—*Law Times.*

"There are always those who are ready to gather where they have not sown. The number and ardor of the conflicts is usually in proportion to the value of the prize at stake." *Per* Mr. Justice Bradley, in Rubber Co. *v.* Goodyear, 9 Wall. (U. S.) 788, 793, a patent infringement suit.

"Companionship, with its reciprocal duties, is the basis of marriage, and no respectable young woman should be obliged to divide the life companionship of a husband between herself and the penal institutions of the state." *Per* Mr. Justice McAdam, in Keyes *v.* Keyes, 6 N. Y. Misc. 355, 26 N. Y. Supp. 910.

Obiter Dicta.

WANTED HIS DUE.—Due *v.* Bankhardt, 151 Ky. 624.

SUING HER HUSBAND.—Darling *v.* Haff, 175 Mich. 304.

DOWN THE PIPE?—Sink *v.* Sink, 150 N. Car. 444, was an action for waste.

RELUCTANT.—"I give a grumbling assent."—Per MacMahon, J., in McKeown *v.* Toronto R. Co., 12 Ont. W. R. 1297.

MAYHEM.—In State *v.* Wainwright, 128 Tenn. 544, the defendant was indicted for stealing a ham from one Pigg.

A PERSONALLY INJURED WAGON.—"This was an action based on personal injuries and damage to plaintiff's ice wagon."—See Nashville R. Co., etc., *v.* Dungey, 128 Tenn. 587.

CHOOSING HIS OWN WEAPONS.—The plaintiff in Bryant *v.* Rich's Grill, 216 Mass. 344, was a colored man. His attorney was named Raysor, but wasn't sharp enough to win.

TWO ESTABLISHMENTS.—"As applied to modern wives and husbands, the phrase 'living together' does not always import that they are living at the same place." See Wright *v.* Bank, 79 S. E. 184.

TICKLED HIM TO DEATH.—An examination of the case of Tickle *v.* State, 6 Tex. App. 623, reveals the fact that Tickle inflicted on one Shields a wound from which the latter died.

WELL STYLED.—State *v.* Medler, 17 N. Mex. 644, was an action against a judge of the District Court for a writ of prohibition to restrain him from assuming jurisdiction of a certain cause of action.

CHARACTER OF THE GAME.—"Whether playing poker can be classified as 'social rest and pastime' or would come under the head of 'actual labor' we are unable to determine."—See People *v.* Viskniskki, 255 Ill. 388.

THE LONGEST LAW FIRM NAME.—We are still receiving from correspondents the names of law firms which are of unusual length. But still there seems to be no firm with eight names. The latest additions to the list are as follows:

Henderson, Wunderlich, Brandebury & Stiles, of Minneapolis, Minnesota (suggested because of the number of letters required in spelling);

Knowles, Dickinson, Buchanan, Graham & Wilson, of Superior, Wisconsin (dissolved);

Laces, Wilson, Todd, Stone, Fletcher & Hull, of Liverpool, England.

DID THEY PASS?—The following answers to certain questions asked at a bar examination recently held in Canada have been sent us for the enlightenment of American law students:

Q. Define "Mistake in law."

A. Mistake in law is something unforeseen, for instance an Act of Parliament.

Q. Explain *"Quicquid plantatur solo, solo cedit."*

A. This is the maxim from which is derived the inalienable right that "An Englishman's house is his castle."

(Another answer.) The second mortgagee must buy out the first mortgagee before he can foreclose.

Q. Define *"Delegatus non potest delegare."*

A. No action will lie when you are a party to the act by which you are claiming damages. This is common as regards seduction, and the party seduced cannot claim damages.

Q. Give the different kinds of corporations.

A. There are corporations segregate and corporations aggregate, consisting of more than one person, a *definated* number of persons.

A TRAVESTY.—The following extract from Touchard *v.* Crow, 20 Cal. 163, needs no elaboration: "This action was tried by the court without the intervention of a jury. Of course, in such cases the court not only performs its peculiar and appropriate duty of deciding the law, but also discharges the functions of a jury, and passes upon the facts. The counsel of the appellants impressed, as it would seem, with this dual character, requested the court to charge itself as a jury, and handed in certain instructions for that purpose. The court thereupon formally charged that part of itself which was thus supposed to be separated and converted into a jury, commencing the charge with the usual address, 'Gentlemen of the jury,' and instructing that imaginary body, that if they found certain facts they should find for the plaintiff, and otherwise for the defendants, and that they were not concluded by the statements of the court, but were at liberty to judge of the facts for themselves. The record does not inform us whether the jury thus addressed differed in their conclusions from those of the court. These proceedings have about them so ludicrous an air that we could not believe they were seriously taken, but for the gravity with which counsel on the argument referred to them. If counsel, when a case is tried by the court without a jury, desire to present for consideration certain points of law as applicable to the facts established or sought to be established, upon which the court might be called to charge a jury, were there a jury in the case, the proper course is to present them in the form of propositions, preceding them with the statement that counsel makes the following points, or counsel contends as follows. The mode adopted in the present case, though highly original, is not of sufficient merit to be exalted into a precedent to be followed."—Among various comments which suggest themselves, it might be asked whether the refusal of the jury to follow the instructions would have been ground for reversal?

RATS.—The case of Lumpkin *v.* Provident Loan Society, 84 S. E. 216, decided in February of this year, involved the right of a tenant to break his lease because the premises were overrun with rats. The Georgia Court of Appeals, discussing the case with that humorous touch which has marked so many of its opinions, said *inter alia*: "The whole trouble of the plaintiff in error can be summed up in one word—Rats! It is true that the evidence discloses that the office was badly ventilated, and one witness for the defendant in error testified that was the cause of the bad odor; but the plaintiff in error himself makes no such complaint; he puts the bad odors, and the consequent

untenantability of his office, squarely upon the 'offending heads' of the rats. There is no contention that the rodents disturbed the office force by unseemly squeaking or squealing, or that they otherwise conducted themselves in any ungentlemanly or unladylike manner, or that they gnawed his furniture, or that they themselves had a bad odor; but the sole contention is that they brought in food, presumably from an adjoining restaurant (which was established about a year after the plaintiff in error leased his office), and that this food alone caused the offensive odors. The plaintiff in error, not being an object of charity, but a man of considerable means, strongly objected to having food thus brought into him from his neighbors, and especially the kind that they furnished; he not being especially fond of 'chicken bones,' 'fish heads,' 'scraps of cheese,' 'tripe,' and such like delicacies. He testified that he disinfected the premises, but all in vain. He set traps, and every day caught scores of rats 'as big as squirrels,' but their numbers were no more diminished by his captures than were the ranks of the Allies or the Germans by the 'Battles of the Aisne.' No traps, no disinfectants, 'no nothing,' could stop the onslaught of these hungry and persistent vermin; they were imbued with the true 'Atlanta spirit,' and continued with undiminished ardor their kindly meant, but misunderstood, attentions. Finally, in despair, the plaintiff in error, having no 'Pied Piper' to entice them by the witchery of his music to their destruction in the 'rolling waters of the River Weser' (or the Chattahooche), cut the 'Gordian knot' by breaking his lease and moving to another and distant building. We do not think that, under the law and the evidence, the landlord can be held responsible for the action of the rats. . . . There is, however, another plea which the plaintiff in error might have set up by way of recoupment, which would have received our careful and sympathetic consideration. The fear of rats, and even of mice, entertained by the fair sex, is proverbial, and this court will take judicial cognizance of the fact that any real estate office overrun by such vermin would lose all patronage of the ladies, and would be entirely deprived of the refining and elevating influence of their presence, to say nothing of the more substantial emoluments derived from business dealings with them. If the plaintiff in error had rested his case on this ground, at once solid and sentimental, this court (though all of its members are staid and settled married men, but, like all men of intelligence and discernment, fond of the beautiful) would have diligently sought to find a way to relieve him, if not by the harsh and inflexible rules of law, then by the softer and more pliant ones of equity. But the plaintiff in error (possibly through fear of his better half) not having made this plea, the only thing we can do, while affirming the judgment against him, is to tender our congratulations upon the fact that at last he has escaped from his too attentive friends (?)—the rats."

NO CLOSE SEASON FOR THIS GAME.—Main *v.* Main (Iowa), 150 N. W. 590, was an action for a divorce, brought by the husband on the ground of cruel and inhuman treatment. The trial court dismissed the petition. On appeal, the Supreme Court affirmed the judgment, adverting to the evidence and the domestic infelicity of the parties in the following manner: "At the time of the trial plaintiff was 66, and the defendant 42, years of age. Defendant had been twice married, once widowed and once divorced. Plaintiff had been twice married and twice divorced—each time at the suit of his wife. He had subsequently been defendant in an action for breach of promise, and had sought the graces of other women with a fervor not altogether Platonic. The parties did not drift into love unconsciously, as sometimes happens with younger and less experienced couples. Both knew from the start exactly what they wanted. She wanted a husband with money—or money with a husband. He wanted a wife to adorn his house and insure that conjugal felicity of which fate and the divorce court had repeatedly deprived him. With an ardor, the warmth of which was in no manner diminished by the frosts of age, he pressed his suit for defendant's favor for a period of a year and a half, though it is but fair to say the speed of his wooing was held in check by the pendency of the damage suit above referred to which had been brought against him by another member of the sex which has been the bane of his strenuous life. He visited defendant frequently and had ample opportunity to ascertain her virtues, faults, and peculiarities—so far at least as these things are ever visible to a suitor before marriage. In short, they had ample opportunity to become well acquainted with each other and form a fair judgment whether marriage was desirable. Considering their worldly experience and matrimonial trials, it is not credible that either believed the other an angel, and in this respect it is quite clear that neither was mistaken. Counsel for plaintiff tell us that defendant is an adventuress who came to Colfax, where plaintiff resided, for the express purpose of 'trapping him into a marriage in order that she might secure a portion of his money,' and that their subsequent union was thus brought about with an ulterior view to her financial advantage. In support of this claim a woman testifying for plaintiff states that shortly before the marriage she said to defendant, 'No woman of our age would marry an old man of 70 unless she married him for money,' and that defendant responded, 'You are darned right, they don't. If there wasn't some money back of old John Main I wouldn't marry him,' and that to this remark she added the further information that she came to Colfax at the suggestion of friends who told her she might there trap a rich old widower, and that she did come and 'set her trap' for plaintiff and 'caught him.' Waiving the improbability that a wise trapper such as defendant is said to be would be bragging of her catch to another woman before the trap was sprung, and accepting the truth of the story, it is very far from affording ground for a divorce. It may show a lack of affection and lay bare the sordid motive which prompts marriages of the kind we have here to deal with, but it is otherwise irrelevant to the issue. The desire for a home and the comforts of wealth has been the controlling influence of many marriages, especially of those who have passed the bloom of youth, and it is not at all inconsistent with a faithful observance of all the duties and proprieties of the married state. Strategy and management in securing an eligible matrimonial partner is not the exclusive privilege of the man, and the game law of the state provides no closed season against the kind of 'trapping' of which appellant complains."

Law Notes

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CONTENTS

The Steel Trust Decision.

THE United States District Court, by the unanimous decision of a bench of five judges, has ruled against the government on the bill brought by Attorney-General Wickersham to dissolve the United States Steel Corporation for violation of the Sherman anti-trust act. Judge Buffington, writing for the court, reviews the decisions of the Supreme Court and deduces therefrom as a conclusion that "these cases may be taken to have established that only such combinations are within the act as by reason of intent or the inherent nature of the contemplated acts prejudice the public interest by unduly restraining competition or unduly obstructing the course of trade." Discussing the evidence in the application of this test, the court lays particular stress on the fact that sixty per cent of the steel in the United States is produced by the competitors of the Steel Corporation, and that while its business has increased greatly in the last ten years that of its competitors has increased even more rapidly. In discussing the question of domestic and foreign trade generally, the court says: "In taking up this question we dismiss once and for all the question of the mere volume or bigness of business. The question before us is not how much business was done or how large the company that did it. The vital question is, How was the business, whether big or little, done? Was it, in the test of the Supreme Court, done by prejudicing the public interests by unduly restricting or unduly obstructing trade? The question is one of undue restriction or obstruction, and not one of undue volume of trade." The acquisition by the corporation of several properties including that of the Tennessee Coal and Iron Co. is discussed at length, and the court finds that neither the purpose nor the effect thereof was inimical to the public interest. Commenting on the much discussed Gary dinners, the court says that, however innocent may have been the intent, there was undoubtedly an illegal cooperation in the fixing of prices, but that the practice complained of had ceased before the filing of the bill. "We do not think," said the court, "the Gary movement would justify us in imposing so drastic a penalty as the dissolution of the corporation, but we will, if the Government moves for such action, retain the bill for the purpose of restraining any similar movement by the defendants that might be contemplated hereafter."

The effect of the decision, if it is affirmed, will be to establish clearly the principle that every prosecution for violation of the Sherman act must rest primarily on the question of fact whether the combination complained of prejudices the public interest by unduly restricting competition or unduly obstructing the course of trade, a question to be decided, as the court says, "not by the size of that which is acquired but by the trade power of that which is not acquired." This is a rule which would seem to afford ample power to safeguard the public interest without hampering any legitimate business enterprise.

A Popular Decision.

THE utter absence of any marked expression of popular disapproval of the decision dismissing the Government's bill against the United States Steel Corporation is the more remarkable when compared with the chorus of criticism which greeted the announcement by the Supreme Court of the "rule of reason" on which the present decision is founded. Several causes undoubtedly contribute to this result. The focusing of the public attention on the conflict now raging in Europe is not the least of these. To this may be added a more or less general conviction that the "dissolution" of previous trusts has been absolutely futile so far as any benefit to the consumer is concerned. It is probable that a decision in favor of the Government would have evoked only a cynical query as to its probable effect. Those who are opposed to governmental regulation of "big business" will hail the present acquiescent attitude as an indication that the wave of aggressive popular agitation has subsided and that the conditions of twelve years ago have been restored. But one may be pardoned for entertaining a hope that neither preoccupation, cynicism nor indifference is wholly at the root of the general acceptance of this decision. The agitation of the past decade has left some residue of education. The people have learned that there are good trusts and bad trusts; that the mere size and prosperity of an institution affords no convincing reason for its immediate dissolution. But we venture a prophecy that the corporation which presumes on a supposed popular apathy to violate the law is doomed to a rude awakening.

The New Baggage Law.

AMID much protest from travelers and carriers the new United States Baggage Law went into effect recently. Known as the Cummins Amendment to the Interstate Commerce Act, it provides in substance, that any carrier receiving property for interstate transportation shall issue a receipt or bill of lading therefor and shall be liable for any damage or loss to the property by any carrier over whose lines the goods may be passed, and that this liability shall not be limited by any contract or regulation. So far so good; but the act further provides that when the goods are hidden from view by boxing or other means,

their value may be required to be given to the carrier, who shall not be liable beyond the amount so stated, and declares it a misdemeanor to make a false valuation. When the question was presented the Interstate Commerce Commission promptly decided that baggage was within the meaning of the phrase "hidden from view" and that its value must be declared. The resulting operation of the law is especially obnoxious to merchants who sell by samples through traveling salesmen, and they have denounced it as a bit of "pernicious legislation." They contend that the extra charge exacted by carriers for the additional risk involved in carrying valuable baggage when imposed on valuable samples, such as furs and gems, carried by their salesmen, is prohibitive, and may drive them out of business, leaving the mass of people to the tender mercies of the mail order concerns. This is a somewhat altruistic view to take of the situation, but it is questionable whether their samples, when they pay the charges on them, are quite as valuable as when they sue for their loss, and in any case they cannot be so badly injured, for the new law prohibits a valuation greater than $2500 unless the passenger buys another ticket; and besides they can resort to the express companies. After all, the expediency of the act remains to be determined by its actual operation, and the railroads will probably soon enough adjust themselves to its terms. Indeed they were not, before its passage, so immune in that direction as they seemed to think, for their armor had already been punctured by several judicial decisions construing the previously existing Carmack Amendment as applying to carriers of baggage, and undoubtedly this view would have been more generally adopted, had the Cummins Act not been passed. It is small comfort to the would-be-traveler at this time, to say that the act would probably not apply to carriers transporting passengers to foreign countries, since the Carmack Amendment has been held not to apply to them, so both the people and the railroads must make the best of what they have, at least until Congress meets again.

Right of Women to Practice Law.

All progress in social matters is gradual. We pass almost imperceptibly from a state of public opinion that utterly condemns some course of action to one that strongly approves it. While, according to the common law, women had no right to practice law, since Mrs. Belva A. Lockwood waged her long series of dramatic legal conflicts for admission to the bar the status of women has in the eye of the law and in popular acceptation so changed that either by virtue of specific statutory authority, or by judicial construction of laws which contain no prohibitory phraseology, their eligibility to practice has been generally recognized. Three States, Arkansas, Georgia and Virginia, however, still hold out for the old order, and just recently the Georgia Bar Association at its annual convention voted negatively, though by the small majority of two, on the proposal to admit women to practice. Despite the sharp shafts of criticism hurled from many quarters at Georgia lawyers because of this action—it being ironically and sneeringly commended by many editors as good economics—we believe that their motives may have been high-minded enough, whatever we may think of their judgment. That God designed the sexes to occupy different spheres of action and that it belonged to men to make, apply and execute the laws, was not so long ago regarded as an almost axiomatic truth, radical error though it may have been, and with some it still has weight. There is a whole lot of nastiness in the world which finds its way into courts of justice, and men possessing a reverence for womanhood may well be pardoned if they prefer to keep women safe from contact with it. But at this time of day it is too late to say that a woman shall not be permitted to pursue the vocation to which her tastes lead her and for which her studies have qualified her, to earn her bread in any respectable calling she may elect to pursue, or that the profession of the law is, of all the professions and vocations in the world, the only one from which she shall be excluded —"the only tree of knowledge of which she shall not eat." This is a practical work-a-day world, and we are not so certain that women even in Georgia are so carefully protected against contamination therewith that they can be reasonably regarded as a group apart. Women can still obtain employment for even a considerable number of hours per week in Georgia factories, we believe. Moreover, we can imagine many cases involving questions of delicacy in which woman would possibly prefer to suffer injustice and wrong rather than confer with a man, and in such instances the services of a sensible female attorney would doubtless be of great benefit. If the practice of the law by women is not found agreeable, lucrative, or expedient, they will not seek it, and if it tends to enlarge their sphere of usefulness or to elevate and refine the bar it ought certainly to be encouraged. In any event they should be given equality of legal right with men, and each should be protected in that measure of success which his or her individual merits may secure. There seems to be little danger that by admitting them to practice the bar will be overrun with female attorneys, so Georgia lawyers need have no fear. On the other hand, if such a result should happen, that will but prove, as a wise judge has remarked (Clayton, P. J., in Matter of Kilgore, 17 Phila. (Pa.) 615, 616, 41 Leg. Int. 242), that they make the best lawyers, and will show the wisdom of the rule admitting them.

The Tribulations of Portia.

Recently in New York a woman was appointed a receiver. In commenting thereon publicly, the successful aspirant for this honor, Mrs. Charles Truax, declared that she was as competent to hold the position as a man, because thereby she merely became a landlord, and "a landlord is nothing but a housekeeper, and women are always being told that this is especially their sphere." Irrespective of the cogency of these arguments we are willing to accept the fact of her appointment by the court as at least prima facie evidence of her capabilities and hasten to convey our felicitations. The appointment, however, having by its novelty attracted the public attention to the standing of women attorneys, has served as an occasion for some of them to give a public airing to their grievances, and many, we are told, are the disadvantages under which a woman must labor, as compared with men, in her quest of forensic success. Thus, we are informed, most of the good law schools of the East are closed to women. They are, as a result, forced to content themselves with inferior training, and when they have been admitted to the bar they find it practically impossible to secure positions as clerks with reputable firms. Moreover, although the law permits the district attorney and corpora-

tion counsel to appoint women assistants, the appointments are always given to men on account of the political importance which attaches to them. Again, women have not the privilege of membership in the City Bar Association, which possesses the best law library in New York, and consequently, since there is no public law library, the woman lawyer of small means is often forced to limp along under a great disadvantage.

Damnum Absque Injuria.

ADMITTING that these handicaps exist, it does not necessarily follow that they are the result purely of a blind traditional prejudice, nor must they necessarily be construed as examples of man's injustice. Women also labor under certain physical handicaps inherent in their constitution and organization, but man cannot be indicted therefor. A blind or physically decrepit man attempting to practice law is greatly handicapped in the race for success, but he does not hold his more fortunate brethren responsible. He either seeks a field for his activities, more in keeping with his powers, or accepting the conditions philosophically, struggles on despite them. It may be ungracious of the City Bar Association to deny women access to their library facilities, but no one other than members has such a privilege and women in competition with men can expect no more. That an organization heretofore solely masculine and in part social in character should hesitate before welcoming women to membership is not unnatural. The commingling of the sexes generally implies more restraint than exists when they are apart. So with the few law schools which exclude women. Such exclusion is mostly the result of the attitude of the authorities of the university of which the law school is a part, towards the great problem of co-education, and is not merely a discrimination in favor of male attorneys. The value of co-education is, we believe, still a debatable question even with women. Tennyson's Princess, strong exemplar of woman's rights as she was, rigidly excluded the odious male from the sacred precincts of the university under pain of death, and coming down to our own day we doubt not a male would have great difficulty in gaining entrance to Vassar, Smith, Bryn Mawr or Wellesley. Indeed in Vassar, we are informed, even a poor harmless bootblack cannot get a job, but perforce the business must be done by female shoe-shiners. Nor does mere inability to secure positions in law firms or appointments in district attorneys' offices necessarily spell crying injustice, the suffragists to the contrary notwithstanding. Gaining admission to the bar—equality of right—is one thing; obtaining lucrative positions, securing business, or rich appointments, is another, as many young male attorneys have learned—some to their sorrow. In all such cases the personal equation figures largely, and it is no just cause for complaint that prominent male attorneys, considering the nature and variety of their business, should prefer males for their intimate personal associates, any more than it is a cause of wonderment that most law firms have a male stenographer for certain kinds of business or that milady prefers a waiting-maid and Beau Brummel a valet. There is even in a moral and ethical sense, apart from strict legal technicality, such a thing as *damnum absque injuria.*

Is a Boy Worth Two Girls?

THE suffragettes are much exercised over the conduct of a jury composed of "mere men" who recently declared that one boy is worth two girls. A New Jersey man brought suit against the manufacturers of a certain condensed milk, for the death of his three-months-old twins, a boy and a girl, alleging that the children died from ptomaine poisoning resulting from the use of the milk, and the jury, after deliberating two hours, decided that the life of the boy was worth $2000, and that of the girl $1000, rendering their verdict accordingly. Several women prominent as suffrage leaders have commented in caustic tones on the verdict, and what the result would have been if there had been women on the jury. A girl, said one, is always worth more than a boy, for the reason that girls are to become the mothers of the race. One wonders if fathers are to be dispensed with when the millennium of equal suffrage arrives! Another contends that girls are more loyal to the family than boys, and are more ready to assist their parents in time of need. The majority, however, are willing to concede that a man is at least of equal value, and assert that the amounts should have been the same for both children, as the girl is as great an economic factor as a home maker as the boy is as a home provider; with a woman of this opinion on the jury it is possible that this result would have been reached. It requires no great stretch of the imagination to picture a female judge who would have set aside the verdict on the ground that it was "contrary to the law and sentiment" of the case. Aside, however, from the merits or demerits of the views of those in favor of equal suffrage, it is rather startling to find such a difference made in the value of the lives of children so young. Their value was, at most, a personal question affecting the parents, and it must have been an exceedingly astute jury that was able to differentiate between the sexes in this respect.

Newspapers and Legal Proceedings.

MUCH has been written and unanimous has been the condemnation of the ill-advised newspaper criticism of the bench and its decisions, and the premature comments on cases pending in the courts for trial. That is to say, condemnation by all except the newspapers. So well defined is the sentiment on this subject that only exceptional circumstances would justify further comment. However, when such men as ex-President Taft and Judge Lamm, former chief justice of the Supreme Court of Missouri, take occasion to condemn such comments, and to warn the journalistic world against such criticism, it warrents further notice. Mr. Taft goes so far as to urge the convention now assembled at Albany for the purpose of rewriting the Constitution of the State of New York to embody in its provisions one modifying and limiting the freedom of the press in this particular, stating "that the greatest evil and a most vicious one, in this State, is that of trial by newspapers." Such a provision would be no more radical than the present law of England as interpreted by its courts, under which an editor was committed to jail for contempt, for publishing a racy account of the life of one of the parties to a divorce suit. Prison newspapers, conducted under the modern idea of prison reform, would have a great addition to their editorial staff if such were the law in this country. Judge Lamm, a jurist noted for his legal learning and his keen insight into human nature (also animal, *vide* his now famous Missouri mule decision), in a recent address to the school of journalism at Columbus, Missouri, took occasion to warn the budding editors and

moulders of public opinion against the hasty and ill-advised criticism of the courts and their decisions. While admitting the right of the press to criticise the decisions of the courts, he insists that when this is done it be done with a knowledge of the law and facts of the case, and an intelligent understanding of the reasoning of the opinion of the court, a fair synopsis of which should be given to the public and any unsoundness pointed out. "If the point is obtuse you can let it alone or inform yourself by investigation. If the court is enforcing a statute and you don't like it, your grievance is against the statute, the lawmaker, and not against the court, and you should say so. The excuse of necessary haste, or striking while the iron's hot, can never be allowed for a misstatement or slovenly statement." If Judge Lamm's advice were heeded it would in a large measure preclude the necessity for constitutional or statutory regulation of the extent to which a newspaper might go in its comments and opinions on the weight of the evidence in favor of or against parties to proceedings pending in the courts. Few, indeed, are the cases where a sincere investigation of the facts of a case and an intelligent application of the law to such facts would not preclude the publication of such cases as news sensations, and make them news items purely and simply within the valid and proper meaning of the word news.

Expert Testimony on the Judiciary.

THE example of the frank and comprehensive views expressed by Chief Judge Willard M. Bartlett before the Judiciary Committee of the New York Constitutional Convention might well be emulated, with profit to all concerned, by members of the courts throughout the country, and this without waiting for such momentous occasions as constitutional conventions. Judges are usually reticent on the very subjects as to which they are most competent to give expert testimony, namely, the merits and shortcomings of the courts. To mention the one seems too much like self laudation. To confess the other resembles "telling tales out of school." Naturally, the judge desires not to blow his own horn, nor, adopting the vernacular of the school children, to be a "snitch baby" or a "tattle-tale." But the fact remains that if they would talk more freely Doctor People might be able to diagnose the case and to prescribe the proper remedy.

The Law's Delays.

ESPECIALLY would the courts largely be vindicated, if the judges would freely express themselves, from the charge of being responsible for the law's delays; and likewise would be exploded the popular theory that the abolition of formal procedure would materially expedite the disposition of cases. So far as concerns appellate courts, it is well known among lawyers that much of the delay is in presenting the cases to the appellate courts, whether due to cumbersome methods of bringing them up or to dilatory tactics or neglect on the part of the attorneys, or, which the lawyers are not expected to admit, to insufficient briefing. Of course it must be confessed that there is much wasteful delay involved in appeals, and it seems that improvements might be made in this connection. One, suggested by Judge Bartlett to the New York Constitutional Convention, is a limitation on appealable cases or orders, and there is a strong tendency in this direction in a number of States. There is also an indication that we are "progressing back" to the old system of appeals on points of law only, that is, to something in the nature of the old writ of error. Certainly it seems to be a waste of time, and money, to send thousands of pages of evidence to the appellate courts, from which thereupon emanate many printed volumes of opinions, the burden of which is that the verdict of a jury will not be disturbed on appeal unless clearly without evidence to support it, or unless manifestly contrary to the evidence—which it seldom is—or that the action of the trial court in granting or refusing a new trial on the ground of insufficiency of the evidence will not be disturbed except for abuse—which seldom occurs. It may be added, however, that the most effective remedy for delay in decisions after the cases reach the appellate tribunals might be found, not in limited appeals, or in an increase of the number of justices, or in expert clerical assistance, but in cutting down the number and length of opinions. If an appeal is determined squarely on the authority of *Doe* v. *Roe,* why should the court be expected to write dozens of printed pages to say so? Only a small percentage of the published opinions have any appreciable value as precedents or as contributions to legal literature. Then why compel, and pay, the judges to write them? But before the ideal of expedition is reached all the remedies suggested, and more, may have to be applied; for despite the general industry and efficiency of most of our courts, we have heard of only one that ever got ahead of the schedule. Of this one it is told that there was some complaint on the ground that its opinions were filed so soon after submission as to indicate lack of consideration of the cases; whereupon the court continued to grind out opinions as fast as ever, but refrained from filing them while "green," the usual time for ripening being from two to three weeks after argument.

Majority Verdicts.

EXCEPT in certain cases involving special considerations other than the ends of justice, it has seldom even been suggested that a court consisting of several judges should be required to be unanimous in order to dispose of a case. Yet the proposal that a jury should be allowed, in civil cases, to render a verdict by a large majority vote, invariably meets with strenuous opposition. Judge Bartlett, of the New York Court of Appeals, is quoted as saying that when such a practice was adopted in New York he would feel like emigrating to some "free country." The practice obtains in some States, however, and is said to work well, and without any perceptible diminution of American freedom. Furthermore, there are many arguments in its favor, and, as yet, few have been advanced against it. The jury system is unquestionably entitled to its high place in the English and American conception of justice and liberty; but with the ever-increasing standard of the judiciary there seems to be no good reason for perpetuating the ancient custom requiring unanimous verdicts, and that the American people realize this is evidenced by the frequency with which jury trials are waived entirely. Indeed, it appears somewhat anomalous that in equity, where ultimate justice reigns, untrammeled by the logic of the common law, there has never been any right of trial by jury.

Power of Successor of Trial Judge to Pass on Motion for New Trial.

THE incapacity, by death or otherwise, of a trial judge to hear and pass on motions for new trials in cases previously tried before him has often been seized on by the attorneys for the parties cast in the trial as a fortuitous circumstance, and the right of the succeeding judge to pass on such motions has been vigorously denied or affirmed according as the interests of the parties were affected. Once granted that the succeeding judge had the right to pass on such motions, there has heretofore been no question as to what his course must be, either to grant or dismiss the motion as might seem best in his discretion. The recent death of the judge of one of the Cincinnati courts has, however, furnished occasion for the presentation of a novel if not convincing argument against the power of the succeeding judge to hear and determine a motion for a new trial made in behalf of two defendants convicted of a misdemeanor during the life of the former judge. It was contended on the one hand, that the motion could not be dismissed and sentence entered because the degree of punishment was within the discretion of the trial judge and one who had not heard the evidence was not in a position to exercise such discretion. On the other hand, it was argued that to grant the motion would be to place the defendants in jeopardy for the second time. Just what action it was sought to have the court take, it did not appear, except that it should not dismiss the motion and pass sentence nor should it grant the motion and place the defendants on trial for the same offense for the second time. The dilemma is not such, however, as is not easily disposed of if precedents are to be followed. It has been very generally held that the succeeding judge may hear and determine motions made before his predecessor where he can satisfy himself as to the facts from the record, stenographic reports, or additional statements of witnesses or counsel. See *Southall* v. *Evans,* 76 S. E. 929, wherein the authorities are collected and reviewed. The argument that to grant such a motion in a criminal case would be in violation of the doctrine of former jeopardy would apply equally well to such action by the judge who tried the case as to his successor before whom the motion was argued, and it would be difficult to imagine a court refusing such relief where the parties were entitled to it, solely because its presiding officer at the time the motion was made could no longer act.

Propriety of Agitation for Pardon.

THE complaints emanating from many sources in Georgia that the widespread agitation for a commutation of the sentence imposed on Leo Frank is an affront to the jurisprudence of the State and an unwarranted attempt at interference with its officers present an interesting and difficult question. On the one side it may be argued that an application for a pardon or commutation, especially when based on a claim that the guilt of the convict was not indubitably proved, presents a judicial question, as much as an appeal based on a like contention, and that extraneous efforts to influence the tribunal charged with its determination are as improper in the one case as in the other. Again, it is usually true that knowledge of the true merits of any such application varies inversely as the square of the distance from the scene of the crime, and most of the foreign pronouncements on the subject are based on very imperfect information. On the other hand, there is much to be said for the view that an application for a commutation of a death sentence involves more than a question of the legal sufficiency of the evidence; that it is an appeal to considerations of humanity which transcend cold legal formalities. From this viewpoint the local sentiment is regarded as too narrow, too much warped by the horror of a crime, and needing the wholesome corrective of the more impartial conscience of other communities, remote from the pitiful memory of the innocent dead, on exactly the same theory that a change of venue is sometimes essential to a fair trial. The conflict between these diverse points of view will undoubtedly continue, for so long as most of the States maintain a form of punishment which shocks the moral sense of a large number of people, protests against its execution must continue without much regard to the merits of any particular case. The public authorities, for their part, will doubtless usually act on the theory of Frederick the Great, who is said to have declared that he got on admirably with his subjects since they said what they pleased and he did what he pleased.

English Cabinet System for the States.

IT may be that the States will lead in the introduction of the English system of a "responsible cabinet" into this country. And it may be that some such system will eventually be the answer to the demand for the initiative, referendum, and other means of realizing the ideal of a popular government. In any event the suggestion of Mr. John G. Saxe of the New York Constitutional Convention that this system be adopted in that State is interesting. As said by contemporary press comments, it would at least sharpen executive responsibility and facilitate appeals to the people on definite issues. It might be added, also, that it would, in great measure, embody the better features of the "recall" so far as concerns the governor, and likewise apply the same principle to the legislature with a practical effectiveness hardly possible under any other system of recall. The English government is often lauded as the most successful democracy, though in the guise of a monarchy, and, manifestly, the chief merit in that claim lies in the "responsible cabinet," with the attendant responsibility on the part of the Parliament. Moreover, a republic thus may borrow some of the effectiveness of centralized power, and yet retain, in full measure, the freedom which is its soul. After all, the remarkable thing about Mr. Saxe's recommendation is not its uniqueness, but that it has not heretofore been made with reference to state government. It has frequently been mentioned in connection with the government at Washington.

"It is the theory, and I may add, the glory of our institutions, that they are founded upon law, that no one can exercise any authority over the rights and interests of others except pursuant to and in the manner authorized by law." Field, J. U. S. *v.* San Jacinto Tin Co., 125 U. S. 307.

"A court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law, or even without the authority of law. It acts upon established principles not only, but through established channels." Hunt, J. Rees *v.* Watertown, 19 Wall. 122.

A CHECK ON JUDICIAL SUPREMACY.

THERE has been presented to the New York Constitutional Convention, now sitting at Albany, a provision of the following tenor: "Every presumption is in favor of the validity of the acts of the legislature, and the courts shall not hold such acts to be void unless invalidity shall be established beyond a reasonable doubt. No act of the legislature shall be annulled by any court of this state except with the concurrence of all the judges sitting in the cause in which the validity of the act is questioned." At first glance this provision may appear to be somewhat revolutionary, yet it is not so as a matter of fact. Indeed it is reactionary in its tendency and should operate to restore a condition of things that obtained long ago in our country's history. In favor of the proposed provision much may be said, and against it apparently nothing. It is a restriction upon the judicial annulment of statutes, and undoubtedly it will have some effect to reduce the number of the statutes that the courts hold invalid. A provision of this nature actually has been adopted as part of the Constitution of the State of Ohio.

The public has manifested not a little uneasiness at the freedom with which the courts have exercised their power of reviewing legislative enactments; and this moderate concession to popular demand may well be made rather than the risk be taken of more drastic reform, even the abolition of the Constitution that some of the more radical students of political economy are demanding. Certain it is that strong economic reasons support a limitation upon the exercise of the power of the courts to annul acts of the legislature. Not only is the country, pending a judicial determination, left in great uncertainty as to what is the law, but enormous expense is entailed upon the State in every case where a statute is annulled. According to our present cumbersome system, a law is passed as follows: by one branch of the legislature, by the other branch, by the governor, by the courts. Each of these bodies or persons may give or withhold consent to the existence of the law. Important laws, at the moment when they are in the hands of the courts for final approval or disapproval, must represent a very great expenditure of the State's funds—an expenditure that goes for naught if the act is not permitted to stand. It is apparent that a judicial annulment of statutes on a large scale may become a real calamity. Now, from the beginning of our government to the present time there has been a steady increase in the percentage of acts held invalid by the courts. In the past decade the United States Supreme Court has annulled more statutes than it declared invalid in the whole previous century, or from the time of its creation.

Something may well be done to restrict this tendency, and the provision requiring decisions of unconstitutionality to be unanimous seems to be a reasonable means of accomplishing that result. Nor does this question the integrity of our judges. They have without doubt been actuated by the highest motives. Every member of the court acts according to his conscience and sense of duty. The very fact that the judges disagree among themselves demonstrates this. It is inherent in men to disagree on all manner of matters and especially on questions of policy in government. And if, as appears, there is an increasing tendency of the courts to disagree with the legislature on such questions it is but reasonable that their power should be somewhat restricted if we are to maintain the balance of government that has been enjoyed for a century and a quarter.

Statutes Must Be Presumed to Be Valid.

The proposed constitutional provision, which was set forth at the outset, declares that all acts of the legislature shall be presumed to be valid, and gives to that presumption the force of the presumption of innocence in criminal cases,—that is, requires proof beyond a reasonable doubt to overcome it. This is no new principle, at least in its statement. Indeed it had its origin in the very words that first announced the doctrine of judicial supremacy. Examine the first half dozen decisions of the Federal Supreme Court on the subject, and concurrently with the assertion of judicial power to review legislative enactments will be found expressions of the gravity and delicacy of the "duty" of deciding constitutionality. The presumption, it was said, is in favor of the validity of the act, and it is only when the question is free from any reasonable doubt that the court should hold an act of the law-making power of the nation to be in violation of that fundamental instrument upon which all the powers of the government rest. The greatest of all constitutional lawyers, Mr. Chief Justice Marshall, said in the Dartmouth College Case: "The single question now to be considered is, do the acts to which the verdict refers violate the Constitution of the United States? This court can be insensible neither to the magnitude nor delicacy of this question. The validity of a legislative act is to be examined, and the opinion of the highest law tribunal of a state is to be revised: an opinion which carries with it intrinsic evidence of the diligence, of the ability, and the integrity, with which it was formed. On more than one occasion this court has expressed the cautious circumspection with which it approaches the consideration of such questions; and has declared that in no doubtful case would it pronounce a legislative act to be contrary to the Constitution." Again: "The question," says the court, in *Fletcher* v. *Peck*, (quoted with approval in *Ogden* v. *Saunders*), "whether a law be void for its repugnancy to the Constitution, is, at all times, a question of much delicacy, which ought seldom or never be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligation which that station imposes. But it is not on slight implication and vague conjecture, that the legislature is to be pronounced to have transcended its powers, and its acts to be considered void. The opposition between the Constitution and the law should be such, that the judge feels a clear and strong conviction of their incompatibility with each other." Said Mr. Justice Washington in *Ogden* v. *Saunders:* "I shall now conclude this opinion, by repeating the acknowledgment which candor compelled me to make in its commencement, that the question which I have been examining is involved in difficulty and doubt. But if I could rest my opinion in favor of the constitutionality of the law on which the question arises, on no other ground than this doubt so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but a decent respect due to the wisdom, the integrity, and the patriotism of the legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond all reasonable doubt." In *Com.* v. *Smith* (4 Binney 123), the language of the court was: "It must be remembered that, for weighty reasons, it has been assumed as a principle in construing constitutions, by the Supreme Court of the United States, by this court, and by every other court of reputation in the United States, that an act of the legislature is not to be declared void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt."

Coming down to the time of *Planters' Bank* v. *Sharp*, 1848 (6 How. 319) we find this expression of the court: "Our legislatures stand in a position demanding often the most favorable construction for their motives in passing laws, and they require a fair rather than hypercritical view of well-intended provisions in them. Those public bodies must be presumed to act from public

considerations, being in a high public trust: and when their measures relate to matters of general interest, and can be vindicated under express or justly implied powers, and more especially when they appear intended for improvements, made in the true spirit of the age, or for salutary reforms in abuses, the disposition in the judiciary should be strong to uphold them." And in the Legal Tender Cases (12 Wall. 531), the court said: "A decent respect for a co-ordinate branch of the government demands that the judiciary should presume, until the contrary is clearly shown, that there has been no transgression of power by Congress—all the members of which act under the obligation of an oath of fidelity to the Constitution. Such has always been the rule." Expressions of the tenor of the extracts set forth are to be found in abundance, but these are characteristic and nothing is gained by cumulating them. Numerous cases from many jurisdictions will be found in volume six of Ruling Case Law, at page 97 et seq.

Of course the courts of New York have expressed the same views. Some of the cases containing apposite expressions are the following: *People* v. *West,* 106 N. Y. 295; *People* v. *Durston,* 119 N. Y. 577; *Sweet* v. *Syracuse,* 129 N. Y. 329; *People* v. *Rosenberg,* 138 N. Y. 415; *Matter of Stillwell,* 139 N. Y. 341; *People* v. *Tax Commissioners,* 174 N. Y. 437. The language of the cases varies not a little, but it is plain that the presumption of constitutionality is a strong one. It is not a weak assumption which may be overcome by the merest preponderance of judicial opinion.

In no doubtful case, then, should a statute be held to be invalid. That is the rule to guide every judge. To declare a statute unconstitutional he must "feel no reasonable doubt of the correctness of the conclusion," as was said in *Ogden* v. *Saunders.* Being the rule of guidance for each judge, it must be deemed to be the rule controlling the action of the court collectively. And yet the courts persistently invalidate statutes by five to four and four to three decisions! Is there no doubt in a case when four out of nine or three out of seven judges dissent? What case can be more doubtful in a court consisting of nine or seven judges? All judges agreeing, a case may be said to be free of doubt. One judge disagreeing must cast some doubt on the decision of the court. Two judges increase the doubt. And so on. Is not a five to four decision popularly regarded as clouded by uncertainty? Does not the defeated party gather comfort from the opinion of the judges who sided with him? We have seen such decisions overruled. These overruled cases certainly had a doubtful existence. That doubt existed before the decision; it increased until it ultimately prevailed. *Hepburn* v. *Griswold,* overruled in the Legal Tender Cases, illustrates the point.

At Present Minority Views May Prevail.

It will hardly be contended that in a republic minority views should be forced upon the people; and yet this is the effect of the present system which permits a bare majority of the judges of our courts to annul statutory enactments.

The test of the validity of any law, whether it be denominated constitution, statute, ordinance, judicial decision, custom or otherwise, is public opinion. If it is not supported by the will and wish of the people it goes for naught. We have on our statute books today numerous statutes which in the common phrase have become a "dead letter." They have been repealed by public opinion. By common consent they are abrogated. Our Sunday laws are examples of this condition. Public opinion, however, frequently has been directly opposed and set at naught by the judgments of bare majorities in our courts. Not that the court is slow to recognize unpopular decisions and correct them. It does do this. For example, the decision of *Hepburn* v. *Griswold* evoked such a storm of disapproval from the country that the Supreme Court flatly and quickly overruled it when the same question was presented in the Legal Tender Cases. This is not an efficient system because, if for no other reason, our rights for a considerable space are left in a state of uncertainty.

Under our existing arrangement it may occur that a bill is introduced in one house of the legislature and passed by unanimous consent, is presented to the other house and likewise passed without dissent, is sent to the governor and receives his approval. Let us suppose besides that the law originated with some committee who called before them experts on the subject affected, that these experts were unanimous in their approval of the measure. And yet a bare majority of the court unaided by expert advice may overturn this mature, unanimous expression of public opinion. There are in the books cases of this character. Again, a minority of all judges to whom the validity of a statute is submitted may hold it invalid,—in case of successive appeals; that is, the trial judge, five or more judges of the Appellate Division, and three judges of the Court of Appeals may all deem a statute to be good law, and yet it may be nullified by the remaining four judges of the court of last resort.

It is hardly to be doubted that this opposition of public opinion is one of the causes if not the principal cause of the many criticisms and attacks that have been directed against our courts in the past few years. The frequency and violence of these attacks have increased exactly in the measure that the courts have increased the exercise of their power of annulment. It has been repeated *ad nauseam* that in respect of legislation protecting the people from disease, ill-health and the rapacity of capital, we in America are a generation behind the more advanced European countries. Certain it is that most of our important statutory reforms, such for example as the Workmen's Compensation Act, have been adopted more than a generation after their acceptance in Switzerland, France, Germany and even England. Is it not conceivable that this is due to the fact that some of our judges have failed in the duty, as it was expressed by a great Pennsylvania justice, to "keep abreast of the times"?

Lack of Unanimity Produces Uncertainty.

Decisions by a divided court are always unsatisfactory. They lead to dissension and are unstable precedents. Almost invariably the cases that are overruled are those in which the judges disagreed. The United States Supreme Court has expressed the opinion, it seems, that in determining whether a case should be overruled it is important to observe whether the decision was made with "reasonable unanimity" and has been "acquiesced in by the country." See *Knox* v. *Lee,* 12 Wall. 570. On the other hand, unanimous decisions are looked upon by every one with great favor. The *New York Times* recently said: "There has been a good deal of talk of late years about the 'judicial legislation' involved in the action of our higher courts in decisions as to the interpretation of a State or the National Constitution. In strenuous criticism of this alleged practice Mr. Roosevelt has not unnaturally taken the lead, and he openly seeks a remedy in the 'recall' of unpopular decisions, and even of unpopular judges. There have been, however, lawyers, and even judges, of good repute and acknowledged ability, who have conceded the existence of a tendency of the sort claimed. . . . Meanwhile, in view of the intense interest aroused in this discussion and the somewhat excited condition of the public mind in some quarters regarding it, it is particularly fortunate that we have a *unanimous decision* of the Court of Appeals of the State of New York in which are clearly defined and admirably stated the function of

the judiciary regarding constitutional interpretation, the relation of the judicial branch of the Government to other branches, and the conditions under which—and under which alone—that function will be undertaken."

Under the present system the slightest change in the personnel of the court may be decisive of the validity or invalidity of a statute. The death of a judge may completely change the court's conception of the Constitution. This was pointed out by Mr. Justice Story in *Briscoe* v. *Bank of Kentucky*. The learned judge observed: "When this cause was formerly argued before this court, a majority of the judges, who then heard it, were decidedly of opinion that the act of Kentucky establishing this bank was unconstitutional and void, as amounting to an authority to emit bills of credit for and on behalf of the state, within the prohibition of the Constitution of the United States. In principle it was thought to be decided by the case of *Craig* v. *The State of Missouri*, 4 Peters 410. Among that majority was the late Mr. Chief Justice Marshall; a name never to be pronounced without reverence. The cause has been again argued, and precisely upon the same grounds as at the former argument. A majority of my brethren have now pronounced the act of Kentucky to be constitutional. I dissent from that opinion, and retaining the same opinion which I held at the first argument, in common with the chief justice."

Requiring Unanimity Restores an Old Principle.

It should not be supposed for a moment that the proposed constitutional provision is revolutionary in character. On the contrary, this provision will have the effect merely to restore the conditions that obtained a century ago, the period that demonstrated the success of the American experiment in government. De Tocqueville posed the query whether our somewhat novel frame of government would stand the stresses and strains that time ever develops. The period from 1800 to 1840 demonstrated that the fathers of our country had builded well. During that period the form of government underwent popular examination and met with popular approval. The courts were most temperate and conservative in dealing with the acts of the legislative department, and no criticism seems to have been directed against their decisions. On the contrary, Chief Justice Marshall's opinions on the Constitution met with popular approval. Not so today. The departments of government have been getting steadily out of balance. Our overzealous courts have encroached not a little upon the province of the legislative department. Cries of "judicial legislation," "recall the judges," "recall the decisions," "abolish the Constitution" and the like fill the air. The agitation has disrupted business and is possibly responsible in a measure for the existing condition of financial depression.

Preliminary to declaring a statute invalid the courts used formerly to comment upon the delicate but inexorable duty of passing upon the constitutionality of statutes. A careful and elaborate comparison was made of the meaning attributed to the constitutional provision and the effect of the act in question; and frequent were the expressions respecting the dignity and importance of the acts of the co-ordinate department of government. Latterly, however, the courts in many cases have not troubled to find the constitutional grounds of invalidity, but have contented themselves with the broadest declarations of invalidity. In *Atlantic Coast Line* v. *Riverside Mills*, 219 U. S. 207, is found this expression: "The conclusion we reach in respect to the validity of the amendment has the support of some well considered cases. Among them we cite: *Smeltzer* v. *Railroad*, 158 Fed. 649; *Railroad* v. *Mitchell*, 91 N. E. 735; *Railroad* v. *Scott*, 118 S. W. 992." See also *Monongahela Bridge Co.* v. *U. S.*, 216 U. S. 192, and *North Dakota* v. *Hanson*, 215 U. S. 524. Nor is this all. There are decisions that cite no authority whatever. "This is not a reasonable regulation in aid of interstate commerce, but a direct and immediate burden upon it," said the court in *Central of Georgia R. Co.* v. *Murphy*, 196 U. S. 194, 205. . . . "It is idle to attempt to comment upon the various cases decided by this court relating to this clause of the Federal Constitution. We are familiar with them, and we are certain that our decision in this case does not run counter to the principles decided in any of those cases. The statute here considered we think plainly imposes a burden upon the carrier of interstate commerce and is not an aid to it, but in its direct and immediate effect it is quite the contrary." A changed judicial attitude is observable, also, in the statement of the New York Court of Appeals that a certain statute was "an inexcusable and intolerable invasion of the rights and liberty of the citizen,"—three judges dissenting. In another recent case the Court of Appeals says: "It is difficult to see how there could be any limitation to the power of the legislature in this direction. To our minds this is going too far."

Nor has this judicial attitude escaped the attention of the judges themselves. In *Lake Shore, etc. R. Co.* v. *Ohio*, 173 U. S. 313, the dissenting judge observed: "I am not able to think that this decision is satisfactorily disposed of, in the principal opinion, by citing it and then dismissing it with the observation that it is not perceived that there is any conflict between it and that now made." Mr. Chief Justice Parker, in one of his ablest opinions, notes the same tendency. "We come next to the question," said that able jurist, "in what spirit should the court approach the consideration of a statute said on the one hand to offend against the Constitution, and on the other to a proper exercise of the police power? The courts are frequently confronted with the temptation to substitute their judgment for that of the legislature. A given statute, though plainly within the legislative power, seems so repugnant to a sound public policy as to strongly tempt the court to set aside the statute, instead of waiting, as the spirit of our institutions requires, until the people can compel their representatives to repeal the obnoxious statute. In the early history of this country eminent writers gave expression to the fear that the power of the courts to set aside the enactments of the representatives chosen to legislate for the people would in the end prove a weak point in our governmental system, because of the difficulty of keeping the exercise of such great power within its legitimate bounds. So far in our judicial history it must be said that the courts have in the main been conservative in passing upon legislation attacked as unconstitutional; but occasionally, and especially when a case is one on the border line, it is quite possible that the judgment of the court that the legislation is unwise may operate to carry the decision to the wrong side of that border line. Certain it is that the courts have greatly extended their jurisdiction over many administrative acts that were originally supposed not to present cases for the court to pass upon, and in that way the courts have come to play a very important part in state and municipal administrations." Contrast this with the dissenting opinion, which almost seems to raise a presumption against the validity of statutes. It was said by the dissenting judges: "Laws which encroach upon the personal or property rights of the citizen, as guaranteed by the Constitution, are generally defended upon the ground that they are police regulations; but the courts have prescribed a test by means of which their true character and purpose may be known. The rule is that the court *must be able to say judicially* that a statute in question is a health law, and has some appropriate relation to the promotion or protection of health. It will not be deceived or misled by mere names or pretenses. The cases are numerous in which the courts have *condemned statutes* as in-

vasions of the rights secured to the citizen by the Constitution, though enacted or sought to be upheld under the guise of health laws or other police regulations. They all arrive at the same result, and that is that the legislature may not under the guise of a statute to protect against some wrong, real or imaginary, arbitrarily strike down private rights and invade personal freedom or confiscate private property. The police power must be exercised within its appropriate sphere and by appropriate methods."

We are a race who make government work. Our tendency is to support the government and correct abuses if any exist, not to overthrow the established structure. A well-ordered government is our heritage. Corrective measures of some sort will be adopted to stay the encroachment of the judiciary. The measure herein referred to seems to be most moderate, restorative, and free from objection. As an alternative there is the recall of judicial decisions or a complete abolition of the Constitution.

Doubtful Laws Should Be Left to Legislative Correction.

If the only objection to a statute is of doubtful character an adequate means of correcting the error lies with the legislature. That body may amend the act so as to eliminate its objectionable features, or it may repeal the law *in toto*. If, in truth, the people of the state do not want the enactment on the statute books they will not be slow to express themselves, and thus in a short time public opinion will manifest itself with sufficient clearness to bring about an amendment or repeal of the act by the legislature, or upon a second attack a unanimous decision of invalidity by the court. A wise judge said in a recent Supreme Court case: "If the statute is beyond the constitutional power of Congress, the court would fail in the performance of a solemn duty if it did not so declare. But if nothing more can be said than that Congress has erred—and the court must not be understood as saying that it has or has not erred—the remedy for the error and the attendant mischief is the selection of new senators and representatives, who, by legislation, will make such changes in existing statutes, or adopt such new statutes, as may be demanded by their constituents and be consistent with law." *Northern Securities Co.* v. *U. S.*, 193 U. S. 197, 350. It would seem that the present tendency of the courts may well be checked by the adoption of the provision in question. Let the court in case of doubt give the legislature an opportunity to remedy the evil if any is produced by its acts.

BERKELEY DAVIDS.

New York.

THE CIVIL COURTS AS SOURCES OF NEWS*

THERE is probably no field of the reporter's work which is so highly specialized as that of reporting in the civil courts. No other line of work requires such a long initiation before the beginner achieves efficiency.

A few years ago a well-known racing chauffeur was at the Brighton Beach track during an aviation meet. A large biplane was near by with its motor running. Although he was without any previous experience as an aviator, the chauffeur exclaimed: "I'll try anything once." He hopped aboard the plane and threw in the clutch. His evolutions resulted in a short and dramatic flight.

Many a brilliant newspaperman has found a brief assignment to the civil courts as exciting and unsatisfactory as the racing chauffeur's first attempt at aviation.

The general verdict among reporters is that the civil courts assignment is the most difficult in any office. They regard it generally as dry and technical, as likely to be full of unpleasant opportunities for surprises and as full of danger from libel suits. They soon find that listening to testimony in court is not more than ten per cent of the job and that there are a hundred unsuspected places from which an enterprising rival can get a story about which there is sure to be an inquiry from a disappointed city editor. They look upon its necessary routine as monotonous.

The difficulty of the position brings its proper compensations. It is usually one of the best-paid places on the city staff of a large newspaper. The proficient court man is always sure of a job. The qualities developed in gaining success in this line are those which ordinarily bring promotion to positions of editorial responsibility.

I believe, however, that no man can become a really good civil courts reporter who looks upon the place merely as a stepping-stone to something better, or who looks upon his assignment as temporary. The department is so large that the civil courts reporter is particularly dependent upon the friendship, good-will and active assistance of those among whom he works, the lawyers, judges and attachés of the courts. He must become a member of the company, of the fraternity of the priests of justice. To be accepted as such, he must himself be accepted as a just and humane man. Those who are about courts every day of their lives are keen judges of human nature. They readily detect the fraud and the snob. They readily recognize and rebuke the blandishments of the ill-advised reporter who would patronize them to win their help. They appreciate genuine good fellowship, while they despise insincerity and hinder pride and egotism. The best reporter is not only the one whose industry and accuracy entitle him to the respect of judges and attorneys, but whose geniality and democracy win him the friendship of court clerks and attendants. Both judges and attendants have more confidence and regard for the man who intends to make court reporting a permanent task and who is building his career on his day to day record for fairness.

Ordinary reportorial curiosity is not enough for a civil court reporter's equipment. He should have a sort of X-ray curiosity. Many lawsuits are interesting in themselves, as battles of wits and games of technicalities, like games of chess or poker. To make this side of lawsuits interesting requires not only a knowledge of the niceties of pleadings and procedure, but sometimes is as much a tax upon the story-telling skill as confronts a writer who would make a euchre tournament as vivid as a baseball game. Such stories dealing with the technical side of the law frequently have only a small audience of the legal profession. It is only when natural justice is defeated by technicalities, when a poor litigant or a worthy cause is defeated by recourse to legal trickery, or when the schemes of clever sharpers and skilful counsel are defeated by turning against them some sharp technical trick they had overlooked, that a story which hinges upon the purely legal aspects of a case is worth putting on the front page. Such stories need special care in their writing. They must contain the human element to carry them along. They must contain no mistakes of procedure, or of terminology, for their very nature makes them searchingly read by lawyers and judges who are keen to detect mistakes and sure to hold them against the writer and his newspaper and the journalistic profession in general.

When I spoke of the X-ray curiosity which a civil courts reporter should cultivate, I meant to refer to a searching attitude

*An address by Louis White Fehr, Secretary of the Park Department, before the Pulitzer School of Journalism, Columbia University.

of mind eager to learn the human story back of the court proceeding. The works of Scott contain some vivid descriptions of the old trial by battle from which our common law trials were developed. Most of our present day proceedings lack the intrinsic dramatic interest of their forbears. But all of them concern something very dear to the human heart. Every civil trial is a battle for rights. Every lawsuit is an attempt to wrest property from a present holder and put it into the hands of a person who portrays himself or herself as a victim of injustice. In many, if not most of them, some reputation is at stake as well. Each is entwined with hopes and fears. Any complaint filed in the county clerk's office contains the possibility of some account of human motive and action, which if traced to its source might reveal a theme for a Dickens or a De Maupassant.

A reporter who goes into the civil courts with the idea that back of the mass of papers filed each day in the county clerk's office, back of the mass of motions in special term, there is the rich pulsating matter of life itself, and who searches it out steadily and who handles it, not as a sensationalist, not for the passing beat of the hour, but respectfully, carefully, reverently and with regard for the rights of the parties and the sacredness of human rights and justice, with a keen love for the play of the motives of men and women and their operation in a complex society, soon gains a great flood of assistance. Lawyers stop to talk to him in the court house lobby. Judges invite him over to chambers and have him sit on the bench with them. The clerks and attendants of the courts are eager to call his attention to interesting cases to see what his skill will do to elucidate them. The elevator men call out to him as he passes, to communicate bits of gossip. The messenger boys hurry up to tell him that a great firm has just rushed up papers in important cases. The telephone girls greet him on arrival with self-gathered bulletins of the latest developments in litigation overheard above their switchboards. He is taken into the secrets of the judge's chambers. He knows whom Judge So-and-so is consulting on his decision of the important case pending before him, and he is able to forecast many times how it will be decided and when the decision is coming down. The keeping of such confidences, the interchange of frank opinion, lead often to more intimate relations, and we find the leading civil courts reporters as the comrades and companions of leaders of the bar and the judges and leading officers of the courts. Such friendships have their professional value, but the civil courts reporters prize them for their own sakes and value their calling the more for bringing them the opportunity of knowing these men. For my own part I feel that the making of a single friendship in one of our civil courts has fully compensated me for all the work of five years in the courts of this county.

When I was handling the civil courts for a New York morning newspaper, I had one or two assistants. I always started the beginners in the Surrogate's Court. Physicians start their studies by dissecting corpses. New reporters in the civil courts get their best start in the Surrogate's Court. There is a good reason for both procedures. The dead are complete. They are in repose. They may be studied in whole and in detail. They may be investigated and laid open without pain to themselves. They do not interfere with the search or the dissection. They interpose no barrier of wits, no shield of deceit, no pretense of any kind.

Go to the will contest, you novelist, if you would see human life develop and decay, if you would see human intrigue spun and unwound! Go to the will contest, you dramatist, for plot and counterplot! There you will see young romance defy crabbed wealth and crusty parenthood, and challenge disinheritance with optimism. There you will see charming adventuress entangle golden widower and dally with ardent suitor behind the back of aged husband. There you will see religious bigotry fanned by designing cousin against cousin, and doting eccentricity cozened by sly and scheming flatterers. There you will see all the foibles and vanities of the great played on as a harp of a hundred strings. You will live on the lawns of great country houses, you will ride with perfumed beauties in humming limousines, you will sit at midnight councils in closely curtained libraries, you will look over the shoulders of indiscreet letter writers, you will penetrate the secrets of gilded boudoirs, you will listen at the planning of great enterprises, dine at the tables of the wealthy and aristocratic here and abroad, play with the pets of prosperous dotards and wait with expectant ears outside the sacred chamber where a woman lies in agony, hearkening for the first cry of the posthumous infant, which if it lives but for an instant is to break the will for which so many sharpers schemed so long, and change the current of a famous fortune. The first papers in a will contest are very technical. They simply attack the will on every ground declared sufficient by the code. They reveal nothing of the story behind the contest; and there is a tragic story of broken family ties behind every contest. The getting of this story and the other stories connected with the contest, before the case comes to trial, is the task of the civil courts reporter. His success depends equally on his reputation for fair dealing or ability to inspire confidence, and his resourcefulness.

But as the will contests satisfy the most highly developed cravings for the mysterious, the sensational and the dramatic, other proceedings in the court minister to the gratification of the milder forms of curiosity. Wills are a great study in themselves. The repressing influence of lawyers cannot make all wills wooden. Many a man or woman who never expressed an original idea during life reveals a curiously flavored personality by will. Rare but self-contained men and women flower out in their home-made, hand-written wills. Great men burst the bonds which held them back during life and blazon forth their characters and their philosophies of life, not only by strangely sincere expressions of their thought, but by the way they dispose of their property. You might almost write a history of the development of modern ideals of social service and the trusteeship of wealth from the files of wills in New York County during the past quarter century.

And then there are the appraisals of estates. Every one has to die. And in New York you have to pay a tax for doing so. Most people of importance leave some kind of a going business behind them. Or they own stock in great and going corporations. The State Comptroller is a curious gentleman. He is like the little boy who got a clock for Christmas. He wants to know all about the business, how it goes, why it goes, what makes it go. His appraisers usually get the whole history of any business that the dead man instituted, and find out how he did it. In some cases, when the family cook has been doing her duty well, they agree to make an allowance for the loss the business suffered by the death of its founder or leading spirit. But first they take testimony as to what made the great one great, and then all his particular genius is unfolded before you. There isn't any business about which you can't get inside information about how to run, from the files of appraisals of estates in the Surrogate's Courts of this state, from railroads down to delicatessen stores. You young men are going into the newspaper business. You will find it a liberal education to you in your chosen work to read the testimony and schedules in the appraisal of the estate of Joseph Pulitzer, whose benefaction founded this school. In the great estates the testimony is most exhaustive and touches almost every field of human endeavor, art and industry. In some estates, the history of famous masterpieces of painting and sculp-

ture, for instance, is traced for hundreds of years from one hand to another, from one country to another, often with romantic accounts of smuggling, bankrupt nobles, wars and the sack of cities, back to the hand of the artist who made it and sold it for a song and whose sufferings seem more tragic when weighed against the present value of his work.

The accountings of guardians and trustees are also full of interest. In them you can find pictures of the upbringing of the little daughters of the rich, the lives of spoiled young men about town, the pitiful struggles of the orphan poor for education and health. From these accountings you could take a cross section of the modern organization of society.

A reporter who has been trained in the Surrogate's Court to habits of accuracy, who has undergone the discipline of searching through the mass of papers filed every day for the vitally interesting and important, is fairly well prepared to attempt the Supreme Court. His training in surrogate's matters will help him in going through the deluge of documents which floods into the County Clerk's office every day, and detecting the stories behind complaints, answers, bills of particulars and so forth.

In the Supreme Court, however, he will be met with special difficulties, which do not exist in the more open Surrogate's tribunal. He will find motion papers in one part of the court separated from their related documents. He will find divorce cases referred to referees, and pleadings which are kept under lock and key to hinder his even getting a hint at the allegations behind many causes of action in which his editors have a lively interest. He will find that in the Special Terms many papers are hurried to the judge's chambers without even being entered on a book, so that he may know that some one is planning an injunction against a private wrong or a public injury, that some prominent person is being spirited off as a lunatic to an asylum or sanitarium, and he will discover that when the papers are signed there is no place where a record is made which is open to his view. He must be more than specially alert, and he must cultivate the friendship of those employees of the court who will give him the hints he needs to uncover the news. In this court with its many parts, its swarm of judges, its multiplicity of actions and its abundance of opportunities for concealment, he is specially dependent on the good will and confidence of attorneys.

The City Court with its many parts offers opportunities similar to those of the Supreme Court for an insight into the motives of life and the methods of business. Changes of name sought by those dissatisfied with their patronymics are usually passed upon by judges in this court and furnish many humorous stories. It is in the City Court also that judgment debtors are examined in supplementary proceedings, and their accounts of how they manage to live without money or anything the sheriff might seize furnish many comical narratives. The City Court has gained greatly in dignity and has increased its usefulness by the addition of a commercial calendar since the election of a former newspaper man, William Lynn Ransom, to its bench recently. Justice Ransom's record in his first year on the bench, of thirty-six cases appealed and affirmed by the higher courts and with no case appealed from him reversed, set a new record for this court and is a source of pride to his late colleagues of the newspaper profession.

The Appellate Division is usually reported by the most experienced men. Its decisions handed down Fridays usually contain several of vital public interest, oftentimes decisions which affect matters of government. The reading of the reports of this court is bound to give reporters a working knowledge of law which is of great value in their other work.

The reporters in the civil courts have an organization of their own, headed by a chancellor. Their annual dinners are jovial affairs for which invitations are eagerly sought by leaders of the bar. On such occasions, convention is cast aside, and even the judges have to waive the prerogative of the ermine and submit to the japeries of the *Jaw Journal*, a publication which burlesques the *Daily Law Journal*, the official newspaper of the courts.

LAW AT THE THRESHOLD.

LAW in its essence is an initial fortification against error. Yet, in its application, it is to-day merely curative. We are the architects of to-morrow's citizenship. But when the germ of that citizenship—a child—stands on the threshold of wordly endeavor, we passively permit him to grope an entrance, ignorant not only of his own rights, but also a stranger to those fundamentals that govern his relations with the complex society about him. Contrast with this attitude the painstaking care with which we supervise his other preparations: and our indifference becomes the more startling. He is groomed mentally by rigorous discipline and minute instruction at schools provided for that purpose by society. Nor is his physical equipment neglected now, whatever may have been the prior usage. From babyhood he is given anxious attention that he may become a man among men. And the schools of to-day unite in providing for his instruction in the code of physical welfare. The introduction of hygiene into the curriculum of our schools has a deeper significance than the maintenance in health of the particular students instructed: it imports a recognition by us that the function of medicine is not merely to patch up the ravages of dissipation, but rather to light the path of right living; that medicine, in short, is not only remedial, but also, and basically, preventive.

Just as medicine is the science of physical health, so law is the science of social health; and the same relation that medicine bears to the health of the individual is borne by law to the health of society. But as yet this is scarcely perceived. One is too apt to apply the old conception of medicine to law—something to be dodged as long as possible and to be used only in case of extreme emergency. Here again, however, must spring the more rational view and law must come to be understood as our strongest social bulwark and safeguard. Such a conception has always been desirable—practically necessary; but now, with the ever-increasing complexity of modern life, it has become imperative. Reference to the numerous proposals of theoretical fanatics to abolish all law and to the general suspicion with which the lower classes regard law, its officers, and agencies, gives the statement ample support. Hence, into the fabric of our future manhood a knowledge of jurisprudence needs must be woven. Woman, too, now knocking at the portals of business and politics, demands for her protection and guidance a common familiarity with the principles of conduct.

Admit, then, that a proper understanding of law is an essential, and it is next material to seek the most appropriate agency to that end. The answer is the instruction of our future citizens in the principles of law. As the principles of individual health are taught in the high school, so should the principles of social health be taught there. Then, when the youth becomes the man and enters a role of purposeful activity, he will do so with an understanding of its duties and responsibilities. Every step in his entrance will be accompanied by a knowledge of the principles that should govern him. And thus equipped at the threshold he will pass on into the City of Men, efficient in his own cognizance of its ritual of citizenship; with an ingrained

respect for the rights and interests of his contemporaries, so inextricably interlocked with his own; with a deep reverence in his heart for the one agency that brings security from confusion and mistake. Such instruction would keep many from taking that first defiant step on the byway leading to lawlessness, and would preserve many a potential outlaw as a peaceful member of society.

The primary function, then, of a high-school course in law would be to enlist the students as comprehending supporters of the law. But aside from that broad ideal, it would offer many other practical advantages that cannot be overestimated. "Ignorance of the law excuses no one," and the path of that phrase has been strewn with many bitter experiences and regrets. Thus a vendee cannot enforce a parol contract for the sale of land, no matter what inconvenience or loss he may have sustained. Again, parol evidence cannot be introduced to vary the terms of a written agreement; a past consideration is not sufficient to support a contract; a will improperly executed is a nullity, the property of the deceased going in accordance with the rules of descent and distribution and not in accordance with his expressed wishes. These, you say, are among the merest A B C's of law. Yet the decisions of our courts pyramid in testimony of the havoc that has been wrought through ignorance of these simple rudiments. But law at the threshold, presenting just such elementary rules, would largely eliminate the constantly arising cases of patent injustice which the law in itself is powerless to relieve, cases ofttimes arising from the ignorant violation of some most primary legal principle.

K. R. E.

AMERICA AND INTERNATIONAL LAW.

IT may be, when lapse of time enables us to see in true perspective the turmoil of events now crowding upon each other with perplexing rapidity—when we can look back upon the confusion with which we are now surrounded—that the American note to Germany on the sinking of the *Lusitania* will stand out as one of the most notable and significant national acts of the war. In this State document President Wilson has spoken for the whole American people. He has put forward a plea for the freedom of the seas, and he has appealed not to force, but to law. The note is based primarily on the idea of public right. Whatever the reply, whatever the immediate results, it is for that reason a great achievement.

The book *Mare Liberum*, written three hundred years ago by the Dutch lawyer Grotius to promote the freedom of the seas, was the starting point of international law as we know it. The note of President Wilson may mark the inauguration of a new phase in the development of international law.

The policy of President Wilson and Mr. Bryan has been stigmatized as weaker than milk and water. Mr. Roosevelt has urged that until there is a world league to enforce by the combined strength of all nations the decrees of a competent court against any offending nation, it is the duty of every nation to keep itself prepared to defend by its own strength both its honor and its vital interest. The United States is very far from being prepared to enter into the present war. Mr. Wilson has nevertheless dispatched a note insisting upon the "right of free travel upon the sea" for American citizens. He declared shortly before the note was sent that the example of America to the world must be an example not merely of peace because she would not fight, but because peace is a healing and elevating influence in the world and strife is not. "There is such a thing," he said, "as a nation being so right that it does not need to convince others by force that it is right."

The surprising and significant thing is that this appeal to the majesty of law and abstract right has not been received with derision. It has been received with almost world-wide respect. It was a bold and courageous move of which the ultimate and perhaps distant effects are of more concern than any immediate consequences. What, asked Mr. Asquith in a speech last October, does the idea of public right mean when translated into concrete terms? He answered his question by saying, "It means, finally, or it ought to mean, perhaps by a slow and gradual process, the substitution for force, for the clash of competing ambition, for grouping and alliances and a precarious equipoise, the substitution for all those things of a real European partnership, based on the recognition of equal right and established and enforced by a common will. A year ago that would have sounded like a Utopian idea. It is probably one that may not or will not be realized either to-day or to-morrow. If and when this war is decided in favor of the allies, it will at once come within the range, and before long within the grasp, of European statesmanship."

President Wilson has done a more effective thing than the issue of a mere academic protest against the disregard of Hague Conventions would have been. He has been blamed by many for remaining silent. It has been urged that the greatest neutral nation should have spoken in the name of humanity and civilization and protested against German outrages. But perhaps it was deeper wisdom on the part of President Wilson to wait till he could take occasion by the hand. The acts of the German authorities culminating in the sinking of the *Lusitania* constituted, the President said in his note, "a series of events which the Government of the United States has observed with growing concern, distress, and amazement." He recalled the attitude assumed in the past by the German Government in the matter of international right, "particularly with regard to the freedom of the seas." Then he registered a protest which carries tremendous weight, and is all the more effective because of its restraint and temperance. This step marks an advance towards "the parliament of man, the federation of the world," which, as time goes on, becomes less and less a poet's dream, more and more a possible reality. There is a risk that outraged feeling may make one nation an outlaw for a time, but there is little room for doubt that international law is assuming a new importance.

In this connection it is not without significance that since the present war began ratifications have been exchanged between this country and the United States of a treaty with regard to the establishment of a peace commission—a permanent international body to which the contracting parties agree to refer all disputes between them of every nature whatsoever other than disputes the settlement of which is provided for and in fact achieved under existing agreements. The two countries agree by the treaty not to declare war or begin hostilities during investigations by the Permanent International Commission and before its report is submitted. The parties would be free to act independently after the report of the commission, but no one can doubt that the process of impartial investigation would do much to prevent any dispute resulting in war.

There is nothing new under the sun, and it is possible that, in the future development of international polity and international law, old ideas may reappear in altered shapes. Independent States have taken the place of the one empire which was the Roman ideal. But even as the influence of the Romans may be seen in the laws of most countries, so the development of the idea of a federation of nations may bring to life again something

of the system which once centered at Rome. The idea of a single world-wide rule has lived in many great minds in past ages. It may be that it will work itself out in the coming development of international law.—*Law Times.*

Cases of Interest.

LIABILITY OF POLO PLAYER TO SPECTATOR INJURED WHILE WATCHING GAME.—In Douglas *v.* Converse (Pa.) 93 Atl. 955, the facts showed that the plaintiff's son while a spectator at a polo game was injured by one of the polo ponies, which ran into and trampled him. He brought suit against the rider and a judgment of nonsuit was entered by the trial court which was reversed on appeal, it being held that the question of the defendant's negligence was for the jury. The court, on the question of the relative rights of spectators and player at a polo game, said: "There is in the game of polo the element of risk, and both players and bystanders assumed the chance of the ordinary dangers incident to the game in participating in and witnessing the contest. Spectators, however, do not assume a risk which results from reckless playing or the failure of a player to control and guide a horse so as to avoid accident when such control is reasonably possible. They, however, have a right to assume that the game will be played within boundaries, and that players will not voluntarily, or without reasonable effort upon their part to prevent, permit their horses to leave the field limits."

CHANGE OF HARBOR LINE AS ENTITLING RIPARIAN OWNER TO COMPENSATION FOR PARTIAL DEMOLITION OF WHARF.—The United States Supreme Court in Greenleaf-Johnson Lumber Co. *v.* Garrison, 35 Sup. Ct. Rep. 551, has adjudged that the fact that a harbor line is changed does not entitle a riparian owner whose wharf extending out to the former harbor line has to be partly demolished to put it within the new harbor line, to compensation. Mr. Justice Lamar dissented and wrote a vigorous opinion in which he said: "The power of the Secretary of War to run harbor lines may not be exhausted when once exercised, and, from time to time, they may be relocated over unused and submerged land. But, as against lawful structures, the line must be run to conform to the physical conditions of the stream and to meet changes occasioned by the washing of the water or other natural causes. But the public cannot determine to widen the river, artificially create a channel, and thus, by its own act, acquire a right to declare that what was formerly a lawful structure in shallow water will be an obstruction to a storage basin to be artificially created. In Com. *v.* Alger, 7 Cush. 53, 103, it is strongly intimated that the power to establish harbor lines does not confer authority to take, without compensation, existing structures lawfully built out to the navigable channel. Other cases hold that the establishment of the line is in the nature of an invitation to fill in and build out to that line."

INDICTMENT FOR LARCENY OF "BLUE AND WHITE SPECKLED" COW AS COVERING "BLACK AND WHITE SPECKLED" COW.—An amusing case is that of Graham *v.* State (Ga.) 84 S. E. 981, wherein it was held that an indictment for the larceny of a "blue and white speckled" cow covered a cow which was black and white speckled. Judge Wade on this question commented as follows: "While the indictment described the cow as 'one blue and white speckled' cow, this description would include equally well a cow which was black and white speckled, since it is a matter of common knowledge that, literally speaking, no cow on this mundane sphere is actually 'blue,' though cows of that color may possibly browse through the valleys of the moon, graze along the banks of the canals that seam the face of the planet Mars, or disport themselves in the realms of fairyland. According to the vernacular of the woods and fields, of 'Crackerdom' at least, 'blue,' as applied to a cow or other animal, generally denotes either a modified shade of black, or black with white intermingled, or dark gray, dove, or slate color, which, in contrast with some decided color, or with white, suggests and somewhat resembles blue; and this court, 'to the manner born,' cannot affect ignorance of the general meaning of the adjective 'blue' when used in such a connection, but must hold that a 'blue and white' speckled cow and a 'black and white' speckled cow may be one and the same, and a jury would be authorized so to find."

LIABILITY OF STATE BOARD OF AGRICULTURE FOR INJURIES TO SPECTATOR AT STATE FAIR.—In Morrison *v.* MacLaren, (Wis.) 152 N. W. 475, it was held that a state board of agriculture under whose auspices a state fair was held was not liable for injuries resulting to a spectator in the grand stand from the negligent management of an aeroplane, the aviator of which had been engaged by the board to give an exhibition. The ground of the holding was that the board was but exercising its governmental functions in holding the fair and engaging the aviator. The court said: "The giving of the state fair and exhibitions is done by the state through this agency in the discharge of a governmental function to promote the general welfare of the people of the whole state, and no private or local interests are subserved. No benefit is derived by the board in a proprietary capacity, but the benefits are for the governmental and sovereign purposes of the state. Under the statutes of the state appropriations are made by the state to defray the expenses of carrying on fairs, and the revenues derived are applied to reduce or defray, so far as they go, the expense of carrying on the governmental function. Numerous statutes passed from time to time show appropriations and provisions made by the state for the state board of agriculture. . . . The weight of authority is to the effect that the giving of a state fair under statutes similar to ours is a governmental function. . . . The authorities are also to the effect that exhibitions in connection with fairs which afford entertainment to the public are proper exhibits and within the scope of attractions contemplated by the statute as properly belonging to a state fair, because necessary to make the fair a success; and the board has a reasonable, sound discretion in determining what exhibitions shall be given."

RIGHT OF PERSON TO KILL DEER IN CLOSE SEASON TO PROTECT PROPERTY.—That a deer may be killed in close season by one whose corn is being injured and destroyed is the holding of the Iowa Supreme Court in State *v.* Ward, 152 N. W. 501. The defendant in that case was prosecuted under an indictment charging him with unlawfully killing a deer. He defended by setting up that the deer was at the time of the killing eating his corn. The court on these facts said, after quoting the statute under which the prosecution was instituted and which provided that it should "be unlawful for any person other than the owner, or person authorized by the owner, to kill, maim, trap, or in any way injure or capture any deer, elk, or goat except when distrained as provided by law," said: "It will be noted that the prohibition of this statute is absolute and unqualified in its terms. The one question in the case is whether a person who kills a deer, elk, or goat is necessarily guilty of violating the statute regardless of the reasons for such killing. To put it in another way: Is it open to the defendant to justify an admitted killing by showing a reasonable necessity in defense of person or property? . . . It will be noted that the deer was killed, not only while upon the defendant's premises, but while he was actually engaged

in the destruction of the defendant's property. Giving the testimony the fullest credence, the deer was one of great voracity. He was capable of doing, and was threatening to do, great injury to defendant's property. By way of analogy we may note that the plea of reasonable self-defense may always be interposed in justification of the killing of a human being. We see no fair reason for holding that the same plea may not be interposed in justification of the killing of a goat or a deer. The right of defense of person and property is a constitutional right (article 1, § 1, Const. Iowa), and is recognized in the construction of all statutes. If in this case it was reasonably necessary for the defendant to kill the deer in question in order to prevent substantial injury to his property, such fact, we have no doubt, would afford justification for the killing. Aldrich *v.* Wright, 53 N. H. 398, 16 Am. Rep. 339. We do not presume to pass upon the weight of the evidence tending to prove the fact of reasonable necessity. It is sufficient to say that the evidence would have sustained such a finding if made by the trial court. The case was tried below on the theory that such defense was not available. It will be noted that the act of killing, as contended by defendant, was wholly defensive and preventive. Whether a deer may be lawfully killed to-day by way of retaliation for the damage wrought by it yesterday, or whether it may be so killed by way of reprisal for damage wrought or threatened by other deer, are questions not involved herein, and we do not purport to pass on them."

VALIDITY OF STATUTE REQUIRING ELECTORS AT MUNICIPAL ELECTION TO EXPRESS CHOICE FOR EACH OFFICE TO BE FILLED.—In Orpen *v.* Watson (N. J.) 93 Atl. 853, wherein it appeared that the governmental powers of a municipality were vested in five commissioners to be elected by the people, and that a statute required each voter to express on his ballot a first choice for each office to be filled under penalty of having the ballot declared void if this requirement was not observed, it was held, that this requirement was not in contravention of paragraph 1, art. 2, of the Constitution, which declared that every citizen should be entitled to vote for all officers elective by the people. The decision was by the New Jersey Supreme Court which said: "The first ground urged is that the statute does not permit a free choice because it compels the voter to vote a first choice for each office to be filled, which in the present case is five, to make his vote effective, when he may desire to vote for only one commissioner, and therefore his right to vote is restricted. My understanding is that the right of suffrage in organized society is not absolute or inherent, and that the majority of the persons constituting the society may regulate that question as they deem best, except as limited by some organic compact, such as the Constitution of our state. So it would seem that, on this branch of the case, the simple question is whether, the legislature deeming it wise that some of the powers of the state shall be intrusted to five commissioners, it can provide that each citizen, if he desires to participate in the selection of such instrumentalities of the state, shall vote for the entire number of officers necessary to exercise, for the common welfare, the delegated powers, and, if so, whether such requirement infringes upon his constitutional right to vote for all officers that are elective. I think it must be conceded that if there be no constitutional limitation, the legislature could condition the right to vote for a class of officers upon a requirement to vote for all, and my opinion is that the right reserved in the Constitution to a vote for all elective officers is not restricted by a requirement that he shall vote for as many persons as there are offices necessary to be filled, in order to carry on the government. It is not to vote for particular persons that choice is left open, but to aid in filling elective offices; it is a regulation of the method of voting for all elective officers. The argument that, in voting for only one, the voter thereby advances the chances of one person whom he may prefer to the others, does not take into account that the Constitution reserves no such privilege, either expressly or by implication, nor does it secure him the right not to vote, for as was said by former Chief Justice Depue in Bott *v.* Secretary of State, 62 N. J. Law 107, 40 Atl. 740: 'The Constitutional provision in itself gave no consideration for the qualified voter who, for any reason, was indifferent or noncommittal with respect to proposed amendments.'"

VALIDITY OF STATUTE LIMITING RIGHT OF RAILROAD TO DISCHARGE EMPLOYEE.—In the case of In re Opinion of the Justices (Mass.) 108 N. E. 807, the facts showed that the Massachusetts Senate requested the opinion of the Massachusetts Supreme Court on certain questions contained in an order as follows: "Whereas, there is pending in the Senate a bill, printed as Senate Document No. 537, a copy of which is hereto annexed, wherein it is provided that no employee of a railroad corporation shall be disciplined or discharged in consequence of information affecting the employee's conduct until such employee shall have been given an opportunity to make a statement in the presence of the person or persons furnishing the information; now therefore be it Ordered, that the opinion of the Justices of the Supreme Judicial Court be required by the Senate upon the following important questions of law: First, Is it within the constitutional power of the General Court to enact legislation limiting the right of railroad corporations to discharge their employees for cause by annexing conditions thereto of the nature above set forth? Second, Is it within the constitutional power of the General Court to enact legislation of the nature above set forth relative to the employees of railroad corporations giving them as a class privileges not enjoyed by the rest of the community? Third, Are the provisions of Senate Bill No. 537 constitutional?" The three questions were answered in the negative. As to the first question the court said: "The fourteenth amendment to the federal constitution prohibits the several states from depriving 'any person of life, liberty or property, without due process of law.' In the application of these principles it has been held that the right to liberty and property secured by the fourteenth amendment was impaired by a statute which prohibited the discharge of any employee because he was a member of a labor union. Adair *v.* U. S., 208 U. S. 161, 28 S. Ct. 277, 52 L. ed. 436, 13 Ann. Cas. 764. That decision recently has been reaffirmed in its application to a statute which made unlawful any requirement not to join or remain a member of a labor union as a condition of securing or continuing in employment. Coppage *v.* Kansas, 236 U. S. 1, 35 S. Ct. 240, 59 L. ed. ——. The ground upon which these decisions rest is that the freedom of contract guaranteed by the fourteenth amendment prohibits the imposition of such restraints upon the right of the employer to decline to employ at all, or to continue to employ, a person whom he does not desire. . . . In the absence of a contract, conspiracy, or other unlawful act, the right of the individual employee to leave the service of a railroad without cause, or for any cause, is absolute. The railroad has the correlative right under like circumstances to discharge an employee for any cause or without cause. It is an unreasonable interference with this liberty of contract to require a statement by the employer of the motive for his action in desiring to discharge an employee, as this statute in substance does, and to require him also as a prerequisite to the exercise of his right, to enable the employee to make a statement in the presence of some one else—a thing which may be beyond the power of the employer. His freedom of contract would be impaired to an unwarrantable degree by the enactment of the proposed statute.

The power of the legislature to require a hearing in connection with the discharge of one employed under the civil service law rests on the authority of the commonwealth to direct the conduct of its government and that of its political subdivisions."

PRACTICE OF CHIROPRACTIC AS PRACTICE OF MEDICINE.—In the interesting case of Commonwealth *v.* Zimmerman, (Mass.) 108 N. E. 893, the defendant was prosecuted for practicing medicine without first obtaining a license, and he defended on the ground that he was a chiropractor, and that his acts did not constitute a violation of the statute. The defense was held insufficient. Rugg, C. J., answering the defendant's argument used language as follows: "The evidence tended to show that he kept an office in Boston, indicated by a sign on which was his name followed by the word 'chiropractor'; that he practiced for pay; that he said that the basis of chiropractic is the adjustment of the vertebrae of the spine; that the vertebrae when not in their normal positions press upon the nerves at the spine; that the malposition of these vertebrae was the cause of abnormality and that an adjustment of these vertebrae to their normal positions would remove the pressure at the spine; that he said he did not cure, that he simply adjusted. He testified that: 'Chiropractic is the specific science that removes pressure upon the nerves by adjustment of spinal vertebrae; there are no instruments used; it is done by the hand only.' The treatment pursued by the defendant was to have those who resorted to him to go into an inner room and remove their outer garments until they were stripped to the waist. The patient then took a sitting position. The defendant examined down the spine, beginning at the top, by feeling with his fingers to see whether each vertebra was in its proper position. The method to discover whether a vertebra was out of position was by making a gliding move of the three middle fingers of the right hand, which constituted the process of 'palpation' whereby one vertebra was compared with another. As a result of this 'analysis' the defendant was able to tell whether vertebrae were out of alignment or out of their normal positions. In making 'adjustments,' the patient was placed on a low table with face downward and the vertebra which was out of position was given a quick thrust or push by the hands of the defendant. The acts performed by the defendant constitute, first, an examination of the vertebrae of the spinal column and a determination whether they are in a normal or in an unnatural position; and, second, a manipulation of such of the vertebrae as are found to be out of position, so that they will become regular and correct with reference to each other. Although the defendant did not prescribe medicine, and testified that he paid no attention to the patient's description of symptoms or disease, yet it is obvious that his purpose was to treat the human body in order to make natural that which he found abnormal in the narrow field of his examination. The removal of pressure upon nerves is a means of relieving the ills flowing from that source. 'Chiropractic' is defined as: 'A system of healing that treats disease by manipulation of the spinal column.' Webster's International Dict. The plaintiff's manipulation was of a most important part of the body and related to a nerve center. It might have been found that it could have no other aim than a prevention of disease or relief from existing disarrangement of body functions. That which the defendant did and its manifest purpose might have been found to be practicing medicine within the meaning of the statute."

VALIDITY OF STATUTE PROHIBITING WOMEN FROM WORKING IN FACTORIES BETWEEN CERTAIN HOURS.—A statute prohibiting the employment of women in factories before six o'clock in the morning or after ten o'clock in the evening of any day was declared constitutional in People *v.* Charles Schweinler Press, (N. Y.) 108 N. E. 639. Hiscock, Judge, wrote the opinion of the court which was in part as follows: "It is not a basis for a constitutional objection to a statute like this, generally prohibiting the labor of women between certain hours, that in exceptional cases it may prevent employment of some women for a short time between those hours under such conditions as would be productive of no substantial harm. A legislature must legislate in general terms, and its mandates are not constitutionally vulnerable because, having power to act concerning a certain subject and to legislate in terms reasonably calculated to accomplish the general purpose within the scope of its authority, it covers and prohibits some isolated transaction which by itself would be harmless and unobjectionable. . . . Neither is it an effective objection to a statute if some of those who will be protected by its provisions oppose such protection, for the state has such an interest in the welfare of its citizens that it may, if necessary, protect them against even their own indifference, error, or recklessness. . . . Nor if some cases which might have been included are omitted, for police legislation may rest on narrow distinctions. . . . Tested and fortified by these rules, we cannot and ought not to say that the legislature did not act within the wide powers of discretion and judgment possessed by it in adopting the prohibition which it did as a means of preventing the evils with which it was justified in believing the state to be threatened as the result of such night work by women. . . . It is urged that whatever might be our original views concerning this statute, our decision in People v. Williams, 189 N. Y. 131, 81 N. E. 778, 121 Am. St. Rep. 854, 12 Ann. Cas. 798, is an adjudication which ought to bind us to the conclusion that it is unconstitutional. While it may be that this argument is not without an apparent and superficial foundation and ought to be fairly met, I think that a full consideration of the Williams Case and of the present one will show that they may be really and substantially differentiated, and that we should not be and are not committed by what was said and decided in the former to the view that the legislature had no power to adopt the present statute. The statute under consideration in the Williams Case, like the present one, prohibited night work by women in factories, and, while its provisions were somewhat more drastic than those of the present one, it may conceded that these differences were of details and would not serve to distinguish that statute from the present one in respect of its constitutionality. But the facts on which the former statute might rest as a health regulation and the arguments made to us in behalf of its constitutionality were far different from those in the present case. That statute bore on its face no clear evidence that it was passed for the purpose of protecting the health and welfare of women working in factories; and while, of course, the presence or absence of such a label would not be controlling in determining the purposes and validity of the statute it still was in that case an incident of some importance as leading to the conclusions finally expressed by Judge Gray and adopted by the court, as appears by the quotations from his opinion hereafter made."

VALIDITY OF RAILROAD COMMISSION ORDER REQUIRING RAILROAD TO STOP TRAINS AT CERTAIN STATION.—In Chicago, etc., R. Co. *v.* Railroad Commission of Wisconsin, 35 Sup. Ct. Rep. 560, the United States Supreme Court had for consideration the validity of an order of the Railroad Commission of Wisconsin requiring under a law of the state the railroad company to stop two of its interstate passenger trains each way daily at a certain station. The statute under which the order was made was as follows: "Every corporation operating a railroad shall maintain a station at every village, whether incorporated or not, having a post-office and containing two hundred inhabitants or more,

through or within one-eighth of a mile of which its line or road runs, and shall provide the necessary arrangements, receive and discharge freight and passengers, and shall stop at least one passenger train each day each way at such station, if trains are run on such road to that extent; and, if four or more passenger trains are run each way daily, at least two passenger trains each day each way shall be stopped at each such station." It was held that the order was invalid, being based on a statute which was invalid because a burden on interstate commerce. The court through Mr. Justice McKenna said: "In reviewing the decision we may start with certain principles as established: (1) It is competent for a state to require adequate local facilities, even to the stoppage of interstate trains or the rearrangement of their schedules. (2) Such facilities existing—that is, the local conditions being adequately met—the obligation of the railroad is performed, and the stoppage of interstate trains becomes an improper and illegal interference with interstate commerce. (3) And this, whether the interference be directly by the legislature or by its command through the orders of an administrative body. (4) The fact of local facilities this court may determine, such fact being necessarily involved in the determination of the federal question whether an order concerning an interstate train does or does not directly regulate interstate commerce, by imposing an arbitrary requirement. . . . Bearing these propositions in mind, let us consider the test of the statute. The statute expresses, it is said, the legislative judgment of the conditions of its application, and would seem to preclude a consideration of anything else. In other words, the test of the adequacy or inadequacy of the local facilities is determined by the statute, and their sufficiency as so determined becomes the question in the case. What, then, is the test? Every village having 200 inhabitants or more and a post-office, and within one-eighth of a mile of a railroad, must be given by such railroad the accommodation of one passenger train each way, each day, if trains be run to that extent, and at least two trains if four or more passenger trains be run. The test, on first impression, is certainly quite artificial. The effect of it is that the number of trains is not necessarily determined by the local needs of a village, but, it may be, by the needs of other places; not by the demands of local travel, but, it may be, by the demands of interstate travel, and automatically to be increased as interstate travel increases. This is pointedly so in the case at bar, for the railroad runs only interstate trains."

News of the Profession.

The Wisconsin Bar Association will meet at Superior, Wis., on July 14, 15 and 16.

The Alabama State Bar Association will meet in annual convention at Montgomery, Ala., on July 9 and 10.

The Iowa State Bar Association held its annual meeting at Fort Dodge, Ia., on June 24 and 25. Further details will be given in the next issue of Law Notes.

Attorney General Resigns.—Attorney General D. M. Kelly of Montana resigned on June 1, and Governor Stewart appointed J. B. Poindexter of Dillon to fill out the unexpired term.

County Judge Appointed.—W. V. Whitson of McMinnville has been appointed by Governor Rye of Tennessee as county judge of Warren County, a position recently created by the legislature.

First Chief Justice of South Dakota Dead.—Dighton Corson, the first presiding justice of the Supreme Court of South Dakota, died at Pierre, S. Dak., on May 8, in his 88th year.

Minnesota Judge Named.—Governor Hammond of Minnesota has appointed George W. Granger, of Rochester, Minn., to succeed Arthur H. Snow as judge of the district court in the third district.

The Pennsylvania Bar Association held its annual meeting at Cape May, N. J., on June 29, June 30 and July 1. A more detailed notice of the convention will appear in Law Notes for August.

Judiciary Change in Ohio.—John H. Fimple, common pleas judge for Carroll county, Ohio, has resigned from the bench, and Governor Willis has appointed as his successor Harvey J. Eckley of Carrollton.

Death of Noted Maine Lawyer.—George M. Seiders, formerly Attorney General of the State of Maine and at one time a law partner of the late Thomas B. Reed, died on May 26, at Portland, Me., aged 71.

Noted Colorado Jurist Dead.—Joseph Church Helm, for twelve years one of the justices of the Colorado Supreme Court and for three years its chief justice, died at Denver, Colo., on May 13, aged 67.

New Jersey State Bar Association.—The annual meeting of the New Jersey State Bar Association was held at Atlantic City, N. J., on June 15 and 16. Law Notes for August will contain further particulars.

Death of Iowa Jurist.—Emlin McClain, former chief justice of the Iowa Supreme Court, died suddenly at his home at Iowa City, Iowa, on May 25. For the past two years Judge McClain had been dean of the college of law of the University of Iowa.

Chief Justice of Texas Dead.—Chief Justice Thomas J. Brown of the Texas Supreme Court died at Greenville, Tex., on May 26, aged 80. Judge Brown had been on the supreme bench for twenty-two years and for the past five years had been chief justice.

Maine Lawyer Dead.—Charles F. Libby, who was president of the American Bar Association in 1909-10, died on June 3 at Portland, Maine. He had served as mayor of the city, president of the state senate and president of the board of overseers of Bowdoin College.

Appointed to Bench in Florida.—Governor Park Trammell of Florida has made the following appointments to the bench: S. J. Hilburn of Palatka to be judge of the fourth judicial circuit; DeWitt T. Gray of Jacksonville to be judge of the Duval court of record; O. K. Reeves of Bredentown to be judge of the new sixth judicial circuit.

Death of Washington Judge.—Judge John E. Humphries of the Superior Court of Washington died at Seattle, Wash., on May 29, aged 63. Judge Humphries in July, 1913, drew nationwide attention by imprisoning one hundred Socialists for contempt of court in signing a paper denouncing him for issuing an injunction against street speaking.

Changes in Texas Supreme Court.—Associate Justice Nelson Phillips has been elevated to the position of Chief Justice of the Texas Supreme Court to fill the vacancy caused by the death of Chief Justice Thomas J. Brown. The vacancy thus caused in the ranks of associate justices has been filled by the appointment to the bench of J. E. Yantis of Waco.

The American Institute of Criminal Law and Criminology will hold its annual meeting at Salt Lake City on August 16. Reports from committees and the annual address of President Robert Ralston will be the chief items of business. A report will also be submitted from the Society of Military Law, a branch of the Institute. The annual meeting of the Society of Military Law will be held in Salt Lake City on August 17.

CHANGES AMONG FEDERAL ATTORNEYS.—Sherman T. McPherson has resigned as United States attorney for the southern district of Ohio and President Wilson has appointed Stuart R. Bolin of Columbia, Ohio, to fill the vacancy.—Joseph C. Breitenstein of Canton, Ohio, has been appointed Assistant United States attorney for the northern district of Ohio.—John L. Neeley of Tallahassee, Fla., has been appointed United States attorney for the northern district of Florida to fill the vacancy caused by the resignation of Phillip D. Beall.

ILLINOIS STATE BAR ASSOCIATION.—As mentioned in last month's LAW NOTES, the annual meeting of the Illinois State Bar Association was held at Quincy, Ill., on June 11 and 12. The program included the address of the President, Edward C. Kramer, of East St. Louis, on "Constitutional Revision," and other addresses as follows: "Chicago and the Constitution," by George T. Buckingham; "The English Constitution," by Alexander P. Humphrey of Kentucky; "The Judicial Power of the United States," by Frederick Green; and two special addresses on "The Constitution" by Lawrence Y. Sherman and James Hamilton Lewis. The program of the joint session with the Illinois State Society of the American Institute of Criminal Law and Criminology is given elsewhere in this column.

THE ILLINOIS STATE SOCIETY OF THE AMERICAN INSTITUTE OF CRIMINAL LAW AND CRIMINOLOGY met in annual convention at Quincy, Ill., on June 10 and 11. The subject of the President's address, delivered by George T. Page of Peoria, was "The Criminal, Why Is He and What We Do to Him." Edwin R. Keedy, Professor of Law at Northwestern University Law School, Chicago, gave "A Brief Review of the Criminal Cases in the Supreme Court for the Past Year." At a joint session of the society with the Illinois State Bar Association the following addresses were delivered: "The Findings and Recommendations of the Chicago Committee on Crime," by Charles E. Merriam, Professor of Political Science at the University of Chicago and Chairman of the Chicago Crime Committee; "Psychological Tests and the Administration of Justice," by Dr. George Ordahl, State Psychologist, Lincoln; "Is the Psychologist an Aid to the Court in the Administration of Justice?" by William N. Gemmill, Judge of the Chicago Municipal Court.

GEORGIA BAR ASSOCIATION.—The thirty-second annual meeting of the Georgia Bar Association was held at St. Simon's Island, Ga., on June 3, 4 and 5. The official program follows: President's address, by Samuel E. Bennet of Albany; annual address on "Commercial Land Titles," by Eugene C. Massie of Richmond, Va.; address on "The Georgia Tax Equalization Act and Its Operation," by John C. Hart of Union Point, state tax commissioner; paper on "Specimens of Judicial Humor Found in the Georgia Reports," by Harry S. Strozier of Macon; address by Judge E. E. Cox of Camilla; paper on "The Practice of Law in the Georgia Mountains," by John Henley of Atlanta; symposium on "The Georgia Laws Regulating Marriage and Divorce and Their Administration, the Defects and Suggested Remedies," by Lamar Rucker of Athens, John B. Harris of Macon, Boozer Payne of Elberton, and A. B. Conger of Bainbridge; address on "The Geneva Award and Its Present Application," by William M. Howard of Augusta; paper on "The Federal Reserve Banking System," by Hollins N. Randolph of Atlanta, general counsel Federal Reserve Bank; paper on "The Miscarriage of Justice," by A. W. Cozart of Columbus; paper on "Workmen's Compensation Laws," by L. W. Branch of Quitman. Officers for the ensuing year were elected as follows: President, George W. Owens, Savannah; first vice-president, William H. Barrett, Augusta; second vice-president, Z. B. Rogers, Augusta; third vice-president, S. M. Turner, Quitman; fourth vice-president, J. M. Bulah, Sommerville; fifth vice-president, T. G. Hofmayer, Albany; secretary, Orville A. Park, Macon; assistant secretary, Harry S. Strozier, Macon; treasurer, Z. D. Harrison, Atlanta.

English Notes.

JUDICIARY CHANGES.—Lord Haldane has retired from the office of Lord Chancellor and has been succeeded by Sir Stanley Buckmaster.—Mr. Justice Molony has been appointed a Lord Justice of Appeal in Ireland, in succession to the late Lord Justice Moriarty. Mr. Molony was called to the Irish Bar in 1887, and in 1900 to the English Bar by the Middle Temple.

ADDRESSING THE SOVEREIGN.—The letters addressed by M. Venizelos, the late Prime Minister of Greece, to the King of Greece in explanation and defense of his policy are in the first person to the sovereign in the second person. The mode, however, in which British ministers address the sovereign in epistolary communications is peculiar. It is the established etiquette in England for the minister to use the third person and to address his sovereign in the second. When or by whom this epistolary form was introduced is unknown. Mr. Grenville's letters to George III. in 1765 are in the ordinary form. But twenty years later we find Mr. Fox employing the phraseology which is now in use: "Mr. Fox has the honor of transmitting to your Majesty the minute of the Cabinet Council assembled at Lord Rockingham's, 18th May, 1782." Mr. Gladstone's letters to the sovereign usually began thus: "Mr. Gladstone's humble duty to your Majesty."

GAS AS A WEAPON.—Sir John French's contention in his recent dispatch that the use of projectiles diffusing asphyxiating and deleterious gases has been forbidden by declaration adopted by the First Hague Peace Conference and signed by Great Britain and Germany is incontestable. The First Hague Peace Conference adopted a declaration signed on the 29th July, 1899, by sixteen states—namely, Belgium, Denmark, Spain, Mexico, France, Montenegro, Holland, Persia, Portugal, Roumania, Russia, Siam, Sweden, Norway, Turkey and Bulgaria—stipulating that signatory Powers should in a war between two or more of them abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases. Austria-Hungary, China, Germany, Japan, Luxembourg, Nicaragua, Servia, Switzerland, and Great Britain acceded later. Great Britain withheld assent in the first instance only because the conference was not unanimous, but acceded to the declaration in 1907, while the United States is still dissentient on the ground that enough is not yet known as to the effect of such projectiles to decide whether they are more or less inhumane than other methods of warfare.

AN IMPERIAL BAR ASSOCIATION.—The possibility of forming an Imperial Bar Association forms the subject of an interesting note in the last number of the *South African Law Journal*. It is regarded as "a gigantic scheme" and a "great ideal." The suggestion is not so large, perhaps, as it seems, and it is admitted that "there is no reason why an Imperial Bar Association should not be formed with similar objects" to those of the American Bar Association. An Imperial Bar Congress is proposed as a preliminary to the formation of an association. In South Africa, as in England, the two branches of the profession are distinct, so that there would be no difficulty in sending representatives, but Canada and Australia would expect to find the Law Society taking part in the deliberations. It would

be a helpful preliminary to any discussion of the way in which the original proposal would be carried out to have a definite statement of the existing organization of the legal profession in the different parts of the British Empire. In the meantime the St. Louis Congress of Lawyers suggests the analogous gathering for an assembly which might do most valuable work as soon as we are free to consider problems of imperial co-operation in which law is bound to have an important part.

COTTON AS CONTRABAND.—The correspondence has been published in the press between the Attorney-General and Mr. W. S. Hopkins, the secretary of the Conference of Chemists and Engineers, in which Sir John Simon maintains the correctness of the view that cotton should not be declared absolute contraband on the ground that a blockade stops all articles whether they are contraband or not, and that the declaring of cotton to be contraband would not have any practical consequences whatever so far as Germany is concerned. Cotton was, no doubt, declared absolute contraband during the American Civil War by the Federal Government on the ground that it took the place of money, while the Confederate Government expressly prohibited the sale of cotton during the Civil War except to furnish the sinews of war. These proceedings cannot, however, owing to the peculiarity of the circumstances, be regarded as a precedent for the declaring of cotton to be contraband. Raw cotton should not under ordinary circumstances be considered absolute contraband. For this reason Great Britain protested when Russia in 1904, during the Russo-Japanese War, declared cotton in general as contraband, since this action of Russia seemed to be directly in conflict with the principles laid down by Lord Stowell in the case where the conveyance of cotton is most likely to occur, that of cotton shipped on account of American cotton growers in American vessels: (Twee Juffrewen, 4 Rob. 242). Even when the ship did not belong to the same country as the neutral owner of the product transported, Sir William Scott refused to confiscate the cargo when it consisted of the produce of the country of the neutral on whose account it was shipped. Russia eventually altered her standpoint and declared cotton conditional contraband only.

LEGITIMATION OF CHILDREN BY SUBSEQUENT MARRIAGE.—A resolution placed on the notice paper of the House of Commons by Mr. Dundas White, for discussing which an early day is to be assigned, declares that the principle of the legitimation of children by the subsequent marriage of their parents, which is embodied in the civil law and the canon law and is part of the law of Scotland and of some British dominions and of other countries, should be applied throughout the United Kingdom, at least as regards children born subsequent to the commencement of the war. The legitimation of antenati advocated by the resolution is contrary to the trend of the English law, which has been from the first opposed on this point to the civil and canon laws on grounds far other than those stated by Blackstone, who endeavors to explain and justify the severity of the law with elaborate sophistry as based on the highest moral considerations. The antenati are still retained in a state of illegitimacy after the marriage of their parents simply because such legitimation might render the succession to realty of the eldest son a matter of dispute and uncertainty. The great contest between the canonists and civilians and common lawyers on this subject was decided by the Statute of Merton (20 Hen. III, c. 9) when the peers refused to enact that children born before marriage should be esteemed legitimate. It has, indeed, been decided that, even where born in a foreign country the law of which allows an antenatus to be legitimated, he is nevertheless incapable of inheriting land in England.

LIABILITY FOR TORTIOUS ACT OF THIRD PERSON.—A vista of a somewhat alarming character to shopkeepers in particular—not to mention other classes of persons in general—is opened up by the decision of the Divisional Court, consisting of Justices Avory and Rowlatt, in the recent case of Wheeler *v.* Morris, 112 L. T. Rep. 412. Reference to the report will convince the reader that what befell the sunblind in that case may, and in all likelihood does, happen to such property almost every day and certainly everywhere. Sunblinds suspended outside shop premises, and overhanging the pavement, are in universal use. And the same are nearly always extended by means of projecting arms or rods. The existence of such "horizontal bars" is apt to incite a section among the passers-by—mischievous lads and boys whose irrepressibility is a constant source of annoyance to others traversing the public streets—to the performance of gymnastic feats thereon. To jump up and catch hold of such rods doubtless proves to them an irresistible attraction. That the strain thereby placed on the blind may ultimately draw the screws out of the woodwork, and so cause the whole apparatus to drop and injure anyone thereunder, is only to be expected. But that a shopkeeper can be held liable for such an injury will probably come as a revelation and shock to most of the fraternity. Well may it be urged that a shopkeeper in such circumstances as those in the present case is not guilty of negligence, inasmuch as it is not in any way due to his own conduct, but to the tortious act of some third party, that the injury has occurred. Not negligence on the part of the railway company, but the reprehensible conduct of some boys who trespassed on the line and played with the trucks and brake van standing on a siding on a gradient and with the couplings of those vehicles, was deemed by the Court of Appeal to be the effective cause of the accident in McDowall *v.* Great Western Railway Company, 88 L. T. Rep. 825; (1903) 2 K. B. 331. That authority was relied on, it will be observed from the report, in the present case. The shopkeeper in erecting the sunblind was guilty of no negligent or unlawful act. And in the cases where a defendant has been made liable for the act of a third party—all of which were reviewed in Clark *v.* Chammers, 38 L. T. Rep. 454; 3 Q. B. Div. 327—he had himself been guilty of some act which was in itself negligent. The view, however, that the shopkeeper in the present case ought to have contemplated and guarded against the possibility of his sunblind being interfered with by passers-by was that on which the County Court judge based his judgment. And the Divisional Court could not see their way to holding in this admittedly difficult case that there was no evidence on which His Honor could come to the conclusion that there was a risk of that description. Hence their decision, startling as it may seem, and its application will not necessarily be confined to the property of shopkeepers.

UNTRUE STATEMENTS IN COMPANY'S PROSPECTUS.—A maxim analogous to that of *caveat emptor* should be vividly present to the mind to every individual before he yields to the solicitations of the promoter of a company to become a director thereof and to sign its prospectus. That is certainly the conclusion that one feels much inclined to deduce from the decision of the learned judges of the Court of Appeal in the recent case of Adams *v.* Thrift. Their lordships frankly adopted the view that was expressed in that case by Mr. Justice Eve. His lordship gave it as his opinion that the uncorroborated statement of a vendor and promoter offered by themselves no reasonable ground for believing them to be true. But Lord Cozens-Hardy, M.R., uttered an even stronger warning. A vendor and promoter is the very last person, said the learned judge, whose statements, uncorroborated, ought to be relied upon by an intending director as justification for saying that he had "reasonable ground to be-

lieve" that a statement in the prospectus of a company was true, Such is the language of sect. 84, sub-sect. 1 (*a*), of the Companies (Consolidated) Act 1908 (8 Edw. VII, c. 69). That subsection replaces sect. 3, sub-sect. 1 (*a*), of the Directors' Liability Act 1890 (53 & 54 Vict. c. 64). Liability to pay compensation to all persons who subscribe for any shares or debentures in a company on the faith of a prospectus, for the loss or damage they may have sustained by reason of any untrue statements therein, is evaded if such belief is capable of being proved. In the present case, no charge of fraud or dishonesty was made against the directors. They foolishly relied upon the verbal representations of the promoter of the company, who was subsequently appointed as its managing director. They "were the victims," in the trenchant words of Mr. Justice Eve, "of the unscrupulous individual who, in accordance with long-established precedent, is conspicuously absent when the tale of his rascality comes to be told." The suggestion was made in the course of the argument that no director could discharge the onus of proving that he had "reasonable ground" for believing a statement to be true without showing that he had separate advice from his own lawyer, his own accountant, and, maybe, his own patent agent. Mr. Justice Eve attached no importance to that supposed direful result of the requirements of the subsection; neither did the Court of Appeal. The learned judge's reading of those requirements was thus formulated: "The existence of a reasonable ground for belief in the truth of any statement is established by the proof of any facts or circumstances which would induce the belief in the mind of a reasonable man, that is to say, a man who stands midway between the careless and easy-going man on the one hand and the over-cautious and straw-splitting man on the other." And since the Master of the Rolls characterized Mr. Justice Eve's judgment as "common sense and very good law," it may be taken that that dictum met with the approval of the Court of Appeal. The design of the subsection was never, perhaps, better expounded.

Obiter Dicta.

A FLORAL CONTROVERSY.—Violet *v.* Rose, 39 Neb. 660.

NOT A REAL CONTROVERSY.—Moot *v.* Moot, 108 N. E. 424.

LEAVING THE MATTER AT LARGE.—Damm *v.* Damm, 109 Mich. 613.

AND THEN SOME IN AMERICA.—"An Act of Parliament can do no wrong, though it may do several things that look pretty odd." Lord Holt in London *v.* Wood, 12 Mod. 669.

A PUZZLE.—"I neither concur nor dissent to the opinion of my learned associate, written in this case," etc.—Per Woodson, P. J., in Brinkerhoff *v.* Juden, 255 Mo. 730. *Quære,* What did he do?

SPLITTING THE INFINITIVE FORCIBLY.—"The power of removal does not include, or have incidental thereto, power to forcibly install a successor." See syllabus to Ekern *v.* McGovern, 154 Wis. 157.

MISNOMERS.—Things are seldom what they seem. For instance, the defendant in Flatauer *v.* Loser, 211 N. Y. 15, won her appeal, and the defendant in Aldrich *v.* Amiss, 178 Ind. 303, no matter how he expected things to go, won all the way through the courts.

HE OUGHT TO KNOW BETTER.—"The writer of this opinion knows no reason why an old man has not the same right to be infatuated with a woman as a 16-year-old boy or a 30-year-old man."—Per Rosser, C., in Hogan *v.* Leeper, 37 Okla. 663.

A PLEA FOR GRAPE JUICE.—"Ordinarily one in an intoxicated condition is not a safe bearer of the olive branch, and if he goes to his enemy to bury the hatchet, he should be careful not to carry the hatchet with him." Per Nunn, J., in Hixson *v.* Slocum, 156 Ky. 487.

SATISFIED.—David Fletcher Hunton, dean of the legal profession of Western Michigan, recently passed his one hundred and first birthday. Not only has Mr. Hunton made a brilliant success at the bar, but he has successfully wooed the poetic Muse in his declining years. Not long ago he wrote a poem which he called "I'm Satisfied." While as an entirety it is excellent above the average, we may be pardoned for singling out the following stanza for particular mention:

> "I've had the love of women fair,
> And I've enjoyed them everywhere.
> With four wives I have allied,
> The good Lord knows I'm satisfied."

A DISCOVERY.—We have at last discovered why railroads and other kinds of "big business" are down on a certain ex-president of the United States. It seems that if a railroad happens to kill a man, the amount it has to pay in the way of damages depends largely on the size of his family. At least, no other deduction can be drawn from the following statement of the Texas Civil Court of Appeals: "We are not disposed to hold that a verdict of $28,500, to be divided among the eight persons, was excessive. The probabilities are that each one would have received more from the deceased than was allotted to him or her. Considering each sum allowed to each appellee, it does not appear to be excessive. It may be unfortunate for appellant that the size of the family was such as to preclude any thought of race suicide and measures up to the Rooseveltian standard; but under the facts of this case we would not be justified in holding that the life of Edward Pingenot was not worth to the mother, the wife, and the six minor children the sum given them by the jury."—See Galveston, etc., R. Co. *v.* Pingenot, 142 S. W. 96.

FOOLISH QUESTIONS.—
"Oh, I would like to know"—to the lawyer man says I,
"Why laws are good for nothing if you fail to dot an i;
Why crimes will go unpunished if you do not cross a t."
"Oh, it's mighty easy askin'," said the lawyer man to me.
"Oh, I would like to know"—to the lawyer man said I,
"Why Jones who stole the widow's mite and to the pen should hie
Lives now in style, and just because the steno dropped a 'the.' "
"Oh, it's mighty easy askin'," said the lawyer man to me.
"Oh, I would like to know"—to the lawyer man says I,
"Why Smith who forged, and Brown who robbed, and Green who votes did buy,
All these were freed and others too on a technicality."
"Oh, it's mighty easy askin'," said the lawyer man to me.

"But I would like to know"—to the lawyer man says I,
"Why justice doesn't govern—kindly give an answer—why?"
"If laws were clear and always just, how would I get my fee?
Now cease your foolish questions," said the lawyer man to me.
M. M., in St. Louis (Mo.) *Post Despatch.*

SOME OF JUDGE LAMM'S PHILOSOPHY.—"Counsel hazard the suggestion that 'what money they had was the test, not what they spent.' So? There is quicksand there, and one should sound at every step for firm ground. Does the pecuniary value of a father's life to his household hinge on the cash he has and not on what uses he puts it to—i. e., on what he spends for the household, in this case $1,200? The concept not only opens a philosophical vista for the mind's eye to gaze down, but provokes at least one inquiry, thus: Is a cheeseparing, close-fisted father who hoards like a miser of more pecuniary value to a mother and child than an open-handed, great-hearted gentleman whose earnings during life flow for his household as unchecked and ungrudgingly as does the love he bears them? There is a philosophy about keeping, as over against giving, hid away as a kernel in a nut in the epitaph on an old tombstone in Doncaster, Yorkshire, worth something on the thought, to wit:

'That I spent, that I had;
That I gave, that I have;
That I kept, that I lost.'"

See Powell *v.* Union Pacific R. Co., 255 Mo. 443.

A SUBPŒNA DUCES TECUM.—The Alumni Association of the Albany Law School recently had a reunion. The notices sent to the brethren were in the form of a *subpœna duces tecum* of which the following is a copy:

To "An Old Grad".....Greetings:

WE COMMAND YOU, that you postpone all business engagements, lay aside your car-fare to Albany, N. Y., pack your excuses in your dusty old suit-case, and appear in your proper person, dressed in your new Spring suit, before the COURT OF GOOD FELLOWSHIP on the NINTH of JUNE, 1915, at seven-thirty o'clock in the evening of that day, to testify and give evidence concerning your past life in a certain "RE-UNION" now pending in the said COURT between THE ALBANY LAW SCHOOL ALUMNI ASSOCIATION, Plaintiff, and YOURSELF, Defendant, on the part of the plaintiff, and that you bring with you, your wife, heir-ship, air-ship, submarine, automobile, or Ford, and produce at the time and place aforesaid certain retrospective memories of your "ALMA MATER," a definite desire to meet your brothers, young and old, who are doing a "Weston" stunt on life's broad, rocky highway, and also certain facial characteristics possessed by you to correspond (without expert testimony) with the likeness hanging on the walls of the A. L. S. now in your custody or control, and all other misdeeds and evidences, real or imaginary, which you have in your custody or under your wife's control concerning the premises. And for a failure to attend, you will be deemed GUILTY of a BREACH OF DISCIPLINE and liable to pay all losses or damages sustained thereby, by your class-mates aggrieved, and forfeit THE BEST TIME OF YOUR LIFE.

WITNESS, HON. WILLIAM P. RUDD, President Association of the Alumni of Albany Law School, the twenty-ninth day of May, in the year of our Lord one thousand nine hundred and fifteen.

Wm. R. Whitfield,
Secretary.

JUSTICE AS SHE IS ADMINISTERED IN MONTANA.—The following copy of a page of the docket of a justice of the peace of Cascade County, Montana, tells its own story:

STATE OF MONTANA,
vs.
JOHN ———.

June the 17th 1905 personally appeared before me the 17th day of June 1905 ———— who being duly sworn complains and says that one John ——— is running a boarding house without a license. Warrant isued and Defendant arested by ————. Defendant araigned and was mad for being arested and said he would not take a license he would not give me time to read the complaint nor the law to him but walked out he came back and said he would pay for the license but would not pay for the costs of court. I called up the Treasurer and explained the case to him about the costs he said give him 10 days in the pen. Defendant came again and called me a thief and a robber and every name but a gentleman. I sent ————, after him and sentenced to 20 days in county jail 10 days for contempt of court and 10 days for not the costs. His wife came to my house that night crying and said she would pay the costs and not send him to jail I told her I might change my mind in the morning. I let him out on parole for his good beheivur for 4 months costs of courts paid by Mrs. ———. $4.00

Costs of Court	2.50
Costable	1.50
Total	4.00 paid

HEARSAY EVIDENCE.—No better illustration of the absurdity of some of our rules of evidence, particularly the hearsay rule, has come to our attention in recent years than the following actual occurrence in the trial of the case of the United States *v.* William Y. Barnett et al., in the United States Court for the Eastern District of Oklahoma, at Muskogee, early in June. One of the questions in the case was whether Judy Barnett, a Creek Indian, was living or dead on April 1, 1899. After the institution of the suit William Y. Barnett, a son of said Judy Barnett, died. The Government placed a witness named McGilbray on the stand for the purpose of proving by him that William Y. Barnett had stated in the year 1911 that Judy Barnett died on January 17, 1899. McGilbray testified that William Y. Barnett could not speak or understand the English language, and that on a certain occasion in 1911 he had acted as interpreter for one Bliss who desired to know from said William when Judy died, and that said William had stated through the interpreter to said Bliss the date of said Judy's death. This question was then put to McGilbray: "What did William say was the date of her death?" Counsel for the defendants objected to this question on the ground that it was hearsay. This was at 3:30 o'clock in the afternoon, and the court heard argument from counsel until 5 o'clock, then adjourned until 10 o'clock the next morning to give counsel an opportunity to produce authorities. The next morning at 10 o'clock counsel for the Government brought six books into the court room and counsel for the defendants twelve books. Counsel for the defendants thereupon presented their authorities with a lengthy discussion, and counsel for the Government responded, presenting their authorities, whereupon the court overruled the objection and directed the witness to answer. The question was read to the witness, whereupon he answered, "I don't remember."

Law Notes

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CONTENTS

Is There a War in Europe?

A DILIGENT explorer in the wilds of Borneo might, perchance, if he were able to speak the native lingo, discover a poor untutored aborigine who was still unaware that the greatest of the world's conflicts is now being waged in Europe, but it is doubtful if there could be found in the United States a man, woman or child who has reached years of understanding who is not thus informed. Nevertheless, to satisfy a New York city judge on this point so that a case before him could proceed to trial on its merits it recently required the production of documents properly certified by the State Department at Washington to the effect that this government had been notified of the existence of a state of war in Europe, this procedure, of course, involving a prolongation of the litigation and an increase in the costs. A suit was pending in which one of the parties pleaded that he was prevented from carrying out a contract by causes for which he was in no wise responsible, to wit, a war between Germany, Austria and Turkey on the one side and England, France and various other European powers on the other. The lawyer for the other side demanded proof of this, and the presiding judge refusing to take judicial cognizance of the fact ordered its production. In support of his action there seems to be one direct authority, *Dolder* v. *Lord Huntingfield,* 11 Ves. 283, 32 Eng. Reprint 1097, wherein Lord Eldon in 1805, without venturing any particular reason therefor, obliged a litigant to prove that France was at war with Austria. On that case as a basis we also find it laid down as a general proposition in Wigmore on Evidence (vol. iv, § 2574), that "the external political facts of international affairs, as distinguished on the one hand from the common international law and on the other hand from the domestic political facts of the forum of the court, cannot be said to be made the subject of judicial notice." If these authorities are to be considered as controlling on a court, the result is the exaltation of a rule of law above the sense and reason of the judge himself, the jury, the very attorney, doubtless, who demands the proof, and in fact of every one present at the trial. By the production of proof of such a notorious fact no useful purpose is served, but in the eyes of the laity at least, to whom, in the words of Alexander Pope, "fine sense and exalted sense are not half so useful as common sense," such a requirement renders the administration of the law little short of ridiculous.

Judicial Notice.

THERE is, as every lawyer knows, a large class of facts the establishment of which requires no proof, because they are the subjects of judicial recognition. Of this great variety of facts thus "judicially noticed" some are in reality part of the law of the land, others relate to the organization and duties of the court itself, with which of course the court is presumed to be familiar, and a still larger class is composed of facts which for their acceptance without proof are dependent solely on the principle of common and general notoriety. This third class is not subject to an exact classification but embraces a wide range of matters touching on almost every department of human knowledge, and the boundaries of its domain are constantly being extended in response to the call of convenience and expediency, so long as the determining characteristic, common notoriety, is present. That a state of war exists among various nations in Europe is certainly as well if not more widely known than the general use of the demand stack, or the straight stack spark-arrester, the status of the Isle of Cuba, or the fable of "the frozen snake," all of which have been held to be proper subjects of judicial notice. True, the present war is a matter occurring beyond our territorial jurisdiction, but that alone is not determinative. Generally notorious facts of foreign history will be noticed, as that Napoleon I. established an empire and died in St. Helena, or that Charles XII. was the most famous king of Sweden. And the fact that the historical occurrence noticed is ancient or contemporaneous does not seem to be material. Thus, judicial notice has been taken of the fact that the Boer War was in progress during the year 1901. (*Dowie* v. *Sutton,* 227 Ill. 183, 81 N. E. 395.) Is the fact that the war in question is still in progress a logical distinction? However, the distinction between a foreign war and one between the domestic government and a foreign power, to prove which no formal evidence is required (Maclane's Trial, [1797] 26 How. St. Tr. 797; *R.* v. *De Berenger,* 3 M. & S. 67), has been intimated to lie in this, that in the latter case the war is not only notorious but is also the result of executive action, and in such cases the courts take notice of the acts of their own executive with reference thereto. But since courts recognize generally the public acts of high officials, and proclamations by the chief executive are of such general notoriety that they may be judicially noticed, does it not seem that the various proclamations of neutrality published from time to time by the President and necessarily including a recognition by this government of the fact that a state of war exists in Europe would furnish the additional reinforcement to the element

of common knowledge required by this view? While it would seem that in the exercise of his discretion the New York judge might well have taken cognizance of the existing war, nevertheless in view of the authorities his act can be said to represent at most merely an excess of judicial caution; and at least he erred on the side of safety.

Our Rules of Evidence.

One who reads with an impartial mind many hundred appellate court opinions every year cannot but be impressed by the number of judgments which are reversed because of violations of technical rules of evidence, and the equally great number wherein it is obvious that a full consideration of the merits was prevented by the enforcement of those same rules. Is it not a *reductio ad absurdum* that we have established for our public investigations of fact a system of rules which no individual, however judicial his temperament, would ever think of adopting if charged with the responsibility of ascertaining privately the truth of the same issue? Could there be a greater travesty than to extol as the consensus of human wisdom and experience rules which are disregarded by all men in the most important affairs of their own lives? Nor is such a practice excused by a want of precedent for a contrary procedure. Admiralty courts and commissioners of patents, to say nothing of legislative committees, ignore the rules of evidence with no cataclysmic result. This fact brings out rather clearly the true source of the rules of evidence—a distrust of the intelligence of juries, which is traditional from monarchical days and which should have expired with the divine right of kings. The result often has been to make of the trial of an issue of fact a gladiatorial combat in which victory is awarded not to the just cause but to the most skilful wielder of the artificial weapons of proof.

Prof. Wigmore's Suggestions.

In a preface to the recently published supplement to his work on evidence Prof. Wigmore considers at some length the faults of our system of evidence and their cure. In so doing he is distinctly less radical than one would expect from his past dire assaults on established nomenclature. While declaring that "a complete abolition of the rules is at least arguable," he regards it as beyond the realm of possibility, for the reason, among others, that our trials are so entirely in the control of men imbued with those rules that the practice of the present rules would survive a fiat abolishing them. Coming to the corrigible faults of our system he asserts them to be three, "inflexibility," "exaggeration of details" and "exaggeration of errors." To remedy the inflexibility of the system, he proposes a threefold remedy: (a) A power in the trial judge to dispense with a rule of evidence unless there is a bona fide dispute as to the fact which the evidence tends to prove or as to the danger which the rule aims to safeguard. (b) That the decision of the trial judge, while reviewable as to the *tenor* of a rule of evidence, shall be final as to its *application*. (c) That the trial judge shall have the right to express to the jury his personal opinion as to the weight of the evidence. As to "exaggeration of details," while recognizing the prevalence of the evil and the need that it be minimized Prof. Wigmore says: "What specific measure could avail to this end we are unable to suggest." To rectify exaggeration of errors, he recommends a real "harmless error" law, not one which begs the question by leading the appellate tribunal to speculate as to whether the error did in fact affect a substantial right or as to what the jury might have done. "The sound form," he says, "requires the appellate court to determine according to what the jury *should* have done."

But running through all these suggestions, excellent enough perhaps as palliatives, is the same assumption that a jury must be safeguarded from error and imprudence by some superior order of intelligence. They miss the fundamental truth of democracy that the highest justice which fallible humanity can attain is the common conscience and common sense of common men. In Prof. Wigmore's concluding paragraph is, however, a glimpse of idealistic insight. He says: "No reform of rules of evidence will ever of itself, i. e. as an improved rule of law, accomplish *much* in promoting actual justice. It may remove an intellectual error from our records. And it may of its own force effect some good for some time. But on the whole its effect must depend upon its surrounding conditions and *their* coincident advancement. The administration of justice, being a human affair, is not very unlike the human body. The perfect operation of any one organ is dependent more or less on the general conditions of the rest of the body. And the system of evidence is dependent upon procedure in general, upon the organization of courts, upon the personnel of the judiciary and of the bar, upon the human nature of witnesses, and upon the temper of the community in wanting and supporting a high and intelligent standard of justice. Let us therefore expect that the system of evidence, on the whole, will most readily improve when the men who administer it also improve and the system of justice as a whole advances. Sound rules of evidence, in short, are as much a symptom as a cause of better justice."

Government by Receiver.

A current press report states that creditors of a city in one of the southern states have applied for a receiver to take charge of the fiscal affairs of the city. The application challenges attention not only by its novelty, but by the legal questions which it suggests. Is it possible to displace a constitutionally elected officer by a judicial appointee without infraction of the fundamental principles of self government? What limit, other than the discretion of the appointing judge, is imposed on the power of such an appointee? A few years ago a magazine fictionist exploited a plot wherein a coterie of bondholders aided by a subservient judge took possession of the government and finances of New York City by the expedient of a receivership. Is this to be another instance in which the novelist has proven himself a prophet? It is probable, however, that this unique application will receive but scant judicial consideration. It is exasperating enough, no doubt, to the creditors to be kept out of their money by official mismanagement. But one of the inevitable consequences of a recognition of the right of popular self government is the right of the people in their sovereign capacity to make mistakes without being answerable to anyone. There is a county in Missouri which has for over a decade resisted the enforcement of a federal decree for the payment of certain county bonds. The bonds were issued in aid of a rail-

road, the railroad never came, but the genial promoter had lost no time in getting the bonds into the possession of a "bona fide" purchaser. It is said that the amount of the bonds with interest now equals the taxable value of all the property in the county. Successive county boards have spent their entire terms in jail for contempt rather than order the payment of the bonds. There is no record that a receiver was ever applied for in that case, though the temptation to some drastic action must have been considerable.

Workmen's Compensation Acts as Applied to Railroads.

THE Illinois Supreme Court in a decision recently handed down holds that the Workmen's Compensation Act of that state has no application to railroad employees engaged in interstate commerce, but that the remedy in all cases of injury to such employees is under the federal Employers' Liability Act. A contrary result was reached in an even more recent decision of the New York Court of Appeals. In *Minneapolis, etc., R. Co.* v. *Industrial Commission,* 153 Wis. 552, Ann. Cas. 1914D 665, it was held that "all" railroad employees came within the purview of the Workmen's Compensation Act, but the claimant in that case was not engaged in interstate commerce at the time of his injury and the question of conflict with the federal statute was not considered. The holding of the Illinois court is in line with the repeated decisions of the federal supreme court that the remedy afforded by the federal Employer's Liability Act is exclusive as to all persons within its purview, but the question is scarcely on all fours with that involved in those decisions. The question involves the rights of such a large number of employees that it is to be expected that an authoritative federal decision on the subject will soon be invoked. As a practical matter it would be exceedingly desirable if all railroad employees could be brought within the state law. As at present construed the test of the applicability of the federal statute is the nature of the work on which the employee is engaged at the time of his injury. (*Illinois Cent. R. Co.* v. *Behrens,* 233 U. S. 473, Ann. Cas. 1914C 163.) To avert the necessity of resting a case wholly on the decision of this somewhat difficult question a practice has grown up of suing in general form for negligence, and asking a submission of the case to the jury to be determined under the federal act or the state law accordingly as the injured employee is found to be or not to be within the terms of the act. (*Grow* v. *Oregon Short Line R. Co.,* 44 Utah 160, Ann. Cas. 1915B 481.) But where the alternatives are a suit under the federal act or a claim under the Workmen's Compensation Act, this practice is no longer feasible, and the result must frequently be the dismissal of a meritorious claim because of an error in choosing the remedy. This may be inevitable as a matter of law, but it certainly runs counter to the spirit of modern personal injury legislation.

State-wide Prohibition.

ALABAMA is again trying out state-wide prohibition. Some years ago she made the attempt, but confessed failure by repealing the statute. This time, however, she has a fairer chance of success by reason of the very drastic terms of the new law, though it contains one rather weakening feature in that transportation companies are not absolutely forbidden to deliver liquor in the state, but are merely prohibited from delivering to any person over two quarts of liquor or more than twelve dozen bottles of beer a month—an allowance, forsooth, sufficiently liberal to accommodate the thirst of the average citizen. It may be that the failure to make the inhibition against shipments absolute was due to fear for the constitutionality of the law. But if the decision of the Circuit Court of Appeals in *West Virginia* v. *Adams Express Co.,* 219 Fed. 794, is sound, it would seem that such a fear is ungrounded. In that case it was held that the Act of Congress of March 1, 1913, known as the Webb-Kenyon Act, withdrew federal protection from interstate commerce in liquors shipped into a prohibition state. The West Virginia statute is probably even more drastic than the Alabama law, and its failure to prohibit delivery of liquors by transportation companies is largely compensated by the holding in the case cited that the express company would be enjoined from delivering a consignment of liquor shipped into the state in violation of the law. The decision is a remarkable one in many respects, but under the settled construction of the interstate commerce clause there seems to be no reason why Congress has not the power to outlaw interstate commerce which is subversive of the policies of the several states with reference to a matter so clearly subject to their police power as intoxicating liquors.

Eugenic Divorces.

IT seems worthy of remark that the modern tendency towards eugenics has found no expression in the divorce cases. Of course certain matters which would debar a matrimonial aspirant from a eugenic license have long been grounds for divorce or annulment, but the theory has always been based on the personal rights and relations of the parties, with practically no regard for the offspring and only a limited regard for the propagation of the species. Thus, while it is laid down that mental incapacity is ground for annulment, it seems that if a lunatic is clever enough to go through the ceremony he may marry, and this doctrine is coupled with the paradox that if he or she is incapable of begetting or conceiving another lunatic the marriage will be annulled. Again, prenuptial insanity and prenuptial impotency are grounds for annulment, but not so, generally, as to the same defects arising after marriage. Furthermore, a spouse may waive or condone grounds for divorce which render propagation little short of a crime. In short, the parties are first held bound under a doctrine analogous to that of *caveat emptor,* and then allowed to continue in the marriage relation if they so desire, regardless of whether they are capable of propagating the species or are fit to do so if able. Certainly it would seem that eugenic marriages will prove fruitless of benefit to the human race unless they are re-enforced by a corresponding change in the divorce laws. The personal privilege of husband and wife to indulgence of the marital rights must be subordinated to considerations affecting the next generation, or else all regulation of the original mating must prove futile. The sexual appetence is given for a purpose far removed from the individual pleasures of the husband and wife, and yet this purpose has been entirely ignored in the divorce laws. Does the awakening of the conscience of mankind to the enormity of past transgressions in uneugenic marriages mean that society will some day have the right of its own motion not only

to say that a man and woman are unfit to marry but that, having married, they may remain in that relation only so long as they continue to be fit?

Official Experts.

Once upon a time it was said by somebody—we refrain from giving credit through lack of time to verify the citation—that there are three classes of liars, viz., common liars, liars with a profane prefix, and experts. Far be it from us to subscribe to this classification, for we are sincerely assured that most experts are honest in their opinions. Yet even the tolerance of a lawyer towards advocatory partisanship is often strained by the readiness with which an expert may be found to give the required testimony. The Thaw case has furnished many examples of the irreconcilable conflict of expert testimony predicated on the same state of facts, and there are indications of a revulsion against this class of evidence as a whole, one manifestation of the public attitude being the suggestion of official experts. The latter remedy may be adopted, and may solve the problem. Certainly it would seem that it would have some efficacy, in that the element of personal bias will largely be eradicated. But the consoling feature of the whole problem is that the jury usually ignore most of the expert testimony and decide the case on the facts. Whether this is due to incapacity to understand the testimony or to recognition of the aforementioned classification, does not matter; for the fact remains that the verdict is generally a fair approximation of right, or that at least the expert testimony does little harm.

Communication Made to Judge as Privileged.

Can the judge of a juvenile court be compelled to disclose, as a witness in a criminal prosecution in another court, a communication made to him in his capacity as judge? This is the rather novel question that has arisen in Denver through the refusal of Judge Ben Lindsey, of juvenile court fame, to repeat at the trial of a woman for the murder of her husband the confidences of a child, the son of the accused, given in the juvenile court. Judge Lindsey contends that as judge of the juvenile court he acts in a peculiar capacity; that under the Colorado statutes and the common law he is the custodian of the confidences, the welfare, and the health and happiness of every child who is a ward of his court, and of every child against whom a complaint has been filed; and that to violate the confidence of a child given under such circumstances would be contrary to the doctrine of privileged communications and of public policy, and would jeopardize if not destroy the strength of the juvenile court. That anything which would tend to lessen the efficiency of such courts would be most unfortunate cannot be doubted, as it is generally admitted that the juvenile courts fill a much needed want. However, the judge is not without authority to support his contention. Though the decisions in the great majority of cases dealing with confidential communications between lawyer and layman are based on the relation of attorney and client, there is at least one case in which a communication made to a judge in confidence was held to be privileged. In *People* v. *Pratt,* 133 Mich. 125, 94 N.W. 752, a witness summoned to testify before a grand jury, fearing that they were about to investigate certain bribery charges with which he was connected, sought the advice and counsel of the presiding judge. Though told that he could not advise him further than that he should tell the truth and that he could not be made to incriminate himself and that he should employ counsel, he insisted on making a confession to the judge, stating that there were no lawyers in whom he had confidence. In a subsequent prosecution of the witness for bribery it was held that the communication was privileged and to compel the judge to disclose it was reversible error. The reasoning of the court in that case would seem to apply with peculiar force to Judge Lindsey's case, the court saying: "The reasons for regarding as confidential communications made in consequence of advice from an ordinary attorney apply with full force and are re-enforced by others, when that advice emanates from an attorney who is also a judge. The law protects these communications as confidential, because of the nature of the confidence which exists between the client and the attorney of his choice. That confidence is not diminished, but is increased, when the advice is given by the judge, authorized not merely to express an opinion, but to declare the law. . . . If, as a result of such advice, he receives the confidence of that person, the principles of public policy applicable to attorney and client require that confidence to be respected." The doctrine is also supported by Greenleaf (§ 254 *c.* 16th ed.) who declares that it is considered dangerous to allow judges to be called on to state what has occurred before them in court. Whatever may be the result, it is to be hoped that the usefulness of the juvenile court will not be impaired.

Liability of Prosecuting Attorney for False Imprisonment.

Not to discriminate in her dispensation of trouble, fortune has fastened on the district attorney at whose instance Judge Lindsey's arrest for contempt was procured, a suit for ten thousand dollars damages for false imprisonment. Just on what theory it is sought to hold a prosecuting attorney liable for false imprisonment does not appear, as it is well settled that when acting in his official or judicial capacity a prosecuting attorney is not responsible to an individual for a wrong he may have done in aiding and procuring his imprisonment. See *Hann* v. *Lloyd,* 50 N. J. L. 1; *Parker* v. *Huntington,* 2 Gray (Mass.) 124. And this has been held to be true even though his motive may have been malicious. *Griffith* v. *Slinkard,* 146 Ind. 117. That a recovery in such a case might not be without its salutary effect has often been admitted by the bar as well as the public, and it cannot be denied that anything that would bring public prosecutors to a truer realization of their duty is not without merit. As was said in *Hillen* v. *People,* 149 Pac. 250, a recent Colorado case: "It is greatly to be regretted that prosecuting officers so often forget that in the trial of a criminal case they represent the state, which demands not that the accused be convicted, but that justice be done. A prosecutor should act not as a partisan eager to convict, but as an officer of the court, whose duty it is to aid in arriving at the truth in every case. Occupying this quasi judicial position, he may not properly endeavor to exclude competent evidence, nor introduce that which is of doubtful competency. He owes a duty to the accused as well as to the state." Judging from the conduct of criminal cases in recent years one would say that the main if not the sole object of the prosecutor was to obtain a conviction, and it is to be feared that too often evidence favor-

able to the defendant is thrown into the discard. Certainly it is hard to imagine the modern prosecutor following up such evidence with a view to giving the accused the benefit should it prove to be of value to his defense. Not that a prosecuting attorney would endeavor to convict a person charged with crime, knowing or having good reason to believe him innocent; but when his efforts are expended entirely in one direction—that of securing evidence of guilt—he has no time to follow up clues that might lead to proof of innocence. Though the courts have long recognized this tendency to strive for a conviction rather than to secure justice, and have frequently called attention to it, it is almost too much to expect of human nature that there will be any change for the better, and the public prosecutor will doubtless continue in his "misapplied zeal, a mistaken desire to win." That this fact is recognized by the public and the bar is evidenced by the growth of the movement for the creation of the office of public defender, which presents the anomaly of one public officer whose duty it is to prevent the conviction of one accused of crime through the efforts of another officer paid by the public to secure his conviction.

CONFISCATION OF PROPERTY IN WARFARE.

The halcyon days when war was a profitable occupation seem to have passed beyond recall. Once upon a time there was profit not only for the individual—the soldier of fortune—but there was rich booty for the state as well. To-day the soldier has become a mere hireling, who serves during peace as well as war and receives no greater pay in face of the enemy than he does on the parade ground; while, as for the state, recent wars show that profit is out of the question. All participants emerge from the conflict burdened with debt and weakened from loss of lives. Not, however, that the plunder-loving instinct has given place to more moral ideals. It has not. Amongst the first acts of the nations now at war in Europe were levies on captured cities, confiscation of debts due by nationals to enemies, and the seizure and confiscation of tangible enemy property. Publicists and commentators have decried these acts for many years, but their observations have little weight with the military profession. Indeed the international law of the courts is very different from the international law of the military commander. After peace has been established the rules of the law of nations may be consulted and recognized in the judicial tribunals, but during hostilities there is only one rule: that of expediency. The general in the field seizes the person or goods of the citizen, regarding only convenience; but when the war is over and the justice of the seizure is presented to a court of claims the judges will be guided by the humane rules that have been formulated by the courts and publicists.

In early times every species of enemy property was confiscated as a matter of course. The Romans deemed such goods to be the spoil of the first taker, and even considered it lawful to enslave such nationals of the enemy as might be found within the state. Grotius, whose classic on the laws of war and peace appeared in 1625, adopted as the basis of his opinion upon this question the rules of the Roman law, but qualified them by more humane sentiments that began to prevail in the intercourse of mankind in his time. In respect of debts due to private persons, he considered the right to demand them as suspended only during the war, and as reviving with the termination of hostilities. Bynkershoek, who wrote about the year 1737, adopted the same rules, and followed them to all their consequences. Vattel, who wrote about twenty years after Bynkershoek, after laying down the general principle that the property of the enemy is liable to seizure and confiscation, established an exception in the case of real property held by the enemy's nationals within the belligerent state. Having been acquired by the consent of the sovereign, this is to be considered as on the same footing with the property of his own subjects, and not liable to confiscation *jure belli*. But he adds that the rents and profits may be sequestrated, in order to prevent their being remitted to the enemy. As to debts, and other things in action, he holds that war gives the same right to them as to the other property belonging to the enemy. Within the past decade the United States Supreme Court has repeated its earlier statement of the rule as follows: "It is sufficient that the right to confiscate the property of all public enemies is a conceded right. Now, what is the right, and why is it allowed? It may be remarked that it has no reference whatever to the personal guilt of the owner of confiscated property, and the act of confiscation is not a proceeding against him. The confiscation is not because of crime, but because of the relation of the property to the opposing belligerent, a relation in which it has been brought in consequence of its ownership. It is immaterial to it whether the owner be an alien or a friend, or even a citizen or subject of the power that attempts to appropriate the property. In either case the property may be liable to confiscation under the rules of war. It is certainly enough to warrant the exercise of this belligerent right that the owner be a resident of the enemy's country, no matter what his nationality."

The only enemy property that may not be confiscated, according to Vattel, is debts due by the sovereign to the enemy. "In reprisals," says that author, "the property of subjects is seized, as well as that belonging to the sovereign or state. Everything which belongs to the nation is liable to reprisals as soon as it can be seized, provided it be not a deposit confided to the public faith: this deposit, being found in our hands only on account of that confidence which the proprietor has reposed in our good faith, ought to be respected even in case of open war. Such is the usage in France, in England, and elsewhere, in respect to money placed by foreigners in the public funds."

But while the confiscation of enemy property always has been practiced by nations at war, there has been no recognition in recent times of a right to seize private property of pacific persons for the sake of gain. That learned commentator Chancellor Kent observed that such a seizure is a violation of the "modern usages of war." The Supreme Court established more than a century ago that enemy property found within the territory of a nation at the time of the declaration of war is not subject to seizure and condemnation as prize of war, unless some legislative act authorizes such a proceeding. The conclusion of the court was "that the power of confiscating enemy property is in the legislature, and that the legislature has not yet declared its will to confiscate

property which was within our territory at the declaration of war." In showing that the declaration of war did not, of itself, clothe the executive with authority to order such property to be confiscated, Mr. Chief Justice Marshall relied on the modern usages of nations, saying: "The universal practice of forbearing to seize and confiscate debts and credits, the principle universally received that the right to them revives on the restoration of peace, would seem to prove that war is not an absolute confiscation of this property, but simply confers the right of confiscation;" and again: "The modern rule then would seem to be that tangible property belonging to an enemy, and found in the country at the commencement of war, ought not to be immediately confiscated; and in almost every commercial treaty an article is inserted stipulating for the right to withdraw such property." According to the Roman practice the lands of the vanquished were confiscated and partitioned among their conquerors. The last example in Europe of such a conquest was that of England, by William of Normandy. Since that period, among the civilized nations, conquest, even when confirmed by a treaty of peace, has been followed by no general or partial transmutation of landed property. The property belonging to the government of the vanquished nation passes to the victorious state, which also takes the place of the former sovereign; but in other respects private rights are unaffected by conquest. The Hague Conferences have reflected the humane modern views on this subject. The Conference of 1907 forbids pillage, the confiscation of private property, and the making of levies except for military necessities or the administration of the occupied territory. It is declared that an army of occupation shall only take possession of cash, funds, and realizable securities which are strictly the property of the state, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the state which may be used for military operations.

Granting that the law of nations permits debts due from individuals to the enemy, by the rigorous application of the rights of war, to be confiscated, still it is a right which seldom has been exercised in modern warfare, and the rule is universally acknowledged that if the debts are not so confiscated, the right to enforce payment revives when the war has terminated. Vattel says that the sovereign may confiscate debts due from his subjects to the enemy, if the term of payment happens in time of war, or at least he may prohibit his subjects from paying while the war continues, but that at present a regard to the advantages and safety of commerce induces a less rigorous rule. Again he says, "The sovereign declaring war can neither detain those subjects of the enemy who were within his dominions at the time of the declaration, nor their effects. They came into this country on the public faith; by permitting them to enter his territories, and continue there, he has tacitly promised them liberty and perfect security for their return. He ought, then, to allow them a reasonable time to retire with their effects; and if they remain beyond the time fixed, he may treat them as enemies, but only as enemies disarmed." In this connection it may be interesting to notice one of the military regulations adopted by the governor-general appointed to govern the provinces of Belgium which have been occupied by the German forces. It is forbidden to make payment of debts due to persons in England, France or the colonies of those countries, but "the debtor may discharge his obligation by forwarding the sum due to the German Bureau of Civil Administration for the account of his creditor." We are not informed as to whether this opportunity for making payment has been taken advantage of to any considerable extent. Some payments probably have been made in this fashion—by Germans or German sympathizers. What will be the attitude of the civil courts toward these transactions? Will the English and French courts hold that the debt has been discharged? It may be inferred from the order itself that payments so made must be upheld by the Belgian courts.

By the practice of all civilized nations, property employed only for the purposes of science is considered to be exempt from the contingencies of war, and therefore not subject to capture. In 1813, while the United States were at war with England, an American vessel, on her voyage from Italy to the United States, was captured by an English ship, and brought into Halifax, Nova Scotia, and, with her cargo, condemned as lawful prize by the Court of Vice-Admiralty there. But a petition for the restitution of a case of paintings and engravings, which had been presented to and were owned by the Academy of Arts and Sciences in Philadelphia, was granted by Dr. Croke, the judge of that court, who said: "The same law of nations, which prescribes that all property belonging to the enemy shall be liable to confiscation, has likewise its modifications and relaxations of that rule. The arts and sciences are admitted, amongst all civilized nations, as forming an exception to the severe rights of warfare, and as entitled to favor and protection. They are considered not as the peculium of this or of that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species." And he added that there had been "innumerable cases of the mutual exercise of this courtesy between nations in former wars." The Marquis de Somerueles, Stewart Adm. (Nova Scotia) 445, 482, approved in Paquete Habana, 175 U. S. 709.

While the general rule declares that private rights of property remain unchanged by conquest and cession of territory, yet this is not without exception. A very interesting case arose as a result of the Spanish-American War and the acquisition by the United States of the Island of Porto Rico. When the United States, in the progress of the war, took firm military possession of Porto Rico, and the sovereignty of Spain over that island and its inhabitants and their property was displaced, the United States, the new sovereign, found that some persons claimed to have purchased, to hold in perpetuity, and to be entitled, without regard to the public will, to discharge the duties of certain offices or positions which were not strictly private positions in which the public had no interest. They were offices of a quasi-public nature, in that the incumbents were officers of court, and in a material sense connected with the administration of justice in tribunals created by government for the benefit of the public. The question immediately arose as to whether the rights to these offices continued notwithstanding the change in sovereignty. The United States Supreme Court said: "It is inconceivable that the United States, when it agreed in the treaty not to impair the property or rights of private individuals, intended to recognize, or to feel itself bound to recognize, the salability of such positions in perpetuity, or to so restrict its sovereign authority that it could not, con-

sistently with the treaty, abolish a system that was entirely foreign to the conceptions of the American people, and inconsistent with the spirit of our institutions."

BERKELEY DAVIDS.

New York.

THE AMENITY OF PRIVACY.

EVERY owner of a suburban garden, or, indeed, of any garden overlooked by a neighbor's house, knows the petty annoyances which arise from the mere fact of being overlooked. It is in suburban gardens particularly that this discomfort is most felt. To the philosopher it may appear a very trivial matter, but philosophy is too lofty in its conceptions to bring much solace to an exasperated owner who feels he cannot sit comfortably in his garden and read his newspaper or drink his tea without becoming the interesting object of some curious spectator who is so devoid of ideas as to require the mental stimulus afforded by the mild entertainment of watching the doings of "the people next door."

Unfortunately, annoyance of this kind, when once noticed, has the unpleasant tendency to become an ever-increasing discomfort. There is much sound wisdom in Lord Selborne's dicta in the celebrated case of *Gaunt* v. *Fynny* (27 L. T. Rep. 569; 8 Ch. App. 8, at p. 13). That was a case of nuisance arising from the noise of machinery. The defendant's premises had long been used as a kind of mill, but the plaintiffs, whose house adjoined, alleged that the noise had of recent years been greatly increased. The defendant's counsel contended apparently that this increase of noise existed chiefly in the minds of the plaintiffs—that the noise had, in short and to use a colloquialism, got on their nerves. In his judgment his Lordship referred to this argument, and remarked on the happy use which the defendant's counsel had made of a passage in a then recent work on mental science, which, treating of the influence of the mind on the sense of hearing, said that the thought uppermost in the mind, the predominant idea or expectation, makes a real sensation from without assume a very different character. "Everyone," said his Lordship, "must have had some experience of the truth of this statement; a nervous, or anxious, or prepossessed listener hears sounds which would otherwise have passed unnoticed, and magnifies and exaggerates into some new significance, originating within himself, sounds which at other times would have been passively heard and not regarded." These remarks may be aptly applied to the sense of sight. The casual glance of the neighbor may, to an exasperated owner, appear to be an impudent stare.

When our common law was in course of development, circumstances were not such as to call for the protection of the amenity of privacy. In strictness, the common law is always in course of development. It develops itself to suit the altering conditions of life. But the change is far too gradual to admit of a ready adjustment to fit the modern and comparatively recent form of suburban habitation. No better example of the slowness of this growth or development of the common law to attune itself to the exigencies of life can be taken than that which is afforded by the history of development of the law of light. At one time the protection of light was unknown in this country. Where houses and buildings were in close proximity, which only occurred in ancient cities and towns, the question of the rights of owners as regards their light was regulated by local custom. Notable instances of these customs were the custom of London and the custom of York. Apart from these customs the law of light was not regulated. The reason is obvious. It was only in ancient cities and towns that buildings were erected in close proximity. But with the gradual increase of the population the matter became of importance. Even prior to the days of Lord Coke our lawyers were in search of a method to protect the amenity of light, and they found it in the Roman civil law. Yet in this country the rules of the civil law were never applied in a strictly logical manner. Hence it came about that light can now only be claimed by prescription or by grant.

It was the growing importance of the amenity of light that led in course of time and step by step, to the protection of that amenity. Those steps can be traced. The reader, indeed, can trace them for himself by perusing the judgments in the case of *Dalton* v. *Angus* (44 L. T. Rep. 844; 6 App. Cas. 740), which, in point of fact, was not a case on the law of light, but a case on the law of support to buildings; but, as the law of light furnishes the standing example of how our law came to give protection to some of the most important amenities connected with property, all the judges devoted much attention to that collateral subject. Lord Blackburn's judgment is perhaps the most illuminating.

The amenity of privacy, like the amenity of prospect, was not deemed of such vital importance as to be recognized as an easement. The dividing line had been drawn even so long ago as the year 1610. Speaking at that time of the amenity of prospect, Chief Justice Wray in Aldred's case (9 Co. Rep. 57b) is reported to have said: "For prospect, which is a matter only of delight and not of necessity, no action lies for the stopping thereof, and yet it is a great commendation of a house if it has a long and large prospect; but the law does not give an action for such things of delight." This distinction between mere matters of delight and matters of necessity Lord Blackburn in *Dalton* v. *Angus* (sup.) considered "more quaint than satisfactory." In his Lordship's view the reasons given by Lord Hardwicke in *Attorney-General* v. *Doughty* (1788, 2 Ves. Sen. 453) were more in point—namely, that were such trivial but far-reaching matters to be protected in law there could be no large towns. "The decision that a right of prospect," said Lord Blackburn in *Dalton* v. *Angus* (sup.), "is not acquired by prescription shows that, whilst on the balance of convenience and inconvenience, it was held expedient that the right to light, which could only impose a burden upon land very near the house, should be protected when it had been long enjoyed, on the same ground it was held expedient that the right to prospect, which would impose a burden on a very large and indefinite area, should not be allowed to be created except by actual agreement." Apply those remarks to the amenity of privacy, and it is clear why our law affords no protection to such a thing.

Strange to say, some of the earlier cases appear to suggest that privacy might be protected, but that notion has long since been dispelled. "The invasion of privacy by opening windows is not treated by the law," said Lord Westbury in *Taplin* v. *Jones* (12 L. T. Rep. 555; 11 H. L. C. 290, at p. 305), "as a wrong for which any remedy is given." To this high authority we may add the dictum of Lord Parker, when a judge of first instance, in the recent case of *Browne* v. *Flower* (1911, 1 Ch. 219, at p. 225), that our law does not recognize any easement of privacy.

Has, then, an overlooked owner or occupier no remedy for the annoyance he suffers? The answer to this question is not wholly in the negative. Broadly speaking, he has no remedy, but he may, in particular circumstances, take steps to stop the evil. In the first place, he may "plant out" the windows which offend him. He may plant large, fast-growing shrubs or trees. But there are two objections to this—the first, practical; the second, legal. In the first place, the planting of trees is an expensive business. Further, they may not grow sufficiently quickly to allay the trouble. In the second place, he may not be in a position to

"plant out" the windows, for the lights may be privileged lights. There is a singular dearth of authority on the question whether the planting of trees, which either at first or subsequently grow so as to effect an obstruction to the light coming to a privileged window, constitutes an unlawful act. There is, however, a dictum of Lord Lindley in the comparatively recent case of *Paddington Corporation* v. *Attorney-General* (93 L. T. Rep. 673; (1905) A. C. 1, at p. 7) which suggests that such a planting might be illegal. "It would, in my opinion, be wrong," said his Lordship, "to grant an injunction to restrain these defendants from planting biggish trees in front of these windows *unless* the trees would interfere with already acquired rights of light." The italics are, of course, the writer's.

Rights connected with the ownership of land and buildings may be conveniently subdivided into three great classes. The first class comprises all rights which are said to attach *ex jure naturæ*. The second class consists of additional rights attached to the land by grant or user. The third class of rights are also additional rights, which, like the rights of the second class, do not attach to landed property *ex jure naturæ*, but are added by agreement. An example of a right attaching *ex jure naturæ* is the right which one owner enjoys of having his land supported by the land of an adjoining owner. Another example is the riparian owner's right to prevent water being polluted. The second class of rights embrace, and may be said to consist almost entirely of, easements negative and affirmative and of *profits à prendre*. The right to an easement is always based on a grant of some kind. The grant, of course, may be notional only, as in the case of prescriptive easements or of easements of necessity, but the basis of such a right is a grant by the owner of one tenement to the owner of another.

Now, the amenity of light, to take the best example, came to be protected in law not as a right *ex jure naturæ*, but as an easement only. If a man builds a house overlooking his neighbor's land that neighbor may rightfully build or plant so as to obstruct the light coming to the windows. That neighbor could not rightfully obstruct the light if there was an easement of light. Now, turning to the amenity of privacy; there is no right *ex jure naturæ* to privacy, and no easement of privacy; yet the invasion of privacy may be indirectly prevented. The amenity of privacy can, in fact, be made to attach by means of restrictive covenants framed in such a way as to prohibit the opening of any windows overlooking adjoining land. Rights based on restrictive covenants of this kind fall within the third class of rights mentioned above.

There is a very important distinction between a negative easement such as the easement of light and a right protected by means of a restrictive or negative covenant. As was pointed out by Lord Justice Mellish in the case of *Leech* v. *Schweder* (30 L. T. Rep. 586; 9 Ch. App. 463, at p. 474), a negative easement when once validly created runs with the land, and binds all subsequent owners of the land regardless of the question of notice. But a right resting solely on a negative or restrictive covenant, although, generally speaking, binding on all subsequent owners taking with notice of the existence of such a covenant, is not binding as against a purchaser for value of the land without notice. A purchaser for value who acquires the legal estate in the land without notice of a restrictive covenant may disregard that covenant altogether.

Except for the distinction mentioned above—and that distinction is an important one—there is a strong similarity between a restrictive covenant and a negative easement. This similarity is all the more confusing in that a negative easement may be created by words in the form of a mere restrictive covenant, while words purporting to create a valid negative easement may only operate as on a covenant. As Lord Wensleydale said in the well-known case of *Rowbotham* v. *Wilson* (2 L. T. Rep. 642; 8 H. L. C. 348, at p. 362), it is undoubted law that no particular words, or form of words, are necessary to constitute a grant, and any words which clearly show an intention to give an easement which is grantable as such in law are sufficient to effect that purpose.

There is a well-known rule in the law of easements, applying both to affirmative and negative easements, that there must be two tenements in every case of a valid easement—the one tenement to which the benefit attaches, and the other on which the burden is imposed. "There can be no easement properly so called," said the late Lord Cairns, when Lord Chancellor, in the case of *Rangeley* v. *Midland Railway Company* (18 L. T. Rep. 69; 3 Ch. App. 306, at p. 310), "unless there be both a servient and a dominant tenement." His Lordship went on to say that there is no such thing in our law as what might be called an easement in gross.

The decision of the Court of Appeal, affirming the decision of Mr. Justice Neville, in the recent case of *Milbourn* v. *Lyons* (111 L. T. Rep. 388; (1914) 2 Ch. 231) shows that this last-mentioned rule of easement law applies with equal force to the case of a restrictive covenant, and that, in order to create a restrictive covenant binding on subsequent owners of the quasi servient tenement, there must be a quasi dominant tenement to which the benefit of the covenant may attach. The facts of that case were, in substance, as follows: The owners of two properties held under different titles agreed to sell one to a purchaser. The agreement contained, amongst other provisions, a provision that the conveyance should contain certain covenants (framed so as to bind the purchaser and her heirs and assigns) with the vendors, their heirs and assigns, owners and occupiers of the other property, not to do certain things on the purchased land. No lights or windows were to be opened in a particular direction. This latter restriction was, however, confined to the lifetime of one of the vendors, who, in fact, died prior to the execution of the conveyance. The covenants were to prohibit the doing of certain other acts, and that prohibition was not limited to the lifetime of the last-mentioned vendor. After the date of this contract for sale, but prior to the execution of the conveyance, the other property was sold and conveyed away, so that, when the conveyance of the first property was eventually executed, the vendors had no property to which the benefit of any covenant could attach. The covenants originally stipulated for in the agreement were in part repeated in the conveyance. When the subsequent owners of the property sought to sell, a question was raised with regard to the effect of the covenants, and the would-be purchaser objected to the title on the ground that the property was bound by the restrictive stipulations. An action for specific performance was accordingly commenced.

As already intimated, the Court of Appeal (Lord Cozens-Hardy, and Lords Justices Swinfen Eady and Pickford) held that the covenants mentioned in the agreement were not binding, because at the date of the conveyance the vendors had ceased to be the owners of the land to which the benefit of the covenants was intended to be annexed.

There can be no doubt, however, that if the owner of land intends to sell a part of that land, he can stipulate for covenants by the purchaser not to open windows overlooking the land retained. In this way privacy for the retained land may be secured for as long and as fully as that privacy may be desired. But the vendor must see that the covenants against opening windows are actually inserted in the conveyance, for if the conveyance be executed without those covenants, the agreement will be of no assistance to him. It is a well-recognized rule that the conveyance supplants the contract, and once the conveyance is executed the

contract is gone. "If parties have made an executory contract," said Lord Justice James in *Leggott* v. *Barrett* (15 Ch. Div. 306, at p. 309), "which is to be carried out by a deed afterwards executed, the real completed contract between the parties is to be found in the deed, and you have no right whatever to look at the contract, although it is recited in the deed, except for the purpose of construing the deed itself." This very point was dealt with at considerable length in the recent case of *Millbourn* v. *Lyons* (sup.) both by Lord Cozens-Hardy and by Lord Justice Swinfen Eady.

It has been laid down in a large number of cases that the interference of the comfortable use and enjoyment of premises constitutes an unlawful act—namely, a nuisance. But, so far as the writer is aware, no court has ever held that the staring of an overlooking neighbor is an actionable nuisance. Annoyance of that kind apparently falls within the scope of the old legal maxim, *Lex non favet votis delicatorum.* "If my neighbor," said Lord Selborne in *Grant* v. *Fynny* (sup.), "builds a house against my party wall, next to my own, and I hear through the wall more than is agreeable to me of the sounds from his nursery or his music-room, it does not follow (even if I am nervously sensitive or in infirm health) that I can bring an action or obtain an injunction." Vice-Chancellor Knight-Bruce in the case of *Walter* v. *Selfe* (1851, 4 De G. & Sm. 315) defined a nuisance as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to the plain and sober and simple notions among the English people. However this may be, it would only be a logical deduction from the general principles of the nuisance cases to give relief to an overlooked owner, if the overlooking and staring was prompted by something more than mere curiosity—if, for instance, it was obviously done with the intention to annoy.

There is, at any rate, one case which would seem to throw some light on the question whether the court would grant an injunction to restrain a deliberate purposeful and persistent staring by a neighbor at another neighbor who had complained of being unduly overlooked. This is the case of *Christie* v. *Davey* (1893, 1 Ch. 316), which seems to point to the fact that the court will interfere in the case of an annoyance occasioned intentionally. In that case a dispute arose between two neighbors. Their respective houses were semi-detached. In the house in which the plaintiff lived with his family musical lessons were given by his wife and daughter to pupils. The party wall appears to have been somewhat thin. The defendant jocularly complained of the noise, stating that during the week he had been much disturbed by what he at first thought were the howlings of his neighbor's dog, but that he had found that he was mistaken, and that the noise was a frantic effort by someone trying to sing with piano accompaniment. As no notice was taken of this letter, the defendant commenced (as it was alleged) a series of noises whenever the playing of music was going on in the plaintiff's house. It was alleged that these noises consisted of knocking on the party wall, beating on trays, whistling, shrieking, and imitating what was being played in the adjoining house. The plaintiff in turn complained, and ultimately commenced an action seeking an injunction to restrain these counter-noises. The defendant counter-claimed for an injunction to restrain the making of noises in the plaintiff's house by giving lessons, practising or playing on pianos, violins, violoncellos, or other musical instruments, or singing in an unreasonable manner or at unreasonable times. Mr. Justice North came to the conclusion on the evidence that the noises which arose on the defendant's premises did not arise from anything which had been done in the due course of the defendant's trade, which was that of an engraver on wood. "I am satisfied," said his Lordship, "that they were made deliberately and maliciously for the purpose of annoying the plaintiff. If what has taken place had occurred between two sets of persons both perfectly innocent, I should have taken an entirely different view of the case." The learned judge granted an injunction in favor of the plaintiff, but refused to grant an injunction in favor of the defendant.

The foregoing remarks outline the four corners of the rights and remedies of an overlooked householder. Except in the case of malicious staring, the court's assistance on the ground of nuisance need not be expected. If there are covenants which prevent the opening of overlooking windows there may be remedies, but as a rule, the occupier of a suburban garden is not the owner, and the owner may not be very ready to take the matter up once he has secured a tenant. But even if the suburban dweller owns the house he occupies, it is extremely improbable that there are any covenants to forbid, even indirectly, overlooking; for covenants not to open windows are rarely entered into.

Unfortunately, it must be laid down as a broad general rule that no action can be taken by an owner or occupier to prevent the privacy of his garden and grounds being molested by an overlooking neighbor. Fortunately, however, there is that code of rules embodied in the term "neighborly conduct." And in nine cases out of ten a civil and courteous complaint—if it judiciously avoids any reference to the conduct of the neighbor himself or of the members of his family, and is directed only to the undue curiosity of his servants—will have the desired effect, and will prevent any further undue interference with the cherished amenity of privacy. In the tenth case the harassed party would be well advised to suffer in patience, for if he fails in reasonable self-restraint it is he himself, and not the neighbor, that becomes the chief source of his own discomfort. At any rate, as we have seen, the law will not help.—*Law Times.*

POINTS OF LEGAL ETHICS.

From the New York County Lawyers Association. Committee on Professional Ethics.

Question. When an accused person has deposited cash bail for his appearance for trial on a criminal charge and has also made a deposit of money with his lawyer, subject to the order of the accused, in case of conviction, and the bail is forfeited.

1. Is it improper for the lawyer to honor an order from his client who has fled to Canada, directing the payment to one outside the State of the deposit made with his lawyer?

2. Is it incumbent upon the lawyer to advise the police officials of the receipt of a communication from his client disclosing his whereabouts and enclosing such order?

Answer. In the opinion of this Committee there is no impropriety in the lawyer's honoring the order of his client, in respect to the disposition of his client's property. The client has not forfeited all civil rights nor his ownership of property by becoming a fugitive from justice. In the opinion of the Committee it would be improper for the lawyer to disclose the information; his obligation to his client, imposed by our law in the interest of the supposedly proper and satisfactory administration of justice, a rule which is binding upon the lawyer, precludes him from making the disclosure to anyone without his client's express consent.*

*The Committee in answering the foregoing question did not consider that it implied any corrupt agreement, or intent to evade the provisions of any law, and particularly of Sec. 390-399 of the Prison Law.

The Committee bases this latter opinion upon its view that the professional relation extends to the date of the communication, notwithstanding the other facts stated in the question.

Question. A young man, intending to apply for admission to the Bar, but not yet having taken the examination, has a position as a law clerk in the office of a firm of attorneys. The young man and the firm wish his friends to know where he is and that he holds an important position in the office, believing it to be possible that some legal business may follow him into the office.

Under these circumstances, is it proper that the name of the young man should appear upon the office door, underneath and separated from the names of the firm and the partners, there being nothing on the door to indicate that the firm is a law firm or practising law? The young man's name does not appear upon the stationery.

Answer. In the opinion of the Committee, the placing of the young man's name upon the door under the specific conditions of the question and with the purpose indicated, would seem to be objectionable. It is not proper for members of the Bar even to aid in misrepresenting any occupant or employé in the office as being a member of the Bar.

Question. A lawyer is consulted by a client named as executor in a document purporting to be the last will and testament of a decedent, and in and by which provisions are made for the benefit of others than the person named as the executor, the executor being a stranger in blood to the decedent and the beneficiaries named in the said document being the decedent's next of kin and heirs at law. After a statement of the facts by the client the lawyer forms an opinion thereon and advises his client that it is the client's duty to file the will for probate. He subsequently learns that the client instead of following his advice intends to conceal the will and appropriate the property of the decedent. His only source of knowledge of the existence of the will is his consultation with the person named as executor in which the will was exhibited.

In the opinion of the Committee,

1. Can the lawyer properly disclose the existence of the will to those interested in its provisions, whom he believes to be otherwise ignorant of its existence and of the provisions therein for their benefit?

2. Can he properly advise the prosecuting attorney of his knowledge?

Answer. While the Committee recognizes the wide extent of the privilege accorded to communications from a client to his legal counsel, and the fact that such privilege is protected by statute (Code Civ. Pro. S. 835), nevertheless it is of the opinion that such privilege ought not to be extended to the circumstances of the present case; the lawyer should unquestionably first expostulate with the executor, so that he himself may avail himself of the opportunity to disclose the existence of the Will; but if such expostulation fail, then in the opinion of the Committee the attorney should make known to the interested parties the fact that there is a will in existence. Where a client consults an attorney in order to obtain his assistance in the commission of a crime, the rule of privileged communications does not apply. The duty of the attorney to the Court and to society forbids the application of the rule in such a case. For like reasons we believe that where an attorney ascertains that a former client is about to commit a felony (Penal Law, S. 2052), such, for example, as the concealment of a Will as suggested in the present question even though his knowledge of the contemplated felony is due to the communications previously made to him by the client, when no crime or felony was in contemplation, it is the duty of the attorney to prevent the felony if he can, by disclosing the facts to those against whom, or against whose interests, the felony is directed.

We do not believe, however, that this duty goes to the extent of requiring him to call the matter to the attention of the prosecuting attorney, although in our opinion it would not be improper for him to do so.

Question. A is in possession of a tract of land under claim of ownership. B also claims ownership. Both have consulted counsel in regard to their respective claims, and the counsel have consulted with each other. B's counsel proposes to A's counsel that B bring an action in ejectment to test the title and that a stipulation be entered into before the action is commenced that the judgment shall be without costs. A's counsel refuses to make the stipulation. Afterward B's counsel goes to A and induces him to sign, in his individual capacity, the same stipulation which his counsel had refused to make for him. A's counsel ascertains the fact and charges B's counsel with unprofessional conduct, which B's counsel denies, defending the propriety of his act upon the ground that A's counsel was not an attorney of record in the matter.

Was or was not B's counsel guilty of unprofessional conduct?

Answer. In the opinion of the Committee, the conduct of B's counsel was unprofessional. It violates the following tenets of Canon 9 of the Canons of Ethics of the American Bar Association, in the provisions of which, in its application to the present case, this Committe concurs:

"A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matter with him, but should deal only with his counsel."

Question. A husband, five years ago, became infatuated with another woman and, since that time, has made life with him so intolerable that his wife accepted his frequent invitations to leave and has left him.

The wife now resides in New York County, while the husband continues to reside in the county where both formerly lived as man and wife.

Before the final rupture, and as part of the causes leading to it, the husband repeatedly told his wife that he had been unfaithful, that he intended to continue to be so, and that evidence existed which would entitle her to an absolute divorce. He gave her no details by which she could, unaided by him, obtain for herself such evidence.

Certain real property purchased by the husband stands in the name of the wife. In certain other real property of the husband she has an inchoate right of dower.

She desires a divorce but has no means with which to watch for and obtain evidence of probable and threatened future delinquencies of the husband.

He has offered, and repeats his offer through his attorney, to furnish the names of witnesses to offenses which occurred before the rupture, on condition that terms satisfactory to him in regard to alimony and the disposition of the real property above mentioned are agreed upon and that the action be brought in the county of the wife's present residence.

Is it proper for her attorney to bring an action for absolute divorce, upon evidence so obtained, the attorney, by the way, having been retained a day or two before the rupture?

Would such an action be collusive? I am attorney for the wife and do not desire to participate in a collusive action.

Answer. In the opinion of the Committee, the propriety of the suggested agreement is not to be determined solely by the test of collusion. The acts of which evidence is to be secured are stated to have been already committed, and this circumstance would

seem to avoid the charge of collusion in its technical sense (Dodge *v.* Dodge, 98 App. Div., 85, 88); the Committee is of opinion, however, that the attorney in a divorce case should regard with disfavor any offer by the adverse party to stipulate to furnish witnesses to the past offense charged, in consideration of stipulations as to alimony, release of dower, etc. (See Train *v.* Davidson, 20 App. Div. 577.) A majority of the Committee is of the opinion that nevertheless, in the case submitted, if the attorney for the wife be satisfied of her good faith, it would not be improper for the attorney to bring the suit in the manner and pursuant to the arrangement stated, provided that the whole agreement be in writing and be expressly made subject to the approval of the Court, and a full disclosure thereof and of all the facts relating thereto is made to the Court at the trial (see Schesinger *v.* Kling, 112 App. Div., 853), and the client be advised of the fact that the Court may decline to confirm it.

Question. An attorney discovers through his professional relations with a client facts which convince him that his client is mentally incompetent and is about to bring financial ruin upon himself and family through his improvident and reckless business transactions.

1. Can the attorney properly accept employment from the client's wife to have him legally decreed incompetent?

2. If the answer be in the affirmative, can the attorney properly utilize in behalf of the wife's application the knowledge of the husband's affairs and acts which he acquired during his employment by the husband?

3. Can the attorney in legal proceedings instituted by the wife, to have her husband legally declared incompetent, testify concerning said affairs and transactions?

Would it make any difference in the answers, or any of them, if it were assumed that the attorney believed or even knew at the time of his employment by the husband that he was mentally incompetent, and accepted the employment with the knowledge and consent of the wife in the belief that he could thereby so advise the incompetent as to prevent loss through his ill-advised and reckless conduct?

Answer. In the opinion of the Committee, subdivision 1 and subdivision 2 of the question should be answered in the affirmative, and subdivision 3 of the question should not be answered by this Committee, because it presents a pure question of law. (See Secs. 835, 836, Code of Civ. Proc. and in *re Cunnion*, 201 N. Y., 123.) The Committee is also of the opinion that the last paragraph of the question should be answered in the negative.

In making the above answer, the Committee has assumed that the lawyer in question is acting from good motives in the way that he deems best for the true interests of the supposed incompetent, and that he has no reasonable doubt as to his client's incompetency.

Cases of Interest.

LIABILITY OF MUNICIPALITY FOR ASSAULT BY POLICE OFFICER.—The fact that a policeman was known by the municipal officers appointing him to be a man of savage and vicious propensities was held in Lamont *v.* Stavanaugh, (Minn.) 152 N.W. 720, not to vary the rule that a municipality is not liable for the acts of its servants in performing its governmental functions. A contention that the case was within the doctrine of liability for a dangerous condition in the streets was overruled, the court saying: "We are unable to hold that the presence of Stavanaugh on the streets of Waterville, armed with a policeman's club, constituted a defective condition of the streets or a danger therein which would impose a liability on the city, even though the official who placed him there knew of his vicious propensities."

PRIVILEGE OF NONRESIDENT SUITOR FROM SERVICE OF PROCESS.—In Sofge *v.* Lowe, (Tenn.) 176 S.W. 106, it was held that a suitor from a foreign state is while passing through the state for the purpose of attending court exempt from the service of civil process. "The courts of this state," said Williams, J., "will see to it that their processes are not used to thus embarrass the administration of justice in a sister state, and we shall expect the courts of other states to rule in reciprocation. Thus, by a species of comity, a common end will be served. It may be that this cannot be demanded of us or of other courts, or asked to be extended except by way of that courtesy which is really comity. Reasons of convenience, expediency, and public interest prompt us to announce this doctrine for our state. A liberal interpretation in favor of the privilege is manifested in the authorities, state and federal, and we deem our ruling to be in accord with that trend."

FRIGHTENING HORSE DRIVEN BY ANOTHER AS ASSAULT.—In Lambrecht *v.* Schreyer, (Minn.) 152 N.W. 645, it appeared that the plaintiff and the defendant were neighboring farmers. The plaintiff, with several members of his family, was driving in a light two-seated surrey. The defendant was driving in a loaded lumber wagon. The parties had not been on good terms for some time and it was claimed that, as the plaintiff passed, something occurred to anger the defendant; that he followed, yelling and lashing his horses, and himself passed the plaintiff just as the plaintiff had reached the driveway leading into his house; that as the defendant passed he drove very near the plaintiff's team, and struck one of the horses with a whip, causing the team to become unmanageable so that they ran into a stump, and the plaintiff was injured. These acts the court held to constitute an assault, and contributory negligence of the plaintiff was held to have been properly excluded from consideration, being no defense to an action sounding in malice.

VALIDITY OF STATUTE TO PREVENT NEPOTISM IN APPOINTMENTS.—In Barton *v.* Alexander, (Idaho) 148 Pac. 471, the court sustained the validity of a statute known as the "Anti-Nepotism Bill" making it an offense for any state, district, county, or city officer to appoint to any position a person related to him by affinity or consanguinity within the third degree. In so holding the court said: "We believe it to be within the legislative power to prohibit officers from appointing persons to office related to them by affinity or consanguinity, in the interest of efficiency in public service and for the best interests of the people and of the municipal subdivisions of the state, and as a legitimate police regulation, in regard to which the law-making power may legislate, and reasonable legislation in regard thereto is constitutional and enforceable. Nepotism is recognized as an evil that ought to be eradicated and stamped out, and we know of nothing in the state constitution that prohibits the legislature from passing reasonable regulations in regard thereto."

VALIDITY OF CONTRACT BY SPENDTHRIFT TO MARRY.—A statute in Massachusetts avoiding, on the appointment of a guardian for a spendthrift, his contracts except those for necessaries was held in Sullivan *v.* Lloyd (Mass.) 108 N.E. 923 to render void a contract to marry by a spendthrift under guardianship. The court said: "It is apparent that the intention of the Legislature was that the guardian of a spendthrift should have the management of the estate of the ward in every particular and to the utmost limit. If a spendthrift without the consent of his guardian can make a valid contract to marry, he would be liable in damages if

he afterwards should without cause commit a breach of that contract, and his property (the entire management of which has been put in the hands of the guardian) would be answerable for the breach of the contract. On the other hand, if the other person to the contract should refuse to marry the spendthrift in such a case, and the contract was valid, it would follow that the spendthrift could of his own motion institute an action to recover damages without the consent of the guardian, a result not consistent with the decision of this court in Mason *v.* Mason, 19 Pick. 506. The ability of one under guardianship as a spendthrift to enter into a valid contract to marry of necessity involves consequences which are not consistent with the provision of the statute giving to the guardian 'the management of all his estate,' as that provision has been construed by this court. In addition it hardly seems to be consistent with the provision that the guardian of a spendthrift 'shall have the care and custody of the person of his ward.' Marriage even of a man creates such new relations that it is hardly consistent with a third person's having the care and custody of his person."

PROHIBITION OF TAKING OF CLAMS IN CONTAMINATED WATERS.—The court in Com. *v.* Feeney (Mass.) 108 N.E. 1068, considered the validity of a prohibition, made under authority of statute at the instance of the state board of health, against the taking of clams from certain tide flats in the city of Boston. The court said: "When in the course of time the density of population had so increased that certain portions of such waters and flats became impregnated with sewage or deleterious substances from manufacturing establishments which affected and poisoned the imbedded shellfish, the Legislature apparently for the protection and preservation of the public health enacted St. 1901, c. 138, now R. L. c. 91, § 113, authorizing the state board of health upon complaint to delimit the contaminated area, and authorizing the board to request in writing the commissioners on fisheries and game to prohibit the taking therefrom of oysters, clams, quahogs and scallops. The commissioners upon receiving the request are required to prohibit the taking of shellfish from the waters thus designated during such period of time as the board shall have prescribed, although by Stat. 1907, c. 285, clams and quahogs may be taken for bait only, by any person having a permit in writing from the local board of health. See also Stat. 1911, c. 411, § 10. By section 114, upon the issuance and publication of the order of prohibition its violation is made a misdemeanor punishable by fine. The statute is a valid exercise of the authority given by part 2, c. 1, § 4. of the Constitution, to enact 'all manner of wholesome and reasonable orders, laws, statutes and ordinances,' even if legislative functions to determine whether the conditions referred to in the statute exist are conferred upon the state board of health, without giving to parties who may be interested an opportunity to appear and be heard."

QUALIFIED PRIVILEGE IN NEWSPAPER CRITICISM OF BUSINESS HOUSE.—Wilson *v.* Sun Pub. Co., (Wash.) 148 Pac. 774, grew out of a campaign by a Seattle newspaper to improve the restaurant service of that city. To that end it sent forth a corps of investigators and published their reports on the various eating houses visited. One restaurant keeper, being unfavorably reported on, brought suit for libel and recovered a verdict. Replying to the contention that the publication fell within the rule of qualified privilege, the court quoted the rule as stated by a text writer and said: "It is obvious that the publications here in question do not fall within any of these classes. unless it be 'matters relating to appeals for public patronage.' That class, however, relates to those who are in a sense public characters, such as seekers for office, artists, inventors, showmen, patent medicine men, and such others as by appeals to the public by advertisement in a special sense directly challenge public criticism of their claims. Newell on Slander and Libel (2d ed.) p. 583. There is nothing of that nature in the case presented here. The mere fact that a man's business, in a sense, touches the health and comfort of his customers or patrons does not invoke the rule of special privilege against him. Those who desire to criticize the manner in which his business is conducted are sufficiently protected against an action for damages by their absolute immunity in publishing the uncolored truth, and against a criminal prosecution in a proper case by negativing malice, which, under our present criminal statute, is the gist of the criminal offense of libel. State *v.* Sefrit, 144 Pac. 725. We have been cited to no authority, and have been able to find none, which would carry the rule of qualified privilege to the extent here asserted."

RIGHT TO TAKE TWO DEPOSITIONS AT DIFFERENT PLACES ON SAME DAY.—An interesting question of practice and one for which few if any of the statutes make specific provision was passed on in Gillis *v.* First National Bank, (Okla.) 148 Pac. 994. In that case the plaintiff served notice of the taking of depositions in five places, in as many different states, on the same day. The defendant attended at the taking of one and moved to suppress the others. Holding that the motion should have been sustained, the court said: "The question is presented whether or not depositions so taken may be read in evidence over the objection of the adverse party. Section 5079, Rev. Laws 1910, provides: 'Notice shall be served so as to allow the adverse party sufficient time, by the usual route of travel, to attend, . . . one day for preparation, exclusive of Sunday, and the day of service; and the examination may, if so stated in the notice, be adjourned from day to day.' It certainly was not the intention of the legislature, by this section, to permit the service of two or more notices to take depositions at places widely apart from each other, on the same day. The taking of testimony is in a sense a part of the trial, and the opposing party has the right to confront the witnesses, whose depositions are taken under the notice, and to have his counsel present to aid in the examination thereof. Any other construction would require him to employ a multitude of attorneys to protect his interests at the different places on the same day. A reasonable construction of the statute in the light of its evident purpose would seem to be that a party giving notice to take depositions at different places should so arrange the times as to allow the adverse party to attend each one, and that sufficient time must elapse after the conclusion of the taking of one deposition to allow the party at least time sufficient to reach the place where another is to be commenced."

ELIGIBILITY OF WOMAN TO BE APPOINTED NOTARY PUBLIC.—In an exhaustive discussion of the question, the Supreme Court of North Carolina held in Bickett *v.* Knight, 85 S.E. 418, that a notary public is an incumbent of an "office" within a constitutional provision that every "voter" shall be eligible to office, and accordingly concluded that a woman is not eligible to appointment as a notary. Chief Justice Clark in the course of a vigorous dissent said: "The Constitution of this state does not prohibit the legislature from admitting women to any office. The prohibition is just the opposite, and forbids any one who is a voter from being disqualified to hold office. State *v.* Bateman, 162 N. C. 591, 77 S.E. 768. The General Assembly has all the powers of legislation that the people themselves have unless restrained by some provision of the Constitution. Cannot the legislature of a sovereign state provide that the function of authenticating a certificate or acknowledgment or protest by making the impression of a seal on paper shall be a 'place,' and not an 'office,' and that women may receive the fees for such work, if appointed? There is but one question in this case: 'Can this

plaintiff discharge that duty when so authorized by an act of the legislature and commissioned by the Governor?' Or is she barred because she is a woman? Under the Constitution of the United States no one is debarred from holding any office from President down because of sex. What provision of the state Constitution will be shattered, and what detriment will the public welfare receive, if by legislative and executive authority a woman shall authenticate a certificate made by herself by impressing the seal upon a piece of paper? If the defendant were a man, he would not be debarred from holding this appointment unless he were an idiot, a lunatic, or a convict. The legislature, voicing the sentiment of the people of the state, has enacted that it is neither a crime nor a defect that this appointee to discharge the clerical duties of a notary public is a woman. Shall the court hold that it is?"

Prohibition of Greek Letter Fraternities in State Educational Institutions.—The Supreme Court of the United States in Waugh *v.* Board of Trustees, 35 Sup. Ct. 720, sustained the validity of a Mississippi statute prohibiting certain designated societies by name and all other secret fraternities or sororities in the University of Mississippi and all other educational institutions supported in whole or in part by the state. The complainant, a member of Kappa Sigma Fraternity, sought to enjoin the enforcement of the act. The federal court adopted as an apt statement of the rule determinative of the case, the language of the state supreme court (105 Miss. 635): "The legislature is in control of the colleges and universities of the state, and has a right to legislate for their welfare, and to enact measures for their discipline, and to impose the duty upon the trustees of each of these institutions to see that the requirements of the legislature are enforced: and when the legislature has done this, it is not subject to any control by the courts." Continuing Mr. Justice McKenna said: "It is said the fraternity to which complainant belongs is a moral and of itself a disciplinary force. This need not be denied. But whether such membership makes against discipline was for the state of Mississippi to determine. It is to be remembered that the University was established by the state, and is under the control of the state, and the enactment of the statute may have been induced by the opinion that membership in the prohibited societies divided the attention of the students, and distracted from that singleness of purpose which the state desired to exist in its public educational institutions. It is not for us to entertain conjectures in opposition to the views of the state, and annul its regulations upon disputable considerations of their wisdom or necessity. Nor can we accommodate the regulations to the assertion of a special purpose by the applying student, varying, perhaps, with each one, and dependent alone upon his promise. This being our view of the power of the legislature, we do not enter upon a consideration of the elements of complainant's contention. It is very trite to say that the right to pursue happiness and exercise rights and liberty are subject in some degree to the limitations of the law, and the condition upon which the state of Mississippi offers the complainant free instruction in its University, that while a student there he renounce affiliation with a society which the state considers inimical to discipline, finds no prohibition in the Fourteenth Amendment."

"The Science of Government is the most abtruse of all sciences; if indeed, that can be called a science which has but few fixed principles, and practically consists in little more than the exercise of a sound discretion, applied to the exigencies of the state as they arise. It is the science of experiment." Johnson, J. Anderson *v.* Dunn, 6 Wheat. 226.

New Books.

The Swiss Civil Code of December 10, 1907 (effective January 1, 1912). Translated by Robert P. Shick, A.M., LL.B., member of the Philadelphia Bar. Annotated by Charles Wetherill, A.B., LL.B., member of the Philadelphia Bar. Corrected and revised by Eugen Huber, Dr.Jur., Rer. Pub. et Phil., Law Professor, University of Berne; Alfred Siegwart, Dr. Jur., Professor of Swiss Law, University of Freiburg; Gordon E. Sherman, Ph.B., LL.B., member of the New York and New Jersey Bars. Boston: The Boston Book Company, 1915. Pp. lxxii, 262.

Of more than usual interest to American statesmen and students of comparative legislation is the civil code of Switzerland. This little nation probably leads the world in Kultur, as that term is understood by the Germans. If we remember correctly, the exportations of machinery from Switzerland a few years ago were second only to the exportations of the same product from the United States. And the population of that country is only about four millions! Since their social and economic growth and progress have been so satisfactory, perhaps America can do no better than follow the sociologic path blazed by the Swiss pioneers. And, anyhow, there is a steady tendency to adopt the principles of the civil law in place of the doctrines of the common law. The champions of the civil law are fond of proclaiming that their system was the product of a high civilization, whereas the common law had its beginning and early growth in the customs of barbarians—our ancestors who invented wager of battle, the prototype of the modern common law trial.

The author of the Swiss Civil Code, Professor Eugen Huber, was confronted with the task of moulding into a practical yet scientific whole a multitude of ancient, local, contradictory and seemingly irreconcilable customs and statutes, cantonal and federal, which had in the course of centuries culminated in conditions no longer tolerable by an enlightened people. Yet so well known and popular had the work become that no referendum was demanded, and for the first time Switzerland was endowed with a common federal civil law. Lawyers in this country who had observed the progress of this codification could not overlook the many features of similarity between the Swiss conditions and those difficulties which our various systems of legislation and jurisprudence have long presented and which in time will demand some like remedy. The matter being precisely within the field of the Comparative Law Bureau of the American Bar Association, a member of its editorial staff. the late Charles Wetherill, Esq., of the Philadelphia Bar, proposed that the Bureau publish an English translation of the Code. In 1908 the work was begun; and now is presented to the public after more than six years of labor by Dr. Huber, Professor Siegwart, Mr. Shick, Mr. Wetherill and Mr. Sherman.

The paper, binding, and press work of this handsome book are up to the standard long ago established by the Boston Book Company.

German Legislation for the Occupied Territories of Belgium. Official Texts, edited by Charles Henry Huberich, J.U.D., D.C.L., LL.D., of the United States Supreme Court Bar, Counsellor at Law, The Hague, Berlin, Paris, Hamburg, and Alexander Nicol-Speyer, J.U.D., Advocate, The Hague, Rotterdam. Second series, 31 Dec. 1914—31 March 1915. The Hague: Martinus Nijhoff, 1915.

Statesmen, army officers and students of international affairs generally will find much interest in the regulations promulgated by the German military authorities for the government of the occupied provinces of Belgium. A second volume containing orders numbered twenty-six to fifty-five is now made available by

the enterprise of the well known Dutch publisher Martinus Nijhoff. America has been taking such an intense interest in the present struggle for European supremacy, that we may expect to increase very greatly the number of our students of international relations. Removed as we have been from the political complications of European nations, it is little wonder that we have neither read nor thought very much of international politics. But conditions suddenly have changed. We now find that our nation may be very vitally affected by the conflicting ambitions of European sovereigns. Everything relating to the present war must be of nearly as great interest to us as to the inhabitants of England and the Continental nations. This volume of military regulations, which, by the way, is edited by Messrs. Charles Henry Huberich and Alexander Nicol-Speyer, lawyers and publicists whose activities have been of international scope, will find many interested readers. It is too bad, however, that no English translation has been made of the official texts, which appear in German, French and Dutch. Europeans fail to realize how few Americans find it necessary to read—fluently at least—any other language than English.

The regulations contained in this volume touch on a variety of subjects: banking, exports, customs duties, conservation of food, declaration of mineral products, health of domestic animals, licensing of dogs, slaughtering of hogs, and other matters. A war contribution amounting to eight millions of dollars per month is levied under date of January fourth. On January twenty-first public gatherings are forbidden, public political discussion is prohibited, and all political clubs and societies are closed. Under date of December thirty-first it is declared that the right to own and operate wireless apparatus appertains exclusively to the German troops; and it is ordered that whoever possesses or has knowledge of such an apparatus must notify the German authorities without delay. The same order contains a provision relating to pigeons, the right of flying such birds being declared to be exclusively in the German soldiery. Owners are required to keep their pigeons shut up, regardless of the character of the birds, whether carriers or otherwise. The penalty for letting pigeons go is three months imprisonment or a fine of six hundred dollars. Commerce in live pigeons is prohibited; indeed, anyone who is found carrying a live bird may be fined two thousand dollars or imprisoned for a year. As might be expected, the pigeons did not thrive under the close confinement imposed by the above order. Consequently, on March twenty-ninth the pigeon regulations were modified, so as to permit owners to liberate their birds at one o'clock in the day, keeping them shut up from sunset until that hour.

News of the Profession.

THE OHIO STATE BAR ASSOCIATION held its annual meeting at Cedar Point, Ohio, on July 6, 7 and 8.

THE AMERICAN BAR ASSOCIATION will meet in annual convention at Salt Lake City on August 17, 18 and 19.

THE MINNESOTA STATE BAR ASSOCIATION will hold its annual convention at St. Cloud, Minn., on August 5, 6 and 7.

NEW JUDGE IN COLORADO.—General N. C. Miller, former attorney-general of Colorado, has been appointed county judge of Mesa county.

NEW YORK JUDGE DEAD.—John Clinton Gray, a judge of the New York Court of Appeals from 1888 to 1913, died at Newport, R. I., on June 28, aged 72 years.

OHIO JUDICIAL APPOINTMENT.—Governor Willis of Ohio has appointed Elmor O. Petit of Logan to succeed O. W. H. Wright as judge of the common pleas court.

APPOINTED TO BENCH IN FLORIDA.—Governor Park Trammell has appointed Cephas L. Wilson of Marianna to be judge of the new fourteenth judicial circuit of Florida.

ARKANSAS JUDGE DIES.—John McClure, Chief Justice of the Arkansas Supreme Court during reconstruction days, died at Little Rock, Ark., on July 8, aged 81 years.

THE WISCONSIN STATE BAR ASSOCIATION held its annual convention at Superior, Wis., on July 14, 15 and 16. Further details will be given in the next issue of LAW NOTES.

WASHINGTON JUDGE NAMED.—John S. Jurey of Seattle has been appointed by Governor Lister of Washington to the King county superior bench to fill out the term of the late Judge John E. Humphries.

NORTH CAROLINA STATESMAN DEAD.—Thomas Jordan Jarvis, former Governor of North Carolina, once Minister to Brazil and United States Senator, died at Greenville, N. Car., on June 17, aged 79 years.

DEATH OF FAMOUS KENTUCKIAN.—Judge James Hillary Mulligan, former United States consul-general at Samoa, and author of the famous poem "In Kentucky," died at Lexington, Ky., on July 1, aged 71 years.

DEATH OF DISTRICT OF COLUMBIA JUDGE.—Alexander Burton Hagner, associate justice of the Supreme Court of the District of Columbia from 1879 to 1902, died at Washington on June 30, at the age of 89 years.

THE ALABAMA STATE BAR ASSOCIATION held its annual meeting at Montgomery, Ala., on July 9 and 10. The annual address was delivered by Hannis Taylor of Washington on "Our Rights and Duties as a Neutral Nation."

APPOINTED TO BENCH IN TENNESSEE.—Ben L. Capell of Memphis has been appointed by Governor Rye of Tennessee to succeed the late Walton Malone as judge of the second division of the Shelby County Circuit Court.

DEATH OF NOTED PENNSYLVANIAN.—James T. Mitchell, for twenty-one years a Justice of the Pennsylvania Supreme Court, for seven years its Chief Justice, and since 1910 Prothonotary of that tribunal, died at Philadelphia on July 4, aged 81 years.

THE NEW HAMPSHIRE BAR ASSOCIATION held its annual meeting at Laconia, N. H., on June 29. Officers elected were as follows: President, Chief Justice Robert G. Pike of Dover; vice-president, Stephen Jewett of Laconia; secretary, Arthur H. Chase of Concord.

FEDERAL ATTORNEYS APPOINTED.—President Wilson has appointed Charles B. Williams of Georgia to be United States Attorney for the Panama Canal Zone. Francis B. Kavanaugh of Cleveland, O., has been appointed assistant United States Attorney at Cleveland.

THE ILLINOIS STATE BAR ASSOCIATION at its recent annual session elected the following officers: President, Nathan W. MacChesney of Chicago; vice-presidents, Roger Sherman of Chicago, Walter M. Provine of Taylorville and William F. Bundy of Centralia; secretary and treasurer, John F. Voight of Mattoon.

MICHIGAN STATE BAR ASSOCIATION.—The annual meeting of the Michigan State Bar Association was held at Lansing, Mich., on June 10 and 11. The President's address was delivered by John

J. Carton, of Flint. Among other addresses were the following: "The Supreme Court," by Judge John W. Stone, of Lansing, justice of the Michigan Supreme Court; "The First Judge at Detroit and His Court," by Judge William Kenwick Riddell, of Toronto, justice of the Supreme Court of Ontario.

TEXAS JUDICIARY APPOINTMENTS.—Governor Ferguson of Texas has made the following appointments to the bench: County Judge J. D. Harvey of Hempstead to be judge of the new Eightieth District Court; E. A. McDowell of Beaumont to be judge of the Sixtieth District Court, succeeding Judge John N. Conley who becomes a member of the Ninth Court of Civil Appeals; Ben M. Terrell of Fort Worth to be judge of the Sixty-seventh district court to fill the vacancy caused by the resignation of Judge Marvin H. Brown.

THE TENNESSEE STATE BAR ASSOCIATION met in annual convention at Chattanooga, Tenn., on June 24 and 25. The President's address was delivered by H. H. Shelton of Bristol. Other addresses on the program were as follows: "A Roman Advocate" by Peter W. Meldrim, of Savannah, Ga., President of the American Bar Association; "A Right of the States," by Alfred P. Thom of Washington, D. C. The following officers were elected: President, Charles M. Burch of Memphis; vice-presidents, C. J. M. John of Bristol and Erwin L. Davis of Tullahoma; secretary and treasurer, Charles H. Smith of Knoxville.

KENTUCKY STATE BAR ASSOCIATION.—The fourteenth annual meeting of the Kentucky State Bar Association was held at Frankfort, Ky., on July 8 and 9. Included in the program were the following addresses: President's address, by Thomas W. Thomas of Bowling Green; "Lawyers' Fees Historically Treated," by Wilbur F. Browder of Russellville; "Henry Clay and Pan-Americanism," by John Bassett Moore of New York; "Federal Trade Commission," by Alexander G. Barret of Louisville; "Some Great Lawyers of Kentucky," by John B. Rodes of Bowling Green; "Suggestions for the Improvement of the Trial by Jury," by Judge Rollin Hurt of the Kentucky Court of Appeals.

THE NEW JERSEY STATE BAR ASSOCIATION met at Atlantic City, N. J., on June 11 and 12. Among the speakers were George A. Bourgeois of Atlantic City, President of the Association; Judge George Gray of Delaware; former Secretary of State Philander Knox of Pittsburgh; former Governor Franklin Fort; Judge Joseph Buffington of Pittsburgh; Howard McSherry of Newark; and Martin W. Littleton of Brooklyn. Officers were elected as follows: President, John R. Hardin of Newark; vice-presidents, Frederick W. Guichtel of Trenton, Edward Colie and Edward Keasbey of Newark; secretary, William Kraft; treasurer, Lewis Starr of Camden.

COLORADO BAR ASSOCIATION.—The eighteenth annual meeting of the Colorado Bar Association was held at Colorado Springs, Colo., on July 9 and 10. The program included the following addresses: President's address, by Edward C. Stinson of Denver; "Limitations and Qualifications of Statutory and Equitable Water Right Decrees," by Frank J. Annis of Fort Collins; "Judicial Discretion," by H. P. Burke of Sterling; "Equity Jurisdiction and Procedure in America," by John R. Nicholson of Wilmington, Del.; "The Court Rules Act of 1913 and the Supreme Court Rules of September, 1914," by Erwin L. Regenitter of Idaho Springs; "The Law of Contraband," by John S. Macbeth of Denver.

IOWA STATE BAR ASSOCIATION.—The twenty-first annual convention of the State Bar Association of Iowa was held at Fort Dodge, Ia., on June 24 and 25. The program of addresses included the following: "Legal Self-Government for Cities and Towns," by F. F. Dawley of Cedar Rapids, President of the Association; "International Law and the European War," by Judge Horace M. Towner of Corning; "The Lawyer as a Craftsman," by Judge Charles B. Elliott of Minneapolis; "Dismissing Without Prejudice," by Fred W. Sargent of Des Moines; "The Lawyer's Relation to Politics," by Senator W. S. Kenyon of Fort Dodge; "The Victories of Peace," by Judge M. J. Wade of Iowa City.

THE TEXAS BAR ASSOCIATION held its thirty-fifth annual meeting at San Antonio, Tex., on July 1, 2 and 3. The President's address was delivered by Allan D. Sanford of Waco. Other features of the program were as follows: Address by Hon. James A. Reed of Kansas City, United States Senator from Missouri; paper on "The Progress of the Law as an Element in Modern Industrial Conditions," by Carlos Bee of San Antonio; address on "The Meaning of the Unrest in Things Political and Economic," by Frank Dillard of Sherman; paper on "The Workmen's Compensation Act," by Harry P. Lawther of Dallas; paper on "Recent Noteworthy Decisions," by Judge Erwin J. Clark of Waco; "The Lawyer as a Moral Force," by Thomas H. Franklin of San Antonio.

INDIANA STATE BAR ASSOCIATION.—The nineteenth annual meeting of the State Bar Association of Indiana was held at Indianapolis, Ind., on July 7 and 8. Among the addresses on the program were the following: "Respect for the Law," by Thomas E. Davidson of Greensburg, president of the Association; "The Evolution of Jurisprudence," by William J. Houck of Marion; "The Next Step in National Control of Corporations," by James H. Wilkerson of Chicago; "The Law and the Telephone," by Will A. Hough of Greenfield; "The Monroe Doctrine," by Andrew J. Montague of Richmond, Va.; "Stub Beltz Runs for Circuit Judge—A True Narrative," by Harry B. Tuthill of Michigan City; "The Fourteenth Amendment," by Attorney-General Richard M. Milburn.

MARYLAND STATE BAR ASSOCIATION.—The twentieth annual session of the Maryland State Bar Association was held at Cape May, N. J., on July 7, 8 and 9. The program included the following addresses: President's address, by Judge N. Charles Burke of the Maryland Court of Appeals; "Some Aspects of the Applicability of the Workmen's Compensation Law of Maryland to Interstate and Foreign Commerce Carriers by Rail or Water," by George Weems Williams of Baltimore; "The Debt We Owe to the Civil Law," by Albert C. Ritchie of Baltimore; "The Courts and the People," by T. Scott Offutt of Baltimore; "Legislative Neurasthenia versus Uniformity of Laws among the States," by James R. Caton of Alexandria, Va.; address by Joseph W. Bailey of Washington, formerly United States Senator from Texas.

PENNSYLVANIA STATE BAR ASSOCIATION.—The twenty-first annual meeting of the Pennsylvania State Bar Association was held at Cape May, N. J., on June 29 and 30 and July 1. The President's address was delivered by Henry J. Steele of Easton, who spoke on "Law Reform in Pennsylvania," and the annual address was by James M. Beck of New York, ex-assistant Attorney-General of the United States. Other addresses were as follows: "Development of Constitutional Limitations of the Power of the Legislature in Pennsylvania," by Franklin Spencer Edmonds of Philadelphia; "Modern Attacks upon Our Form of Government," by John C. Bane of Pittsburgh. Officers for the ensuing year were elected as follows: President, George B. Gordon of Pittsburgh; vice-presidents, Cyrus G. Derr of Reading, John B. Head of Greensburg, William S. Hammonds of Altoona, Frederick J. Shoyer of Philadelphia, and John V. Wetzel of Mechanicsburg; secretary, William H. Staake of Philadelphia; treasurer, Samuel E. Beschore of Mechanicsburg.

English Notes.

Lawyers as Secretaries of State.—The appointment of Sir John Simon to the position of Secretary of State for the Home Department is in strict consonance with the principle which in recent times, notwithstanding some deviations, has been observed, that in the filling of that great office, having regard to its intimate connection with the administration of justice, the holder should be one learned in the law, with the advantage of a legal training and experience. Since the appointment in 1866 of Mr. Spencer Walpole, Q. C., to the position of Home Secretary, there have been, inclusive of Sir John Simon, sixteen occupants of that position. Of them, no fewer than nine have been bred to the law—namely, Mr. Spencer Walpole, Mr. Gathorne-Hardy, Mr. Bruce (Lord Aberdare), Mr. Lowe (Lord Sherbrooke), Sir William Harcourt, Mr. (Viscount) Cross, Mr. Henry Matthews (Viscount Llandaff), Mr. Asquith, and Mr. McKenna. Out of a period of forty-nine years, the head of the Home Office has for thirteen years only been a "layman."

The Size of the Cabinet.—The number of the new Cabinet, which consists of two-and-twenty members, may recall the fact that during the greater part of the eighteenth century the Cabinet was a large body meeting occasionally for the formal settlement of business which had been practically settled by a small "inner group," the confidential Cabinet or "the efficient Cabinet." Walpole's efficient Cabinets consisted of himself, the two Secretaries of State, and the Lord Chancellor, who met for the discussion or virtual settlement of policy. The meeting of the whole Cabinet Council was a formality amounting to futility. The disappearance of this titular external Cabinet must have been gradual. The Rockingham Cabinet of 1782 was a definite group of eleven persons, each of whom held high office. Fox, however, complained that the number was too large. Pitt's Cabinet in 1784 consisted of seven persons only. The Cabinet of 1808 was eleven in number. Lord Grey's Cabinet of the Reform era consisted of twelve members. The Cabinets till the latter end of the nineteenth century rarely, if ever, exceeded fourteen in number. The size of the efficient Cabinet, after the disappearance of the outer circle, has grown with the requirements of Scotland, Ireland, local government, education, agriculture, and, in the present emergency, of munitions, to be represented thereon.

Scottish Criminal Procedure.—Three cardinal points of difference between English and Scottish practice in criminal—other than treason—cases are again strikingly illustrated by the trial in Edinburgh recently of two iron merchants on a charge of trading with the enemy. The first point of difference is that in Scotland there is no opening speech for the prosecution, the evidence being called immediately after the jury have been told by the clerk of the court the charge they are to investigate: the second is that in Scotland the accused is in every case entitled to the last word: and the third is the possibility of a majority verdict. It may be added that in Scotland the jury in criminal cases consists, not of twelve, but of fifteen men. As to the merits of these points of difference, there is certainly much to be said in favor of the first two. Opening speeches occasionally overstep the proper limits assigned to them and tend to prejudice the jury, but it says much for the deep-rooted instinct for fair play among Englishmen that in the generality of cases the opening speech is conspicuously fair, and really elucidates for the jury the complicated story of the particular crime they are investigating. Theoretically, however, the Scottish practice seems the more satisfactory, as the jury listen to the evidence uncolored by any preconception as to its import. With regard to the second point, the Scottish practice seems fairer to the accused, and might well be adopted in England: but probably no one would for a moment countenance the idea of a majority verdict obtaining in England.

Workmen's Compensation Act as Applicable to Street Accident.—In the recent case of Cooper and others (applicants) *v.* Healy (respondent) the Court of Appeal of Ireland consisting of the Lord Chancellor, the Lord Chief Baron, and Lord Justice Ronan, delivered a judgment of much importance on the Workmen's Compensation Acts. The applicant was the widow of John Cooper, who was employed as porter by the respondent at 14s. weekly. Deceased was sent to deliver goods on the 14th Sept. last, and, while passing along a street, a parapet fell on him and killed him. The learned Recorder of Dublin held that the death arose out of the employment, but felt coerced by the decided cases to hold that an employer was not liable in respect of a street accident. The strongest case cited was that of Collins *v.* Collins (1907, 2 Ir. Rep. 104; 41 Ir. L. T. Rep. 3), where it was held that the employer was not liable where the accident was due to a wilfully tortious act. The Lord Chancellor, on the authorities, felt bound to hold that the employer was not liable. The Lord Chief Baron said the court was coerced by the Irish case of Collins *v.* Collins, but his Lordship had grave doubts as to the soundness of the law laid down in that case. But at present the court was bound by it, and, contrary to his own opinion, the appeal must be dismissed. Lord Justice Ronan concurred. The deceased was only running a risk common to all mankind; there was no peculiar danger, and the employment had nothing to do with the fall of the parapet. The applicants, it is stated, intend to carry the case to the House of Lords.

The Duke of Wellington's Tenure.—The centenary of Waterloo on the 18th inst. was marked, as every anniversay of that great epoch in our history has been, by the rendering by the Duke of Wellington of the day to the Sovereign at Windsor of a tricolored flag as tenant to the King by the ancient tenure of petit serjeanty. On the 11th July 1815 the sum of £200,000 was granted to the great Duke of Wellington towards the purchase of lands and the building on them of a suitable mansion, such estates to be holden by him or his heirs in free and common socage by fealty, and rendering to his Majesty, his heirs and successors, on the 18th June in every year, at his castle at Windsor, one tricolored flag for all manner of rents, services, exactions, and demands. When by the statute of Charles II. (12 Car. 2, c. 24) all tenures by knight's service were taken away and turned into free and common socage, although the tenure of grand serjeanty was amongst the tenures thus abolished, the honorary service whereby lands were held on this tenure was expressly retained. The ancient tenure of grand serjeanty was where a man held his lands of the King by services to be done in his own proper person to the King, as to carry the banner of the King or his lance, or to be his marshal, or to carry his sword before him at his coronation, or to do like services. The ancient tenure of petit serjeanty, whereby the Duke of Wellington holds his estate of Strathfieldsaye, remains wholly unaffected by the statute of Charles II. This tenure is where a man holds his land of the King "to yield him yearly a bow, or a sword, or a dagger, or a knife, or a lance, or a pair of gilt spurs, or an arrow or divers arrows, or to yield such other things belonging to warre:" (Litt. sect. 159). This is, of course, but socage in effect, because such tenants are not to do any personal service, but to render and pay certain things to the King year by year.

Mutual Wills and Presumption of Survivorship.—It sometimes happens that near relatives, such as a husband and wife, who are about to proceed on a long sea voyage, make what are termed "mutual" wills—that is, identical wills in favor of each

other. If, however, they should die at the same time, as may well happen in the case of a shipwreck, such wills would fail if they were made, as they often are, conditional upon the one testator surviving the other. By the law of England there is not (as by the Code Napoleon) any presumption from age, sex, or other circumstances, as to the survivorship of one out of several persons who are destroyed by the same calamity. Where, therefore, the husband, wife, and two children were swept off the deck of a vessel by one wave, and there was no distinct evidence that any one was seen later than another, although evidence was given that the husband was a strong man, and a good swimmer, and the wife was a weak and delicate woman, and could not swim at all, it was decided by the House of Lords in Wing *v.* Angrave, 8 H. L. 183, that it could not be assumed that one survived the other, and accordingly that the wills (each of which was made in favor of the other, with a gift over if the donee died in the lifetime of the other) failed. The same thing happened in *Re* the Goods of Alston, 66 L. T. Rep. 591 (1892), p. 142. In that case it appeared that a husband and wife executed identical wills, each appointing the other universal legatee and sole executor, and substituted executors and legatees in case of the other dying first. They started together upon a voyage to Peru in the same ship, which was supposed to have been lost at sea with all on board. There was no evidence that either of them survived the other. It was held that a grant of administration with the will annexed of the estate of each, as in the case of an intestacy, ought to be made to one of the next of kin of each of them. This being so, when persons make wills of the kind they should not make the gift over conditional only upon the primary donee dying in the lifetime of the testator, but, in the alternative, conditional also upon the gift to the primary donee failing for any other reason.

PARLIAMENT IN CAMERA.—The proposal made by Sir Richard Cooper, in his speech on the adjournment of the House of Commons on May 18, that a private sitting of the House of Commons should take place, is not consonant with the trend of opinion in Parliament as developed in modern times. Mr. Gladstone, speaking as Prime Minister on the 18th March 1886, in deprecating a return to the practice of secret committees, used language applicable to private meetings of the House of Commons. "You must," he said, "go back to the state of things when the debates of this House were not reported to the country. You must have a secret organization in the House. You must have another interest within the House. . . . It would be totally alien to our ideas of a free Parliament, where everything is spoken out and nothing is concealed, if the House determined to have such a change in the relations of Executive and Parliament." According to ancient usage, the exclusion of strangers could at any time be enforced without an order of the House under a practice which was thus explained by Mr. Speaker Shaw Lefevre (Viscount Eversley) on the 5th Feb. 1840: "The right," he said, "possessed by individual members of having the gallery cleared upon mentioning that strangers were present did not depend upon sessional orders. It was an inherent right arising out of the ancient usage and practice of the House, and analogous to the right, also enjoyed by members, of calling the attention of the Chair to the absence of forty members, upon which the Speaker is required to see whether that number of members is present, and, if such is not the case, to adjourn the House." The inconvenience of the rule was demonstrated on the 27th April 1875, when the galleries were crowded with strangers anxious to hear a debate on the export of horses, the late King Edward VII., then Prince of Wales, occupying a seat in the Peers' Gallery. Mr. Biggar called the Speaker's attention to the presence of strangers. The House of Commons on 31st May 1875 agreed to a resolution, now Standing Order No. 91, which provides that, if notice be taken that strangers are present, the Speaker or chairman shall forthwith put the question that strangers be ordered to withdraw, reserving to the Speaker or the chairman the power, whenever he thought fit, to order the withdrawal of strangers from any part of the House. In April 1878 the rule thus passed was applied under peculiar circumstances. Mr. O'Donnell rose to propose a resolution censuring the action of the Government in Donegal consequent upon the recent murder of Lord Leitrim, and his remarks were frequently interrupted. Mr. King Harman spied strangers, and the question that they be ordered to withdraw was then put by the Speaker without debate and carried by fifty-seven to twelve. The reporters' and other galleries were cleared about 9.30 p.m. and not reopened till 12.30 a.m., the proceedings within the House meanwhile, it was understood, having been of a turbulent character.

TRADING WITH THE ENEMY.—The Court of Appeal recently decided that the employment of a British subject as proxy to exercise the voting power of an enemy at a company meeting is illegal. The case, Robson *v.* Premier Oil and Pipe Line Company, Limited, was an appeal from an interlocutory judgment of Mr. Justice Sargant, whose judgment was affirmed. The decision seems to be an extension of the rule as to "trading with the enemy" hitherto applied by the English and American courts. The Hoop (1 Chr. Rob. 196) is the leading authority that all trading with a public enemy, unless by permission of the Sovereign, is interdicted, but there has been some uncertainty as to (a) what constituted trading with the enemy, and (b) whether all intercourse of every kind with the enemy was unlawful. The first of these points was dealt with quite recently by the President, Sir Samuel Evans, in the case of The Panariellos (138 L. T. Jour. 484). It was there held to be trading with the enemy where, before the outbreak of war, an ally had sold goods to the enemy f.o.b. at a neutral port and at the request of the purchasers had chartered a neutral ship for conveyance of the goods to Newcastle, and, war breaking out before the vessel was fully loaded, the ship had sailed and the goods been confiscated. There are American dicta to the effect that every kind of intercourse with the enemy is unlawful (The Rapid, 1 Gallis, 304; The Julia, ibid. 601; The Emulous, ibid. 571). Lord Stowell also lays down the doctrine very broadly, and speaks of "no intercourse between the subjects of hostile states" (The Cosmopolite, 4 Chr. Rob. 8); and the Black Book of the Admiralty (temp. Henry VI.), at p. 76, says: "Inquisition to be taken of all those who intercommunicate (*entrecommunent*), buy, or sell" with the enemy. These cases are, however, dicta, and there are American decisions to the contrary. Kershaw *v.* Kelsey (1868, 100 Mass., 561) held that a lessor who was a citizen of rebel territory during the Civil War could recover rent from the lessee, a citizen of the Commonwealth, in respect of a plantation in the rebel territory. In that case Mr. Justice Gray dismissed the Black Book with a terse quotation from John Selden that "the book itself is rather a monument of antiquity . . . than of authority," and, having gone very carefully into all the authorities, English and American, came to the conclusion that "beyond the principle of these cases the prohibition has not been carried by judicial decision. The more sweeping statements in the text-books are taken from dicta which we have already examined" (Kershaw *v.* Kelsey, 100 Mass. 561, at p. 573). In The Panariellos the President, having exhaustively dealt with the matter (although Kershaw *v.* Kelsey does not seem to have been cited), followed the dicta above mentioned extending the idea of "trading" with the enemy,

and the Court of Appeal in Robson *v.* Premier Oil Company expressly disapproved of Kershaw *v.* Kelsey and approved of The Panariellos, thus laying down the rule forbidding all intercourse with the enemy.

MEDICAL EXAMINATION OF WORKMAN ENLISTED AND ORDERED ABROAD.—To require an employer to pay compensation to a workman who has been injured by "accident arising out of and in the course of" his employment, within the meaning of sect. 1, subsect. 1, of the Workmen's Compensation Act 1906 (6 Edw. 7, c. 58), without first causing him to submit himself for examination by a duly qualified medical practitioner, would be to impose a burden on the employer wholly unwarranted. Again, to expect him to continue so paying in the absence of such a precaution would be equally unreasonable. The employer, as everyone familiar with the contents of the Act must, of course, be fully aware, is consequently adequately protected by the provisions of sect. 14 of its first schedule. But it may be convenient to remind the reader that the protection extends to relieving the employer from liability to make any weekly payments "if the workman refuses to submit himself to such examination, or in any way obstructs the same." Moreover, by sect. 18 of the same schedule, "if a workman receiving a weekly payment ceases to reside in the United Kingdom, he shall thereupon cease to be entitled to receive any weekly payment, unless the medical referee certifies that the incapacity resulting from the injury is likely to be of a permanent nature." The outbreak of the war has resulted in much new light being thrown on these statutory provisions in circumstances which cannot fail to happen repeatedly. For workmen who have acted in the same gallant fashion as did the one in the recent case of J. and C. Harrison Limited *v.* Dowling are now hundreds of thousands in number. The decision of the Court of Appeal in that case may, therefore, be said to be of the most far-reaching character. Can any injured workman who, having afterward enlisted in the army, departs, in obedience to military orders, to a foreign country be regarded as having refused to be medically examined, or as having obstructed a medical examination? Furthermore, can he be regarded as ceasing to reside in the United Kingdom? The present case afforded the learned judges of the Court of Appeal the opportunity of explaining the meaning and intention of the enactments in the two sections above quoted in a particular way that naturally before the war was never found necessary. And the following was the outcome of their Lordships' deliberations thereon: With reference to the provisions of sect. 14, the mere fact that a workman, after he has sustained an injury, enlists in the army and is then sent abroad with his regiment and is thus prevented from complying in this country with the terms of the section, does not cause him to be acting in breach thereof. With reference to the provisions of sect. 18, the mere fact that an injured workman is for the moment not in truth physically in the United Kingdom does not deprive him of his right to receive compensation. The section contemplates the case of an injured workman having left the United Kingdom as an emigrant, his design being to remain permanently in a foreign country. Workmen injured by accidents, who have subsequently become soldiers in the existing emergency, must obviously stand on a special footing in respect of their claims for compensation.

"The hardships of a particular case would not justify this tribunal in prostrating the fundamental rules of a court of chancery—rules which have been established for ages, on the soundest and clearest principles of general utility." Marshall, C. J. Crocket *v.* Lee, 7 Wheat. 527.

Obiter Dicta.

SHOCKING HER.—Cannon *v.* Prude, 181 Ala. 629.

THE LAST CASE ON THE DOCKET.—Ex p. Ah Men, 77 Cal. 198.

MARCHING THROUGH HEAVEN?—Sherman *v.* Angel, 20 App. Cas. (D. C.) 330.

OF WHAT SEX WAS THE PLAINTIFF?—Lassman *v.* Jacobson, 125 Minn. 218.

CABINET TROUBLES.—Bryan *v.* Wilson, 27 Ala. 208; Wilson *v.* Peace, 38 Tex. Civ. App. 234; Bryan *v.* Doolittle, 38 Ga. 255.

TRITE BUT RIGHT.—"Litigation is expensive to him who wins."—Per Mayfield, J., in Mobile County *v.* Williams, 180 Ala. 669.

CONSISTENT WITH THE FACTS.—Wills *v.* Wills, 166 Cal. 529, was a controversy respecting the true construction of a will.

A WHITE MARK FOR IOWA.—"Men do kiss their wives, but ordinarily do not kiss their servant girls."—Per Seevers. J., in State *v.* Kirkpatrick, 62 Ia. 558.

A FIG LEAF CONTROVERSY?—The suggestiveness of the title of Eaves Costume Co. *v.* Pratt, 2 Misc. (N. Y.) 420, is rather enhanced by the fact that Comstock was counsel for the defendant.

A SPOUT FROM A DRY WELL.—The following excerpt from Morningstar *v.* Lafayette Hotel Co., 211 N. Y. 465, deserves a place in this column only because it is the nearest approach to a bit of humor that we remember to have seen in the opinions of the New York Court of Appeals: "The plaintiff was a guest at the Lafayette Hotel in the city of Buffalo. He seems to have wearied of the hotel fare, and his yearning for variety has provoked this lawsuit."

CAUSTIC!—"We pause here to remark the notable fact that it is rare for the seller of labor to appeal to the courts for the preservation of his inalienable rights to labor. This inestimable privilege is generally the object of the buyer's disinterested solicitude. Some day, perhaps, the inalienable right to rest will be the subject of litigation; but as yet this phase of individual liberty has not sought shelter under the state or federal constitution."—Per Cook, J., in State *v.* J. J. Newman Lumber Co., Miss. 267.

THE EXCESSIVE USE OF PARTICULAR WORDS.—One of our correspondents, apparently of a mathematical turn of mind, has counted the number of times certain words are used in two of the opinions of the United States Supreme Court. He declares that in the majority opinion in Knowlton *v.* Moore, 178 U. S. 41, the word "proposition" occurs 27 times and the word "contention" 22 times. Also, he says that the majority opinion in Haddock *v.* Haddock, 201 U. S. 562, uses the word "proposition" 22 times and the word "contention" 9 times. We don't like to start trouble, but if any of our readers have figures at hand showing an equally excessive or a more excessive use of particular words in court opinions, we should like to publish them.

LOVE AND NEGLIGENCE.—In Bogan *v.* Carolina Central R. Co., 129 N. Car. 154, the plaintiff sued for damages for injuries received by being knocked off a trestle by the defendant's train. "The able counsel for the defendant contended that as the plaintiff testified that she was walking upon the trestle on Sunday afternoon with a man whom she has since married, and in whom she was then 'deeply interested,' neither of them was in a mental condition to see or hear anything except each other, and their going upon the trestle in such a frame of mind was negligence *per se*." The trial court upheld this contention by charging the jury that if they believed the evidence they would find that the plaintiff was guilty of negligence. The jury so

found and the instruction was approved by the appellate court. Thus is evolved the somewhat startling doctrine that being in love is negligence *per se*.

SEEKING ACCESS TO THE CUSPIDOR.—The case of Portland *v.* Inman-Poulsen Lumber Co., 66 Oregon 86, involved the right of the plaintiff city to open a street through the property of the defendant corporation. The court held that the city was estopped to assert its right because it had stood by and permitted the defendant to spend a large sum of money in building up a great industry. At one point in its opinion the court said: "A fair sample of the reasons given for destroying this great industry appears in the testimony of Mr. Cellars, who, when the question of opening these streets was being mooted in the council, asked a councilman who was agitating the proposition what reason there was for opening them. The reply was: 'I might want to go down to the river and spit sometime.'"

PROVIDENCE AND THE COURTS.—Ison *v.* Mayor, etc., 25 S. E. 611, was a decision by the Georgia Supreme Court. The action was brought by a seller of intoxicating liquors to recover damages from the city authorities because of the summary revocation of his license to sell. The trial court decided against the plaintiff and the Supreme Court affirmed the judgment. Justice Lumpkin wrote the opinion, and at the end thereof appears this significant statement: "Atkinson, J., providentially absent and not presiding." A correspondent of LAW NOTES makes the following comment: "This may be but another illustration of the mysterious way in which 'God moves . . . his wonders to perform,' and though the decision would appear to have been been procured by indirection, if not collusion, it is evidently legally as well as morally right. Score one for Providence—and Justice Lumpkin and his fellow jurists in collaboration with Deity."

"IN KENTUCKY."—In another column of this issue, the death is noted of Judge James H. Mulligan, the author of the famous poem "In Kentucky." For the benefit of those of our readers who are not familiar with it, we take pleasure in reproducing the poem in full:

The moonlight falls the softest,
In Kentucky;
The summer days come oftest,
In Kentucky;
Friendship is the strongest,
Love's light glows the longest,
Yet wrong is always wrongest,
In Kentucky.

Life's burdens bear the lightest,
In Kentucky;
The home fires burn the brightest,
In Kentucky;
While players are the keenest,
Cards come out the meanest,
The pocket empties cleanest,
In Kentucky.

The sun shines ever brightest,
In Kentucky;
The breezes whisper lightest,
In Kentucky;
Plain girls are the fewest,
Their little hearts are truest,
Maidens' eyes the bluest,
In Kentucky.

Orators are the grandest,
In Kentucky;
Officials are the blandest,
In Kentucky;
Boys are all the fliest,
Danger ever nighest,
Taxes are the highest,
In Kentucky.

The bluegrass waves the bluest,
In Kentucky;
Yet, bluebloods are the fewest (?)
In Kentucky;
Moonshine is the clearest,
By no means the dearest,
And, yet, it acts the queerest,
In Kentucky.

The dove-notes are the saddest,
In Kentucky;
The streams dance on the gladdest,
In Kentucky;
Hip pockets are the thickest,
Pistol hands the slickest,
The cylinder turns quickest,
In Kentucky.

The song birds are the sweetest,
In Kentucky;
The thoroughbreds are fleetest,
In Kentucky;
Mountains tower proudest,
Thunder peals the loudest,
The landscape is the grandest—
And politics—the damnedest,
In Kentucky.

JUST AN ANSWER.—A Montana correspondent sends us the following copy of an answer filed in the case of Spotted Eagle *v.* Spotted Eagle, docketed in the District Court of the Eighth Judicial District, State of Montana:

Browning, Montana,
February 13, 1915.

HON. PERRY J. DAY, Clerk of Court,
Shelby, Toole County, Montana.

Dear Sir:

I hereby respectfully submit my answer to the allegations set forth in my wife's complaint and cause of action for divorce. I received the summons from the Indian Office at Blackfeet Agency, not served on me by an officer of the said Toole County and State of Montana.

The first charge of an attempt to kill my wife with knife is wholly untrue. The affair that took place on or about the 24th day of September 1912, at Helena, in the County of Lewis and Clark in the State of Montana, while my wife, myself, and other Blackfeet Indians were attending the State Fair, I beg to state that my wife exhibited her unfaithfulness and I never touched her at all. Two other tribesmen caused me to be intoxicated who induced me to leave the tepee and led me away from the tepee and proceeded to beat me and I called for help and two of my friends came to my rescue. Had not interference occurred, I would have been murdered through her instrumen-

tality, because I have a cause and a reason to believe she conspired against me. I can summon any of the members of that State Fair Party to testify in my behalf.

In reference to the occurrence which took place on the 5th day of November 1912, near Valier, in the County of Teton, State of Montana, a woman came to our camp and started to joke with me and my wife took exception to her remarks; my wife got mad, went out of the tepee and run away, but I did not use any violence against her at all. I can get reliable witnesses to support my contention in connection with that affair.

She has left me time and again and simply because of her unfaithfulness. Dick Sanderville has been causing all the trouble between my wife and myself. He has been coaching her to complain and institute an action for divorce.

As to charges of cruel and inhuman treatment and threats by me of inflicting of great bodily harm, have been more or less continuous for several years, and for any period are wholly without foundation and the whole surrounding community can verify and substantiate my statement.

In regards to living conditions. I can prove that I have always supported her to the best of my means and ability and I have never neglected and refused to provide for her and I have always assisted her relatives. She carrys every thing out of our house and home to her people, therefore there is nothing to that. She left me in August 1914 without cause and just provocation and set me afoot because she took all the horses with her and everything belonging to our home was moved out by her, even our bedding, and this I can prove by the Government officials in charge of the District where I reside.

It seems absurd to prefer a charge of drunkenness against me when the liquor traffic suppression laws are rigidly enforced. I was arrested once for strong drink, but I did not introduce the whiskey to my place and I accepted the treat, and the records of Blackfeet Agency can show my conduct in respect to the habit of whiskey drinking and the Court proceedings will establish the occasions and circumstances led to that particular time when I indulged.

My wife abused me and her own relations will testify against her and her charge of adultery against me is without foundations because she left me in August 1914 and she was nowhere near me on the first day of October 1914. She claims that Mrs. Calf Tail's full name is unknown to her. My wife does know her as well as her ownself.

She demands that I should pay all costs and expenses in connection with her cause of action for divorce. I do not think she or court will be able to extract a drop of blood out of dried up turnip. She got all the live stock and I have nothing except my 320 acre allotment of land in severalty held in trust by the Governor and if you can get it from the Secretary of Interior in this case, why I would say, fly to it.

Yours very truly,
JAMES SPOTTED EAGLE.

Correspondence.

IN RE THE PUBLIC DEFENDER.

To the Editor of LAW NOTES.

SIR: The Eastern advocates of the public defender ignore the fact that it is an attempt to carry out the plank of the socialist platform for the "free administration of justice," meaning in both civil and criminal cases.

The works of Professor Maurice Parmelee, who the writer believes is the father of this plank to the above effect, are generally ignored by them as the ideas of the professor, who is not, at present at least, a lawyer in active practice.

Publications in California recently filed in the library of the Association of the Bar of the City of New York show, however, that some of the leading Western lawyers advocating the public defender desire not merely to carry out the socialistic idea of the "free administration of justice," but also to purge and socialize the bar by prohibiting any lawyers except a small class of public champions or public trial lawyers, to be paid exclusively by the community, from trying any cases in courts of record, and preventing all litigants from having any choice in selecting who shall represent them as trial counsel in such courts.

Some of these gentlemen have published their views in the following readily accessible publications: 4 *Journal American Institute Criminal Law and Criminology*—Reorganization of the Bar: The Public Defender, pp. 650-654, by R. S. Gray; An Official Trial Bar, pp. 654-662, by R. S. Gray; An Official Trial Bar, pp. 663-673, by Abram E. Adelman. See also 8 *Illinois Law Review*—Reorganization of the Legal Profession, pp. 239-245, by Wesley W. Hyde.

For an interesting account of the defeat of this project in the San Francisco Bar Association, before the Economic Club of San Francisco, and its being opposed by the American Judicature Society, the only copy the writer knows of in the East is in the files of the library of the Association of the Bar. Possibly, however, Mr. R. S. Gray, Hobart Building, San Francisco, California, might be able to advise where and how the rare California publication on this subject can be had, which he furnished to the Bar Association.

Dr. Stolper, the Oklahoma Public Defender, performed the same kind of valuable services there that a state-wide legal aid society would perform in a state with many Indians (who are legally minors in Oklahoma) holding property, whose rights the local powers that prey did not feel bound to respect.

The volunteer or bar association public defenders in some cities are merely an attempt to improve on the practice of assigned counsel in criminal cases.

The public defender of the Los Angeles type, however, will sooner or later inevitably attempt to realize the "free administration of justice" plank of the socialist platform. Already, according to the figures in his address before the California Bar Association, he received 6,715 applications for assistance in civil matters, and he appeared in 352 criminal cases during the first ten months of his administration.

Yours very sincerely,
New York City. HENRY H. FORSTER.

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CONTENTS

Motion for New Trial after Affirmance of Conviction.

WITHOUT regard to the merits of the motion for a new trial made on behalf of Charles Becker a few days before the date set for his execution, such a motion presents several interesting questions. The first impression of the average lawyer naturally is that it is grossly irregular that a single judge should have the power to grant a new trial after a conviction has been affirmed by the appellate court. But obviously the question of newly discovered evidence is one which was not presented on the appeal, and so such a motion after affirmance differs in no substantial respect from one made before the taking of an appeal. And assuming the discovery, after the affirmance of a conviction, of evidence clearly showing the innocence of the accused, it would seem an atrocity if it could be presented only by an appeal for clemency. It is probable, however, that such an appeal is the only recourse in many states, since the common-law power to grant a new trial expires with the term at which conviction is had. The application in the Becker case was made under a statute (Code Crim. Proc. § 465) which provides for a motion for a new trial without limit as to time, when "it is made to appear, by affidavit, that, upon another trial, the defendant can produce evidence such as, if before received, would probably have changed the verdict; if such evidence has been discovered since the trial, is not cumulative, and the failure to produce it on the trial was not owing to want of diligence. The court in such cases can, however, compel the personal appearance of the affiants before it for the purposes of their personal examination and cross-examination, under oath, upon the contents of the affidavits which they subscribed." There are, however, many states in which statutes of this kind do not exist, and without the aid of a statute the technical obstacles to the motion seem to be insurmountable. The New York courts have held several times that after the expiration of the time limited for a motion for a new trial there is no power to entertain such a motion except as it is given by the statute above quoted. (See *People* v. *Dwyer,* 30 Misc. 283; *People ex rel. General Sessions,* 185 N. Y. 504.) The situation seems to suggest very strongly the necessity of legislation on this subject in states which have not so far acted on it. Irrespective of the merits of the alleged newly discovered evidence in the Becker case, his execution would have left a very unpleasant impression if there had been no means by which that evidence could have been presented to an impartial tribunal. While the New York statute is in some respects a good model for legislation of this kind, it is at least questionable whether such a motion should not, at any rate in capital cases, be required to be made in an appellate court and heard by the full bench.

When is Evidence Newly Discovered?

ANOTHER question of some nicety was presented by the motion heretofore referred to for a new trial in the Becker case. Can evidence which was known to the accused but which he did not communicate to his counsel be said to be newly discovered when communicated to them after a conviction? Judge Ford held that such evidence was not ground for a new trial, and his holding is in accord with the few cases which have passed on the question. Thus in *Moore* v. *State,* 53 S. W. 862, the Texas court said: "An examination of this showing indicates, not so much that the alleged facts were newly discovered, as that appellant was too stupid and ignorant to inform his counsel of said facts before going into trial. Of course, this would not be a sufficient showing in regard to newly discovered testimony." Technically this is undoubtedly good law, and a relaxation of the rule might open the door to fraud, since a false assertion of the client that he did not communicate the information could not be disproved by the prosecution. But does not an application to open a capital conviction for evidence which was not offered at the trial present a question broader than that of the right of the accused to be relieved from the consequences of his own mistake? That he who did not speak when he should will not be heard when he would speak may be a sound rule in civil cases, but is it not a little drastic when a man's life is at stake? Over and above all rules of practice and questions of policy, the state should not put a man to death when there is evidence in existence which raises a reasonable doubt of his guilt. We do not assume that the evidence which was refused consideration in this particular case was of that class. But the rule would operate as inflexibly though the evidence showed the innocence of the accused beyond the shadow of a doubt. Some safeguard against imposition must of course be interposed, even in a capital case, for it is in such a case that the motive for imposition is most compelling. But it would seem that if the matter were left in the discretion of an appellate bench the rights of the public would be adequately guarded, and the horrifying suspicion that an innocent man has been put to death on a technical rule of law be at the same time avoided.

Regulation of Prices by Manufacturers.

A QUESTION of more than ordinary interest to the business world was decided by Judge Hough of the United States Court in the case of *The Great Atlantic*

& Pacific Tea Co. v. *The Cream of Wheat Company.* The invalidity of contracts by which a manufacturer of goods seeks to fix the prices at which they may be resold by a purchaser was established by the decision in *Miles Med. Co.* v. *John D. Park & Sons Co.*, 220 U. S. 373, and that case has been followed by several others to like effect. Those decisions however all arose on attempts by the manufacturer to enforce the contract limitation on the purchaser's right of resale. In the Cream of Wheat case, as reported in the press, the manufacturer refused to sell to a certain large retail dealer because of its practice of cutting prices, and action was brought by the dealer for the penalty imposed by the Clayton Act of October 15, 1914, charging that such refusal was in pursuance of an attempt to maintain an unlawful monopoly. Judge Hough is reported to have held that the power of Congress to regulate interstate commerce does not extend to compelling a sale against the will of the vendor. "There is no commerce," he argued, "until a sale is made," and a statute compelling a sale would be unconstitutional. While the decision may result in some readjustment of business methods, it is difficult to see how it can have much permanent effect, as dealers will undoubtedly find indirect methods of purchasing, and any contract not to resell to them would undoubtedly fall within the condemnation of the earlier decisions.

The Public Defender.

AMONG the many innovations, reforms we might say, in the administration of the law in recent years in the United States, is the creation of the office of public defender. To the West, more willing to experiment than the conservative East, is due the birth of this new idea of the administration of justice, as was that of the juvenile court, and that it has proved a success is evidenced by its spread to other sections of the country. An amendment to the constitution of the state of New York providing for the establishment of the office has recently been submitted to the constitutional convention. Theoretically, the prosecuting attorney as an officer of the court, sworn to see justice done, represents the accused as well as the state, but practically it has been demonstrated that one man cannot represent two sides of a case at one and the same time without one or the other suffering, and the result is that the poor man must do without a proper and adequate legal defense or, worse, accept an attorney of the class known as "shysters." The strongest argument in favor of the creation of such an office is the highly successful results obtained in other communities where it has been practically tested, while the most serious objection urged by many is that of expense. This contention also finds its best answer in the experience of others, it being claimed that the administration of the office in Los Angeles, where it has been more thoroughly tested than anywhere else, shows that the public defender actually saves money for the county by eliminating delays and useless trials. The idea has also been attacked because of its socialistic tendencies. In the August number of LAW NOTES a correspondent points out this tendency to carry out the socialistic platform for the "free administration of justice" and predicts that public defenders of the Los Angeles type will sooner or later attempt to realize that goal. Whether this be true or not, it will hardly retard the growth of a reform so universally praised by those who have tried it.

Novel Attack on the Initiative and Referendum.

A RATHER novel and interesting contention was advanced by a prominent attorney of Indianapolis in an address at the recent meeting of the Wisconsin Bar Association. The initiative and referendum, he claimed, could not be legally adopted in the states formed from the Northwest Territory because of the stipulation made by Virginia when she ceded this territory to the Confederation in 1784, that the area should always have "a strict republican form of government." Were this position sound it would seriously affect the great states of Ohio, Indiana, Illinois, Michigan, Wisconsin, and a part of Minnesota, for most if not all of these states have adopted, in some form more or less modified, the initiative or referendum or both. The assistant attorney general of Illinois, in a recent interview on the subject, points out that both the initiative and referendum are in limited operation in that state, and defends the legality of such laws, as not inconsistent with any prohibition, express or implied, in the phrase "a strict republican form of government," arguing that the same issue might as well be raised in any state under the guarantee in the Federal Constitution of a republican form of government. Just what is meant by "a strict republican form of government" is not precise, though it is ordinarily understood to mean a representative government as opposed to a pure democracy. Madison, in the Federalist, defines a republic as "a government which derives all its powers directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior." This definition would seem effectually to dispose of the argument that the initiative and referendum are prohibited under a republican form of government. However, such a contention would scarcely receive much consideration at the hands of the courts, and the question loses interest except from a historical and theoretical viewpoint. To those interested in the history and science of government and prone to academic discussion it presents a fruitful subject, but the advocates of such laws need hardly fear serious harm to their pet theories from such a source.

Professional Ethics.

OUGHT a lawyer to defend a prisoner whom he believes to be guilty? Mr. Justice Darling in a case in which a solicitor was the plaintiff made some observations on this familiar problem which ought not to go unrecorded. He protested, says the London *Globe,* against the notion that a lawyer, whether barrister or solicitor, is under an obligation to cease to conduct a case which he realizes to be bad. "If an advocate in the course of a trial for murder comes to recognize that his client is guilty, is he," asked the learned judge, "to say to the court, 'Hang my client'?" To lawyers this counter-query with its self-evident response effectually places beyond the realm of argument the original question. They know that when once embarked on a case they cannot retire therefrom without the consent of the client or the court, and to come before the latter with a revelation of facts damaging to the person they have chosen to defend is such a breach of confidence that no lawyer worthy of the name could be found to commit it. Moreover, even if a lawyer were himself willing to commit such perfidy the law itself, having regard to

the sacredness of the relation subsisting between attorney and client, would from motives of public policy effectually seal his lips. But how about a lawyer accepting a retainer and voluntarily engaging in the defense of an accused person where he has, prior to his retention, direct knowledge of the prisoner's guilt, derived, we will say, from the accused's own confession? Is not such a defense highly unethical and evidence of a professional depravity in the lawyer who will dare to undertake it, the pseudo-moralist asks? And Lord Macaulay in his glittering style inquires, "Can it be right that a man should, with a wig on his head and a band round his neck, do for a guinea what, without those appendages, he would think it wicked and infamous to do for an empire?" To this rhetorical question we answer simply, "It can." The public hangman or chief electrocutioner can by virtue of his office and under warrant from the state legally and morally deprive of his life at the appointed time a murderer condemned to die; but let any one before such time seek to accomplish his death by lynch law or otherwise, and it is the duty of the sheriff or other proper custodian to defend him to the utmost, even to the point of taking life, although the prisoner may be richly deserving of death. His death, however, the law and good morals say, should be accomplished only by due process of law. The trouble with most detractors of the legal profession is that they fail utterly to comprehend the principle on which advocacy is based. Advocacy implies nothing more than the substitution for an actual litigant of a person professing special skill and learning in litigation to do on behalf of the litigant and in his stead all that he, if possessing sufficient knowledge and ability, might do for himself with fairness to his opponent. Every man, accused of an offense, has a constitutional right to a trial according to law; even if guilty, he ought not to be convicted and undergo punishment unless on legal evidence, and with all the forms which have been devised for the security of life and liberty. As former Chief Justice Sharswood of Pennsylvania has wisely said: "These are the panoply of innocence, when unjustly arraigned; and guilt cannot be deprived of it, without removing it from innocence." To conduct his defense in accordance with the forms of law, a prisoner, no matter how guilty, is entitled to the benefit of counsel, and moreover, if he cannot procure counsel the law will assign him counsel and force the latter to act under pain of punishment for contempt if he fails to discharge his duties properly. It can therefore not be improper or unethical for an attorney to do what the law can oblige him to do, and this principle is embodied in the codes of professional ethics adopted by many states which provide that "an attorney cannot reject [or is not bound to reject] the defense of a person accused of a criminal offense, because he knows or believes him guilty. It is his duty by all fair and honorable [or lawful] means to present such defense as the law of the land permits, to the end that no one may be deprived of life or liberty, but by due process of law."

The Virginia - West Virginia Controversy.

THE long standing issue between the states of Virginia and West Virginia as to the liability of the latter state for a share of the ante-bellum debt of the former has been settled by the decision of the Federal Supreme Court requiring West Virginia to pay some thirteen million dollars to the elder commonwealth. At least we thought for a time that it was settled. But in an article in *The Bar,* the official organ of the lawyers of West Virginia, it is contended with much earnestness and ability that the proceeding, though ostensibly a suit between two states as warranted by Article III, section 2 of the Constitution, was in fact merely an arbitration, having no legal status and warranting no binding decree. This view is based on certain interlocutory expressions of the court and its alleged disregard of rules of practice, which are not presently available for our examination, and no opinion can be expressed as to its merits. It is, however, very improbable that the august tribunal which rendered this decision can be convinced that it has abandoned its constitutional jurisdiction and rendered nothing more than an extra-judicial opinion. To one removed from the atmosphere of the local controversy it seems a little surprising that an objection of this kind should be urged against a decree which at least settles, so far as human judgment can settle, the merits of the controversy. Perchance it is impossible to enforce this decree against the state; indeed it is a little difficult to see in what manner it can be enforced. But time was when just but unenforceable claims were denominated "debts of honor" though many of them had little enough of honor in their contracting.

Repeal of Initiated Laws.

DOES the power of the people to make a law carry an implication of exclusive power to repeal it? Judge Alva E. Taylor, of the circuit court for Beadle County, South Dakota, says not. In an action to enjoin the enforcement of South Dakota's new primary law, which repealed the Richards primary law, enacted by the people of the state under the initiative in 1912, Judge Taylor holds the new law, and therefore the repeal of the old, valid. The ground of his decision seems to be that all the sovereign powers of a state not taken away by its constitution reside in the legislature, and hence that since the constitution does not prohibit the legislature from repealing an initiated law it may do so. We are not advised as to how Judge Taylor disposed of the claim—which undoubtedly must have been made by the plaintiff—that power in the legislature to repeal is so totally inconsistent with the theory of the initiative that the two cannot coexist. Perhaps he concluded that there was no such inconsistency. But however that may be, his decision certainly raises an unique question the final answer to which will be awaited with more than ordinary interest throughout the country. If the court that gives this answer can and will consider the history, aim, and purpose of the initiative, it might be argued that there could be but one result, viz., a reversal of Judge Taylor's holding. Yet who can say that the people who incorporated the initiative amendment in their constitution intended to adopt the initiative theory to its fullest logical conclusion? The question, after all, is not so simple as it might seem, and on the present record we refrain from further comment.

Filing Fees for Primary Candidates.

IT seems that another primary law is to run the gauntlet of constitutional objections. In Indiana, as in other states, the legislature has framed a law (Acts 1915, c. 105) designed to give effect to the demand for some sort of

regulation of political parties in the matter of nomination of candidates, and the usual attempt has been made to safeguard the integrity of the parties by certain requirements respecting party affiliation in connection with the right to vote at the primary. And again, as in other states, the law will probably be attacked on the ground that this feature is an unwarranted restriction of the right of suffrage. This objection, however, will probably go the way of others of the same character, and be held to be without merit. A more serious objection may, perhaps, be found in section 13, where it is provided that candidates for certain offices, when filing their declarations to have their names placed on the primary ballot, shall pay into the county treasury a fee of one per cent of one year's legal salary or per diem of that office, and that candidates for President, Vice-President, Governor, and United States Senator shall each pay into the state treasury a fee of one hundred dollars. It is interesting to note in this connection that in one instance at least, a primary law has been attacked on the gronnd that it involved the expenditure of public funds for private purposes. This objection proved fruitless. *State* v. *Michel,* 121 La. 374, 46 So. 430. But the other alternative—adopted by the Indiana law—of imposing the expense on the candidates has been held unconstitutional. *People* v. *Board of Election Com'rs,* 221 Ill. 9, 5 Ann. Cas. 562, 77 N. E. 321; *Johnson* v. *Grand Forks County,* 16 N. D. 363, 113 N. W. 1071, 125 Am. St. Rep. 662; *Morrow* v. *Wipf,* 22 S. D. 146, 115 N. W. 1121; *Ballinger* v. *McLaughlin,* 22 S. D. 206, 116 N. W. 70; *State* v. *Drexel,* 74 Neb. 776, 105 N. W. 174. On the other hand such provisions have been upheld in some instances, on the ground that they are reasonable regulations and that the money is used for defraying the expenses of the election. *Socialist Party* v. *Uhl,* 155 Cal. 776, 103 Pac. 181; *Kenneweg* v. *Allegany County Com'rs,* 102 Md. 119, 62 Atl. 249; *State* v. *Scott,* 99 Minn. 145, 108 N. W. 828; *State* v. *Brodigan,* (Nev.) 143 Pac. 238; *State* v. *Nichols,* 50 Wash. 508, 97 Pac. 728. In view of this irreconcilable conflict a decision by the Supreme Court of Indiana on the same point will be received with great interest. It would of course be futile to attempt a forecast of what the decision would be, except that it would seem safe to say that even in the event of a decision against the validity of section 13, the rest of the law will probably stand.

THE KENTUCKY WEBB-KENYON LIQUOR CASES AND THEIR EFFECT

THE lot of those total abstainers from all alcoholic beverages who would *pro bono publico* by legislative enactment impose on others, at least by indirection, their own code of morals is, forsooth, not a happy one. They have worked industriously and, despite many rude judicial setbacks, perseveringly to cut off entirely from potential imbibers all sources of supply. With this end in view they have in some jurisdictions secured the passage of statewide prohibition laws; in others local option has been triumphant. To remove the objection presented by the interstate commerce clause to the prevention under state laws of the sale of interstate shipments in the original package, they secured the adoption of the Wilson law in 1890, thereby making illegal the sale of intoxicating liquors even in unbroken packages. But inasmuch as the federal Supreme Court has construed the word "arrival" in the Wilson Act to mean "arrival at destination and delivery to the consignee," interstate shipments thereby being rendered immune from state laws until such time, the act of March 1, 1913, known as the Webb-Kenyon law, was passed over the presidential veto to supply the deficiency of the earlier act by subjecting interstate shipments of liquor to the operation of state laws immediately on their arrival within any part of the state. And yet despite all these herculean endeavors, a man in a "dry" county in Kentucky can still, it seems, enjoy a legitimate acquaintance with John Barleycorn, at least in the inner sanctum of his own domestic circle, and what is more, to aid him in this end, he may take advantage of an express company's facilities and have liquor despatched from without the state to his very door, the express company incurring no liability in consequence of its performance of this friendly act.

Such is the effect of the recent decision of the United States Supreme Court in the Whitley County (Ky.) case which arose out of a prosecution of the Adams Express Company for taking liquor for personal use from Tennessee into Whitley County which is "dry territory." Justice Day, for the court, without determining the constitutionality of the Webb-Kenyon law, held that it was bound to accept the decision of the Kentucky Court of Appeals (see *Adams Express Co.* v. *Commonwealth,* 154 Ky. 462, 157 S. W. 908, 48 L.R.A.N.S. 342) that the Webb-Kenyon law was not applicable. Since the Webb-Kenyon law only prohibits the transportation into a state of intoxicating liquor which "is intended by any person interested therein, to be received, possessed, sold or in any manner used . . . in violation of any law" thereof, and since Kentucky, according to the decision of its highest court, is without a statute defining the mere purchase and personal use of liquor as criminal, the decision of the Supreme Court is highly reasonable, and must appear so even to the prohibitionists (at least to the lawyers among them) although they may privately lament the sad result. As was said by the court in *Adams Express Co.* v. *Commonwealth,* 154 Ky. 462, 157 S. W. 908, 48 L.R.A.N.S. 342: "The history of the Webb-Kenyon law, the causes that led to its enactment, and the evils it was intended to remedy, taken in connection with the carefully chosen words of the act, show that the object was to aid the states in suppressing the illegal traffic in intoxicating liquors that they had been much hindered in doing by the protection afforded violators of the law by the commerce clause of the Federal Constitution; and that it was not meant by this legislation to in any manner abridge the personal liberty of the citizen in the right to personally use liquor or the right to have it in his possession for such use."

While to those whose dreams of enforcing total abstinence by virtue of the Webb-Kenyon law have been thus rudely shattered, it may seem to be like adding insult to injury to speak of the Webb-Kenyon law as an aid "in suppressing the illegal traffic in intoxicating liquors," still it may be pointed out that the Webb-Kenyon law is by no means rendered entirely abortive by these decisions nor is the effect thereof wholly nugatory. Under its operation, as the court in *Adams Exp. Co.* v.

Commonwealth, supra, indicated, the boot-legger and the citizen who purchase liquor in other states and have it delivered in prohibition territory by a carrier, one for unlawful, the other for lawful, purposes, do not occupy the same position, nor are the duty and immunity of the carrier the same in respect to each. The commerce clause of the Federal Constitution does not now under the Webb-Kenyon law afford to the carrier the complete protection it formerly did. The carrier must now, if it wishes to avoid being prosecuted, take notice of the use to which it is intended to put the liquor, and, if this use will violate the law of the state at the place of delivery, the carrier may refuse to receive the shipment, or, having received it, may refuse to deliver it. "In short," says the court, "the carrier, in bringing into and delivering intoxicating liquor at places where its sale is forbidden, or at places where the local option law is in force, does so at its peril and takes the risk of being prosecuted and punished . . . if the liquor is intended by any person interested therein to be received, possessed, sold, or in any manner used in violation of the laws of the state."

All things being said, however, the basic fact remains that the Webb-Kenyon law has failed to remove entirely the obstacles raised by the interstate commerce clause to the extension to interstate transactions of the policy of many states with respect to intoxicating liquors, and to that extent it must be admitted that the state laws which have had for their indirect object absolute prohibition within certain areas have been ineffective. But while on that account the decision in the Whitley Co. (Ky.) case may be disappointing to the advocates of these prohibitory laws it seems scarcely possible that it could have been entirely unexpected by them. In truth, its results may in a measure be said to spring from their own inconsistent demands. The national legislature, in order to insure to each state protection in the working out of its own individual policy with respect to intoxicating liquors, has consented to divest of their interstate character such commodities where their contemplated use is unlawful within a state, but it has thus far not seen fit to prohibit the importation of articles for a use not condemned by the local law. This would seem to be eminently proper, but it is not just what the prohibition element controlling some states exactly desires. In such states they have with the sanction of the courts and in the interest of the public health, morals, peace, or safety, entirely prohibited the manufacture and sale of intoxicants; in some cases they have made it criminal for any person to have such liquors in his possession within the territory wherein the sale or gift is prohibited, with intent to sell or give away, and they have lawfully changed the rules of evidence by making such possession *prima facie* evidence of a guilty intent. But thus far they have very generally shrunk from making the mere act of drinking or of having intoxicants in possession for purposes of personal consumption criminal. The seller, the purveyor, or transporter may be criminal, but not the buyer. Under the prevailing laws the right of the citizen to drink what he wants provided the rights of others are not invaded is admitted, but the utmost ingenuity is employed to prevent the possibility of a would-be consumer getting near a source of supply.

Fears as to the constitutionality of such a measure if the mere act of drinking were made a criminal offense may of course have acted as a powerful deterrent of such drastic legislation, as it is self-evident that if the legislature may pass a general law prohibiting any citizen from possessing or using liquor in any quantity, this would in itself be the most perfect prohibition law possible, because no man could retail liquor without first having possession of it. That such fears are justified it requires but a cursory glance at the authorities fully to demonstrate. True, there exists in the opinion of Justice Harlan in *Mugler* v. *Kansas,* 123 U. S. 623, 662, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273, a famous dictum frequently referred to in support of the right of a state to prohibit its citizens from manufacturing intoxicating liquors for their own personal use. He there says: "If, in the judgment of the legislature, the manufacture of intoxicating liquors for the maker's own use as a beverage would tend to cripple, if it did not defeat, the effort to guard the community against the evils attending the excessive use of such liquors, it is not for the courts, upon their views as to what is best and safest for the community, to disregard the legislative determination of that question. So far from such a regulation having no relation to the general end sought to be accomplished, the entire scheme of prohibition, as embodied in the constitution and laws of Kansas, might fail, if the right of each citizen to manufacture intoxicating liquors for his own use as a beverage were recognized. Such a right does not inhere in citizenship. Nor can it be said that government interferes with or impairs anyone's constitutional rights of liberty or of property, when it determines that the manufacture and sale of intoxicating drinks, for general or individual use as a beverage, are, or may become, hurtful to society, and constitute, therefore, a business in which no one may lawfully engage." On the other hand it has been held very generally that the mere possession of intoxicating liquor, kept for one's own use, is not inherently injurious to the health, morals, or safety of the public, and, therefore, that legislation prohibiting such keeping in possession is not a legitimate exercise of police power, but, on the contrary, is an abridgment of the privileges and immunities of the citizen without any legal justification and as such void. See *Sullivan* v. *Oneida,* 61 Ill. 242; *State* v. *Williams,* 146 N. C. 618, 61 S. E. 61, 71 L.R.A. (N.S.) 299, 14 Ann. Cas. 562; *Titsworth* v. *State,* (Okla.) 101 Pac. 288; and *Ex p. Brown,* 38 Tex. Crim. Rep. 295, 70 Am. St. Rep. 743, 42 S.W. 554.

Possibly the most clear-cut presentation of the issues involved in any legislative attempt at interference with a man's right to possess for his own personal consumption and so to employ intoxicating liquors is to be found in *Commonwealth* v. *Campbell,* 133 Ky. 50, 117 S. W. 383, 24 L.R.A. (N.S.) 172, 19 Ann. Cas. 159. Referring to the right of the citizen to use liquor for his own comfort, provided that in so doing he commits no offense against public decency by being intoxicated, the court says: "We are of opinion that it never has been within the competency of the legislature to so restrict the liberty of the citizen, and certainly not since the adoption of the present constitution. The bill of rights, which declares that among the inalienable rights possessed by the citizens is that of seeking and pursuing their safety and happiness, and that the absolute and arbitrary power over the lives, liberty, and property of freemen exists nowhere in a republic, not even in the largest majority, would be but an empty sound if the legislature could prohibit the citizen

the right of owning or drinking liquor, when in so doing he did not offend the laws of decency by being intoxicated in public. Man in his natural state has a right to do whatever he chooses and has the power to do. When he becomes a member of organized society, under governmental regulation, he surrenders, of necessity, all of his natural right the exercise of which is, or may be, injurious to his fellow citizens. This is the price that he pays for governmental protection, but it is not within the competency of a free government to invade the sanctity of the absolute rights of the citizen any further than the direct protection of society requires. Therefore the question of what a man will drink, or eat, or own, provided the rights of others are not invaded, is one which addresses itself alone to the will of the citizen. It is not within the competency of government to invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned, or to prohibit him any liberty the exercise of which will not directly injure society."

In none of the cases, however, in which the point has been discussed, was there involved any direct legislative mandate making the act of drinking itself criminal, the legislatures being, as has been stated, apparently averse to taking such extreme measures. And the reason for this aversion, wholly apart from the consideration of the constitutional question involved, has been, it is believed, the existence even among those most ardently in favor of prohibitory measures against the liquor traffic, of a deep-seated disinclination to punish as a common criminal or felon one who indulges in an occasional social glass, based on a tacit if not openly avowed recognition of the fact that there is a real distinction between the use and abuse of even such articles or substances as alcoholic beverages. In fact this idea has been expressed judicially in *Beebe* v. *State,* 6 Ind. 501, 63 Am. Dec. 391, wherein the court stated that it knew as a matter of general knowledge, and was capable of judicially asserting the fact, that the use of beer, etc., as a beverage, was not necessarily hurtful, any more than the use of lemonade or ice-cream. "And," pursued the learned court, "will the general principle be asserted that to prevent the abuse of useful things, government shall assume the dispensation of them to all the citizens—put all under guardianship? Fire-arms and gunpowder are not manufactured and sold to shoot innocent persons with, but are often so misapplied. Axes are not made and sold to break heads with, but are often used for that purpose in the hands of murderers. Bread is not made to make gluttons with, but is perverted to that use. Razors are not made to cut throats with, but are applied in that way by the suicide. The Almighty did not create fists to knock people down with, but they are often put to that use, and still he permits men to be born with fists."

Moreover, it should be pointed out that irrespective of any possible injury resulting to the individual from his own personal indulgence there is involved in any proposal to make such indulgence criminal, the larger governmental question, should a self-regarding act or vice be a crime unless it is thrust on the attention of the public? In former times laws were sometimes passed limiting individual conduct in ways that are now considered ridiculous, such as fixing the number of courses permissible at dinner, the length of pikes that might be worn on the shoes, etc., but these enactments were founded on the pique or whims of an exacting and tyrannical aristocracy rather than on reason, or, as in the case of the old New England blue laws, on views of propriety or religion that do not now obtain with anything like the former degree of strictness. Judge Cooley, in his admirable work on Constitutional Limitations, at page 385, says: "In former times, sumptuary laws were sometimes passed, and they were even deemed essential in republics to restrain the luxury so fatal to that species of government. But the ideas which suggested such laws are now exploded, utterly, and no one would seriously attempt to justify them in the present age. The right of every man to do what he will with his own, not interfering with the reciprocal right of others, is accepted among the fundamentals of our law." The instances of attempts to interfere with this beneficent principle have not been numerous since the early colonial days. One notable instance may be mentioned, however, in the passage in some of the western states of statutes prohibiting the possession without license of opium or the use thereof by smoking, such statutes being upheld as a valid exercise of the police power. See *Ex p. Mon Luck,* 29 Ore. 421, 44 Pac. 693, 54 Am. St. Rep. 804, 32 L.R.A. 738, and *Ah Lun* v. *Territory,* 1 Wash. 156, 24 Pac. 588, 9 L.R.A. 394. It should be noted, however, that even in these cases care is taken to differentiate them from intoxicating liquor cases, the court in *Ex p. Mon Luck,* supra, saying: "It is a matter of common knowledge that intoxicating liquors are produced principally for sale and consumption as a beverage, and so common has been their manufacture and use for this purpose that they are regarded by some courts as legitimate articles of property, the possession of which neither produces nor threatens any harm to the public. But the use of opium for any purpose other than as permitted in this act has no place in the common experience or habits of the people of this country."

The recent federal decision in the Whitley Co. (Ky.) case therefore forces the advocates of state prohibition laws to take a definite stand on this great question of public policy. Will they accept the generally well-recognized principle that a state has no right to prohibit a self-regarding act, and consequently concede to the citizen the right to drink what he pleases as long as he does not do so publicly, or will they, in order completely to accomplish their aims, seek to brand him as a common criminal for so doing? True, they may possibly side-step the issue by centering their activities on the advocacy of nation-wide prohibition, but if they accept the second alternative it is a safe hazard that they will find themselves traveling on a road long and difficult. Moreover, even though it were possible constitutionally to enact such a law there exists an insuperable objection to such legislation which it would be well for all advocates thereof to ponder carefully. This objection was clearly indicated by the Hon. Edgar M. Cullen, ex-chief Judge of the New York Court of Appeals, in an address on "The Decline of Personal Liberty in America," delivered at the annual meeting of the New York State Bar Association in New York City, January 30, 1914, published in LAW NOTES, March, 1914, wherein he says: "Great as are the evils caused by the improper or excessive use of stimulants, people who take wine or liquor in moderation, without injury, at least to others, cannot be expected to surrender their right so to do. At any rate, they will not, despite any laws to the contrary

that may be made. The history of such legislation in the states where it has been enacted shows that it has failed to accomplish its object. The result is that law habitually disregarded breeds contempt for law."

C. E. P.

THE CHARGE OF JUDICIAL USURPATION*

IN a speech delivered in the Senate of the United States on July 31, 1911, in support of a bill for the election and recall of federal judges, the Hon. Robert L. Owen, in discussing the power exercised by the courts to declare void legislative acts contrary to the Constitution, said: "No one pretends that the jurisdiction is *expressly given*, and John Marshall ought to have known it was expressly refused." He adopted, as a part of his argument, an address delivered by the Hon. Walter L. Clark, Chief Justice of North Carolina, to the Law Department of the University of Pennsylvania, April 27, 1906. In his address the Chief Justice declared that the power exercised by the courts to declare an act unconstitutional was "without any warrant, express or implied, in the Constitution." Among other things, equally erroneous and equally harmful, and well calculated to instill into the minds of his hearers disrespect for the action of lawful constituted public authority, the Chief Justice further said, referring to the Convention of 1787 which framed the Constitution: "A proposition was made in the convention —as we now know from Mr. Madison's journal—that the judges should pass upon the constitutionality of the Acts of Congress. This was defeated June 5, receiving the votes of only two States. It was renewed no less than three times, i. e., on June 5, July 21, and finally again for the fourth time on August 15, and though it had the powerful support of Mr. Madison and Mr. James Wilson, at no time did it receive the votes of more than three States. On this last occasion, August 15th, Mr. Mercer thus summed up the thought of the convention: He disapproved of the doctrine that the judges, as expositors of the Constitution, should have authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be incontrovertible.

"Prior to the convention, the courts of four States—New Jersey, Rhode Island, Virginia and North Carolina—had expressed an opinion that they could hold acts of the legislature unconstitutional. This was a new doctrine never held before—nor in any other country since—and met with strong disapproval. In Rhode Island the movement to remove the offending judges was stopped only on a suggestion that they could be 'dropped' by the legislature at the annual election, which was done. The decisions of these four State courts were recent and well known to the convention. Mr. Madison and Mr. Wilson favored the new doctrine of the paramount judiciary, doubtless deeming it a safe check upon legislation, since it was to be operated only by lawyers. They attempted to get it in the Federal Constitution in its least objectionable shape—the judicial veto before final passage of an act, which would thus save time and besides would enable the legislature to avoid the objections raised. But even in this diluted form, and though four times presented by these two very able and influential members, this suggestion of a judicial veto at no time received the votes of more than one-fourth of the States.

"The subsequent action of the Supreme Court in assuming the power to declare Acts of Congress unconstitutional was without a line in the Constitution to authorize it, either expressly or by implication. The Constitution recited carefully and fully the matters over which the courts should have jurisdiction, and there is nothing, and after the above vote four times refusing jurisdiction, there could be nothing, indicating any power to declare an Act of Congress unconstitutional and void.

"Had the convention given such power to the courts, it certainly would not have left its exercise final and unreviewable. It gave the Congress power to override the veto of the President, though that veto was expressly given, thus showing that in the last analysis the will of the people, speaking through the legislative power, should govern. Had the convention supposed the courts would assume such power, it would certainly have given Congress some review over judicial action, and certainly would not have placed the judges irretrievably beyond 'the consent of the governed' and regardless of the popular will by making them appointive, and further clothing them with the undemocratic prerogative of tenure for life.

"Such power does not exist in any other country, and never has. It is, therefore, not essential to our security. It is not conferred by the Constitution; but, on the contrary, the convention, as we have seen, after the fullest debate, four times, on four several days, refused by a decisive vote to confer such power. The judges not only have never exercised such power in England, where there is no written constitution, but they do not exercise it in France, Germany, Austria, Denmark, or in any other country which, like them, has a written constitution."

The declarations of these two distinguished men—one a Senator of the United States and the other a Chief Justice of a State court—are fair samples of the doctrine which is disseminated by many agencies—the public press, magazines, pamphlets, lecturers and declarations of party platforms—among the people, creating a spirit of restlessness, change and dissatisfaction, and weakening their respect and confidence in the form of government under which we have grown to be a great and powerful nation, and under which, notwithstanding the abuses which inevitably creep into the administration of any form of government, we have enjoyed in so large a measure the blessings of peace and prosperity. They charge the judiciary with usurpation, and preach the gospel of the unlimited and unrestricted control of legislative bodies, or the absolute power of popular majorities, as the wisest means of securing the ends for which government is established among men. A moment's reflection upon such doctrine must convince the average man that it involves a radical change in our form of government—the destruction of the constitutional safeguards of life, liberty and property—the omnipotence of the law-making power, and the subjection of the rights and liberties of the minority to the unrestrained will of the majority. It is the proposition to destroy the system of checks and balances placed by the framers of the Constitution upon the exercise of unlimited power by any of the departments of the government, and to substitute therefor the unrestrained popular will, expressed by temporary majorities either in elections or legislative bodies, which in its results would be, as the history of government demonstrates, like the path of the lightning or cannon ball:

> Direct it flies and rapid,
> Shattering that it may reach,
> And shattering what it reaches.

It must be admitted that these political heresies have misled great numbers of people. They are very flattering to human pride whose tendency has ever been to reject all authority which

* Address delivered by Judge N. Charles Burke, of the Court of Appeals of Maryland, at the Annual Meeting of the Maryland Bar Association at Cape May, N. J., July 7, 1915.

imposes restraints upon its own desires. I have faith in the integrity and honesty and good sense of the average man. I believe that the great heart of humanity is sound and right, and that the vast majority of men desire to do the right thing under all circumstances. The great democracy of America—that vast body of plain people—honest, industrious, thrifty and patriotic, but who are not clothed in fine linen or domiciled in the houses of the mighty, are more vitally interested than any other portion of our citizenship in the proposals to which I have adverted. With desolation is the whole world made desolate, because no man thinketh in his heart, said the prophet. When once this democracy—I use the word in its broad sense—realizes the real meaning and consequences of this propaganda they will be prompt to reject it, and will see in the main provisions of the Constitution, as framed by the fathers and as construed by the courts, the best and wisest security for their lives, liberty, property and the peaceful pursuit of happiness.

We are living in a time of great social unrest, criticism and change. New problems and new perils confront us. There is great disquietude and restlessness not only among our own people, but everywhere in the wide world. Violent assaults are being made upon the most venerable institutions, and the spirit of disintegration is abroad in the land. The iconoclast is busy with his work of destruction, and fadism in all its variegated types is now in bloom. The question is whether the voice of truth and common sense shall be silenced by the hoarse cries of those who would impose their crude speculations and discarded theories of government upon a long-suffering people—whether the public will be able to protect itself against the flood of social and political nonsense which has been turned loose upon it. The best work that associations like ours can do is to expose these fallacies—to show that they are inimical to the best interests of the people—to show them that the continuance and security of personal and political liberty depend upon the maintenance inviolate of those principles of law established by the Constitution, and secured and safeguarded by the courts, which will not permit the rights of the humblest man to be invaded, or taken from him by the unconstitutional act of the highest legislative body in the land.

For, during this great work, the protection of the citizen in his person and property against the assaults of unwarranted and arbitrary legislative power, the judges are denounced as usurpers, and all sorts of schemes are proposed, *ostensibly in the interest of the people,* to impede or destroy the exercise by the judiciary of its lawful and constitutional power.

Before examining the propositions, so confidently made, by the gentlemen named, I want to set over against the opinion of the Chief Justice the judgment of another North Carolinian much abler and greater than he.

An action of ejectment was brought in 1786 in the Superior Court of North Carolina for the recovery of a lot of ground with improvements in the town of Newbern in that State. The defendant held under a title derived from the State of North Carolina by a deed from a commissioner of confiscated estates. An Act of the General Assembly of North Carolina required the courts in all cases in which the defendant made affidavit that he held the disputed property under a sale from a commissioner of forfeited estates, to dismiss the suit on motion. Such an affidavit and motion to dismiss were filed. To give effect to this Act by granting the motion to dismiss the suit would have constituted a denial of the right of trial by jury in a case involving the title to land. The Court, by a unanimous decision, decided: "That by the Constitution every citizen had undoubtedly a right to a decision of his property by a trial by jury. For that if the legislature could take away this right, and require him to stand condemned in his property without a trial, it might with as much authority require his life to be taken away without a trial by jury, and that he should stand condemned to die, without the formality of any trial at all; that if the members of the General Assembly could do this, they might with equal authority not only render themselves the legislators of the State for life, without any further election by the people, but from thence transmit the dignity and authority of legislation down to their heirs male forever.

"But that it was clear that no act they could pass could by any means repeal or alter the Constitution, because if they could do this they would at the same instant of time destroy their own existence as a legislature and dissolve the government thereby established. Consequently, the Constitution (which the judicial power was bound to take notice of as much as any other law whatever) standing in full force as the fundamental law of the land, notwithstanding the act on which the present motion was grounded, *the same act must, of course,* in that instance, stand as abrogated and without effect."

This was the case of Bayard and wife *v.* Singleton, Martin's Reports (first division), 48-50, and is the first reported case in which an act of a legislature contrary to a *written constitution* was held void. The decision created a profound impression and aroused much discussion and criticism. One of its adverse critics was Richard Dobbs Spaight, afterwards Governor of North Carolina, and at the time of the decision a member of the Constitutional Convention. He declared that "the State was subject to the three individuals, who united in their own persons the legislative and judicial power, which no monarch in England enjoys, which would be more despotic than the Roman triumvirate and equally insufferable." He denounced the judges as usurpers and charged them with assuming the power of dispensing with the law. But the judges were eventually sustained by public opinion.

In the recrudescence of ancient heresies, the language of Mr. Spaight is quite familiar. The counsel for the plaintiff in the case to which I have referred was James Iredell, afterward a justice of the Supreme Court of the United States, and William R. Davie, one of the framers of the Constitution. Mr. Iredell in two public letters asserted and supported the power of the judiciary over unconstitutional legislation. No abler, clearer, or more profound exposition of the power can be found than that contained in these letters. He set forth so clearly the dangers to popular liberty from the omnipotence of legislative bodies, that I cannot do better than to quote from his letter of August 26, 1787, in which he declared that: "The experience of the evils which the American war fully disclosed, attending an absolute power in a legislative body, suggested the propriety of a real, original contract between the people and their future government, such, perhaps, as there has been no instance of in the world but in America. Had this not been the case, bills of attainder, and other acts of party violence, might have ruined many worthy individuals here, as they have frequently done in England, where such things are much oftener the acts of a party than the result of a fair judicial inquiry. In a republican government (as I conceive) *individual liberty* is a matter of the utmost moment, as, if there be no check upon the public passions, it is in the greatest danger. The majority having the rule in their hands, may take care of themselves; but in what condition are the minority, if the power of the other is without limit? These considerations, I suppose, or similar ones, occasioned such express provisions for the personal liberty of each citizen, which the citizens, when they formed the Constitution,

chose to reserve as an unalienated right, and not to leave at the mercy of any Assembly whatever. The restriction might be attended with inconvenience; but they chose to risk the inconvenience, for the sake of the advantage; and in every transaction we must act in the same manner; we must choose between evils of some sort or other; the imperfection of man can never keep entirely clear of all. The Constitution, therefore, *being a fundamental law,* and a law *in writing* of the solemn nature I have mentioned (which is the light in which it strikes me), the judicial power, in the exercise of its authority, must take notice of it as the groundwork of that as well as of all other authority; and as no article of the Constitution can be repealed by a Legislature, which derives its whole power from it, it follows either that the *fundamental unrepealable* law must be obeyed, by the rejection of an act unwarranted by and inconsistent with it, or you must obey an act founded on an authority not given by the people, and to which, therefore, the people owe no obedience. It is not that the judges are appointed arbiters, and to determine as it were upon any application, whether the Assembly have or have not violated the Constitution; but when an act is necessarily brought in judgment before them, they must, unavoidably, determine one way or another. It is doubted whether a subsequent law repeals a former one, in a case judicially in question; the judges must decide this; and yet it might be said, if the Legislature meant it a repeal, and the judges determined it otherwise, they exercised a *negative* on the Legislature in resolving to keep a law in force which the Assembly had annihilated. This kind of objection, if applicable at all, will reach all judicial power whatever, since upon every abuse of it (and there is no power but what is liable to abuse) a similar inference may be drawn; but *when once you establish the necessary existence of any power,* the argument as to abuse ceases to destroy its validity, though in a doubtful matter it may be of great weight. Suppose, therefore, the Assembly should pass an act, declaring that in future in all criminal trials the trial by jury should be abolished, and the court alone should determine. The Attorney-General indicts; the indictment is found; the criminal is arraigned, and the Attorney-General requires the trial to come on. The criminal objects, alleging that by the Constitution all the citizens in such cases are entitled to a trial by jury; and that the Assembly have no right to alter any part of the Constitution; and that, therefore, the act appointing the trial by Court is void. Must not the court determine some way or other, whether the man shall be tried or not? Must not they say whether they will obey the Constitution or an act inconsistent with it? So—suppose a still stronger case, that the Assembly should repeal the law naming the day of election (for that is not named in the Constitution), and adjourn to a day beyond it, and pass acts, and these acts be attempted to be enforced in the courts. Must not the court decide they will obey such acts or not? And would it be approved of (except by a majority of the de facto Assembly) if they should say: 'We cannot presume to declare that the Assembly, who were chosen for one year, have exceeded their authority by acting after the year expired.' It really appears to me, the exercise of the power is unavoidable, the Constitution not being a mere imaginary thing, about which ten thousand different opinions may be formed, but a written document to which all may have recourse, and to which, therefore, the judges cannot wilfully blind themselves. . . . In any other light than as I have stated it, the greater part of the provisions of the Constitution would appear to me to be ridiculous, since in my opinion nothing could be more so than for the representatives of a people solemnly assembled to form a Constitution, to set down a number of political dogmas, which might or might not be regarded; whereas, it must have been intended, as I conceive, that it should be a system of authority, not depending on the casual whim or accidental ideas of a majority either in or out of doors for the time being; but to remain in force until by a similar appointment of deputies specially appointed for the same important purpose; and alterations should be with equal solemnity and deliberations made. And this, I apprehend, must be the necessary consequence, since surely equal authority is required to repeal as to enact. That such a power in the judge may be abused is very certain; that it will be is not very probable. In the first place, in a democratical government like ours, it is the interest of every man ambitious of public distinction to make himself pleasing to the people. This is so much the case, that there is great danger of men sacrificing their honor to their popularity, if their principles and firmness of mind are not of a texture to keep them steady in an honorable course. It can be no man's interest certainly to make himself *odious* to the people by giving unnecessary and wanton offense. * * * Besides, if they are disposed by a gross abuse of power (for the mere pleasure of abusing it) to put their negatives on our laws by giving them a false construction, cannot they do this every day with other Acts of Assembly (few of which I believe are more exempt from cavil than any article of the Constitution)? So that it really seems to me, the danger is the most chimerical that can be supposed of this power being abused."

The power of the Courts to declare an act unconstitutional and void was no new doctrine in America. Mr. McMaster, in his history of the United States, states that the judges exercised the power to set aside acts of legislation which in their opinion were unconstitutional.

"When and where," he said, "this right of the judiciary originated, what were the conditions under which it developed, who was the first to boldly announce it from the bench, are questions which cannot be answered. But it is safe to assert that like every other judicial idea that ever existed, it is the slow outcome of circumstances. The majority of the colonies for years before their quarrel with the mother country had seen their laws disallowed at pleasure by the king or queen in council. They had, therefore, become used to the idea of the existence of a body that could set aside a law enacted by a legislature and approved by a governor. They were used to written charters and frames of government, and were accustomed to appeal to them as the source of all authority under the king. When, therefore, in their quarrel with the mother country, it became necessary to find some reason for resisting the stamp tax, the colonists appealed to a written document, and declared the tax laid invalid because it violated the provisions of Magna Charta."

In 1766 the Supreme Court of Virginia unanimously declared that the act of Parliament imposing duties in America did not bind, affect, or concern the inhabitants of Virginia, "inasmuch as they conceived the said act to be unconstitutional." In Massachusetts, Mr. Justice Cushing, afterwards a Justice of the Supreme Court of the United States, charged a jury that certain acts of Parliament were void, and John Adams repeatedly asserted the same doctrine, and declared that the Stamp Act "ought to be waived by the judges as against natural equity and the *Constitution.*" The leading statesmen of the revolutionary period were practically unanimous in their support of this principle.

In Commonwealth *v.* Caton and others, 4 Call 5, decided in 1782, the Court asserted its right to hold "any resolution or act of the legislature, or of either branch of it, to be unconstitutional and void."

In Trevett *v.* Weedon, decided in 1786, the Superior Court of

Rhode Island set aside an act which abolished the trial by jury and the right of appeal in certain criminal cases upon the ground that these rights were guaranteed by the common law and the constitution of Rhode Island, and could not be destroyed by a mere legislative act.

It was a power recognized and applied in our early history as indispensable to the security of the citizen in his constitutional rights, and the cases in which it was exercised by the courts demonstrate that it was used for the preservation of popular liberty, notwithstanding the judges then, as now, were denounced by factions and temporary majorities as usurpers and despots. But the power has survived the assaults of its enemies, and is just as essential and as necessary to the protection of the citizen to-day as it was in the early days of the Republic. It is the very keystone in the arch of our structure of constitutional liberty, and chaos has come again in that day when the people, misled and misguided as to their real interest, shall destroy it.

Is it true that this power has never existed in England or in any other country, as asserted by the learned Chief Justice? It is quite correct to say that it does not exist to-day in England or in any nation of Continental Europe. But I do not apprehend that the people of America for that reason are ready to repudiate their own government and adopt any of the existing forms of government prevailing in Europe. From the days of Republican Rome down to the English revolution in 1688, both in England and Continental Europe, the courts possessed and exercised the power to set aside unconstitutional laws, whether the constitution was written or unwritten. The legal history of England prior to 1688, the older French law, the older German law, the Roman law, and the Canon law, which for more than a thousand years constituted a part of the public law of Europe and which established a division of power between the Church and State, furnish innumerable instances in which legislation was declared by the Courts to be null and void.

I cannot stop to discuss the cases in which the power was exercised. The French courts in the regency cases in the reign of Louis XIII., Louis XIV. and Louis XV., declared legislative acts null and void.

"These French cases suffice to show that the idea of a judicial court holding legislation to be void because contrary to binding right was known in France before the time when the Constitution of the United States was framed."

English legal history in the reign of Henry II., Edward II., Henry VI. and Henry VII., makes clear the existence of this power in the law of England.

In the case of the Prior of Castlaker *v.* The Dean of St. Stephens, a common law court in the reign of Henry VII. set aside as void a whole chapter of an Act of Parliament.

Lord Bacon was of opinion that a statute taking away the king's prerogative power in certain cases was not binding upon the judges and cited the Sheriff's case, reported in the Year Book of 2 Henry VII., p. 6, as a judicial authority for that proposition.

It was upon the authority of that case that the Court of King's Bench, in 1686, in the case of Godden *v.* Hales, declared void important provisions of an Act of Parliament.

It may, therefore, be affirmed that the power of the Courts to declare acts unconstitutional was not only recognized and exercised in America before the adoption of the Federal Constitution, but was a well-established principle in the jurisprudence of other countries.

There is not a single fact contained in Mr. Madison's Journal, or in any other record of the Constitutional Convention, to support the statement of Justice Clark, concurred in by Senator Owen, that the convention three times defeated a proposition to confer upon the courts the power to pass upon the constitutionality of acts of Congress. The proposition to which he refers, as shown by Mr. Madison's Journal, was a plan to create a "Council of Revision," consisting of the President and Judges, with a qualified negative upon *all* bills passed by Congress. It constituted the first clause of the eighth resolution submitted by Mr. Randolph, which was as follows: "Resolved, That the Executive, and a convenient number of the National Judiciary, ought to compose a council of revision, with authority to examine *every* act of the National Legislature before it should operate, and every act of a particular legislature before a negative thereon should be final, etc."

There is nothing in the debates upon this resolution or upon any other to show that the convention refused to confer upon the courts the power to declare legislation unconstitutional. In the debates upon the resolution the power of the State Judges to declare unconstitutional laws void was recognized, and that the Courts, independent of a Council of Revision, would possess that power. The real reasons for the defeat of the proposition were stated by Luther Martin: "A knowledge of mankind and of legislative affairs cannot be presumed to belong in a higher degree to the judges than to the legislature, and as to the constitutionality of laws, that point will come before the judges in their proper official character. In this character they have a negative on the laws. Join them with the executive in the revision, and they will have a double negative. It is necessary that the supreme judiciary should have the confidence of the people. It will soon be lost if they are employed in the task of remonstrating against popular measures of the legislature."

The following members of the convention favored the power of the judiciary to annul unconstitutional legislation, viz.: George Washington, James Madison, George Mason, Edmund Randolph, George Wythe and John Blair, of Virginia; John Dickinson, George Reed and Richard Bassett, of Delaware; Oliver Ellsworth and William Johnson, of Connecticut; Elbridge Gerry, Robert King and Caleb Strong, of Massachusetts; Alexander Hamilton, of New York; Luther Martin, of Maryland; Gouverneur Morris, Robert Morris and James Wilson, of Pennsylvania; William Patterson, William Livingston and Daniel Brearley, of New Jersey; Hugh Williamson, of North Carolina; Abram Baldwin and William Few, of Georgia.

This list includes the names of the strongest and most influential men of the convention. There is not the slightest evidence to show that more than five members of the convention opposed the doctrine of judicial control. Among this number was John F. Mercer, of Maryland, and it is difficult to see how his expression of disapproval of the principle can be said "to have summed up the thought of the convention upon the subject."

Adverting once more to the declaration of Justice Clark that the power exercised by the Courts to annul unconstitutional legislation "does not exist in any country and never has," I quote from a learned and valuable work by Mr. Joseph Doutre, a distinguished member of the Canadian Bar, published at Montreal in 1880, and entitled "The Constitution of Canada. The British North America Act, 1867. Its Interpretation, Etc." Mr. Doutre said:

"Previous to 'The British North America Act, 1867,' the provincial courts did not consider they possessed the power of enquiring and deciding whether the laws of their respective legislatures were constitutional or not. Occasional attempts were made to test the validity of statutes, but they were ineffectual in their results. It has been and is quite different under the Federal act.

"The Supreme Court of Canada and the privy council of

England have both concurred in recognizing the right, assumed by the provincial courts of original and appellate jurisdiction, to pass upon the constitutionality of the laws enacted by the provincial legislatures and the Parliament of Canada. This was anticipated by the framers of the act, as appears by the debates in the House of Commons.

"On the 4th of March, 1867, when the bill was under discussion in the Imperial Parliament, Mr. Cardwell said: 'As matters now stand, if the legislatures of Canada acted *ultra vires*, the question would first be raised in the colonial law courts, and would ultimately be settled by the privy council at home.'

"Important decisions of the privy council, of the Supreme Court of Canada, and of the various provincial courts, have been already reported, pronouncing upon the validity of the Dominion and Provincial statute laws, and on many points settling the principles that should be applied in the construction of the confederation act, and defining the limit and scope of Federal and Provincial legislation."

Section 2, article 6, and section 2, article 3, of the Constitution, are as follows: "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the Judges in every State shall be *bound* thereby, *anything in the Constitution or laws of any State to the contrary, notwithstanding.*

"The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority, etc."

These sections in express terms establish: *first,* the supremacy of the Constitution, the valid laws of the national government, and all treaties then made or thereafter to be made by the authority of the United States; *secondly,* they impose upon the Judges in every State the obligation to maintain the supremacy of the Constitution and the Acts of Congress and the treaty obligations of the Government, even against the Constitution and laws of the respective States, if found to be in conflict therewith; *thirdly,* they make the judicial power of the United States co-extensive with the Constitution and laws of the United States, and the treaties enacted by their authority. The duty imposed upon the Judges by the plain and imperative language of section 2 of article 6 of the Constituion cannot be discharged unless they possess the power of passing upon the constitutionality of legislation, for by the imperative mandate of the Constitution they are bound in the discharge of their official duty to disregard all State constitutions and all State laws which conflict with the Federal Constitution and the laws and treaties of the United States.

That the framers and makers of the Constitution intended to confer on the Courts the power to annul unconstitutional legislation is evident by the terms of the section quoted. But when the reason and causes which led to the incorporation of those provisions into the Constitution—the evils and dangers they were intended to remedy and avoid—are considered, this intention becomes so manifest that it is difficult to conceive how any well informed and dispassionate man can say that the power to declare acts repugnant to the Constitution void was not conferred by the Constitution. One of the main reasons which led to the adoption of the supreme law and judiciary articles of the Constitution was the utter disregard by the States of the treaty obligations of the Union.

Mr. Madison, in enumerating what he called "the defects, deformities and diseases" of the confederation for which the convention was called to provide a remedy, gives a prominent place to the violation of the Treaty of Peace with England, and the treaties with France and Holland. These violations of the Treaty of Peace had taken the form of confiscation of the property of British subjects by State laws, and the release of debts and of interest upon debts due to them. The disregard by the States of the authority of the confederation and of the honor and plighted faith of the government had become so universal that the government had ceased to be respected at home or abroad. Accordingly, on March 21, 1787, the Congress by unanimous vote resolved that the Legislatures of the several states could not of right pass any Act or Acts for interpreting, explaining or construing a national treaty or any part or clause of it; and that all such Acts or parts of Acts then existing, repugnant to the Treaty of Peace, ought to be forthwith repealed.

On April 13, 1787, it transmitted an earnest letter to the legislatures of the several States in which it was said that:

"Contracts between nations, like contracts between individuals, should be faithfully executed, even though the sword in one case and the law in the other did not compel it. Honest nations, like honest men, require no constraint to do justice; and though the necessity of affairs may sometimes afford temptations to pare down contracts to the measure of convenience, yet it is ever done but at the expense of that esteem and confidence and credit which are of infinitely more worth than all the monetary advantages which such expedients can extort."

It recommended that each State pass an Act in the following form: "Whereas, certain laws or statutes made and passed in some of the United States, are regarded and complained of as repugnant to the Treaty of Peace with Great Britain, by reason whereof not only the good faith of the United States pledged by that treaty has been drawn into question, but their essential interests under that treaty greatly affected. And, whereas, justice to Great Britain, as well as regard to the honor and interests of the United States, require that the said treaty be faithfully executed, and that all obstacles thereto, and particularly such as do or may be construed to proceed from the laws of this State, be effectually removed. Therefore,

"Be it enacted by . . . and it is hereby enacted by the authority of the same, that such of the Acts or parts of Acts of the Legislature of this State, as are repugnant to the Treaty of Peace between the United States and his Britannic Majesty, or any article thereof, shall be, and hereby are, repealed. And further, that the courts of law and equity within this State be, and they are hereby directed and required in all causes and questions cognizable by them respectively, and arising from or touching the said treaty, to decide and adjudge according to the tenor, true intent and meaning of the same, *any thing in the said Acts, or parts of Acts, to the contrary thereof in anywise notwithstanding.*"

In these resolutions and in this letter we have the evidence of the consideration by the Congress of the conflict between State and Federal authority, and its deliberately expressed judgment that in such cases the courts of law should disregard all laws repugnant to the constitutionally enacted treaties of the nation. An examination of the records of the Philadelphia Convention show that the two clauses of the Constitution under consideration had their origin in the resolutions of March 21, 1787, and in the recommendations contained in the letter referred to, and that the intention of the convention was, *first,* to establish the supremacy of the Constitution, laws and treaties of the United States over State legislation; and *secondly,* the establishment of a judiciary system by which that supremacy might be maintained.

When the convention met the national authority had failed,

and a disposition was shown in many quarters to take advantage of its weakness and to profit by its approaching downfall. In this distracting and disheartening situation thoughtful and patriotic men saw the absolute necessity of limiting and controlling the action of State authority, and of securing the supremacy of the National authority as to those subjects over which it was to be given jurisdiction. Various plans were proposed to accomplish these objects and they were carefully considered and discussed in the convention. One was to lodge in the national legislature the power "to negative all laws passed by the several States contravening in the opinion of the national legislature the articles of the Union, or any existing treaty under the authority of the Union." Another was to empower the Congress to negative all laws which to it "shall appear improper." Another was the creation of a Council of Revision similar to that which existed in New York, composed of the executive and "a convenient number of the national judiciary" charged with the duty and clothed with the power which has been already mentioned. None of these propositions met the approval of the convention, although they had the support of some of its ablest members.

Gouverneur Morris, on July 17, in opposing the proposed negative, said that he was "more and more opposed to the negative. The proposal of it would disgust all States. A law that ought to be negatived *will be set aside in the judiciary department*, and if that security should fail, may be repealed by a national law." On that day, Luther Martin, of Maryland, moved the following resolution, which was unanimously adopted: "That the legislative acts of the United States, made by virtue and in pursuance of the articles of the Union, and all treaties made and ratified under the authority of the United States shall be the supreme law of the respective States, so far as these acts or treaties shall relate to the said States or their citizens and inhabitants; *and that the judiciaries of the several states shall be bound thereby in their decisions, anything in the respective laws of the individual States to the contrary notwithstanding.*" This resolution finally culminated in the creation of section 2, article 6, of the Constitution.

In the ratifying conventions, composed of delegates elected by the people, it was well understood that the power of judicial control over unconstitutional laws was vested by the Constitution in the Courts. The existence of the power was affirmed alike by friends and foes of the Constitution, and was denied by no one. The arguments of Wilson, in Pennsylvania; Henry, Madison and Marshall, in Virginia; Charles Pinckney, in South Carolina; Iredell and Davis, who was a member of the Philadelphia convention and associated with Iredell in the case of Bayard *v.* Singleton, in North Carolina; Gerry, in Massachusetts; Ellsworth, in Connecticut, and the writings of Hamilton in the *Federalist*, make plain the existence of this power, and the reasons which induced the framers to vest it in the Courts.

Luther Martin, the author of the resolution transcribed above, in his celebrated published letter to the Legislature of Maryland, freely conceded the existence of the power. Richard Dobbs Spaight, who had denounced the decision in Bayard *v.* Singleton as judicial despotism, was a member of the North Carolina convention, and supported the Constitution in that body. He had evidently become convinced that his former position with respect to judicial power was not sound. I have by no means exhausted the evidence in support of this power, but I cannot trespass further upon your patience.

The evidence adduced is sufficient to show that the power of the Courts to declare void unconstitutional laws was not a new or unheard of thing at the time of the meeting of the Constitutional Convention; that the power had been exercised by the Courts in America before and after the Revolution, and had been recognized in Europe for centuries; that the Congress of the confederation urged the several States to vest its exercise in the Courts; and that the framers and makers of the Constitution, for wise reasons, deliberately intended to create and did in fact create a department of government—the Judiciary—and clothed it with the power to annul State laws and Acts of Congress repugnant to the Constitution.

"If a case arises under the Constitution, that is, if a case arises depending on the construction of the Constitution, the Judicial power of the United States extends to it. It reaches the *case*, the *question;* it attaches the power of the National Judicature to the case itself, in whatever Court it may arise or exist; and in that *case* the Supreme Court has appellate jurisdiction over all Courts whatever. No language could provide for more effect and precision than was done for subjecting constitutional questions to the ultimate decision of the Supreme Court. Aud this is exactly what the convention found it necessary to provide for, and intended to provide for. It is, too, exactly what the people were universally told was done when they adopted the Constitution." The Clark-Owen theory has no facts to support it. It rests in the mere imagination of its distinguished propounders.

"Written constitutions sanctify and confirm great principles." The great fundamental rights guaranteed by the National and State Constitutions are life, liberty, contracts and property, freedom of religion, freedom of speech and of the press, and freedom from the exercise by the government of unlimited and arbitrary power.

The maintenance of the limitations and restraints placed by the Constitution upon governmental power is essential to the possession and enjoyment by all the people of peace, security and well-ordered liberty. Our American system makes the judges the guardians of the Constitution, and invests them with the power to protect and safeguard the liberties which it was intended to secure. It places the rights of all—the humblest and the weakest, as well as the most powerful—under the aegis of their protection, and arms them with the power to strike down all unconstitutional assaults upon the rights secured by the organic law. Deprive them of this power, and the limitations and restraints of the Constitution would soon become meaningless and ineffective, and the distribution of the powers of government a futile and an idle thing. The Constitution, it is true, would remain, but the living and breathing spirit which supplies the interpretation of its provisions and safeguards the liberty of the citizen would be lost and gone forever.

Let the people beware. What will all this flattery and pandering to popular prejudice and passion avail them, if they lose their liberty?

"Under the pressure of temporary evils, or the misguided impulses of party, or plausible alarms for public liberty, it is not difficult to persuade ourselves that what is established is wrong; that what bounds the popular wishes is oppressive, and that what is untried will give permanent relief and safety. Frame constitutions of government with what wisdom and foresight we may, they must be imperfect, and leave something to discretion, and much to public virtue. It is in vain that we insert bills of rights in our Constitution, as checks upon legislative power, unless there be firmness in courts, in the hour of trial, to resist the fashionable opinions of the day. The judiciary in itself has little power, except that of protection for others. It operates mainly by an appeal to the understanding of the wise and good; and its chief support is the integrity and independence of an enlightened Bar. It possesses no control over the purse or arms of the government. It can neither enact laws,

nor raise armies, nor levy taxes. It stands alone in its functions, without the countenance either of the executive or the legislature to cheer or support it. Nay, its duty sometimes arrays it in hostility to the acts of both. But while, though few, our judges shall be fearless and firm in the discharge of their functions, popular leaders cannot possess a wide range of oppression, but must stand rebuked in their ambitious career for power. And it requires no uncommon spirit of prophecy to foresee, that, whenever the liberties of this country are to be destroyed, the first step in the conspiracy will be to bring courts of justice into odium; and, by overawing the timid, and removing the incorruptible, to break down the last barrier between the people and universal anarchy or despotism."

Cases of Interest.

CRIMINAL LIABILITY OF STATE ELECTION OFFICERS FOR REFUSING TO RECEIVE AND COUNT ELECTION RETURNS.—In U. S. *v.* Mosley, 35 Sup. Ct. Rep. 904, it was held that state election officers who in pursuance of a conspiracy to defraud threw out returns from several election precincts in a Congressional election were subject to indictment under the federal statute (Rev. Stat. § 5508) which makes it an offense to "conspire to injure, oppress, threaten or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States." Mr. Justice Lamar dissented. Mr. Justice Holmes for the court said: "It is not open to question that this statute is constitutional, and constitutionally extends some protection, at least, to the right to vote for members of Congress. . . . We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box."

STRIKING BRIEF FROM FILES FOR VITUPERATIVE EXPRESSIONS.—In Supreme Council of Royal Arcanum *v.* Green, 35 Sup. Ct. Rep. 724, Chief Justice White ordered that the brief of counsel for defendant in error be stricken from the files for the reason that it was full of vituperative, unwarranted and impertinent expressions. The language of the Chief Justice in doing so was as follows: "Before making an order of reversal we regret that we must say something more. The printed argument for the defendant in error is so full of vituperative, unwarranted, and impertinent expressions as to opposing counsel that we feel we cannot, having due regard to the respect we entertain for the profession, permit the brief to pass unrebuked or to remain upon our files and thus preserve the evidence of the forgetfulness by one of the members of this bar of his obvious duty. Indeed, we should have noticed the matter at once when it came to our attention after the argument of the case had we not feared that by doing so delay in the examination of the case and possible detriment to the parties would result. Following the precedent established in Green *v.* Elbert, 137 U. S. 615, 34 L. ed. 792, 11 S. Ct. Rep. 188, which we hope we may not again have occasion to apply, the brief of the defendant in error is ordered to be stricken from the files."

VALIDITY OF STATUTE PROHIBITING LIQUOR ADVERTISEMENTS.—The validity of an Alabama statute prohibiting liquor advertisements was upheld in State *v.* Delaye, 68 So. 993, as within the scope of the police power of the state, and it was held that its terms were broad enough to prohibit newsdealers from selling newspapers published in another state where they contained whiskey advertisements. From the opinion of the court written by Judge Gardner we find the following: "It is insisted that because of the commerce clause of the Federal Constitution, this state is without power to pass a law which would prevent the respondent from selling at his news stand in Birmingham a newspaper or magazine printed in another state and containing advertisements of prohibited liquors, as defined in the act of February 10, 1915, and that such an act would be an unwarranted interference with the commerce between the states. . . . There can be no question, however, that when the newspapers are received by the defendant from without the state, either by mail, or in bulk, or in a bundle, by express or freight, upon the breaking of the bundle and placing them upon the news stand for sale, they would become commingled with the mass of property in this state and would be subject to its police laws; and that such a single newspaper or periodical sold would not be an original package within the meaning of the law as stated in the decisions of the United States Supreme Court."

RIGHT OF WHITE SHERIFF TO RIDE WITH COLORED PRISONER IN "JIM CROW" CAR.—The recent case of Spenny *v.* Mobile, etc., R. Co., Ala., 68 So. 870, construing statutes of Alabama providing for separate accommodations upon trains for white and negro passengers, and making it a misdemeanor for a person to go into or ride upon a coach to which he does not belong, have no applicability to a white sheriff having in custody a negro prisoner. The court says: "It is evident that the legislature intended to deal with passengers in the ordinary acceptation of the term and in the usual and ordinary course of travel and did not have in mind conditions such as presented in the case at bar; that is, a case where a white sheriff attempts to travel with a negro prisoner, and who could not travel in or be assigned to separate coaches or compartments. Especially is this true when these sections are considered in connection with chapter 212 of the Code, which exacts of officers the highest degree of care in the transportation of convicts and prisoners; and it would be unreasonable to hold that the sheriff would violate the law by staying with his prisoner in a coach to which the one or the other did not belong, when the purpose and effect of the other statute is to require him to be with his prisoner. We therefore hold that the statute does not include or apply to exceptional cases like the one at bar; that is, to two or more passengers who are so situated that they cannot be reasonably separated, although they may belong to a different race."

STATUTE PROHIBITING CARRYING OF WEAPONS AS APPLICABLE TO SUDDEN EMERGENCIES REQUIRING WEAPON.—In Harris *v.* State, (Ga.) 85 S. E. 813, it was held that the act approved August 12, 1910 (Laws 1910, p. 134), which prohibits any person from having or carrying a pistol without first obtaining a license, should receive a reasonable construction in accord with the legislative purpose in enacting it, and that it would be unreasonable to suppose that the legislature ever intended to prohibit the use of a pistol where its use is really necessary by one who knows, or has good and ample reason to apprehend, that an act of adultery is impending or actually in progress between his wife and a despoiler of his home, or to prohibit a person's use of a pistol in any similar case where the use of a pistol as a weapon of defense may be necessary and thus by law be justifiable, by requiring such a one to wait until he can go to the ordinary's office of the county of his residence and obtain a license, before he is permitted to use a pistol for the protection of his family or to prevent an adultery with his wife, or even to take a pistol into his manual possession. In a dissenting opinion Judge Pottle said: "This is a case where I must draw a distinction between the man and the judge. As a man, my sympathy is entirely with the outraged husband, if his statement of the transaction be true,

and I wish that the law might be as announced by the majority. As a judge, I have nothing to do with what the law ought to be, but only with what it is. There is no such exception in the statute as the one declared by the court, and I do not think we have any authority to read it into the statute. If the logic of the ruling thus announced be followed, every trial for a violation of this statute will develop into a determination of the issue whether or not the accused was carrying the pistol for a lawful purpose. The law does not permit such an inquiry."

LIABILITY OF OWNER OF TENEMENT HOUSE FOR ACTS OF PROSTITUTION THEREIN.—In New York a statute provides that "no tenement house or any part thereof or the lot or premises thereof shall be used for the purpose of prostitution or assignation of any description," and it penalizes the owner if there is a violation. In Tenement House Department v. McDevitt, (N. Y.) 109 N. E. 88, it is held that an owner is not liable for a penalty because of a single act of vice, undiscovered and undiscoverable, either by him or by his agent. The penalty is imposed where the building, or some part of it, has been kept or maintained by the occupant for the purpose of prostitution. If, however, there has been a 'use' for prostitution in that sense . . . it is not a defense that the use was unknown to the owner. In the words of the court, "The statute does not make his liability dependent upon knowledge or even upon negligence. It makes his liability dependent upon the prohibited use. If use is interpreted to mean, not an isolated act, but a practice or relation, the statute, we think, charges the owner with the duty to inform himself of the conditions prevailing in his building. In the long run, and looking, as legislation must, to the average results, the law, as thus construed, is not likely to work injustice. If the occupant of an apartment has used it for indiscriminate intercourse with men, has used it in the sense that she has kept or maintained it for that purpose (Commonwealth *v.* Cook, 12 Metc. (Mass.) 93; State *v.* Ruhl, 8 Iowa 447, 454), the diligent owner will seldom be blind to the offense. Looking, then, to the average results, the legislature has said that the owner must prevent at his peril a vicious use which can rarely be continued without his fault. It rules out inquiry into his excuses in the particular instance, because such excuses, if accepted, would tend to nullify the law. It frames its rules to meet the necessities of the average, rather than the exceptional, case. and adjusts its penalties in correspondence with the common experience of mankind."

UNTIDY HABITS OF HUSBAND AND INCLINATION TO GAMBLE AS ENTITLING WIFE TO DIVORCE.—In at least one state it is not "extreme cruelty" entitling a wife to a decree that her husband is untidy in his habits and sometimes plays cards for small stakes. The state in which a husband is free to do these things is Michigan, and persons wishing authority for the proposition are referred to the recent case of Cunningham *v.* Cunningham, 153 N. W. 8, wherein the Supreme Court, after commenting on the fact that untidiness did not constitute grounds for divorce, said: "There is unquestionably ground for the complaint that the defendant was inclined to enjoy a game of cards, which he indulged in when small amounts of money were at stake, and this he frankly admits in his testimony. It is true that his conduct in frequenting the place where he indulged in this practice and the pleasure that he seemed to get from gambling in a small way, could be the subject of some criticism, but as was said by this court in Cadieux *v.* Cadieux, 180 Mich. at page 105, 146 N. W. 161, at page 163: 'While culpable and an evidence of moral instability, we are not prepared to hold that, as proven, it amounted to a cause for divorce.' We have carefully read this record, and although having in mind the fact that the learned chancellor, who heard the case below, had the advantage of seeing and hearing the witnesses, nevertheless we cannot escape the conclusion, taking the record as a whole and carefully weighing the testimony, that no just and legal cause for a divorce has been proved. These parties had resided together as man and wife for a period of twenty years, and it does not appear that any remarkable change has come about in the personal conduct and habits of the defendant from the time of his marriage. The record is convincing that both of the parties have been industrious and apparently willing to meet the everyday problems of life in the proper spirit, and considering their station in life and the surroundings in which the defendant toiled to fulfil his duties as a provider for his family, assisted by the complainant, it does not seem just and equitable that now, when the defendant has reached the age of seventy years, because of grievances of a character which might easily be found in the married life of many people in such a period of time, he should be deprived of the association and comfort of his wife and only child, both of whom he still insists he loves and wishes to have with him."

CORRECTION OF EXAMINATION PAPER BY RIVAL PUPIL AS VIOLATION OF LEGAL RIGHT OF PUPIL SUBMITTING PAPER.—In Wulff *v.* Inhabitants of Wakefield, (Mass.) 109 N. E. 358, the action was one of tort for damages to the plaintiff who was excluded from the high school in the defendant town. The plaintiff and a pupil named North were near each other in the bookkeeping class, each striving to be at the head. The teacher of the school detailed to North the duty of correcting problems by use of a "key book," and the pupil in accordance with this duty corrected a problem submitted by the plaintiff. The plaintiff's parents then went before the teacher and before the school committee to get a change in the methods of correcting work. The school authorities refused to change the method, and, on the plaintiff refusing to attend the bookkeeping class, suspended her from other classes. In the superior court a verdict was ordered for the defendant and the case reported to the Supreme Judicial Court, which ordered judgment to be entered on the verdict. The court said: "The real and vital question is not whether the plaintiff was guilty of misconduct in refusing to attend her class, but whether a parent has the right to say a certain method of teaching any given course of study shall be pursued. The question answers itself. Were it otherwise, should several parents hold diverse opinions all must yield to one or confusion and failure inevitably follow. The determination of the procedure and the management and direction of pupils and studies in this commonwealth rests in the wise discretion and sound judgment of teachers and school committee, whose action in these respects is not subject to the supervision of this court. R. L. c. 42, sec. 27 et seq.; Hodgkins *v.* Rockport, 105 Mass. 475; Watson *v.* Cambridge, 157 Mass. 561; 32 N. E. 864; Hammond *v.* Hyde Park, 195 Mass. 29, 80 N. E. 650. The case at bar is one purely of administrative detail and its exercise violates no legal right of pupil or parent. The plaintiff was without right in requiring that the principal personally should attend to the supervision of her individual work, perhaps to the neglect of more important duties. While constrained to this decision we cannot refrain from the expression of disapproval of the practice of setting a rival pupil in judgment upon the work of an eager and zealous competitor. However honest that pupil may be, a mistake or error of decision inevitably leads to suspicion and often to charge of intentional wrong."

PUBLICATION CHARGING THAT CANDIDATE FOR OFFICE HAS BACKING OF CERTAIN CORPORATIONS AS LIBEL.—In State *v.* Landy, 135 N. W. 258, it was held that a publication stating that a candidate for office had the backing of certain corporations in the state that were not in sympathy with the masses was not per se libelous. The action was a criminal one, and the lower court overruled a

demurrer to the indictment but certified the question to the Supreme Court as one of grave doubt. In reversing the lower court's order the higher court said: "There are no allegations by way of inducement. Hence no inferences, other than those drawn by the ordinary fair-minded readers from the tone and language of the article itself, are to be indulged in. Neither in civil nor in criminal libel is the libelous character of the article to be tested by the interpretation placed thereon by the exceptional kindly disposed who are ever alert to protect the good name and fame of others by thought and deed, nor by that larger class who read every publication with eager desire to find some reflection or calumny against their fellow men. It is not claimed that the article by insinuation, or otherwise, charges Mr. Lawler with any wrongdoing or the violation of law; nor do we think it fairly open to such construction. The suggestion is made that, since Mr. Lawler is said to 'have the backing of certain corporations in the state that are not in sympathy with the masses,' it is to be inferred that the backing was obtained at Mr. Lawler's solicitation, or that he courted or acquiesced in a questionable or unlawful support; a corporation not being permitted to aid a political candidate. Sections 582 and 631, G. S. 1913. We think this is a strained and sinister interpretation not permissible in either criminal or civil libel suits. Newspapers may still be permitted to express an opinion upon the merits of opposing candidates for political office and upon the influence supporting them. And, perhaps, it is still allowable to surmise that corporations are not yet indifferent to the success of political candidates, in spite of the stringent enactments to keep them absolutely dormant in that respect. If so, we do not discover anything unlawful or wrongful in the article published. If 'backing' means a violation of law by the certain corporations referred to, we still think the fair reading of the article does not warrant the inference that such backing was even acceptable to Mr. Lawler, to say nothing of being by his procurement or request. There is then nothing which tends to expose Mr. Lawler to public hatred, contempt, or ridicule. Corporations are public necessities, are creatures of the law, and not per se odious. We are constrained to hold the article insufficient to support a criminal libel. Our attention has been directed to no case holding an article of the import and tone of the one in question actionable either civilly or criminally. The demurrer should have been sustained."

News of the Profession.

THE MISSOURI BAR ASSOCIATION will hold its annual meeting at Kansas City, Mo., on September 28, 29 and 30.

THE COMMERCIAL LAW LEAGUE OF AMERICA held its twenty-first annual convention at Pasadena, Cal., beginning August 2.

OHIO JURIST DEAD.—Judge R. M. Voorhees, until recently a member of the Ohio Court of Appeals, died at Coshocton, O., on July 21, aged seventy-six.

ILLINOIS JUDGE RESIGNS.—Henry Varnum Freeman, dean of Chicago judges, has resigned from the bench of the Illinois Superior Court.

THE CALIFORNIA STATE BAR ASSOCIATION met in annual convention at San Francisco on August 23, 24 and 25. Further details will be given in the next issue of LAW NOTES.

NEW MICHIGAN JUDGE.—Governor Ferris has appointed Circuit Judge Rollin H. Person of Lansing to the bench of the Michigan Supreme Court to succeed the late Justice Aaron V. McAlvay.

CHANGE IN MONTANA DISTRICT COURT.—Judge J. Miller Smith of the Montana District Court has resigned from the bench and Governor Stewart has appointed R. Lee Word of Helena to fill the vacancy.

AMERICAN BAR ASSOCIATION.—Further details of the annual meeting of the American Bar Association, held at Salt Lake City, Utah, on August 17, 18 and 19, will be given in LAW NOTES for October.

DEATH OF NEW YORK JUDGE.—Justice John J. Delany of the New York Supreme Court died at New York city on July 15. Justice Delany was sixty-five years old and had been on the Supreme bench since 1910.

NEW YORK CITY APPOINTMENTS.—Mayor Mitchel of New York city has appointed Henry W. Herbert to be a justice of the Court of Special Sessions, and W. Bruce Cobb to be a city magistrate, each for a term of ten years.

MICHIGAN JURIST DEAD.—Justice Aaron V. McAlvay, of the Michigan Supreme Court, died at Lansing, Mich., on July 10, at the age of sixty-eight. He had been on the Supreme bench since 1904, and was chief justice in 1907.

NEW YORK JUDGE TO RETIRE.—It is reported that Supreme Court Justice Nathan L. Miller of Cortland, who is serving as a designated Judge of the New York Court of Appeals, will soon retire from the bench to resume private practice.

APPOINTED TO BENCH IN WYOMING.—Governor Kendrick of Wyoming has appointed John R. Arnold of Evanston to the judgeship of the Third Judicial District, to fill the unexpired term of the late Judge David H. Craig of Rawlins.

DEATH OF NEW MEXICO JURIST.—Henry L. Waldo, formerly attorney general and chief justice of the Territory of New Mexico, and of late general counsel for the Santa Fe Railway Company, died at Kansas City on July 10, aged 71.

OREGON AND WASHINGTON BAR ASSOCIATIONS.—A joint meeting of the state bar associations of Oregon and Washington was held at Portland, Ore., on August 23, 24 and 25. Further mention of this meeting will be made in the next issue of LAW NOTES.

PROMINENT NEW YORK ATTORNEY DIES.—William M. Ivins, one of New York's leading lawyers and prominent politicians, died at New York city on July 23, at the age of 64. Mr. Ivins was counsel for William Barnes in his recent libel suit against Theodore Roosevelt.

THE INDIANA STATE BAR ASSOCIATION at its recent annual session elected the following officers: President, Robert W. McBride, Indianapolis; vice-president, Will A. Haugh, Greenfield; secretary, George H. Batchelor, Indianapolis; treasurer, Elias D. Salsbury, Indianapolis.

CHANGES AMONG FEDERAL ATTORNEYS.—President Wilson has appointed Thomas S. Allen of Lincoln, Neb., to be United States attorney for Nebraska.—Walter E. Hettman, assistant United States attorney at San Francisco, has resigned, and Casper A. Ornbaun has been appointed to succeed him.—Thomas Sheehan, assistant United States attorney at Cincinnati, has resigned.

THE MONTANA BAR ASSOCIATION met in annual convention at Great Falls, Mont., on August 2 and 3. President Jesse B. Roote of Butte, Senator T. J. Walsh, Judge Bourquin of Butte, Associate Justice Sanner of the supreme court, Judge John Matthews of Townsend, Harry H. Parsons of Missoula and John T. Smith of Livingston were included in the list of speakers. Harry H. Parsons of Missoula was elected president for the ensuing year, and V. L. McCarthy of Helena was elected secretary and treasurer.

THE MARYLAND STATE BAR ASSOCIATION elected the following officers at its annual meeting in July: President, Hammond Urner; vice-presidents, E. Stanley Toadvine, William H. Adkins, David G. McIntosh, Jr., Colonel Charles A. Little, Charles O. Clemson, Judge Edward C. Peter, Clarence M. Roberts, Alexander H. Robertson and Moses P. Walter; secretary, James W. Chapman, Jr.; treasurer, R. Bennett Darnell; executive council, James E. Ellegood, James C. Rogers, T. Foley Hisky and Thomas H. Robinson.

COLORADO BAR ASSOCIATION.—The following officers were elected by the Colorado Bar Association at its recent annual meeting: President, John D. Fleming, dean of the law school of the University of Colorado; first vice-president, W. J. Chinn of Colorado Springs; second vice-president, W. N. Searcy of Durango; secretary and treasurer, William W. Waley of Denver.

FORMER CHIEF JUSTICE OF OHIO DEAD.—J. P. Bradbury, former chief justice of the Ohio Supreme Court, died at Pomeroy, O., on July 17. Judge Bradbury was seventy-seven years of age. He was elected a judge of the Supreme Court in 1888 and served until 1900. Prior to his election to the state's highest tribunal and after his retirement therefrom, he served on the Common Peas bench.

MINNESOTA STATE BAR ASSOCIATION.—At the annual meeting of the Minnesota State Bar Association, held at St. Cloud, Minn., on August 5, 6 and 7, the list of speakers included the following: Harrison L. Schmitt of Minneapolis, president of the association; Frederick C. Stevens of St. Paul; James W. Mann of Chicago, minority leader of the House of Representatives; Charles W. Boston of New York; Prof. John H. Wigmore, dean of the Northwestern University law school; Oscar Hallam of St. Paul, associate justice of the Minnesota Supreme Court; W. S. McClenahan of Brainerd, judge of the Minnesota district court, fifteenth judicial district. The following officers were elected: President, Stiles W. Burr of St. Paul; vice-president, Frank Casseweller of Duluth; treasurer, Royal A. Stone of St. Paul; secretary, C. L. Caldwell of St. Paul; assistant secretary, John M. Bradford of St. Paul.

NOTED LAWYER DEAD.—Arthur G. Sedgwick of New York city, noted as a lawyer, critic and newspaper writer, died at Pittsfield, Mass., on July 14. Mr. Sedgwick was 71 years of age. He had served for several years on the editorial staffs of the *Evening Post*, the *Nation*, and the *American Law Review*, and had also contributed much to the literature of his profession, editing several editions of Theodore Sedgwick's "Treatise on the Measure of Damages" and collaborating with Frederick S. Wait in a "Treatise on the Trial of Title to Land."

THE NORTH DAKOTA STATE BAR ASSOCIATION held its annual meeting at Fargo, N. D., on August 12 and 13. The official program included the following addresses: President's address, by John Knauf of Jamestown; "Juvenile Court," by A. B. Guptil; "The Sense of the State," by George E. Vincent, President of the University of Minnesota; "The Bar Association and Substantive Law," by S. E. Ellsworth; "A Duty of Lawyers," by G. W. Newton; "Some Phases of Labor Insurance," by D. B. Holt; "The Constitution Among Friends," by Henry D. Estabrook of New York city; "Lincoln as a Lawyer," by Smith Stimmel.

THE VIRGINIA STATE BAR ASSOCIATION held its twenty-seventh annual convention at White Sulphur Springs, W. Va., on August 4, 5 and 6. Besides the President's address by Judge L. R. Watts of Portsmouth, the program as announced contained the following addresses: "Probable Changes in the Laws of War," by James Byrne of New York city; "The High Cost of Appeals in Virginia: a Suggested Remedy," by George Bryan of Richmond; "The Supreme Court and the Treaty-Making Power," by Harry St. George Tucker of Lexington; "Financing Municipal Improvements in Virginia: a Needed Constitutional Amendment," by Robert B. Tunstall of Norfolk.

NORTH CAROLINA BAR ASSOCIATION.—The seventeenth annual convention of the North Carolina Bar Association was held at Asheville, N. C., on August 2, 3 and 4. The official program included the President's address on "The Power of the Judiciary over Legislation," by J. Crawford Biggs of Raleigh; the annual address on "The Political Party and Primary Laws," by William R. Vance, dean of the law school of the University of Minnesota, and other addresses by Thomas J. Harkins of Asheville, F. C. Harding of Greenville, W. P. Bynum of Greensboro, Frank S. Spruill of Rocky Mount, De Lancey Nicoll of New York city, Judge James F. Boyd of Greensboro, and Senator James Hamilton Lewis of Illinois.

FLORIDA STATE BAR ASSOCIATION.—The annual meeting of the Florida State Bar Association was held at Atlantic Beach, Fla., on July 23 and 24. The official program included the following: President's address by Will H. Price, of Marianna, on "Confidence in the Courts;" annual address by Peter W. Meldrim of Savannah, Ga., president of the American Bar Association; address by Judge C. L. Wilson of Marianna, on "Trials by Jury;" address by Rivers H. Buford, on "Enforcement of the Criminal Law;" addresses by Judge W. H. Ellis of the Florida Supreme Court, Judge Daniel A. Simmons of Jacksonville, Joseph Jones of Orlando, and E. R. Gunby of Tampa. The following officers were elected: President, Attorney-General Thomas F. West of Tallahassee; secretary, J. C. Cooper of Jacksonville; treasurer, C. E. Pelot of Jacksonville; executive committee, R. L. Anderson, William Hunter, F. P. Winthrop and W. H. Baker.

THE OHIO STATE BAR ASSOCIATION held its thirty-sixth annual convention at Cedar Point, O., on July 6, 7 and 8. The President's address was delivered by John N. Van Deman of Dayton. Other addresses were as follows: "Making Law and Finding Law," by Prof. Roscoe Pound of Harvard University; "Government Ownership of Railroads," by C. W. Dustin of Dayton. The President used as a gavel a wooden hatchet made of cherry wood from the boyhood home of George Washington, a present from Gen. R. C. Ballard Thurston, president general of the Sons of the American Revolution. Officers were elected as follows: President—Charles R. Miller of Cleveland; vice presidents—Albert D. Allen, Cincinnati; M. J. Hartley, Dayton; Ben F. Welty, Lima; G. W. Selber, Akron; L. C. Laylin, Columbus; J. B. Tayler, Wooster; I. M. Foster, Athens; D. A. Hillingsworth, Cadiz; N. B. Billingsley, Lisbon; S. E. Hurin, Findlay; U. L. Marvin, Cleveland; secretary—Charles M. Buss, Cleveland; treasurer—C. P. Gilmore, Dayton.

THE ALABAMA STATE BAR ASSOCIATION held its thirty-eighth annual meeting at Montgomery, Ala., on July 9 and 10. The President's address was delivered by Ray Rushton of Montgomery, and the annual address on "Our Rights and Duties as a Neutral Nation" was delivered by Hannis Taylor of Washington. Other addresses were as follows: "The Doctrine of Comparative Negligence," by Senator J. T. Denson of Eutaw; "The United States Cotton Futures Act," by Col. Francis G. Caffey of Washington, Solicitor of the United States Department of Agriculture; "Decisions of Courts of Last Resort Based on other than Fundamental Principles," by Samuel B. Stern of Birmingham. Former Governor Emmet O'Neal delivered an eloquent address in presenting to President Ray Rushton, for the use of the association, a gavel, the gift of former United States Senator Frank S. White, made of wood taken from the home of John Marshall of Virginia, the first chief justice of the United States supreme court. Officers were elected as follows: President

—Charles S. McDowell, Jr., Eufaula; vice presidents—Joseph H. Nathan, Sheffield; J. T. Stokely, Birmingham; R. T. Erwin, Mobile; N. D. Godbold, Camden; J. B. Barnett, Monroeville; secretary and treasurer—Alexander Troy, Montgomery.

WISCONSIN STATE BAR ASSOCIATION.—As stated in LAW NOTES last month, the Wisconsin State Bar Association held its annual convention at Superior, Wis., on July 14, 15 and 16. The President's address was delivered by Christian Doerfler of Milwaukee. Other addresses were as follows: "The Reasons Why Five States Erected Out of the Territory Northwest of the Ohio River Are Immune from the Initiative and Referendum Form of Government under the Ordinance of 1787," by Addison C. Harris of Indianapolis; "Reminiscences of Lincoln," by George W. Hazelton of Milwaukee; "The Rush-Bagot Convention," by Robert Wild of Milwaukee. Federal Judge F. A. Geiger of Milwaukee delivered an interesting address in which he defended the American courts against the charge that the administration of justice is unnecessarily slow. The following officers were elected: President—George B. Hudnall, Superior. Secretary-treasurer—George E. Morton, Milwaukee. District vice presidents—C. D. Barnes, Kenosha; M. A. Hayes, Milwaukee; Fred Beglinger, Oshkosh; A. L. Houghton, Manitowoc; F. M. Priestley, Mineral Point; C. L. Baldwin, La Crosse; W. E. Fisher, Stevens Point; Spencer Haven, Hudson; Charles S. Lamb, Madison; Paul A. Cary, Appleton; H. S. Butler, Superior; Alexander E. Mattson, Janesville; H. K. Frame, Waukesha; C. H. Cady, Green Bay; George F. Merrill, Ashland; F. E. Bump, Wausau; H. C. Clark, Neillsville; E. E. Bosshard, Columbus; Roy P. Wilcox, Eau Claire; Sam Shaw, Crandon.

English Notes.

SALE OF RIGHT OF COMMENT BY NEWSPAPER.—It must now be taken to be the law that any agreement by a newspaper not to publish any comment upon individuals or companies is invalid, and such a contract will not be countenanced in a court of law. This is the decision of the Court of Appeal in the recent case of Neville *v.* Dominion of Canada News Company, upholding the decision of Mr. Justice Atkin, who held such an agreement contrary to public policy. Lord Cozens-Hardy's principal ground for holding that such an arrangement was invalid was that such a covenant was in restraint of trade, but he certainly made it clear that in his opinion it would also be against public policy. Both Lord Justice Pickford and Lord Justice Warrington based their judgments on the ground of public policy. No one will regret this decision, for agreements for consideration by a newspaper to sell its right of free and unrestricted comment on matters of public concern are reprehensible in the highest degree. It is difficult, however, to see the true distinction, quite apart from questions of conspiracy, between a newspaper selling its right to comment upon particular individuals and a tradesman refusing to sell to particular customers, so far as questions of restraint of trade are concerned. As to the point of public policy, the case seems an extension of that "unruly horse," in order to cover a case where no illegality is alleged or proved.

BEQUESTS FOR ATHLETICS.—Public school boys will welcome the decision of Mr. Justice Eve in the recent case of Re Mariette to the effect that education includes the improvement of the bodies as well as the minds of boys. In Mr. William Morris' "News from Nowhere," which is a tale of the imaginary socialistic future, Eton College was pointed out as a place intended for the education of the poor, but merely used by the aristocracy to get rid of the company of their sons for the greater part of the year. It may be granted that the book learning of many of the boys in the big public schools is not very extensive, but the training there undergone may yet be educational, preparing them to take their places in the affairs of life. In the case referred to there was a gift of £1000 to the governing body of Aldenham School "for the purpose of building Eton fives courts or squash racket courts," and a gift of £100 to the head master upon trust to use the interest to provide a prize for some event in the school athletic sports every year. A school is a charity within the legal meaning of the word, and bequests to a charity for its proper purposes are valid. Hence the learned judge, adopting the meaning of education stated above, was able to hold that the gifts were both good. If the gifts had not been to a legal charity, the first gift might have been allowed to stand on the ground that it was a payment once for all, and so no question of a perpetuity would be raised, but the second gift would clearly have been a perpetuity and therefore void. Even a gift of income to the chess club of Penzance for the support and furtherance of chess and the perpetuity of the club of that town has been held bad as a perpetuity (Re Swain, 99 L. T. Rep. 604), though chess is certainly educational. A gift of a fund to provide annually forever a cup for the encouragement of yacht racing, to be given to the most successful yacht of the season, was held by Mr. Justice Kekewich and the Court of Appeal to be bad (Re Nottage, 73 L. T. Rep. 265; [1895] 2 Ch. 649). Lord Justice Lindley, after referring to the difficulty of drawing the line between gifts which are and those which are not charitable, said: "Now, I should say that every healthy sport is good for the nation—cricket, football, fencing, yachting, or any other healthy exercise and recreation; but if it had been the idea of lawyers that a gift for the encouragement of such exercises is therefore charitable, we should have heard of it before now. I do not attempt to draw the line."

PERMITTING CRUELTY TO ANIMALS.—The question whether the owner of a horse which has been cruelly ill-treated by a servant of the owner is guilty of permitting the cruelty is one which has caused considerable trouble to the courts. An attempt has been made in the Protection of Animals Act, 1911, to remove the difficulty by inserting the provision in sect. 1, sub-sect. 2, that an owner shall be deemed to have permitted cruelty if he shall have failed to exercise reasonable care and supervision in respect to the protection of the animal therefrom. The meaning of these words was discussed by the Divisional Court in the recent case of Whiting *v.* Ivens, wherein the respondent had been charged with permitting his horse to be ill-treated. The evidence showed that a horse belonging to the respondent and being driven by his servant was found to be suffering from mange and to be in a very poor condition. The servant was convicted of cruelty. In the case against the respondent it was proved that he had told the appellant that he had nothing to do with the horses and knew nothing about them, as he left them entirely in the care and control of his servant. He admitted, however, that he saw the horse in question, when it was bought, and remarked on its poor condition, but, on being assured by the servant that it was a good horse, he took no further notice of the animal. No evidence was called for the respondent. The justices held that the onus of proving want of care under sub-sect. 2 was on the appellant, and that, as there was no evidence of such want, they must dismiss the information. In the Divisional Court it was contended for the appellant that the provision in sub-sect. 2 of the Act, that an owner not exercising reasonable care or supervision should be deemed guilty of an offense of cruelty, was intended to meet just such cases

as that under consideration, that the evidence disclosed a prima facie case, and that the onus was thereby thrown upon the respondent. The Divisional Court adopted the latter view, holding that on the evidence the justices would have been justified in coming to the conclusion that there was a case to answer, and remitted the case to be heard and determined by them. The court carefully abstained from deciding whether the effect of sub-sect. 2 is to throw upon the owner the onus of proving that he exercised care, but it seems to be reasonably clear that the sub-section merely defines the offense, and has in no way shifted the burden of proof, in which case it is still for the prosecution to prove that the owner has failed to exercise reasonable care before the latter can be called upon to give evidence or be convicted.

NEUTRAL WATERS.—The prompt and immediate apology of the Russian Government to the Swedish Minister, and also through the Russian Minister at Stockholm to the Swedish Government, for the incident in the recent Baltic naval battle, during the shelling of the German minelayer *Albatross* by Russian warships, of Russian shells flying over the Swedish isles of Oestgarn and falling a short distance from the shore is an acknowledgment of the cardinal principle of international law that neutral territories and territorial waters are not to be violated by naval combats. The operations of war vessels are necessarily confined to the waters of their own country, those of the enemy, or the high seas, which are free to belligerents and neutrals alike. The area covered by the territorial waters of a neutral state is as sacred as its soil. Although Bynkershoek says that pursuit begun outside may be continued and finished within the limit *dum fervet opus,* such is not the practice. The territorial waters of a neutral constitute, says Azuni, a sacred asylum. The duty of a belligerent not to carry on hostilities in neutral territory is reciprocal to that which compels the neutral himself to vindicate his neutrality by armed force if necessary so as to prevent a belligerent from infringing it. These correlative duties are the outcome of a common idea and matured side by side. The only legitimate fields for hostilities are the territories of either belligerent, the high seas, or territory belonging to no one. The most generally recognized exception to the rule protecting neutral territory and neutral waters from invasion is that which concedes the right of a belligerent to cross the boundaries of a neutral for the purpose of self-defense. The emergency justifying the exercise of that right must be, in the words of Mr. Webster, "instant, overwhelming, leaving no choice of means and no moment for deliberation." To give an illustration, Great Britain invoked the right of self-defense to justify the acts of her subjects who during the Canadian Rebellion of 1838 crossed by her command the American frontier, boarded a steamer called the Caroline, and sent her adrift down the falls of Niagara in order to prevent her being used by insurgents, armed on American soil, for the invasion of British territory. Under such circumstances the United States, through Mr. Webster, the Secretary of State, called upon Great Britain to show a necessity of self-defense, "instant, overwhelming, leaving no choice of means and no moment for deliberation" (Parliamentary Papers, 1843, lxi., pp. 46-51). As invasion was imminent, Great Britain found no difficulty in making a case of self-defense forced on her by instant, overwhelming necessity, and so the matter ended with an admission from her that, though the invasion was justifiable, an apology was due for it.

EXAMINATION OF JUDICIAL APPOINTEES IN SCOTLAND.—The quaint custom that each person appointed a judge of the Scottish Court of Session has to undergo what may be called an examination as to his professional fitness for the office—a custom duly observed at the installation recently of Mr. Scott Dickson as Lord Justice Clerk—dates back certainly to 1674, when it was provided by an Act of Sederunt that the Lord Probationer, as the appointee is named, should sit three days with the Lord Ordinary in the Outer House and one day in the Inner House to hear and report his opinion on certain causes. Nowadays the "trials" last a very short time, but the Lord Probationer still has to hear one or two cases both in the Outer House and in the Inner House, and give his reasons for a proposed judgment thereon, after which he is invited to take his seat on the bench. At one time the court claimed, and indeed exercised, the power to refuse to admit a nominee of the Crown. The last instance in which the Court of Session sought to exercise this right was in 1722, when it decided that Patrick Haldane—a member of the family from which the late Lord Chancellor is descended—was not qualified to be a judge. This, however, was not on the ground that his legal knowledge did not fit him for the position, but because his connection with the Scottish Bar was, it was alleged, little more than nominal, he being a member of Parliament and one of the commissioners for disposing of forfeited estates; indeed, it was said against him, that so rare were his attendances in the court that he "had not so much as a pin put up by the Faculty's gownkeepers." The case was carried to the House of Lords where the decision of the Court of Session was reversed (see Robertson's Cases in Parliament, p. 422); but despite this success Haldane did not get the coveted post, as in view of the opposition of the court and the Faculty of Advocates on political grounds—a singular anticipation of recent events—the Crown withdrew his appointment. Very shortly afterwards the Crown took measures to insure that it did not suffer a similar rebuff. An act was passed (10 Geo. I. c. 19) taking away from the Court of Session the power to exclude a nominee but enabling it to signify any objections to his qualifications for the King's consideration. Incidentally, the arguments in Haldane's case throw an interesting light on the qualifications for the Scots Bar in the early years of the eighteenth century. It is there stated that "advocates are not admitted in Scotland as gentlemen are called to the Bar in England, after a certain supposed attendance on the courts whereby they are presumed to have arrived at a reasonable knowledge of the laws and forms of proceeding proper to their country. But in reference to the municipal law of Scotland gentlemen intending to enter advocates apply themselves to the study of the civil law, generally in foreign universities; upon that law only they are tried, without the least examination into a supposed knowledge of the laws of their own country, and if they are found possessed of a reasonable degree of knowledge of that law they are admitted advocates." Although, as will thus be gathered, advocates did not, in those days, require on admission to exhibit proficiency in Scots law, an early statute—that of 1579—shows the remarkably high standard exacted from those appointed as judges in Scotland. That act required that a judge should be "ane man that fearis God, of gude literature, practick, judgment, and understanding of the lawes, of gude fame, havand sufficient living of his awin, and quha can make gude expedition and despatch of matters touching the lieges of the realm."

EVIDENCE OF OTHER CRIMES TO PROVE INTENT.—In order to prove that George Joseph Smith was guilty of the murder of a woman, who was living with him as his wife, evidence was tendered by the prosecution at the Central Criminal Court last week to show that two other women, who had likewise been through a form of marriage with the prisoner, had met their death under almost precisely similar circumstances as the mur-

dered woman. Objection to its admission was taken on behalf of the prisoner, but Mr. Justice Scrutton allowed the evidence to be given, and there seems to be abundant authority to support his ruling. In Reg. *v.* Geering, 18 L. J. M. C. 215, the prisoner was charged with poisoning her husband with arsenic. Evidence was tendered to show that of the three sons who lived with the prisoner, and whose food she prepared, two had died and one became ill from arsenical poison, the symptoms of all three being the same as those of the murdered man. The evidence was held admissible on the ground that it tended to show that the death of the husband was due to arsenical poisoning and was relevant to the question whether such taking was accidental or not. So in Reg. *v.* Dossett, 2 Cox C. C. 243, where the prisoner was charged with having set fire to a rick by firing a gun near it, evidence was admitted to show that the rick had been on fire the previous day, and that the prisoner was then close to it with a gun in his hand. "Although the evidence offered," said Mr. Justice Maule, "may be proof of another felony, that circumstance does not render it inadmissible, if the evidence be otherwise receivable. In many cases it is an important question whether a thing was done accidentally or wilfully." The authorities were carefully reviewed in the elaborate judgment of a very strong committee of the Judicial Committee of the Privy Council in the case of Makin *v.* Attorney-General for New South Wales, 69 L. T. Rep. 778; (1894) A. C. 57. The prisoners (husband and wife) were tried for the murder of an infant child whom they had received from its mother on certain representations as to their willingness to adopt it, and on payment of a sum inadequate for its support for more than a very limited period. The body of the child was found buried in the garden of a house occupied by the prisoners. To prove that the child did not die accidentally or from natural causes evidence was given that the prisoners had received several other children from their mothers on like representations and on like terms, and that the bodies of several infants had been found buried in a similar manner in the gardens of houses occupied by the prisoners. In holding that the evidence was rightly admitted their Lordships laid down the following general principle: It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offense for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears on the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defense which would otherwise be open to the accused. This principle was quite recently acted on by the Divisional Court in the case of Perkins *v.* Jeffrey.

Obiter Dicta.

AT THE OPERA.—Lovely *v.* Back, 158 Ky. 386.

SEE-SAW LITIGATION.—Teater *v.* Teater, 159 Ky. 111.

PROVERBIAL ANTAGONISTS.—Wolff *v.* Love, 78 Wash. 561.

FATAL EVERY TIME.—Railway *v.* Mortal, 18 O. C. C. 562.

THE MARCH OF CIVILIZATION.—Freeman *v.* Savage, 2 La. Ann. 269.

PULLING UP THE STOCKING.—From the opinion in Stocking *v.* State, 7 Ind. 326, it appears that Stocking committed murder for which he was sentenced to death and hung.

ANATOMICAL.—In Louisville R. Co. *v.* Veith, 157 Ky. 424, the sole question for decision was, according to the court, "whether or not one's leg is a part of his body." May not that decision be referred to hereafter with propriety as a "limb of the law"?

SOME ORGANIZATION!—The records of the probate court of Mobile County, Ala., show that on August 2 papers of incorporation were filed for an organization bearing the modest title of "Christian Knights of Heroines of Ethiopia of the East & West Hemispheres."

ELECTRICITY AND GAS TOO.—"The writer inclines to the belief that everyone who receives water through a meter disputes his water bills, particularly those which somehow accrue while his house is closed and he is away on a visit or vacation."—Per Burch, J., in Holly *v.* Neodesha, 88 Kan. 109.

NOMENCLATURE IN OKLAHOMA.—If the following Oklahomans had not been guilty of various infractions of the criminal law, and thus gotten their names into print in volume 9 of the Oklahoma Criminal Reports, we would have been unable to spread before students of nomenclature the following appetizing morsels: Pete Stites (p. 596); Sterling Cluck (p. 580); Bud Tempy (p. 446); Paris Rupert (p. 226); Baldy White (p. 187); and Noble Bowlegs (p. 69).

IT ALL DEPENDS.—In Boerner Fry Co. *v.* Mucci, 158 Iowa 315, complaint was made by the defendant of the refusal of the trial court to permit the jury to taste some ice cream forming one of the exhibits in the case, but the appellate court held that no abuse of discretion was shown. We are inclined to reserve our opinion as to the soundness of the decision, since the record does not show at what time of the year the trial was had.

HOG HUMOR.—Speaking of the effect of a statute relating to trespassing hogs, Ailshie, C. J., in Fall Creek Sheep Co. *v.* Walton, 24 Idaho 778, said: "The man who drew the amendment of February 7, 1889, made swine an exception in the laws of Idaho from all other kinds of trespassing animals. So now, when that cloven-footed quadruped of ancient notoriety goes foraging beyond the protecting care of the swineherd, he at once loses his character as a domestic animal and becomes an animal *ferae naturae*, subject to capture by anyone on whose premises he may at any indiscreet moment find himself. Of course, the hog doesn't care much about his character—he would

ordinarily just as soon be treated as a wild animal as to be treated as if he had been domesticated for centuries. His fate is generally about the same either way."

THE DEFENSE MADE A BULL'S-EYE.—A perplexing problem in bovine jurisprudence recently taxed the legal attainments of local jurists, says the *Portland Oregonian*. A bull and an automobile tried to occupy the same space at the same time, in consequence of which the bull went to his final reward to appear before the Great High Court, from whence no appeals lie, while the owner appeared before a more mundane tribunal, claiming damages. The theory of the defense was that the collision having occurred at night, the bull was guilty of contributory negligence in not having lights. The plaintiff promptly pointed out that the bull had no horn to serve as chandeliers. Thereupon the defendant insisted that tail-lights should have been furnished. Mr. Charles J. Schnabel and Mr. J. B. Ofner, attorneys for the plaintiff, immediately called the court's attention to the fact that the bull had two bull's-eyes, which served the same purpose, in which view Judge Joseph H. Jones concurred.

JUDGE LAMM ONCE MORE.—Our regret that the wit of our good friend Judge Lamm is missing from the pages of the current Missouri reports, is somewhat tempered by the fact that we have by no means exhausted the supply of good things from his pen to be found in earlier volumes. One to which we have not heretofore referred appears in the opinion in Whiteaker *v.* Chicago, etc., R. Co., 252 Mo. 458, an action to recover damages for being kicked off a freight train. The contention that the conductor, Drake, was not acting within the scope of his employment when he ejected the plaintiff was disposed of by Judge Lamm in the following characteristic manner: "Are we to airily suppose that Drake was booting trespassers (unknown to him and with whom he had no personal quarrel) from his master's trains in the night-time for the mere fun of it? Or like Don Quixote was seeking knightly adventures in righting wrongs of others, because of a fixed idea of general personal duty to mankind (or love of knightly renown), shading off into melancholia on the edge? Or was a monster of ingrained cruelty with a habit of wreaking his malice on those who stole rides on the freight trains of his codefendant? Such strained and unreasonable views 'would make posterity think ill of our understanding,' as Lord Chief Justice Holt once remarked. We would have to have the luck incident to being born with a caul (see David Copperfield) to escape such verdict in such hypothesis."

ANIMAL LORE AND LAW.—In James *v.* Atlantic Coast Line R. Co., 166 N. Car. 572, an appeal from a judgment against the railroad for the killing of nine geese, Chief Justice Clark writes so instructively and entertainingly with respect to the characteristics of geese and turkeys, that we feel warranted in making the following rather liberal quotation from the opinion: "The plaintiff relies upon the 'turkey case,' Lewis *v.* R. R., 163 N. C. 33. But the two cases are very dissimilar. In that case the evidence was that the turkeys could have been seen at a distance of 500 yards; there was quite a drove of them, and they were crossing the track. The turkey is a nervous fowl, and the jury might well have found that if the whistle had been blown the turkeys would have taken wing or have run, and therefore we held that it was error to enter a nonsuit. Geese, however, are phlegmatic and slow of movement, and the blowing of the whistle or ringing the bell would not be calculated to make them run or fly. On the contrary, the approach of the train would be more likely to cause them to huddle up in conference or to stretch out their necks to oppose the passage of the engine. In the absence of evidence showing circumstances of actual negligence, the mere fact that the whistle was not blown or the bell rung did not authorize the court to submit the case to the jury. . . . The difference between the characteristics of a turkey and of a goose is a matter of common knowledge. The turkey is long-legged, quick of movement, and promptly responsive to a signal of danger. The goose is short-legged, slow to fly or run, and resentful rather than appreciative of a warning of danger. Though of equal intelligence, probably, with most other fowl, this has made its name a synonym for stupidity. While a turkey on the track would be likely to save itself by flight if the whistle were sounded in time, geese would be likely to put their heads together, or at most waddle down the track away from the noise. . . . We are cited to the classic legend in Livy (Book V, ch. 47) when Rome was saved by the cackling of the geese on the Capitol. A great painter has memorialized the scene. This, however, was not due to the alertness of these birds to flee danger, but to their well known wakefulness at night. If the Gauls had blown their trumpets, the geese, instead of promptly getting out of the way, would simply have raised more clamor and hissed the warriors on both sides."

Correspondence.

THE HUMOR OF THE NEW YORK COURT OF APPEALS.

To the Editor of LAW NOTES.

SIR: Under the heading "A Spout from a Dry Well," in the "Obiter Dicta" column of LAW NOTES of this month, I find the statement that the quotation you make from the opinion in Morningstar *v.* Lafayette Hotel Co. is the nearest approach to a bit of humor you remember having seen in the opinions of the New York Court of Appeals. I might add to your example the statement of Judge Finch in Van Brocklen *v.* Smeallie, 140 N. Y. 70, at page 79, regarding the defendant:

"He defiantly broke his contract and with some natural triumph stands ready to pay the six cents!"

A still more deliberately humorous statement by a judge of the Court of Appeals occurred in an opinion affirming a conviction for murder. In the course of a long and elaborate history of the case, the judge writing the opinion narrated a very unusual and striking series of acts by the defendant, and added:

"Such conduct would probably have appeared important and significant to anybody but a detective."

Unfortunately, however, I have mislaid my reference to this case.

Very truly yours,

New York City. HAROLD H. BOWMAN.

Law Notes

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Reform in Legal Procedure.

"The law's delay," bewailed by Hamlet and lamented by the heirs of Jarndyce, has been the text of so much ill-considered criticism of the legal profession that we hesitate to refer to it again. But the existence of a real abuse has never been stated more forcibly than by that eminent lawyer, Elihu Root, in an address to the late New York Constitutional Convention. That justice is unwarrantably slow and unduly expensive is beyond question. But the cause is another matter. Mr. Root lays much of the blame at the door of the lawyers themselves, charging them with making a cult of their profession, and insisting that they should be priests at the altar of justice and not "shysters, lynx-eyed for the detection of means of delay and clouding of issues." He told of hearing a New York lawyer boast of being able to protract litigation in any case for seven years, and regretfully admitted the truth of the claim. Conceding the truth of the indictment the remedy is still difficult of discernment. If lawyers err in these respects, they do so to gain an advantage for their clients, and the clients will seek the lawyer who can obtain the most advantageous results. So radical reform within the bar itself is hardly to be hoped for. It is not in human nature to lose when means of winning are not condemned by the law—at least it is not within the nature of all the members of any profession. Whether it is possible to devise a system of procedure so simple and expeditious that it cannot be perverted remains to be seen. An avenue of reform which affords more promise of speedy results has been too infrequently referred to—the power of trial judges to expedite proceedings and summarily suppress pettifogging. It may be very well to advise the trial judge to go "to the meek and lowly oyster, to consider its ways and be wise, and to keep the judicial mouth shut." (See *Edwards* v. *Mt. Hood Const. Co.*, 64 Oregon 315.) But, preserving the salt-water simile, with an oyster on the bench there is little chance for justice to escape the clutches of a shark at the bar.

The Judiciary Article of the New York Constitution.

The state of New York was the pioneer in the adoption of a code of procedure, and its example has been widely followed. The Constitutional Convention just concluded has afforded the lawyers of that state an opportunity to review its workings, and the prevailing opinion seems to be that the forty years of practice under the code have developed the same evils of complexity and undue subtlety which the code was designed to abolish. "The existence of this great variety of minute, detailed statutory provisions," said Elihu Root, "has been breeding up a great number of 'code lawyers'—and by that I mean lawyers whose principal concern is with the statutory code of rights, and not with getting justice for their clients." The measures adopted by the Convention to remedy this condition are of commendable simplicity and directness. After some changes in the system of courts, of purely local interest, it is provided that a brief and simple practice act shall be adopted; that at intervals of not less than five years a commission shall be appointed to report on desirable changes therein; and that the practice act shall not be amended except on the report of such a commission or on a certificate of necessity from an appellate court. An extensive power to make rules for civil practice is also given to the Supreme Court and Court of Appeals. The remarkable thing about this provision is that it does not aim to cure all the existing ills by some one inspired measure. In its simplicity, its wise provision against legislative tinkering except at stated periods, and the flexibility afforded by the provision for judicial rules of practice, it is not too rash to hope that New York is on the way to the development of a genuine reformed procedure act which will do all that legislation can do to make justice cheaper and speedier.

No Moratorium in New York.

In a recent comment in these columns on the moratorium which has been declared by the warring European nations, we deemed the subject to be one of purely academic interest to our readers. But it seems that at least one ingenious practitioner has sought to bring it nearer home. In an action in New York city between two Americans of the hyphenated variety owing allegiance to powers now at war with each other, the defendant relied, as a defense, on the proclamation of a moratorium by his sovereign. Needless to say the plea did not prevail. We wonder if this sorely pressed counsel ever contemplated the consequences which would flow from the principle which he sought to establish. The path of neutrality is not wholly strewn with roses as it is, and if unnaturalized denizens in a neutral state retained their belligerent status as to each other, it would be better to go to war and be done with it.

Telephone Conversation as Evidence.

All authorities agree that testimony that a witness recognized the voice of a person with whom he had a telephone conversation is sufficient identification to admit proof of the conversation. (See *Gowsky* v. *Forst,* 20 Ann. Cas. 704.) The doctrine has been somewhat extended in a recent decision of the New York Court of Appeals holding that a telephone conversation with a person then unknown is admissible if on a subsequent meeting the witness recognizes the voice of the person with whom he conversed and is thus able to state his identity. As the court said: "A voice heard over the telephone may be compared with the voice of the speaker whom one meets for the first time thereafter as well as with the voice of a speaker whom one has known before. The difference affects the weight rather than the competency of the evidence." A similar decision was made in an earlier case in the same court. (*People* v. *Strollo,* 191 N. Y. 42.) The decision, indubitable as is its soundness, marks the progress in judicial thought since 1882 when the telephone was referred to as "a new instrumentality necessarily subject to greater uncertainties than a talk . . . face to face." (*Heath* v. *Jones,* 12 Ill. App. 493.)

The Disqualification of Judges.

The people of the state of Colorado are much exercised over the recent decision of the state Supreme Court restraining Judge Hillyer from the further trial of the now famous coal strike cases and granting a supersedeas in the case of John R. Lawson, the strike leader convicted in Judge Hillyer's court of various high crimes and misdemeanors. It will be remembered that Judge Hillyer was appointed to the bench especially to try these cases, whereupon the accused parties presented affidavits to the effect that he was prejudiced and therefore incompetent to sit in the cases. This, they claim, entitled them to a change of venue and a reference to another judge under the Colorado statute providing that when it is charged that a judge is prejudiced in a case such prejudice must be shown by the affidavits of at least two disinterested and creditable parties, and the Supreme Court has upheld that claim in its recent decision holding that on the presentation of such affidavits the judge must step down and out and turn the conduct of the case over to another judge. And this too though it be proven that the affidavits are false and that the judge is thoroughly competent to act. Hence the outcry. The decision is to be commended in one respect—it is a striking example of clearness; there are no hidden ambiguities in its phraseology, so the dullest can but know what is meant when it is said:

"The change of judge is conditioned not upon the actual facts of his prejudice, but upon the imputation of it. The facts set forth in the accusation must, for the purposes of the motion, be accepted as true, notwithstanding they may be known to the judge and all mankind to be false. The whole matter is left with the conscience of the petitioner and affiants, and when affidavits fulfilling the requirements of the statute are presented the change must be made and the truth of the matter is not open to question."

The statute is truly a deadly weapon in the hands of the lawbreaker when clothed in the interpretation given it by the Supreme Court, and the clamor of the press and the public for its amendment is readily understood. This demand is led by Governor Carlson who sees in it a blow aimed at the prevention of all crime, particularly liquor law violations, and he very aptly asks what is to prevent the disqualification of any trial judge by simply filing affidavits alleging prejudice, as long as the statute remains in force, which will doubtless be only until the legislature meets again and so amends it as to provide for some sort of a hearing on the truth or falsity of the charges in affidavits filed to disqualify a trial judge.

Suspended Sentences.

The department of justice at Washington proposes to settle once for all, at least so far as the federal judges are concerned, the vexed question as to the extent of the power of a judge to suspend sentences in criminal cases. The attorney-general recently issued a circular to all United States attorneys to resist the suspension of sentences in all criminal cases, and the action of Judge Killetts of the District Court for the Northern District of Ohio in suspending the sentence of a man found guilty of charges under the National Banking Act, furnished the case through which to test the question. The Supreme Court has been asked to grant a writ of mandamus compelling Judge Killetts to make and enter the order requiring the issuance of commitment and the enforcement of the execution of sentence. This is not the first case that has arisen on this much vexed question, though it seems to be the first to reach the Supreme Court of the United States. The state courts have passed on this alleged right of judges time and again, but unfortunately not always with the same result. That a court has the power temporarily to suspend its judgment for the purpose of hearing motions and other proceedings which may occur after verdict, or for other good cause, is not doubted, but the authorities are in conflict as to whether the court has the power to suspend a sentence for an indefinite period, such as during good behavior. The Circuit Court in *U. S.* v. *Wilson,* 46 Fed. 748, after stating that the District Court had suspended a sentence "for such uncertain time as the defendant should continue to remain so favorably impressed with the laws of the land as to obey them," held that instead of being a mere suspension of sentence "it operated as a condonation of the offense, and an exercise of a pardoning power, which was never conferred upon the court." There are authorities supporting the contrary view, however, and the cases on both sides of the question may be found in a note to *State* v. *Abbott,* Ann. Cas. 1912B 1192. The exercise of the right doubtless had its origin in the peculiar hardships resulting from the enforcement of the rigid rules of criminal procedure, when the discretion now resting in the courts to grant new trials was unknown, and it was not possible to carry the case to a higher court for a review of the facts. Lord Hale in 2 Hale P. C., c. 58, p. 412 described the right of a court to suspend sentences as follows: "Sometimes the judge reprieves before judgment, as where he is not satisfied with the verdict, or the evidence is uncertain, or the indictment insufficient, or doubtful whether within clergy; also when favorable or extenuating circumstances appear, and when youths are convicted of their first offense. And these arbitrary reprieves may be granted or taken off by the justices of

gaol-delivery, although their sessions be adjourned or finished, and this by reason of common usage." The court in *People* v. *Monroe County Court of Sessions,* 141 N. Y. 288, declared the power to be inherent at common law in courts of record possessing criminal jurisdiction and as a reason for its existence said: "It is a power which the court should possess in furtherance of justice, to be used wisely and discreetly, and it is perhaps creditable to the administration of justice in such cases that while the power has always existed, no complaint has been heard of its abuse." Many of the states have recognized the good that may be done by the careful and intelligent exercise of such a power and have passed statutes providing when and in what manner it may be used, and this perhaps is the best solution of the question.

A Trust for Lawyers.

WITH this promising headline a Missouri paper condemns the passage at the last session of the state legislature of a law designed, so it is claimed, to enrich the lawyer at the expense of the rest of the citizens of the state. The law is known as the Unlawful Practice of the Law Act, which provides in effect that thereafter all legal papers, wills, deeds, options, etc., must be drawn by duly licensed attorneys. The clerk, stenographer, small real estate dealer, notary and village wiseacre are up in arms against the act, demanding with loud voice that the iniquitous law be wiped from the statute books. In reality the law was passed in answer to a persistent demand for a legal weapon wherewith to club the ambulance chaser and his runner. If the law is working out badly it is not the first one that was put forth as a remedy but that made matters worse. But can it be said that it works so much to the particular financial benefit of the lawyer? The conscientious lawyer earns every cent he receives for drawing the ordinary legal instrument, and the client generally receives full value for his money. If the average man knew what a fruitful field the home-made deed, will and kindred legal paper prove for the legal profession he would think twice before condemning a law that provides that legal work must be done by those specially trained. Many is the small fee that must be taken in for such work to equal the fat one earned in the contest of a poorly drawn will; the loss or gain of a farm because of a defective deed would pay many times over the fee of a trained attorney for drawing the deeds. There is much that could be said both for and against such a law, but the benefit does not accrue solely to the lawyer. The many lawsuits avoided through properly drawn legal papers, because never existing, are never reckoned, but the fee paid for drawing a deed or will looms large in the mind of the layman.

Licensed Pests.

IN holding an actress and artists' model for the action of the grand jury on a charge of perjury made by the defendant in a breach of promise suit Magistrate Corrigan in the Tombs Police Court of New York city made the following significant remarks: "There is growing up in New York a class of shameless shyster lawyers, who are willing to take any case, who will undertake any 'strike' suit that malice or cupidity can inspire. They are licensed pests. Their only weapon is publicity. They bring disgrace on a lot of decent lawyers and on the whole profession. They are absolutely cold-blooded conspirators. They are legal shake-downs, and when a client fixes on a victim from whom he thinks he can extort hush money, he goes to one of these lawyers and he cooks up the evidence. It is an abuse of legal process and brings publicity, suffering and sorrow to a number of innocent persons and it is done purely to shake down people and get money from them. I am saying [this] because I think it is something that should have been said long ago. I mean to say the criminal courts in New York and the magistrate's bench and the district attorney's office—and I think I have the indorsement of the district attorney in what I am saying—should put themselves on record as strongly opposed to any suit brought against a man, not because there is any meritorious cause, but based on the belief that he will settle rather than face publicity." If not already procured, we feel reasonably safe in assuring the magistrate of the district attorney's indorsement of this denunciation of the blackmailing attorney.

The Failure of the Seamen's Law.

THE La Follette Seamen's Law of which so much was expected in the way of safeguarding the lives of passengers on the high seas has, it seems, turned out to be naught but an abortion. For according to a very recent opinion of Attorney-General Gregory the principal maritime nations of the world do not come within its lifesaving provisions. These are contained in section 14 of the act, which adds greatly to the lifesaving equipment demanded on passenger-carrying liners, compels steamers to carry trained lifeboat men holding government certificates and capable of understanding orders, thus preventing the use of coolie crews, and provides for weekly musters and drills. The inapplicability of this section to foreign vessels generally is due it appears to the ineptness of the framers of the bill in tacking it on to section 4400 of the Revised Statutes as an amendment without deleting therefrom that portion of the section which exempts vessels of nations having inspection laws approximating those of the United States from any other inspection at American ports except such as is necessary to show that they have complied with the laws of their own country, a certificate of inspection from their home port being taken as proof that they have so complied. While, as the Attorney-General points out, the scope of this exemption depends on the meaning to be given to the word "approximate" (which he holds to be a mixed question of law and fact to be determined by the Department of Commerce whose decisions become the subject of judicial review only in the event of a decision adverse to the vessels of any particular nation), the Department of Commerce has practically concluded the question by an earlier ruling of Solicitor Thurman to the effect that section 14 can only be enforced against vessels of the United States, and a few unimportant maritime nations, including Italy, Belgium and Greece, the vessels of Great Britain, France, Norway, and Japan being exempt from compliance with its provisions. The injustice and consequent impossibility of permitting this Seamen's Law (which becomes operative November 4) to remain on the statute books as it is, with its plain discrimination against our own merchant marine in favor of the foreign-owned bottom, is obvious. Doubtless amendments will be proposed in Congress at

the next session to remedy the defect. At the same time it is not unlikely that the steamship interests hostile to the law will seize on this golden opportunity to work for the repeal of the law in its entirety. The blunders which make such a situation possible furnish a strong argument in favor of the establishment of a thoroughly organized official legislative drafting and reference service at Washington, such as has been recommended to the American Bar Association of late years by its special committee on legislative drafting.

The Analogy of Municipal or Social to Natural Law.

Law, in its final analysis, consists of the conditions precedent to existence in a given environment; from which it follows that it is not immutable, but changes as the environment changes. In nature law manifests itself in certain qualities or attributes acquired through the process of adaptation to environment, whereby, after countless sacrifices of individuals, the species comes into perfect and automatic accord with its environment. If the environment suddenly changes, the species will perish. If the change is sufficiently gradual, a new adaptation takes place. Viewed more largely, it may be said that the laws of the universe are but the outgrowth of the adaptation of matter to its environment. And, conversely, were the subjects of the laws of nature or of the universe capable of resisting and disobeying their laws, nature and the universe would be destroyed. Such then being the character of natural law, what is municipal or social law? It takes only slight analysis to demonstrate that it is generically the same as natural law. A social organism is created. It consists of individual components, and upon these it imposes certain conditions with which they must comply in order that it may exist and develop —that is, a social environment is created, and the laws are the precepts for adaptation to that environment. If the individual violates those conditions and yet seeks to remain in that environment, he inevitably suffers, or, perhaps, perishes. If a sufficient proportion of the subjects violate the conditions, the social environment is changed or destroyed. Such changes occurred in the origin and development of the common law. Such destruction is involved in every revolution. And while in modern times the changes of the social environment are usually made by means of statutes, these are neither more nor less than the result of a species of revolution against particular features of the social environment. It may be thought that the above analogy does not hold good as to the penalties, civil and criminal, imposed for infraction of social law. Yet the analogy is perfect in this respect also. The penalty for violation of natural law is usually the destruction of the individual violator, though the converse may occur in some cases. Similarly, the penalty for violation of social law is not only the specific penalty imposed by statute, but destruction of the individual if the violation is persisted in, or else destruction of the social organism.

The Supreme Law of Protest.

It is this last alternative that underlies the Supreme Law of Protest. When the individuals composing a social organism become convinced that a prime essential of that organism is menaced by the refusal of individuals to adapt themselves to the social environment, and when they are also convinced that the prescribed and commonly imposed penalties for such violations are ineffective, they register their protest by reverting to primal methods. Such is every form of "lynch law." It is a social protest against an attack upon the collective ideal of the social environment or of some prime essential of that particular social organism. And thus it is that it is so difficult for one community or section to appreciate the protest of another—the social organisms and environments are different. The danger of such a protest is, of course, apparent. Frequently by its violence it tends to destroy the very organism which it seeks to save. It nearly always establishes a precedent under cover of which other attacks upon the social organism are made—witness the Ku Klux of the early post-bellum days, and the Night Riders of more recent memory. But nevertheless the fact remains that when the established methods, called laws, of compelling individuals to conform to the social environment repeatedly fail, the people will invoke the Supreme Law of Protest. The efficiency or soundness of every law may be tested by the number of protests registered, whether by way of "lynch law," mob violence, and strikes, on the one hand, or widespread unpunished violation on the other. It has recently been said concerning the Night Riders: "Violation of law and disregard of law are followed by anarchy, and this would be worse than the worst possible state or organized society. Lasting reforms are only accomplished by lawful methods and processes." Taken literally this is at least questionable. Is it not rather true that decadent forms of organized society and impossible social environment attempted to be imposed upon the units of the social organism, are usually overthrown by some great protest or series of protests from those units? If so, it may be said that lasting reforms are not accomplished by lawful methods and processes, but rather are thus registered after they have been accomplished. That such is the case is due largely to the fact that much of the social environment under which "the many" are compelled to live is constructed, or else distorted, to fit the needs or desires of "the few," and until some means is reached by which environment will automatically, or at least more readily, change to meet the needs of "the many," we may expect more or less frequent invocation of the Supreme Law of Protest. In this connection we cannot refrain from quoting a recent clipping:

> "America is not in danger from unrest or from criticism of the courts or from hatred of the rich or from muckrakers and professional reformers. But America is in danger from those conditions which make it possible for the professional demagogue and the professional reformer to find millions of followers, and from men who use their talents to attack the reformers and the demagogues rather than to devoting themselves to remedying wrongs and injustice."

The Test of Mendacity.

A test as to when a witness is lying will surely be appreciated by the profession. Here it is, as deduced by the *Pittsburg Dispatch* in commenting upon the methods accredited to eminent cross-examiners of New York city, who are variously said to watch the lips, hands, cheeks, or feet of the witness: "Taken as complete formula it would mean that a perjurer to escape detection would have to school his face to be impassive, keep his

hands in his pockets, hook his feet to the rounds of the witness chair and shut his eyes." But still the poor witness would be at the mercy of the lawyers; for if he did all these things some other eminent cross-examiner would certainly declare that such an exhibition on the witness stand raised a conclusive presumption of perjury.

Keeping Clients out of Court.

Quite recently a layman gave vent to his opinion of lawyers, with: "The spectacle of any lawyer favoring the prevention of litigation is a joke. Of course, there are lawyers who honestly try to keep their clients out of court, but how many can you name?" Which staggering inquiry suggests the story of the darky preacher who, after having declared that God made Adam out of mud and set him against a fence to dry, was asked: "Who made the fence?" "Ef yo is gwine tuh ax sich questions as dat, suh," he replied, "yo will upset all de foundamentions of de Gospel." Unfortunately, however, doubters will ask questions. And, still more unfortunately, they are often difficult to answer without the vindication of the doubt. As long as so many hopeless suits are instituted, so many useless appeals taken, so many vain petitions for reargument presented, and so many opinions handed down with some such refrain as "We have repeatedly held," etc., the layman's question will be a reproach to the profession, suggesting either incompetence or failure to appreciate the fact that the acme of success as a lawyer is to keep the client out of court. Of course there are clients who refuse to stay out of court, and we are here reminded of one that sued a certain other man so often that his lawyer, in desperation, finally advised him to stop suing the fellow and give him a good licking;—which advice the obedient client promptly followed, and as promptly employed the same lawyer to appear in the forthcoming action for assault and battery. The fact remains, however, that a proper appreciation of the functions of an attorney at law—a little more counsel and a little less advocacy—would mean money in the pockets of the clients, fewer judicial opinions, decrease in the expense of maintaining the courts, greater respect for the law, and a happier and more peaceful community generally. Nor would it necessarily mean less compensation to the lawyers. But that, of course, would cut no figure with an honest lawyer.

Keeping People out of Jail.

This is even more important than keeping clients out of court, and, happily, it is recognized as an honorable, and, perhaps unhappily, a lucrative phase of a lawyer's activities, that is, the defendant's lawyer. The state's attorney too often seems bent at all hazards on putting everybody he can in jail. Often only an accusation is needed to let loose his flood of rage, abuse, and condemnation, regardless of the facts. And yet every state's attorney is an officer of the court, individually and componently as a part of the machinery of justice oath-bound not to punish the innocent. Indeed, in view of the modern conception of punishment—at least as it has been judicially declared (see *State* v. *Wolfer,* 119 Minn. 368)—it would seem that the reformative, as distinguished from the punitive, conception might well begin at the trial; for after the state's attorney's convincing argument that the prisoner is an unregenerate and unregeneratable wretch, deserving to be drawn and quartered rather than to receive the inadequate sentence imposed by the law, it must certainly take the said wretch several months of his reformatory detention to persuade himself that it is any use to try to be good. If, as generally seems agreed, "judicial poise" is a good thing, why not prosecutorial poise? The state's attorney as well as the judge is sworn to administer the law, and, while it seems that the prosecutor must of necessity indulge in some contortions of advocacy, he might very well be able to present the case fairly without adopting the rôle of a persecutor. It would be unwarranted to say that many prosecuting attorneys are consciously influenced by considerations of reputation and extra remuneration (contingent on conviction) in pleading the state's case with such partisan zeal. But when some doubter comes along who can answer him?

Liquor as Cause of Crime.

Not the least terrible arraignment of liquor and the liquor traffic is their supposed potency in breeding crime or crime producing conditions. The view that intemperance, by weakening the will, leading to evil associations, and dulling the conscience, is a serious cause of crime seems to be generally accepted. Judges have variously declared that from 40 to 95 per cent of the cases that are called before them are there on account of drink. Authorities in prisons have also at various times declared that intemperance has been responsible for the presence therein of from 60 to 80 per cent of the inmates. Moreover, prisoners themselves, although their competency to diagnose their own cases satisfactorily is at least open to question, have not been shy in attributing their downfall to drink. Since criminal statistics everywhere, with the possible exception of England, seem to bear out the general alarming opinion of experts that crime is on the increase, it would seem that if the social organism could be freed or nearly freed of crime by the simple expedient of doing away altogether with intoxicating liquors, then such a surgical operation ought to be performed in the interests of the public weal, even though thereby private interests would be jeopardized and personal rights sacrificed. Before such a drastic measure is taken, however, the accuracy of such opinions must be thoroughly tested. That they are not to all minds conclusive is shown by the recent statements of District Judge John A. Perry of Colorado, who, as a result of his operations during one year's service as presiding judge in the Denver West Side Criminal Court is of the opinion that "the idea so often advanced that liquor is the cause of crime in this country is an unsound one," and that rather "idleness and the lack of proper home training are at the bottom of nearly all of the crime." Says this judge: "Crime is generally charged to whisky. I thought so until I went to the West Side court and presided for more than a year and had every kind of a criminal before me. There were few cases before me for which drink was responsible. I would say that 10 per cent would be a large ratio to give to liquor as the cause for crime. I would like to say that liquor is responsible for crime and would like to say that prohibition will lessen crime in this state, but I am sorry that I cannot say it conscientiously. Ninety per cent of crime is caused by idleness—city idle-

ness. I have talked with Judge Butler and other judges who have presided in the West Side court and they agree that whisky and strong drink are not the great cause of crime. The two often go together, but we cannot say truthfully that drink causes over 10 per cent of the crime." In this connection reference may also be made to the philanthropist, Mr. Henry Ford, who at the Michigan state fair very recently said: "My experience with men is that they never get into trouble when they are kept busy. It is idleness that breeds crime."

The study of criminology is a complicated and difficult one. As a separate study it is of comparatively recent growth, and statistical information as to the correspondence between drunkenness and crime is usually nonofficial and of little scientific value. The factors responsible for crime are cosmic, social, and individual: cosmic as respects climate and variations of temperature; social as regards the political, economic, and moral conditions under which men live; and individual as respects descent, sex, age, and bodily and mental characteristics. To disentangle these factors is difficult. Until the subject of criminology is better understood, and all its various factors more accurately gauged, while intemperance, no matter what forms it takes, is always to be condemned, it is unwise to accept too readily the partisan conclusions of either the protagonists or antagonists of the liquor traffic.

JUDICIAL PROTECTION OF PRIVATE RIGHTS.

Constitutional government as it exists in America today is unique. In the whole history of the world, among all of the nations of antiquity, of the middle ages and of modern times, the like cannot be found. Not that the structure of government, as set forth in its fundamental law, is so very peculiar; but the construction placed upon not very unconventional provisions has led to practices that are extraordinary in governmental annals. It should not prove very difficult to trace the steps whereby this condition has come about, although lawyers, publicists, and statesmen have differed not a little in this respect. The feature of our institutions which distinguishes the government of the United States from all others is the power exercised by the courts of declaring acts of the legislature to be invalid. We have lived under this system for a considerable time, and our country is commonly said to have been prosperous; but whether our prosperity has been because of or in spite of constitutional government has recently become a very lively topic of debate.

It needs little or no argument to demonstrate that a system which permits legislative enactments to be upset and avoided cannot be very efficient. Legislatures that are given to the practice of frequent repeals and reenactments are commonly made the subject of censure. In the case of judicial review, there is of course a period during which the law is uncertain—that is, it cannot be known whether the courts will hold the particular act valid or invalid—and the expense incident to the annulment of laws enacted by tedious and expensive processes is very great. Furthermore, the judges administering the common law are a more conservative body of men, and no doubt in many instances this has led them to the avoidance of really good though somewhat advanced legislation. It is not the purpose of the present writing to discuss the merits of the system of judicial review, and these matters are only mentioned as being among the objections that have been levelled against it. They have been made the subject of much debate in the lay as well as law periodicals. If we are going to have a change in the structure of our government, as many of the publicists insist, it will be well to know exactly how the existing condition came about.

That the framers of the Constitution of the United States contemplated judicial review of the extent and scope now practiced seems highly if not certainly improbable; but that they intended the courts to have power of annulling statutes in some cases appears to be equally certain. Various expressions of the framers of the Constitution disclose this intention, and if this left any room for doubt, the very structure of the instrument imports such a purpose. The Constitution divides all powers of sovereignty between the federal government and the state governments. It places restrictions and limitations upon each. Some department of government must have been charged with the duty of determining when these powers are overstepped, and what is more probable than that the judicial branch was considered to be the custodian of this power? Again, in the expressions of Mr. Hamilton and Mr. Marshall may be found language that unequivocally discloses this to have been their understanding of the matter. The subsequent Chief Justice, in the Virginia Convention that ratified the Constitution, said: "Has the government of the United States power to make laws on every subject? . . . Can they make laws affecting the mode of transferring property, or contracts, or claims between citizens of the same state? Can they go beyond the delegated powers? If they were to make a law not warranted by any of the powers enumerated it would be considered by the judges as an infringement of the Constitution which they are to guard. They would not consider such a law as coming under their jurisdiction. They would declare it void." Nothing can be plainer than this, but if any doubt should remain in the mind of the investigator it ought to be completely dispelled by the following language of Mr. Hamilton in the Federalist: "The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind 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. Without this, all the reservations of particular rights or privileges would amount to nothing."

Undoubtedly these men, and of course others of less acumen, could have only a hazy idea as to how the system would work out; it had never been tried before and no one could foresee its effects. But they were quite clear to this extent: (1) the Constitution, treaties and statutes of the United States were superior to state enactments, and the courts were bound so to declare; (2) not even an act of Congress could encroach upon the sovereign powers reserved to the states, and if it presumed to do so the courts were obliged so to adjudge. In other words

the Constitution blocked out spheres of legislative action for the federal and state governments and conferred on the courts power to keep each of the actors within its own domain. Had the courts confined themselves to activity within this authority, perhaps no criticism would have been directed against them; but they did not care to recognize a limit to their powers.

Three clauses of the Federal Constitution have been the ground of attack on almost all of the statutes—offhand, say ninety per centum—that have been annulled by the courts pursuant to that instrument. These clauses are (1) the Commerce clause, (2) the Obligation of Contracts clause, and (3) the Due Process and Equal Protection clause. (The provision relating to due process and that of equal protection of the laws are made one, because they virtually are one in practice; both are assigned customarily as objections to the validity of laws, and the courts rarely if ever consider them separately.) About an equal number of cases has been decided under each of these clauses. Beginning slowly with the Commerce clause and the Contracts clause the courts hesitatingly annulled a comparatively small number of enactments during the first half century of our national existence. The succeeding decades showed, however, a rapid increase in the number of acts invalidated, the Due Process clause permitting much greater latitude than had been enjoyed theretofore, until finally the cases have become so numerous that those decided since the inception of the present century outnumber all those previously passed upon.

It has been stated above that the framers of the Constitution contemplated a *separation of powers of government* state from federal, but it appears in the bulk of the cases declaring statutes to be invalid that the constitutional provision invoked relates to the *protection of private rights*. It seems highly probable that neither the framers of the Constitution nor any representative body of the people ever contemplated this result. Had it been suggested to the hard-headed advocates of state rights that a state would not have power under the Constitution to regulate the hours of labor in its own bakeshops, is it probable that even one state would have ratified the instrument? How grudgingly did they surrender every power that was given to Congress! The idea of the separation of powers of government, accompanied by judicial power of review, seems essential to our national structure; but is there any need of judicial protection of private rights? Are not rights of property and of person as secure in England or Canada as they are in the United States? If laws operate oppressively an adequate remedy exists in their repeal. There is little danger that our legislators will be so morally oblique as to refuse to remedy wrongs or injustice that may be inflicted through their acts. If legislatures may make mistakes in some instances—and judicial annulments of statutes are such an assertion—then the courts in their turn must also occasionally be in error, for constitutional amendment to circumvent their decisions of annulment has frequently to be resorted to.

Judicial protection of private rights has, in truth, no place in a government like our own. Guaranties of private rights appertain to monarchies. They are usually concessions wrung from unwilling sovereigns. They do not appertain to a republican form of government. So the Bill of Rights—that "palladium of our liberties," as the Fourth of July orators used to call it—has no value for us in America, however valuable it may have been to our ancestors whose property and persons were seized by unprincipled kings. Our legislative bodies, national and state, should be unfettered to move each within its governmental sphere, according to its own conceptions of whether a workmen's compensation act or other law is politic or not politic. Again, by reason of judicial control, legislatures have become timid and uncertain. They frequently pass legislation of a hasty and ill-considered character, and "put it up to the court" to determine what shall be the law. Indeed, much is to be said in favor of the view that judicial protection of private rights should be abolished.

New York. Berkeley Davids.

THE MISUSE OF PRECEDENT.

Courts have been variously defined, but one definition has not yet found its way into the books. It is related of a certain colored gentleman who while on the witness stand, in answer to a question put by a doubting judge after proof of a rather shady "alibi," said that "a court am a place where justice am dispensed with." However, there is an abiding conviction to a moral certainty lurking in some quarters that enough of truth might be brought to the surface in the definition to offer a rather formidable defense for either contempt or slander grounded upon it. It is adding but little to human knowledge to say that many take seriously what said colored gentleman spoke unwittingly.

For many years past complaints have gone up from the four corners of the continent against the delays and the more serious shortcomings of the courts. Most of these go unheeded by the profession because perforce they are unattended with a bill of particulars. No doubt many will take issue with the writer should he venture the statement that in his judgment, aside from our adherence to the rather dubious tenets of precedent, we have no science or philosophy of law or no clear or adequate ideals. Law under the case system according to no less an authority than James Bryce, the famous author of "The American Commonwealth," is merely a vast collection of rules; and so far as our system of jurisprudence is concerned, it might be said that we are not yet entirely divorced from the age of Coke. Since we are governed by rules why not adopt one designed to make precedent subservient rather than superior to the exigencies and demands of the particular case? Instead of deciding the cases as they come before the courts without other than auxiliary and illustrative reference to what was decided in similar cases—and the word "similar" in this connection refers generally to the paralleling of the case with reference only to the elements covered by the rule—litigants and parties are stretched on a Procrustean bed and martyred if necessary to the rule. We are of course moved by a feeling that justice is being in a certain sense worked out and that a body of jurisprudence is being gradually built up. But it is very doubtful whether we may not soon be compelled to reappraise the values of the stupendous and unwieldy case system that now dominates in all our jurisdictions, and stop to consider the direction at least in which we are tending.

There can be but little doubt that we are overreaching ourselves in our efforts to train the currents of life to static prin-

ciples. Law should not be a thing apart from life and its activities, since it is, or at least should be, but a phase of our aims, our motives, and our acts. As it is, a great gulf exists between the people and their courts,—for in them the thoughts, the mental processes and the language of a foreign age largely prevail. In so far as the law concerns itself with modern life and endeavors to correct or alleviate its injustices and wrongs there can be but little doubt of its beneficent influence; but when in the adjustment, the immediate wrongs are dealt with only and accordingly as precedent may permit, it is very questionable whether the remedy is not at times more pernicious than the wrong sought to be remedied. What was said of philosophy by James in his "Defense of Pragmatism" might well be said of the law. It has ever been "taken for granted that when you entered a philosophic classroom you had to open relations with a universe entirely distinct from the one you left behind you in the street." A future age may wonder why it was ever deemed necessary that any principle should take precedence of the actual purposes and agreements or circumstances of any case. The devotees of precedent point out the desirability of having established rules to serve as a bulwark of property rights. It is not to be understood that a system that is not grounded in an exaggerated regard for precedent such as prevails in this country, in England and in other civilized countries, must be devoid of rules or of basic principles of right. The branches to be lopped off are those which are rotten at the core,—those that cumber the tree. We should discard the branches that shade those who pattern their social and business conduct after the latest cut of the cases; seeking ever to know just how far they may go *legally* in making their inroads and incursions, though ever transgressing *morally*. You will find that such men know intimately caveat emptor, that harlot of the law, and that they live just across the line from the realm of indictments. For just such as these many of our precedents are made, and against such precedents as are so made should the courts and the profession be allied.

The ordinary and well-meaning man acts according to his understanding of reason and right, and it is undeniable that generally speaking little wrong comes from this source. In fact it is truly remarkable to consider how nearly infallible, or, at least, essentially fair, are the judgments of men when conscience and reason are called as chief arbiters. The same arbiters in an enlightened degree are in the courts. Why load their clearer judgments with the crushing weight of dead cases and dead issues? Lawyers and judges are all too generally engaged in a game of dialectics, the lawyers playing rule against rule, and the judges working out a "decision" that will read well, and be "sound" by the test of the authorities. The "reason" for their decisions enjoined on them by the law means to them precedent—for how often do we find a case that does not move from point to point under the shadow of the authorities, even to the extent of denying justice in the particular case rather than defy a rule or brave the condemnation of the "learned" in the law? Even the language of the law is made to serve the designs of precedent, and hence the courts speak a different tongue from that used by the man in the home, in the office or on the street. Legal phraseology is notably archaic, stereotyped, stolid and reactionary. It is given to platitudes, to set phrases, artificial distinctions, technical phrases and ancient conceits.

One remarkable and seemingly unkillable evil in our courts—an outgrowth also of an ancient age and their dense mistrusts—is our modern and abominable system of rules of evidence. Instead of using the natural and frank methods that obtain in nonjudicial investigations we cling to a system that is a constant affront to every man who is not devoid of honor and spirit. While we in America are rather amused at the French method of trying a case, may it not be that the French system (not that it should be copied or adopted) approaches more nearly the processes of life than is possible with us under our modified English system and that we may learn some things even from that system? We are primarily intellectual, logical, in a way, and orderly—but what of the results? That in the last analysis must be the test. The French method is more intuitional—approaches life, is more sympathetic with motives and gives greater freedom to them. It imports more of the actual atmosphere of the case into the court room. It may be that the great latitude allowed in a French trial, and the chaos and the swirl of emotions there let loose, are something shocking to one with a grave sense of decorum. But is that system worse than one which measures every witness and every word he utters by the yardstick of mistrust—whether he be an ex-president or a thug; a child relating a simple incident, or attempting rather to relate it, over scowls, scoldings, rebukes, objections and exceptions; a woman pleading for her son; or a harlot from the street? I am quite sure as between these two systems the one we so often denounce is the more human, the more humane, and possibly, therefore, the one that works in most cases the greater measure of justice.

Recent world events in Europe fully prove the fact that mere efficiency with its accompanying order and decorum may develop into a thing to be abhorred—a hideous, even a monstrous thing. Unless the law reaches into the lives of the people, and applies itself unreservedly to remedying, correcting or alleviating, as far as possible, the social wrongs and the injustices ever recurring, and determines upon the best and most adequate remedy to that end and applies it, and bases its decision on the reason and the necessities of the case itself rather than upon precedents—using precedent if it may, discarding it if it must—there can be but little to justify the system of laws that must necessarily touch every phase of life.

Why should it be such a difficult and almost interminable matter to determine questions as to the right and wrong between persons? To find out even as we do in the ordinary investigations of life: Who is free of deceit, of guile, of unfair acts? Who is at fault? Or who is least at fault? Or are they equally at fault? What is fair between these two men *now* before the court? It is the duty and the purpose of the courts to answer these questions *in each case* and to apply the remedy that approximates at least to undoing the wrong, or correcting it so far as possible. If we have to make a new principle to fit every new case, what of it? The principles will fall in line if they are not deified. The old rules of fixity, of rigidity, of unyieldingness were copied after what was conceived to be nature's methods. But nature itself is in a state of perpetual flux. Even the so-called laws of nature are the artificial creatures of our own understanding, and as knowledge grows we find that we must modify and express anew our understanding of such laws. And if this is true of nature's laws so called, how much more is it true of so-called human laws.

And now for a few cases which, while showing the extremes in a number of instances to which we go, are, nevertheless, still authoritative in many jurisdictions in so far as the principles underlying them are concerned. They are submitted merely to prove that certain defects must certainly exist where such decisions are possible.

The case of *Locke* v. *Alexander*, 2 Hawks (N. C.) 155, 11 Am. Dec. 750, is typical of many of our living authorities: Isaac and Charles acting for themselves individually and as attorneys

for their cotenants sold land to one Merrill and received the money for it. Subsequently Merrill in good faith, thinking he had an unimpeachable title, sold to another. Then the cotenants, who presumably got their share of the price for which the land was so sold through their "attorneys," brought suit to recover the part of the land which they originally owned on the ground that the deed or conveyance was void. The court said "the receipt of the consideration money is acknowledged by Isaac and Charles in their character as attorneys; *and from no part of the deed can it be collected that any money was paid to themselves in their private right, although it may reasonably be supposed that two-fifths of the sum was so paid,*" which of course means that three-fifths of the money went to the fellows who sued for the lands after they sold them and got the money. The court says "presumably." Why didn't it find out definitely? That was *the* important thing to inquire into, not whether such a deed in Lord Coke's time would be considered a void deed. This latter point is of course the one and the only one considered. As a result the court finds that the deed was void as to the cotenants (conspirators). What then? One would suppose Isaac and Charles would be held as on a personal obligation, for they had covenanted that they, "as attorneys aforesaid, for themselves and their heirs, the aforesaid lands and premises, and every part thereof, against them and their heirs, the claim or claims of all and every other person or persons whatsoever, to the said Jonathan Merrill, his heirs and assigns, shall and will forever warrant and defend by these presents." But oh no! A void deed holds nobody. So all these fellows by the sophistry thus imported into the law go free with the spoils. Merrill had to make good to the man that bought from him, and the court gave him nothing but a bone of the law to gnaw upon in the place of the money which all, including the court, admitted they got, and all, including the court, admitted they gave nothing for.

In *Bates* v. *Norcross,* 17 Pick. (Mass.) 14, 28 Am. Dec. 271, it was held that the heirs as successors of a deceased grantor cannot set up a claim of title to lands conveyed to a grantee by warranty deed, because "if the heirs were entitled to a judgment against the grantee the grantee would in turn be entitled to a judgment against the heirs." In support of this proposition, the court goes back to Queen Anne's day, talks of "counterpleading the voucher," of averring "that neither the vouchee nor any of his ancestors had any seisin whereof he might make a feoffment," of "cum onere," lineal warranties, rebutters, and this piece of English that might have been dug up from the pliocene strata with fossil trilobites and Dinosauria, to wit: "If a feme heir of a disseisor infeoffeth me with warranty and marrieth with the disseisee, if after the disseisee bring a præcipe against me, I shall rebut him, in respect to the warranty of his wife, and yet he demandeth the land in another's right." In conclusion the court gloriously remarks: "The result is the clear opinion of the whole court," etc. Let the laity continue to wonder!

The case of *Smith* v. *Ingram,* 130 N. C. 100, 61 L. R. A. 878, is illustrative of a class common in the courts. In this a man and woman sold property under a warranty deed, received their price for it, $130.00, and after the purchaser had sold the land to various other parties in small tracts it was built upon and improved and in the course of a number of years was worth over $40,000. Thereupon the hyena-like greed and cupidity of the original sellers was aroused, and by the aid of a lawyer and a court that stood in awe of a few hideous rules of law even where it tacitly admitted the injustice of their application in the particular case (the dissenting judge who later became chief justice openly charging it in his dissent), recovered back the property with all the improvements. If the law must have rules, then this case ought to illustrate the clamoring necessity for reviving an old one: "Thou shalt not steal!"

Beach v. *Miller,* 51 Ill. 206, 2 Am. Rep. 290, is another authority illustrating the law governing modern covenants in many of the states. A smart chap from the city went into the country and bought a farm. The farm was made particularly valuable on account of its accessibility—a railroad ran across it, and had been in operation for many years. While the deal for the land was pending nothing was said about the fences, the trees, the small brook, the barn or the railroad. It did not occur to the frank-dealing seller to speak of any of these, for he did not attempt to conceal anything that was openly a benefit to the property. But the purchaser had a scheme afoot, and asked for a covenant against incumbrances. The farmer did not keep abreast of the decisions, so when mention was made of incumbrances he thought of mortgages, judgments or other liens, and knowing that there was none of these on the property, of course gave such a covenant. In a very brief time after the purchaser had his deed, he sprung his trick and claimed that the covenant against incumbrances was actually broken at the time the deed was delivered. An action for breach of the covenant on account of the existence of the railroad was commenced. The seller was dumbfounded but not crafty. The tyranny of rules was in command of the higher court, and the judges aided by another decision overturned a just decision of a plain country judge, and decided in favor of deceit and base dealing. It may be said, however, in defense of the court, that it kindly intimated to the poor old farmer that he might escape judgment for damages by "removing the railroad from the land" if he desired. The poor farmer was helpless as he was not supplied with the necessary tools. He went home and voted the same straight ticket for many years afterwards when he died full of years and unsophisticated experience. The courts point out that one might live abroad and not know of a highway or railroad on the land he is about to purchase. They say "the owner must take care at his peril that he is safe in what he engages for," giving as their confession of stupidity and impotence the formidable—and to many dyed-in-the-wool precedent mongers the unanswerable—dictum, and decree that "they (the courts) can found no principle on these varieties of circumstances." *Moore* v. *Boulton,* 10 U. C. Q. B. 140. Well, for heaven's sake, why can't they? Is a legal "principle" a fetish to worship or a thing to serve?

In the case of *Lloyd* v. *Jewell,* 1 Greenl. (Me.) 352, 10 Am. Dec. 73, a man purchased land on the strength of the covenant of the owner that he had a good right to convey and that he would warrant and defend the title. The purchaser gave six notes for the purchase, and after paying three he found out that as to a material part of the premises the plaintiff had no title at the time of conveyance. It would be supposed that an honest court would defeat rather than reward the effrontery of the plaintiff in suing on the remaining notes, when he knew that the failure to give title more than offset the balance due on the unpaid notes. Of course the court went back to Lord Coke's day, and once having submitted to precedent was obliged to further another inherent fraud in the name of the law. It was even held that the defendant could not show a breach of the covenant of seisin for part of the land to the value of the note sued upon. The reasoning of the court is good, the law may be good, but the result is rank. Just to show how close together such cases may be, on the next page of the same report is *Cross* v. *Peters,* 1 Greenl. (Me.) 376, 10 Am. Dec. 78. Here the

same judge reasoned a man out of court who had an experience in selling goods to a person who was insolvent. The goods in the hands of the insolvent were levied on on the day they were purchased on a note given by the purchaser to a creditor. The goods of course were not paid for and the seller sued to have the sale rescinded on the ground of fraud. It is at once apparent what should have been done, for if the sale were set aside the seller would have received his goods back and the other parties would be left where they were originally. If, on the other hand, the sale were not set aside, a virtual fraud would be effected. The court unfortunately upheld the fraud because it felt that it had to, saying: "It is to be lamented, if the plaintiff lost his property by reposing confidence where it was not deserved; *but this is not a circumstance for our consideration in the decision of the cause.*" Why not? It was the only thing that should have been considered, as that was the one vital point in the case. Such decisions illustrate the general wrongs of the system when it is carried to a point of slavish adherence to precedent and rules.

St. Louis, etc., R. Co. v. *Yocum*, 34 Ark. 493, is a case typical of many. A woman sues for the death of her minor child and alleges in the action that she is a widow. The court says this is not saying that the father is dead, and accordingly throws her out. It would be interesting to learn just where the defendant (a railroad company) found the father, since it did not, according to its contention, sufficiently appear that he was dead—and some uncertainty prevails as to how much the company paid him for the damages inflicted on him and the mother for the death of their son. This and *Carrigan* v. *Stillwell*, 97 Me. 247, 54 Atl. 389, 61 L. R. A. 163, carry the legal mind to an exalted state of efficiency. Some one discovered that it did not sufficiently appear that a man was dead where the complaint merely set forth in this respect that the deceased "was then and there burned to death and consumed by fire, and then and there lost his life." No doubt the pleader should have also averred "that by reason of said death, consumption by fire, and loss of life, he, the deceased, ceased to exist, departed this life and was and is no more."

And then, in conclusion, there is the case of *Bloss* v. *Tobey*, 19 Mass. 320, which disgusted William Cullen Bryant, the poet, with the practice of law and drove him into other and more congenial fields of labor. This was an action for slander. Bryant had recovered a judgment for his client in the trial court. The defendant moved in arrest of judgment and the case went to the Supreme Court, presided over by Chief Justice Parker, who wrote a decision in the case which is one of the most imposing monuments to the impositions and injustices of a purely technical construction of the law that has ever been constructed. Now let this case speak its own condemnation to every mind not pickled in the brine of technical thinking. The court says (omitting much of the argument), opening with the usual apology for such decisions: "It is with great regret, and not without much labor and research to avoid this result, that we are obliged to arrest the judgment in this case for want of a sufficient count to support the verdict." Continuing: "The first count only charges the defendant with having said that the plaintiff had burnt his own store in Alford. The words are introduced with a colloquium 'of and concerning the plaintiff and of and concerning a certain store of the plaintiff's, situated in said Alford, before that time, to wit, on the sixth day of December last past, consumed by fire,' and alleges that the defendant did speak, utter and publish the following false, scandalous and malicious words of and concerning the plaintiff, viz., He (meaning the plaintiff) burnt it (meaning the plaintiff's store in Alford aforesaid) himself (again meaning the plaintiff); and further meaning and insinuating by the several words aforesaid, that the plaintiff had been guilty of the crime of wilfully and maliciously burning his own store in Alford aforesaid. Now these words are not actionable, unless it is a crime punishable by law for a man to destroy by fire his own property; and we cannot find that, either by the common law or by any statute of this commonwealth, such an act, unaccompanied by an injury to, or by a design to injure, some other person, is criminal; and although it is alleged by the innuendo, that the defendant meant and intended to charge the plaintiff with having done this act wilfully and maliciously, yet the words do not thereby acquire any force or meaning which they had not in themselves, the office of an innuendo being only to make more plain what is contained in the words themselves as spoken, not to enlarge or extend their meaning or give them a sense which they do not bear when taken by themselves without the aid of an innuendo. The words spoken, as stated in this count, are simply 'He burnt it.' These words are innocent in themselves, though they may have a defamatory meaning if they relate to any subject the burning of which is unlawful. In order to give them that character, that they may be actionable, the plaintiff should have set forth in a colloquium the circumstances which would render such a burning unlawful, or by an averment in the preceding part of his count, without the form of a colloquium, and then should have averred that the words spoken were of and concerning those circumstances." And then the conclusion (I have italicised the line which speaks the utter slavishness and shame of all such decisions): "The judgment must therefore be arrested. If the plaintiff has suffered a serious injury, another action may give him indemnity. *In a matter of technical law, the rule is of more consequence than the reason of it;* and however we may lament the lost labor and expense of the suit, we find ourselves wholly unable to prevent it."

Northport, N. Y. John G. Jury.

DISTURBANCE OF FERRIES.

There is something very fascinating about the law of ferries. This, no doubt, is largely due to the environments where ferries usually ply. The very mention of a ferry is suggestive of picturesque localities. But the subject is not without its charms for the lawyer. Ferry law is intensely interesting. From some points of view it is difficult. The law of ferries does not consist of a category of rules concerning tolls. Tolls, from the owner's point of view, are of the utmost importance; but from the lawyer's point of view they are insignificant. No; the law of ferries does not concern itself much with questions such as the charging of 3d. for a tricycle, when bicycles only are mentioned on the list of tolls, and the notice board intimates that the charge for carrying "a bicycle" over the river is 2d. Questions of that kind may be termed "legal points" by the layman, but they are barely worthy of the name when compared with the intricate niceties which flow from the law's recognition of a right of ferry as a legal entity and a form of property.

The House of Lords has recently dealt with real legal points concerning a ferry across the Thames at Twickenham. The case in question—*Hammerton* v. *Dysart* (*ante*, p. 293)—has been before the Law Courts for some little time. It was originally heard by Lord Justice Warrington when a judge of first instance. The Court of Appeal reversed the learned judge's decision: (see 110 L. T. Rep. 879; (1914) 1 Ch. 822). The

judgment of the Court of Appeal was in turn reversed by the House of Lords, and now the action is disposed of, and the law of ferries is richer by the addition of an instructive case which will probably henceforth be regarded as a leading case in this branch of law. Before, however, explaining the points considered in the recent case it is advisable to explain generally some of the legal conceptions, principles, and rules that constitute our law of ferries.

Apart from statute law, ferries exist as hereditaments. There is no right to the soil, neither as regards the banks of the river nor the river bed. The right consists of a right to carry passengers over the water in return for tolls. Tolls represent the fruit of the hereditament. But the ownership of the hereditament involves certain burdens which, in some cases, are by no means light. For the owner of the ferry must see to it that proper provision is made for carrying the public. If he fails in this he is liable to indictment. How comes it that the Crown can visit penalties on the ferry proprietor? Here we come to the whole gist of ferry law—the Crown grant of a franchise. The reader, however, is not to suppose that every owner of a franchise ferry plying his ferry at the present time could produce his Crown grant. This is very far from the fact. No doubt many actual original grants to former predecessors in title could be produced at the present day, but in nine cases out of ten the most that the ferry owner could do would be to show old deeds referring to an immemorial ferry, and to prove long user of the ferry in support of his title. As a matter of law, that is ample proof of title. In short, ferry franchises are generally supported by prescription.

The ground on which ferry owners are protected cannot be better defined than in the words of Lord Justice Mellish. "The first grantee of the ferry," said his Lordship in *Hopkins* v. *Great Northern Railway Company* (36 L. T. Rep. 898; 2 Q. B. Div. 224, at p. 231), "is supposed to have represented to the Crown that it would be for the public advantage that the ferry should be established in the particular locality, and then, in consideration of the grantee undertaking perpetually to keep up the ferry, the Crown has granted to him the exclusive right of ferrying within certain limits. . . . The Crown professes to protect the grantee against the competition of other persons who are in the same line of business and do the same thing that he does; but he appears to have run the risk of any change of circumstances which may render ferrying at that place useless."

In other words, the Crown in effect undertakes to preserve the monopoly, while the grantee undertakes to maintain the ferry for the use of the public.

The principle thus enunciated amounts to a "deal" between the Crown and the grantee. The Crown, of course, acts for the good of the public at large. The public derive a substantial benefit from the grant of the franchise. A means of transit is afforded. The owner of the franchise on his part secures a return for the outlay which he must make in providing boats and boatmen. If the capital sums expended in providing boats were to be jeopardized by the possibility of competitors carrying the passengers and thus depriving the owner of the tolls, no persons would be found to conduct the ferry. The whole conception was essentially sound from a financial point of view. If there was need for a ferry, no doubt there was always forthcoming an enterprising person willing to supply that need in return for the tolls.

Ancient ferries are always found to consist of two kinds—vill to vill ferries and point to point ferries. A vill to vill ferry was a ferry for carrying passengers from one vill to another. Vill to vill ferries chiefly exist nowadays as ferries between towns. As the term implies, a vill to vill ferry in one respect involved a greater monopoly than a point to point ferry. A point to point ferry was a ferry granted to ply from one point to another—from one place where the public had a right to be to another such spot. From the nature of the case this would be from the end of one highway to the end of another. The ferry was merely the continuation of and the link between these two highways. In both cases, however, highways usually, and it would seem necessarily, served as the termini. "A public ferry," said Lord Abinger in *Huzzey* v. *Field* (2 C. M. & R. 432, at p. 442), "is a public highway of a special description, and its termini must be in places where the public have rights, as towns or vills, or highways leading to towns or vills. The right of the grantee is in the one case an exclusive right of carrying from town to town; in the other, of carrying from one point to the other all who are going to use the highway to the nearest town or vill to which the highway leads on the other side."

The ferry owner, it has been said, has no inchoate right in respect of passengers unless they come to his passage. This was laid down as a general proposition in the case of *Newton* v. *Cubitt* (1862, 12 C. B. N. S. 32, at p. 58). However this may be, if some person sets up a ferry in opposition and carries passengers who would otherwise have used the franchise ferry, the owner of the latter has a right of action, always supposing the traffic thus diverted is a part of the traffic which was to be served by the ferry under the franchise. It is in relation to this question of what does and what does not constitute an unlawful disturbance of the franchise that nearly all the reported cases touching ferry law have come before the courts.

"The principle," said Mr. Justice Willes in *Newton* v. *Cubitt* (*sup.*), "by which to decide whether the proximity of a new passage across the water to an ancient ferry is actionable has not been clearly laid down. It seems reasonable to infer that if the franchise of a ferry is established for the facility of passage, and if the monopoly is given to secure convenient accommodation, a change of circumstances, erecting new highways on land, would carry with it a right to continue the line of these ways across a water highway; and it is obvious that a single landing-place which sufficed for an uninhabited marsh would be utterly inadequate for several towns thronged with industrial mechanics."

Some cases concerning disturbances of ferries may be cited as examples. In the first place, it has been held that the erection of a bridge across the river over which an ancient ferry plies does not constitute a wrongful disturbance of that ferry. This was decided in *Hopkins* v. *Great Northern Railway Company* (*sup.*), where a railroad company had been authorized by statute to erect a railway and footbridge over a river. This bridge, when erected, caused all traffic by the ferry to cease, and the owners somewhat naturally claimed compensation, but failed. The short point whether the owner of a ferry franchise could maintain an action for loss of traffic caused by a new highway by bridge was, however, considerably obscured by reason of the statutory rights of the railway company, and it was not until the case of *Dibden* v. *Skirrow* (97 L. T. Rep. 658; (1908) 1 Ch. 41) was decided that the point was finally settled. In that case the Court of Appeal decided that the right of ferry did not embrace an exclusive right of carrying passengers by any means whatever. The court held that the right of ferry was a right only to carry passengers by boat.

Again, change of circumstances may render that which would otherwise have been a wrongful disturbance of a ferry no wrongful disturbance. This happens where a new traffic has sprung up

since the grant of the franchise. In the case of *Cowes Urban District Council* v. *Southampton, Isle of Wight, and South of England Royal Mail Steam Packet Company, Limited* (92 L. T. Rep. 658; (1905) 2 K. B. 287) the court held that a steamboat company did not wrongfully disturb an ancient right of ferry in conducting passengers by means of steam launches from and to places several hundred yards distant from the termini of the ferry, such launches dealing only with a traffic that had only recently come into existence. "It does not conclusively follow," said Lord Justice Mellish in *Hopkins* v. *Great Northern Railway Company* (*sup.*), "as a matter of law that because a new ferry diverts some of the traffic from an old ferry it is actionable; and it may be that no action can be maintained in respect of the new ferry, if it has been set up *bonâ fide* for the purpose of accommodating a new and different traffic from that which was accommodated by the old ferry."

Before turning to the recent case mentioned at the commencement of this article, we may refer to an old case which is not without some interest. As we have pointed out, the theory which underlies the legal conception of property in a ferry franchise is essentially a sound one, although it involves a monopoly. At one time monopolies were regarded with abhorrence. In the days of the Commonwealth, when men's minds were blinded by political bias, the administration of justice was often affected by the prejudices of the time. The case of *Churchman* v. *Tunstall* (1659, Hardres, 162), furnishes a striking example of this unfortunate result. The plaintiff was a grantee from the Crown of a ferry franchise. The defendant, who had acquired some land on both sides of the river over which the ferry plied, set up a new ferry and carried passengers to and fro, at the distance of three-quarters of a mile from the old ferry. The plaintiff sought to obtain an injunction in the Exchequer Chamber. The court, however, refused relief for the reason that "it came too near a monopoly." It is not, however, surprising to find that a few years later, after the Restoration, the same plaintiff obtained the desired relief from Lord Hale, and the new ferry was abolished: (see *Hussey* v. *Field, sup.*). It is a remarkable fact that any court could ever have acceded to so ludicrous an argument as that put forward by counsel on behalf of the defendant in *Churchman* v. *Tunstall*. It was urged by counsel that these common ferries were in restraint of trade and in the nature of monopolies, that the river was a common highway for the use of the public, and that if the defendant was wrong in carrying passengers three-quarters of a mile from the plaintiff's ferry, he would be just as wrong in carrying them twenty miles from that ferry. A more monstrous argument has never been put forward in any reported case. Yet it received the approval of the court.

Now, returning to our main subject, we have pointed out that the change of circumstances may render that which would otherwise have been a wrongful disturbance of a ferry no wrongful disturbance. If circumstances alter so that a new traffic springs up, the institution of a new ferry to accommodate that new traffic is not an unlawful act. The reason for this is that the old ferry was not granted for the purpose of serving the new traffic. The limits of the franchise do not embrace the new traffic. It is on this point that the recent case concerning Twickenham Ferry was decided.

In *Dysart* (*Earl*) v. *Hammerton and Co.* the plaintiff claimed to be entitled to an ancient ferry across the Thames at Twickenham. Lord Dysart's predecessors in title had for upwards of three hundred years enjoyed the privilege of a franchise ferry, and, so far as the plaintiff's prescriptive title was concerned, there was little or no dispute in the case. The main point was the change of circumstance which had taken place only a few years before the commencement of the action. The ferry plied between two points, one on the north or Middlesex bank, and the other on the south or Surrey bank. It will be convenient to refer to these points respectively as points A and B. At point A public highways led down to the river bank. At point B the land belonged to Lord Dysart and the public had access over this land to the ferry by means of a footpath. The towpath at this point was made a public highway by Act of Parliament in 1902, so the public could also use this towpath as a means of reaching the terminus of the ferry at point B.

One of the defendants was a licensed waterman. With the consent of the Port of London Authority, the defendants moored a floating boathouse in the tideway about five hundred yards from the point A. The defendants let out boats for hire and also ferried persons across the river. This all took place after certain important changes had occurred in the nature of the locality. Certain pieces of land on the south side of the river were acquired and converted into public recreation grounds. These grounds adjoined the towpath which we have already referred to. On the opposite bank the London County Council about the same time acquired a large area of land known as Marble Hill, and converted it into a public park for the use of the public as a recreation ground. The result of these changes was to bring numerous persons to the river bank at the defendants' ferry, who were wishful of crossing the river from one pleasure ground to the other. There was evidence that some use of the new ferry was made by persons who would otherwise have used the plaintiff's ferry, but, broadly speaking, a new traffic had sprung up in connection with the new pleasure grounds, and apparently a large number of persons who crossed by the defendants' ferry would not have crossed the river at all had it not been for the presence of the new method of crossing.

On these facts Mr. Justice Warrington, as he then was, made a declaration that the plaintiffs were entitled to an ancient ferry. But his Lordship was of opinion that a new traffic substantially different in character from that served by the plaintiffs' ferry had arisen, and that, in so much as the defendants had started their ferry *bonâ fide* to meet the new demand on the part of the public, the court ought not to restrain the defendants from continuing the new ferry. The action was therefore dismissed on the ground that there had been no wrongful disturbance. The Court of Appeal, however, took a different view. That court held that no new traffic had arisen so as to justify the defendants ferrying persons over the river to the prejudice of the plaintiff's ferry.

When the case came before the House of Lords, the House adopted the view of Mr. Justice Warrington and reversed the decision of the Court of Appeal. The judgment of the learned judge in the court below was restored with the variation that the declaration of right was struck out, not that the House considered the plaintiffs' title insufficiently established, but because in the view of the House of Lords no declaration of right ought to have been made where no disturbance of that right had been shown.—*Law Times.*

"When the wage-earner cannot collect his wages, he immediately becomes dependent on the kindness of others. He must immediately 'go borrowing,' and therefore 'go sorrowing.'" Per Rosser, C., in Anderson *v.* Canaday, 37 Okla. 175.

Cases of Interest.

Admissibility in Evidence of Card Index Records.—In Haley & Lang Co. *v.* Del Vecchio, (S. D.) 153 N. W. 898, which was an action brought to recover a balance due on merchandise sold the defendant by the plaintiff, a wholesale house, it was held that to prove the account it was competent to introduce in evidence certain card index records. In an interesting opinion written by Smith, J., it is said: "In Wisconsin Steel Co. *v.* Maryland Steel Co., 203 Fed. 403, 121 C. C. A. 507, books of original entries (based on time cards turned in by workmen), in permanent form, were received in evidence, together with the time cards themselves. . . . The evidence in the case at bar shows that the ledger cards used by plaintiff in its system of bookkeeping constitute the original, permanent, and only records of accounts with its customers. This card system is substantially the same as a loose-leaf ledger system of accounts."

Employee "Engaged in Interstate Commerce" as Including Person Firing Locomotive Preparatory to Same Making Schedule Trip Outside State.—In the case of Tonsellito *v.* New York, etc., R. Co., (N. J.) 94 Atl. 804, it appeared that the infant plaintiff, about seventeen years of age, was employed by defendant, a carrier engaged in interstate commerce, to fire its engine preparatory to the same being attached to a train scheduled to run from Weehawken, N. J., to Ravenna, N. Y., and while assisting in operating the engine in the railroad yard, for the purpose of taking on a barrel of oil to be carried on the engine to Ravenna, he was injured. It was held that at the time of the accident the plaintiff and defendant were "engaged in interstate commerce;" within the meaning of the terms of the federal Employers' Liability Act. The court in its opinion called attention to the fact that exhaustive annotations on the subject could be found in Ann. Cas. 1914 C. p. 163.

Validity of Statute Making Possession of More than Certain Amount of Liquor Prima Facie Evidence of Intent to Violate Prohibitory Law.—In the case of Sellers *v.* State, 149 Pac. 1071, the Oklahoma Criminal Court of Appeals holds that a statute, making the possession of more than a certain amount of intoxicating liquor prima facie evidence of an intent to violate provisions of the prohibitory law, is not unconstitutional as invading the province of the judiciary, and depriving the accused of the presumption of innocence, or as making prima facie evidence of guilt a fact which has no relation to, or does not tend to prove, the criminal act. Commenting on the meaning of prima facie evidence, the court says: "The phrase 'prima facie evidence,' as used in the statute, is such evidence as in the judgment of the law is sufficient to establish the unlawful intent, and, if it be credited by the jury, it is sufficient for that purpose, unless rebutted, or the contrary proved; and while evidence of such possession is sufficient to establish the unlawful intent, unless rebutted, or the contrary proved, yet it does not make it obligatory upon the jury to convict after the presentation of such proof, but such evidence is competent and sufficient to justify a jury in finding the defendant guilty, provided it does in effect satisfy them of his guilt beyond a reasonable doubt."

Liability of Electric Light Company for Severing Wires Supplying Burning Building with Electric Current.—A recent case of much importance involving an unusual state of facts is that of Mullen *v.* Otter Tail Power Co., 153 N. W. 746, decided by the Minnesota Supreme Court. The facts showed that the defendant, under contract with the plaintiff, a merchant, supplied electric current to his store. A fire broke out in a restaurant in the rear of the store and separated from it by a solid partition. Defendant severed the wires supplying the store with electric current, and plaintiff, by reason of the darkness, was unable to remove his stock and fixtures. The action was to recover the value of such stock and fixtures, which were ultimately destroyed by the fire, and it was held that the defendant had the right to sever the wires that supplied electricity to the store, providing it was reasonably necessary to do so in order to save loss or damage to its property. The facts showed that the wires were severed forty minutes before there was any such necessity, and that the defendant knew that the plaintiff would need light to save his property, and it was held that the evidence sustained a finding that cutting the wires at that time was a breach of the defendant's duty to the plaintiff. It was also held that the court was justified in finding that the act of the defendant in cutting the wires was the proximate cause of the plaintiff's loss, unless the plaintiff, after discovering that the wires had been cut, could have averted the loss by reasonable diligence.

Title to Hides Seized in Mexico by Military Forces as Valid Title.—In O'Neil *v.* Central Leather Co., (N. J.) 94 Atl. 789, the question in dispute was the title to certain hides claimed by the plaintiff under one Martinez the former owner, and by the defendant Central Leather Company under a title based on a seizure in Mexico by military forces under the authority of General Villa. The facts showed that Villa's forces were in actual possession of Torreon and the Laguna district. By agreement between him and the citizens a war contribution was assessed in the district by commissions appointed by the taxpayers. An assessment was made against Martinez, who as a partisan of Huerta was then in hiding. He failed to pay, and his name was included in a general order to seize the property of those who refused to pay their share of the contribution. In pursuance of that order the hides were seized, and sold by General Villa. The proceedings subsequently had the approval of Carranza. It was held that the sale by Villa passed a title not open to inquiry in the courts of the United States. Judge Swayze for the New Jersey Court of Errors and Appeals in part said: "The right to levy contributions is distinctly a conqueror's right and rests upon paramount force. It does not depend upon the recognition of belligerency, with all that accompanies it, nor is its exercise limited to recognized belligerents. Existing warfare and actual occupancy of the territory are the conditions necessary. Since the right exists under the laws of war, it must be exercised in accordance with those laws. It must not be confused with mere brigandage or looting. Contributions must be levied either by the commander in chief or by the general of a corps acting independently. Hall, 428, 429, adopted by Moore, 7 Moore's Int. Law Digest, 281. The rule is implied in the instructions for our army during the civil war, 7 Moore 286. In the present case the rules of war were complied with."

Validity of Ordinance Prohibiting Emission of Dense Smoke from Marine Boilers.—An ordinance of the city of Detroit, Michigan, prohibiting the emission of dense black or gray smoke from marine boilers was held invalid in People *v.* Detroit, etc., Ferry Co., 153 N. W. 799, it appearing that there was no known appliance which could be used on such boilers to prevent the emission of smoke. The court said: "Recognizing the importance of this case not alone to the owners of vessels plying upon the Detroit river within the corporate limits of the city of Detroit, but to the city of Detroit itself, we have given

careful attention to the testimony introduced relative to the practicability and efficiency of the appliances used for the prevention of smoke in marine equipment in the present state of the art. . . . The expert testimony introduced upon the question, while not conclusive, strongly persuades us to the view that up to the present time no device has been invented which within the confined space available for installation in marine practice is adequate for the elimination of smoke so long as the consumption of bituminous coal is permitted. Mr. Frank E. Kirby, whose opinion seemed to have controlled—or at least largely influenced—the judgment of the court below upon the former trial, testified in the case at bar as follows: 'There is no efficient device that is known to me for the prevention of smoke in marine practice.' Mr. Kirby is known as perhaps the most experienced designer of vessels for use on inland waters in the state of Michigan. . . . We do not think it can be said that the earlier opinion of the recorder's court is res judicata of the question; nor should the conclusion reached in the case at bar be regarded as a bar to a future action under the ordinance, if, in the advance of the art, appliances are invented which in marine practice are efficient and practical. Nor is it to be deduced from this opinion that the defendant or other offenders may not be held liable as for the creation of a common-law nuisance if their acts warrant prosecution therefor."

Validity of Act of Congress Regulating Killing and Taking of Birds Within the Several States.—The late case of State *v.* Sawyer, (Me.) 94 Atl. 886, holds that the commerce clause of the Constitution giving Congress the right to regulate commerce with foreign nations, among the several states, and with the Indian tribes, does not authorize Act Cong. March 4, 1913, purporting to regulate the killing and taking of migratory and insectivorous birds within the several states; the killing or taking of such birds not being an act of "commerce." Nor does the general welfare clause, declaring that Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States authorize such act, for wild game is not property belonging to the federal government. The case further holds that while the federal Supreme Court has the authority to make the final determination of the question of the constitutionality of an act of Congress, the state courts may, where the enforcement of a state statute depends upon the constitutionality of a federal law, determine the question. The opinion contains language as follows: "The question of the constitutionality of the act of March 4, 1913, and the regulations thereunder, has been directly considered in two recent cases in the federal courts, viz., United States *v.* Shauver (D. C.) 214 Fed. 154, decided by the District Court for the Eastern District of Arkansas, and United States *v.* McCullagh (D. C.) 221 Fed. 288, decided by the District Court for the District of Kansas. In each of those cases, in an exhaustive opinion, the court reaches the same conclusion here reached, that Congress has not the power to regulate the taking of migratory game birds within the states, and that therefore the act of March 4, 1913, is unconstitutional. In each of those cases the respondent was prosecuted in the federal court for a specific violation of the federal regulations. Our conclusion, therefore, is that the power of the state of Maine to enact laws and regulations for the protection and preservation of wild game within her borders, including migratory game birds, was in no way suspended or abridged by the act of Congress of March 4, 1913, and the regulations adopted thereunder."

Validity of Statute Taking from Village Authorities Power to Assess and Collect Taxes.—An interesting decision affecting villages is that of People *v.* Village of Pelham, 109 N. E. 513. The question under consideration involved the validity of a statute called the Westchester County Tax Act which took from villages in the county the power to assess and collect taxes and vested the power in the officials of townships. It was held that the statute was invalid as being in violation of the right of self-government accorded to villages by the constitution. Judge Seabury wrote the opinion which in part was as follows: "The constitutionality of the Westchester County Tax Act is challenged upon several grounds. It will only be necessary to consider one of the grounds urged. It is claimed that the act, in so far as its provisions affect the assessment and collection of taxes within the incorporated villages of Westchester county for village purposes, is in violation of section 2 of article 10 of the constitution of the state. In this section it is provided that: 'All city, town and village officers, whose election or appointment is not provided for by this constitution, shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof, as the legislature shall designate for that purpose. All other officers whose election of appointment is not provided for by this constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people, or appointed, as the legislature may direct.' Embodied in this section is the home rule principle under which the right of self-government is secured to the localities of the state. It includes those rights of self-government which relate to the assessment and collection of taxes for village purposes which the villages enjoyed prior to the adoption of the present constitution. Taxation for such a local purpose is the concern of the village rather than the town, county, and state of which the village is an authorized subdivision. Within this limited local sphere the right to control the assessment and taxation of property for village purposes is a right which the village enjoys by virtue of the home rule provision of the constitution. It is not merely a privilege which the village is permitted to exercise by the courtesy of the legislature. The legislature has the power to 'provide for the organization of cities and incorporated villages, and to restrict their power of taxation, assessment, borrowing money, contracting debts, and loaning their credit, so as to prevent abuses in assessments and in contracting debt by such municipal corporations' (article 12, 1, of the constitution), but it cannot take away those local rights of self-government which the municipal corporation enjoyed when the present constitution was adopted."

Right of Personal Representatives to Recover Arrears of Alimony.—In Van Ness *v.* Ransom, 109 N. E. 593, a case arising in the New York Court of Appeals, the question was presented whether a cause of action for arrears of alimony which accrued to a divorced wife prior to her death survived the death. It was held that it did, as the claim was not a personal one. Cuddeback, J., wrote the opinion which was in part as follows: "In other states where the question has come under consideration, it has been held that the arrears of alimony due a divorced wife at the time of her death may be collected by her executor or administrator. . . . The analogous proposition that the wife may hold the husband's estate for alimony due and unpaid at the time of his death has also been sustained. . . . Only one case has been called to our attention in opposition to the motion, and that is Faversham *v.* Faversham, 161 App. Div. 521, 146 N. Y. S. 569. In Faversham *v.* Faversham the court said that the alimony in arrears does not survive to the representatives of the wife, because it is a personal obligation in her favor. That decision rests to a large extent on the case of

Romaine *v.* Chauncey, 129 N. Y. 566, 575, 29 N. E. 826, 14 L. R. A. 712, 26 Am. St. Rep. 544, which held that a wife's alimony cannot be taken by a creditor in discharge of a debt incurred by her prior to the date of the decree, because the alimony is a special fund provided for a specific purpose. It is 'a species of property of a peculiar and specific character, created and existing for one purpose only, and whose express limitations take it out of the general rule.' For a like reason, it has been held that a judgment for alimony is not affected by a discharge of the husband in bankruptcy. Wetmore *v.* Markoe, 196 U. S. 68, 25 Sup. Ct. 172, 49 L. Ed. 390, 2 Ann Cas. 265. These and similar decisions have all been rendered in an effort of the courts to protect alimony and prevent it from being perverted even by the wife from the purposes for which it was intended. But alimony is not a personal claim in the same sense that a cause of action for slander or assault is personal. It is personal in a sense that it is a provision made by the court in favor of the wife for her maintenance and support, and cannot be diverted from that purpose. It takes the place of the husband's liability which ended with the divorce. If there had been no divorce, the husband's liability would have continued while the marital relations existed, and liability on the judgment should continue to the same extent. Therefore, the alimony sued for in this action, which accrued prior to the death of the wife, was not a personal claim that died with her, but a right which survived in favor of her personal representatives. To hold otherwise would be to defeat the object of the law and seriously impair the value of the decree in the wife's favor by depriving her of the credit which she would have to obtain means of support."

Right of Voter Affiliated with One Political Party to be Candidate of Another Party.—The statutes of Ohio relative to primary elections were construed by the Supreme Court of that state in the case of State *v.* Graves, 109 N. E. 590, not to permit a voter affiliated with one party to be nominated at a primary election as a candidate upon a ticket of any other party. The purpose of the action which was brought against the secretary of state was to get a writ of mandamus requiring the secretary to certify the name of the relator as one of the candidates for judge of the Supreme Court of Ohio. The writ was denied. The court through Wanamaker, J., said: "The facts upon which he [the relator] relies, as shown by the pleadings, are in brief as follows: That at the state-wide primary held on the 11th day of August, 1914, the secretary of state, as state supervisor of elections, had printed and distributed primary ballots for use at said primary election; that one of said primary ballots was designated 'Republican,' another designated 'Democratic,' another designated 'Progressive;' that on the Republican ballot there were two or more printed names of candidates, on the Democratic ballot two or more printed names of candidates, and that on the Progressive ballot there were no printed names of candidates; that the relator's name was written on four of the Progressive ballots for judge of the Supreme Court, which fact was certified to the secretary of state by the deputy state supervisors and inspectors of elections for said Mahoning county; and that the secretary of state refused to certify the relator's name as being legally nominated for judge of the Supreme Court of Ohio as a result of the vote had at such August primary election. This is, in substance, the relator's claims as set forth in his petition. The answer, so far as it is relevant to this case, avers the fact to be that the 'relator never has been, is not now, and was not at the time of said primary election, a member of said Progressive party, but, on the contrary, was a member of the Republican party,' and voted as such Republican on said August 11, 1914. The relator filed a reply, but in no wise denies the truth of the foregoing facts appearing in the answer. Should the writ issue? . . . The right to a peremptory writ of mandamus by the relator must be predicated on the clear legal rights of the relator and the inherent natural justice of his claims. Applying these legal and equitable principles to the case at bar, how stands the relator? At this primary there were cast in excess of 440,000 votes, over 8,000 of which were cast for the Progressive ticket. The total vote cast for the relator for judge of the Supreme Court was four, one-twentieth of one per cent. of the total vote cast for the Progressive ticket. The relator himself was not at the time, and never had been, a member of the Progressive party. On the contrary, he appeared at the primary on that day and voted a Republican ticket, thereby declaring himself a Republican. Under existing law the primary is necessarily a party primary. Wisely or unwisely, there is no provision made for the independent voter. The members of a party are presumed to act as the members of a lodge, or the members of a church, or of any other voluntary organization, to select representatives of their lodge, church, or such association, to fill certain offices and discharge certain trusts. By an examination of the primary statutes . . . all combine to demonstrate the soundness of this position. The voters signing the original petition must certify that they are members of the party whose nomination is sought, and some one signer must make oath to that effect. The candidate also makes a declaration that he will abide by the principles enumerated by his political party. . . . The relator cannot as a Republican consistently claim a Progressive nomination. The natural justice of the situation, as well as the clear legal right, is against him, and the secretary of state rightly denied him a place on the ticket."

News of the Profession.

Arkansas Attorney General Dead.—William L. Moose of Morrilton, Ark., attorney general of Arkansas, died at Waukesha, Ark., on September 7.

Death of Federal Judge.—William H. Munger, United States District Judge for Nebraska, died at Omaha, Neb., on August 11, aged seventy years.

New Michigan Judge.—Governor Ferris of Michigan has appointed William B. Williams of Lapeer to be the first judge of the newly created fortieth judicial district.

The Missouri Bar Association held its annual meeting at Kansas City, Mo., on September 28, 29 and 30. Further details will be given in the next issue of Law Notes.

Named Presiding Judge.—Judge Howard Wiest of Lansing has been chosen presiding judge of the circuit judges of Michigan, in accordance with a recent act of the legislature.

Judiciary Change in Texas.—County Judge J. D. Harvey of Waller county, Texas, has resigned from the bench and Allen B. Hannay of Hempstead has been appointed to fill the vacancy.

Federal Judge in Utah Resigns.—Judge John A. Marshall of the United States District Court for Utah has resigned from the bench. He was appointed by President Cleveland in 1896.

Superior Court Appointment in Wisconsin.—Frank W. Chadbourne of Fond du Lac has been appointed by Governor Philipp of Wisconsin to the bench of the new Superior Court of Fond du Lac county.

Missouri Judge Dead.—Judge John C. Brown of the Missouri Supreme Court died at St. Louis, Mo., on September 4. Judge Brown was fifty-five years of age and had been on the supreme bench since 1910.

Changes Among Federal Attorneys.—John Byrne has resigned as assistant United States attorney at Chicago.—Englehart Lieberg has been appointed an assistant United States attorney at Great Falls, Montana.

New Counselor of State Department.—Frank L. Polk, corporation counsel of New York city, has been appointed counselor of the state department, the position formerly held by Secretary of State Lansing.

New Judge of Court of Claims.—George E. Downey, comptroller of the treasury, has been chosen to fill the vacancy on the bench of the United States Court of Claims, caused by the retirement of Justice Howry.

John D. Long Dead.—John D. Long, former Governor of Massachusetts and Secretary of the Navy during the Spanish-American war, died at Hingham, Mass., on August 28, at the age of seventy-six years.

Appointed to Civil Court Bench.—Assemblyman A. J. Hedding has been appointed by Governor Philipp of Wisconsin to the Milwaukee civil court bench to fill the unexpired term of the late Chief Justice Joseph G. Donnelly.

The North Dakota Bar Association elected the following officers at its annual meeting in August: President—B. W. Shaw of Mandan; vice-president—R. M. Pollock of Fargo; secretary and treasurer—O. J. Seiler of Jamestown.

California Judicial Appointment.—Ernest Weyand of Colusa has been appointed by Governor Johnson of California to the Superior Court bench of Colusa county to fill the vacancy caused by the death of Judge H. M. Albery.

Federal Judge Appointed.—Samuel Alschuler of Aurora, Ill., has been appointed a judge of the United States Circuit Court of Appeals, seventh circuit, by President Wilson. Judge Alschuler succeeds Judge Peter S. Grosscup, resigned.

Appointed to Supreme Bench in Missouri.—Governor Major of Missouri has appointed State Insurance Commissioner Charles G. Revelle to the bench of the Missouri Supreme Court to fill the vacancy caused by the death of Justice John C. Brown.

Rhode Island Judge Assassinated.—Justice Willis S. Knowles of the eighth judicial district of Rhode Island was shot and killed by an unknown assassin in the dooryard of his home at Providence on September 6. Justice Knowles was forty-eight years of age.

Death of Noted Virginia Lawyer.—Major Holmes Conrad, a noted constitutional lawyer of Virginia and solicitor-general of the United States during the second administration of President Cleveland, died at Winchester, Va., on September 4, in the seventy-sixth year of his age.

North Carolina Bar Association.—At the recent annual meeting of the North Carolina Bar Association, the following officers were elected: President—Harry Skinner of Greenville; vice-presidents—J. W. Pless of Marion, A. A. Hicks of Oxford, and E. F. Aydelott of Elizabeth City; secretary and treasurer—Joseph W. Davis of Wilmington.

Wisconsin Lawyers Honored.—Governor Philipp of Wisconsin has appointed George B. Hudnall of Superior, Wis., president of the Wisconsin State Bar Association, to be a member of the board of public affairs. The Governor has also selected George P. Hambrecht of Madison to succeed C. H. Crownhart on the industrial commission.

Death of Noted Lawyer and Soldier.—General John C. Black, former commander-in-chief of the G. A. R., and chairman of the Federal Civil Service Commission under President Roosevelt, died at Chicago on August 16. General Black was commissioner of pensions for four years and United States Attorney for the northern district of Illinois from 1895 to 1899.

The Virginia State Bar Association, at its recent annual meeting, elected the following officers: President—Eppa Hunton of Richmond; vice-presidents—N. C. Manson, Jr., of Lynchburg, Fitzhugh Elder of Staunton, H. N. Hawthorne and Joseph A. Massie of Newport News, and Richard T. Wilson; secretary and treasurer—John B. Minor of Richmond; members of executive committee—L. H. Mashen of Alexandria, and Jas. H. Corbitt of Suffolk.

The Oregon and Washington Bar Associations met in joint convention at Portland, Ore., on August 23, 24 and 25. Governor Withycombe of Oregon and Mayor Albee of Portland made welcoming addresses and Frank Reeves, president of the Washington association, responded. Other addresses were as follows: "Law and Government," by ex-President Taft; "The Bench, the Bar and the People," by ex-Senator George Turner of Spokane; "Governmental Supervision of Water Power and Other Natural Resources," by Senator George E. Chamberlain of Portland; "Present Data for Judicial Organization," by Herbert Harley of Chicago; "Expert Evidence in the Courts from the Standpoint of a Physician," by Dr. Paul Rockey of Portland.

California State Bar Association.—The sixth annual convention of the California State Bar Association was held at San Francisco on August 23, 24 and 25. The President's address was delivered by Robert M. Fitzgerald of Oakland, his subject being "Conditions and Problems." The annual address was on "Changing Conceptions of Law and of Legal Institutions," by Professor Orrin K. McMurray of the University of California. Ex-President Taft was one of the speakers. The following officers were elected: President—Eugene Daney, San Diego; vice-presidents—Frank A. Short, Fresno; A. E. Bolton, San Francisco, and Oscar C. Mueller, Los Angeles; treasurer—H. C. Wyckoff, Watsonville; secretary—T. W. Robinson, Los Angeles; executive committee—J. P. Chandler, Los Angeles; Henry Eickhoff, San Francisco; Sam Ferry Smith, San Diego; A. F. Jones, Orville, and C. E. McLaughlin, Sacramento. An amendment to the constitution of the association providing for the admission of women to membership was adopted unanimously.

South Dakota Bar Association.—The seventeenth annual meeting of the South Dakota Bar Association was held at Watertown, S. D., on September 1, 2 and 3. The program included the following addresses: President's address, by Frederick A. Warren of Flandreau; "The Relation Between the Attorney and the Banker," by Charles B. Mills of Minneapolis, Minn.; "Citizenship for Lawyers," by Harlan J. Bushfield of Miller; "Back to the Constitution," by United States District Judge Martin J. Wade of Davenport, Iowa; "The Public Service of Federal Reserve Banks," by John H. Rich of Minneapolis, Minn.; "Shall a Corporation Practice Law," by A. K. Gardner of Huron; "Ethical Economics," by Rev. William Henry Talmage of Flandreau; paper by Olaf Eidem of Brookings; paper by Charles A. Christopherson of Sioux Falls. Officers for the ensuing year were elected as follows: President—John B. Hanten of Water-

town; first vice-president—W. S. Mason of Aberdeen; second vice-president—A. H. Orvis of Yankton; secretary—J. H. Vorhees of Sioux Falls; treasurer—M. L. Simons of Belle Fourche.

Death of Law Publisher.—Frederick G. Sanborn, president of the law publishing house of Bancroft-Whitney Company, died at his home in San Francisco, September 10, after an illness lasting nearly a year. For a quarter of a century he had been a prominent figure in the law book trade, and the books published by his house include some of the best known works of famous legal authors. Mr. Sanborn was a native of New Hampshire, having been born at Webster in that state in 1854. At the age of twenty he went to California and for the rest of his life made his home in San Francisco. He entered the employ of the A. L. Bancroft Company and as the head of its agency department was active in placing on the market Hubert Howe Bancroft's famous work, "Native Races of the Pacific Coast." In 1883 Mr. Sanborn purchased an interest in the law publishing house of Sumner Whitney, which was afterwards consolidated with the house of A. L. Bancroft under the name of Bancroft-Whitney Company. In 1882 he married Helen Peck. Mrs. Sanborn is now the President of the Woman's Board of the Panama Pacific International Exposition. Mr. Sanborn participated prominently in the civic and political activities of San Francisco, and at various times held the positions of Chairman of the Republican County Committee, State Fish and Game Commissioner, and Police Commissioner. He was a member of the Bohemian, Olympic, and Commonwealth clubs of San Francisco, and a director of the Hahnemann hospital.

American Bar Association.—The annual meeting of the American Bar Association was held at Salt Lake City, Utah, on August 17, 18 and 19. The address of welcome was delivered by United States Senator George Sutherland of Utah and the President's address was given by Peter W. Meldrim of Georgia. Other addresses made before the bar association proper were as follows: Annual address on "The Judiciary," by Joseph W. Bailey, former United States senator from Texas; "Changes in International Law," by Simeon E. Baldwin, former governor of Connecticut; "The Law and the Law School," by Felix Frankfurter, professor of law at Harvard University. The following sections of the bar association and allied bodies held separate meetings: American Institute of Criminal Law and Criminology; Commissioners on Uniform State Laws; section of Legal Education; section of Patent, Trademark and Copyright Law; Judicial section; Comparative Law Bureau. At these separate meetings, addresses were made by Robert Ralston, Robert H. Parkinson, Judge Orrin N. Carter, Simeon E. Baldwin, Charles E. Shepard, Hampton L. Carson, Justice Vandevanter of the United States Supreme Court, and Nathan William MacChesney. At the annual banquet, the speakers included ex-President Taft, ex-Senator Joseph W. Bailey of Texas and Senator James Hamilton Lewis of Illinois. A resolution on the Frank lynching presented by Stephen S. Gregory of Illinois was adopted unanimously by the association without discussion. It pronounced the lynching "a willful and deliberate murder by mob violence, concerted and accomplished in a spirit of savage and remorseless cruelty unworthy of our age and time," and expressed the hope of the association that the authorities will speedily bring the guilty persons to the bar of public justice. The question of admitting women to membership in the association went over to the 1916 convention. The following officers were elected for the ensuing year: President—Elihu Root of New York; secretary—George Whitelock of Baltimore; treasurer—Frederick E. Wadhams of Albany; members of executive committee—Peter W. Meldrim, Savannah; Sutton P. Spencer, St. Louis; William P. Bynum, Greensboro, N. C.; Chapin Brown, Washington, D. C.; Charles N. Patter, Cheyenne; John Lowell, Boston, and C. B. Smith, Topeka.

English Notes.

The Graduated Income Tax.—As general opinion is steadily growing in favor of lowering the exemption limit for income tax and the Prime Minister has expressed himself in favor of the proposal, it is worth while to recall to attention an article published last year in the Journal of the Society of Comparative Legislation on the subject of graduated income taxes. Mr. Eric H. Williams showed in it that the limit in several of the German states is only £45, while in others it is even lower, down to £20 in Saxony and Oldenburg. Other countries have similar provisions, and there are also supplementary taxes of different characters. On the other hand, there are various measures of relief by abatement. The children allowance is a common feature, of which Prussia is an interesting example, where the abatement extends to other dependents. Mr. Williams's article also deals with the methods of assessment and collection, and is one which deserves attention at the present time.

Transportation of Wounded Across Neutral Territory.—The German and Russian Governments have approved the proposals of the chief officials of the Red Cross Society for the exchange of mutilated and wounded German and Russian soldiers, and the Swedish Government has given permission to the crossing and recrossing through Swedish territory of four hospital trains weekly with 250 wounded who have been previously subjected to strict medical examination to prevent the spread of epidemic disease. The permission granted impartially to both combatants for the transport in the manifest interests of humanity, and calculated to have no effect, however remote or indirect, on the course of the war, could not by the most severe critic be construed as a breach of neutrality or derogatory to the dignity of Sweden as a sovereign state. In 1870, under different circumstances, Belgium, in observance of a strict neutrality, thwarted an attempt of the Germans to send their wounded home over her railways even when the privilege was asked in the name of humanity. The application was made because after the battle of Sedan the victorious army found it difficult to remove to Germany, over the routes then open, the masses of wounded by which it was incumbered. It was refused because, if the Germans had been permitted thus to relieve the congestion of the lines of communication with their own country, their ability would have been increased to reinforce and support their armies then invading France. In 1874, however, the representative of Belgium at the Brussels Conference, notwithstanding the earnest protest of France, assented, after consultation with Great Britain, to the article then drawn up providing that a neutral state may authorize the transport across its territory of the wounded and sick belonging to the belligerent armies.

Publication of Libel.—Old principles of law have continually to be applied to new conditions, and in Huth *v.* Huth, 138 L. T. Jour. 501, the principles of the law of publication of a libel had to be applied to the contents of a document contained in an envelope, the flap of which was not fastened down and which bore, in accordance with a concession recently granted by the Post Office, a halfpenny stamp. It was sought to put the document, for the purposes of publication, in the same position

as a telegram and a postcard, in which cases there is a presumption that they will be read by a third person in the course of delivery. In the present case the document was in fact read by the addressee's butler, but, as he read it in breach of his duty, it was held that there was no publication to him. On the other hand, there was no evidence that it had been read by any official of the Post Office in the course of his duty to see whether it was liable to surcharge; if this had been the case, there is little doubt that there would have been evidence of publication. The practical importance of the case is that for the purpose of the publication of a libel, apart from any special circumstances, the contents of a document contained in an unfastened envelope bearing a halfpenny stamp are to be placed in the same position as the contents of a document contained in a closed envelope bearing a penny stamp, and the document is not in the position of a telegram or postcard; for, before the document can be abstracted and read, there must, as Lord Reading, C. J., said, be some act by the person who has it in his hands in the nature of opening the letter which is ungummed, and the court cannot presume that such letters will be opened in the ordinary course by third persons.

Killing Prisoners.—The statement, if correct, in a communiqué received from the Russian headquarters, published in Petrograd on the 20th July, and published in the British Press with the permission of the Censor, that, according to information given by Austrian prisoners of war, the Germans shot 5000 Russian prisoners at Rawa Russka, eclipses in its horror the atrocities of the French Revolution. When the Convention in 1794 had decreed that no quarter should be given to the English, Hanoverians, and Spaniards, the French soldiers nevertheless took prisoners from a sense of military honor, and excused it to the Government on the ground that the men were deserters. The infamous decree was soon revoked without even a threat of retaliation. The cases in which prisoners of war may be slain, however exceptionable the circumstances may be, are, in the words of Burke, "cases at which morality is perplexed and reason staggered." The savage practice of killing enemies, to which Henry V. resorted after Agincourt, by putting to death the combatants in what he deemed self-defense, although he protected the peaceful population, was likewise the practice of the Chevalier Bayard, who otherwise conformed to the principles of humanity in warfare. While the killing of captives was an old Roman custom employed to inspire dread, it was not universal among the Greeks, whose later practice was to regard them as slaves. The sparing of the lives of prisoners had, as we have seen, become firmly established in civilized warfare at the time of the French Revolution, although, no doubt, Napoleon in 1799 shot three or four thousand Turks captured at Jaffa, who would not respect parole, because he could not feed or escort them. On the other hand, Charles XII after Narva, released his captives under similar circumstances.

The "Tubman."—While the newly issued section of the Oxford English Dictionary—a work which by its scientific thoroughness excites our admiration each time we open it, says *The Law Times*—contains few words which make a special appeal to lawyers, it at least preserves one which has an interest for the student of legal antiquities. We refer to the word "Tubman," which in this signification must, we imagine, be quite unknown except by older practitioners or by very diligent students of the history of the old common-law courts. "Tubman" is explained thus in the dictionary: "A barrister in the Court of Exchequer whose place was beside the tub used as a measure of capacity in excise cases; the position conferred the right of precedence in motions except over the 'postman' and in Crown business." Although the word and the person must have been known at a much earlier date, the earliest discoverable reference to the tubman is in Blackstone's Commentaries (vol. 3, p. 28n), where attention is called to his right of preaudience in motions. It appears from Foss's Judges of England (vol. 8, p. 214), that the postman and tubman sat in enclosed seats at each end of the front row of the Outer Bar, the postman at the left of the Bar (the right of the court), and the tubman at the right of the Bar (the left of the court). The postman had preaudience in common-law business, while the tubman had the like privilege in equity business. In Reg. *v.* Bishop of Exeter (7 M. & W. 188) it was ruled that the Attorney General, in the Queen's business, had preaudience in the Exchequer over the postman and tubman. It would seem, however, from Lord Alverstone's recently published Recollections of Bench and Bar that the tubman and postman sometimes took precedence in motions over the law officers even when they were appearing in their official capacity. Lord Alverstone mentions that he was appointed tubman by Chief Baron Kelly in 1873 and very shortly afterwards was promoted to be postman, and he recalls that the question of his right of preaudience once occasioned a curious incident. Sir John Holker, the then Solicitor General, came into the Court of Exchequer and rose to move on behalf of the Crown, whereupon the associate, Mr. Davis, intimated to Chief Baron Kelly that Mr. Webster was in court. The Chief Baron interrupted Sir John and said: "Mr. Webster, do we move?" Mr. Webster had a matter to mention and he accordingly moved. The Solicitor-General was much astonished to find a junior member of the Bar given precedence over him, and it was left to his junior, the present Sir John Gorst, to explain to him the singular rule which obtained in the Court of Exchequer.

Disappearance Overboard of Seaman from Ship.—Guided by what was laid down by the House of Lords in MacKinnon *v.* Miller (1909, S. C. 373; 46 Sc. L. Rep. 299; 2 B. W. C. C. 64) and in Kerr (or Lendrum) *v.* Ayr Steam Shipping Company (111 L. T. Rep. 875; (1915) A. C. 217) were the learned judges of the Court of Appeal when deciding the recent case of Proctor *v.* Owners of Steamship *Serbino*. And their Lordships were thereby enabled to make very much plainer than it formerly was the position, as regards a claim for compensation under the Workmen's Compensation Act 1906 (6 Edw. 7, c. 58), of the dependents of a seaman who has mysteriously disappeared overboard from his ship. The question, as was remarked by Lord Cozens-Hardy, M. R., is one "upon which there has been great difference of judicial opinion, extending even to the final Court of Appeal." Put thus by the learned judge is what happens in such a case as the present: "A seaman in mid-ocean disappears. There is no direct evidence as to the circumstances attending his disappearance. One thing is clear, that his body is at the bottom of the sea; he was drowned." Whether to suicide, murder, or accident is to be ascribed the death of the seaman is the problem that is always required to be solved. And even supposing that the last mentioned possibility is held to be the cause, there still remains the question whether it was an accident arising "out of," as well as "in the course of," the employment of the seaman. Anything in the nature of "surmise, conjecture, or guess," however, is not permissible, to quote the expressive, albeit tautological, phrase of Lord Halsbury in the well-known case of Barnabas *v.* Bersham Colliery Company (103 L. T. Rep. 513). The burden of proving by evidence—"as all propositions in a court of law must be proved," again quoting Lord Halsbury—that an accident was the cause of the seaman's death lies on the dependents—but not, as Lord Cozens-Hardy, M. R.,

pointed out in the present case, necessarily by means of direct evidence. There may be facts from which a presumption may properly be drawn. And according to the decision of the House of Lords in Kerr (or Lendrum) *v.* Ayr Steam Shipping Company (ubi sup.), "very slight facts," said the Master of the Rolls, "suffice as a basis for very wide presumptions." Then comes the passage in the learned judge's judgment which will forever be cited in support of the claims of dependents in cases of this description: A seaman who has disappeared from on board ship at sea, whose employment is continuous, stands in a somewhat special position. And if it can be shown, or properly inferred, that when last seen he was engaged in doing his duty as a seaman, the court may presume that the accident with which he met arose "out of" his employment. Irreconcilable earlier authorities may be found to be. But this proposition brings to a distinct focus the position of the dependents in all such cases as the present.

Lotteries.—Whether a music-hall artist, who was accustomed, at each performance he gave, to distribute various sums of money to different members of his audience, was thereby guilty of conducting a lottery, was the question which the Divisional Court were called on to decide in the recent case of Minty *v.* Sylvester. The facts found by the justices were that people paid to enter the theatre, that they were induced to do so by the announcement that there would be a distribution of prizes, and that the distribution of the money was not governed by chance, inasmuch as the respondent gave to whom he chose. The Divisional Court, however, were of opinion that there was no evidence on which they could conclude that the respondent had exercised any judgment in the matter; that the distribution of the prizes was determined solely by chance, and it was therefore a lottery. The case was sent back to the justices with a direction to convict. The proceedings were taken under the statute 10 & 11 Will. 3, c. 17, whereby all lotteries are declared to be common and public nuisances. Notwithstanding this statute and various others of a like nature which were subsequently passed, state lotteries were from time to time authorized by successive Acts of Parliament, the last of which (4 Geo. 4, c. 60), was in the year 1823, exactly a century and a quarter after the first act was passed declaring all lotteries to be public nuisances. It would seem, therefore, that the real reason why lotteries were declared illegal was that they interfered with the raising of revenue by the state. Thus Blackstone (book 4, p. 168) says: "As state lotteries have, for many years past, been found a ready mode for raising the supply, an Act was made (19 Geo. 3, c. 21), to license and regulate the keepers of such lottery offices." This act was repealed by 22 Geo. 3, c. 47, which introduced a great variety of elaborate regulations respecting lottery-office keepers. Thus no one was allowed to keep an office for the sale of tickets in the public lottery, without a license, under a penalty of £100. If any person sold the chance or share of a ticket for less time than the whole time of drawing, or insured for or against the drawing of any ticket, he was fined £50. By a subsequent act, 27 Geo. 3, c. 1, it was forbidden to sell less than a sixteenth share of a ticket, but it gave the right to a holder of a whole ticket to insure it. At the present time it is not without interest to note that in the year 1806, when England was engaged in its great struggle with Napoleon, there was passed "An Act for granting to His Majesty a sum of money to be raised by lotteries" (46 Geo. 3, c. 148). In 1823, just after the conclusion of the great war, we find another act, 4 Geo. 4, c. 60, for granting to His Majesty a sum of money to be raised by way of lottery, but in the recital the following words appear: "It may be expedient to discontinue raising money for the public by way of lottery after the sale of tickets authorized by this act," and that was in fact the last occasion on which the state has raised money by means of a lottery. Curiously enough, it is under this latter statute that proceedings are usually taken against those who promote "missing word," "limerick," and other competitions of a like nature.

Extradition Between United States and Great Britain.—The arrest in the United States, at the instance of the English police authorities, of I. T. T. Lincoln, with a view to his extradition on a charge of forgery preferred against him in this country, in which he has sat in the House of Commons, and who, according to his own confession, having subsequently procured a position in the Censor's office, became a spy in the German interest, will direct attention to the law of extradition in Great Britain and the United States. From the outset, says the *Law Times*, the doctrine has been maintained by Great Britain and the United States that a state is under no absolute obligation to surrender fugitive criminals unless it has expressly contracted to do so. As British extradition treaties can only be put into effect through statutory declarations, 6 & 7 Vict. c. 76 was passed to enforce the treaty of 1842 with the United States, and when that statute proved ineffectual in practice, the Extradition Act of 1870 (33 & 34 Vict. c. 52) was substituted. This case may well recall a serious controversy between the Governments of Great Britain and the United States in 1876, when Great Britain refused to surrender the forger Winslow and other fugitives unless the United States would make an express stipulation that they should not be tried for any offense other than that for which their extradition was demanded. While no such condition or limitation was contained in the treaty of 1842, such a provision had been inserted in the British Extradition Act of 1870, and that provision the British Government attempted to enforce just as if it had been written into the treaty itself. After the United States Government refused to make stipulations, the British Government receded from its position, whereupon the United States clearly indicated its unwillingness to try offenders for any crime except that for which they are extradited—a rule embodied in clear and final form in the convention entered into between the two countries in 1890. It is now firmly settled, certainly so far as Great Britain and the United States are concerned, that a person extradited is not to be tried for any offense other than that for which he has been extradited until a reasonable time and opportunity have been given to him after his release or trial to return to the country from which he was taken. It is generally understood that the demand for extradition must be confined to treaty offenses, and as to extradition treaties, the rule expressio unius est exclusio alterius is in full force. If an extraordinary case not within the list of enumerated offenses arises, the only hope is an appeal, not to the treaty but to that courtesy or comity which a state may extend beyond the

domain of law whenever it is to its interest to do so. In order to obviate that necessity, the tendency is steadily to increase the list of crimes for which surrender may be demanded. To the seven offenses of that kind described in the extradition clauses of the treaty of 1842 between the United States and Great Britain, twenty more were added by the convention of 1890.

Obiter Dicta.

No Balm in Gilead.—Balm *v.* Nunn, 63 Iowa 641.

A Foolish Suit.—Silliman *v.* Silliman, 66 Oregon 402.

Trouble in the Cemetery.—Graves *v.* Stone, 76 Wash. 88.

Revolutionary.—Fellows *v.* Emperor, 13 Barb. (N. Y.) 92; The New World *v.* King, 16 How. (U. S.) 469.

Why Particularize?—"No one (not even a judge) is bound to do what is impossible."—Per Lamm, J., in Akins *v.* Adams, 256 Mo. 17.

As Others Know Us.—In a recent issue the *Law Times* referred to the annual meeting of the American Bar Association "which will be held next week at Utah." It is proper to add, by way of explanation, that the *Times* is published "at England."

Hitching.—Hitch *v.* Riggin, 3 Boyce (Del.) 84, was an action to recover a horse. The plaintiff wanted to hitch the horse to his manger, but the jury declared that that Hitch was wrong and that the animal was properly hitched to the Riggin in the case.

Incurable.—"If counsel knew that an unfair presentation to the jury would prevent the jury being allowed to pass upon his case, he would be careful not to transgress—unless he were a fool; there is no known cure for that."—Per Riddell, J., in Dale *v.* Toronto R. C., 34 Ont. L. Rep. 104.

Up to Date.—In St. John *v.* State, 178 S. W. 363, Judge Prendergast, speaking of a moving picture show, remarked: "The testimony of all the witnesses shows the lights in the show were dimmed. Every one knows how that is." The office of the last sentence, we presume, is to show that Texas judges are keeping abreast of the times.

Just Names.—In Whitesides *v.* Wheeler, 158 Ky. 121, it appeared that the plaintiff was a painter and was employed to paint the defendant's house.—In Western Union Tel. Co. *v.* Westbrook, 110 Ark. 327, one of the witnesses was a negro named Pleas Love.—Diaper *v.* Anderson, 37 Barb. (N. Y.) 168, was an action for an accounting against the guardian of Diaper, an infant.

The Ignorant Majority.—We believe it to be one of the well-known secrets of the jury room that eleven concurring jurors are always fools—in the opinion of the disagreeing twelfth juror. It has now leaked out that the same situation sometimes obtains among judges, as witness the following remark of the single dissenting judge in Jeude *v.* Sims, 258 Mo. 62: "This opinion was written as a principal opinion, but it was seed that fell by the wayside or on stony ground, and—but no matter. Still entertaining the same views after reargument in banc, I file the same opinion as a dissent. Maybe the 'stone which the builders rejected,' etc. *Quien sabe?*"

Collars and the Law.—"It is difficult to conceive any state of facts under which the court is authorized to say as a matter of law how a man shall wear or adjust his coat collar. . . . Collars are of different types and styles, some of which, even when turned up, may not prevent an efficient use of the wearer's hearing. The court can no more declare it the duty of a traveler on the highway to 'turn down his coat collar' as he approaches a railway crossing in order to escape a legal imputation of negligence than it can as a matter of law charge him with the duty of removing his coat entirely to enable him to move more quickly or surely in avoiding an impending collision." See Gray *v.* Chicago, etc., R. Co., 160 Iowa 16.

Briefing in Tennessee.—We are indebted to a correspondent for two striking paragraphs copied from a brief on file in the office of the Supreme Court Clerk at Nashville, Tenn. At one place the briefer says: "This case differentiates from this case in what way? It can apparently be seen that this case is a much stronger case as to the facts and the pleadings, than this case." Further on, he says: "It is our contention as to this question, that this judgment comes within the exception of the bankruptcy act, relative to 'willful and malicious injuries to the persons,' and that the learned judge was in error in squashing the execution raised on said judgment." Commenting on the foregoing, our correspondent indulges in the following sarcasm: "You can see that the legislation enacted a few years ago requiring certain educational and cultural attainments as a prerequisite to admission to the bar in Tennessee is bearing abundant fruit."

Judge Lamm on "Specks."—"There were many objections made to the validity of the tax judgment and deed on many alleged defects. In oral argument learned counsel for appellants conceded a group of them were small ones, taken severally and one at a time, but he insists with spirit that (taken collectively as an aggregation) they had a cumulative effect and invalidated the title. He illustrated his position by the homely proposition announced at our bar, to wit, 'Enough specks make an apple rotten.' The *enough-specks* theory, thus making its virgin and blushing bow on the stage of real estate law, may well excite a mild judicial interest—an interest to be tempered by a word of caution, thus: If comparisons are not 'odious' as some writers put it, they may be 'odorous' as others will have it, and, finally, in dealing with similitudes must we not be chastened by the thought that so great a jurist as Lord Mansfield found it wise to declare (so Lord Westbury vouches) 'that nothing in law is so apt to mislead as a metaphor.' (Knox *v.* Gye, 5 L. R. (H. of L.) 676.) We are told at the mother's knee that continual dropping wears away a stone, that enough pebbles change the courses of rivers, that while one swallow may not, yet many swallows may, make a summer, and why may not many specks spoil an apple? See Skillman *v.* Clardy, 256 Mo. 307.

Law Notes

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CONTENTS

The Border Line of Federal Jurisdiction.

OUR dual system of government, which has been the despair of foreign jurists, has developed fewer conflicts and "neutral zones" than might have been expected. Between the commerce power and a strenuous judicial extension of the power to establish "post roads," Congress has a very substantial field of activity. The reports, however, furnish an occasional reminder that its field is not yet accurately delimited. Thus, the Act of March 4, 1913 (1914 Supp. Fed. Stat. Annot. 148), regulating the killing of migratory birds has been held in several recent cases to be beyond the power of Congress. *State* v. *Sawyer,* (Me.), 94 Atl. 886; *U. S.* v. *Shanver,* 214 Fed. 154; *U. S.* v. *McCullagh,* 221 Fed. 288. With reference to many matters admittedly beyond the congressional province, the advantages of regulations by the general government are increasingly apparent. The ancient distrust of the federal government, with its corresponding emphasis on the rights of the states, has to a great extent passed away, but the constitutional limitations which it dictated remain. There is a crying need for uniform divorce laws, uniform negotiable instruments laws, uniform incorporation laws. Yet experience has shown that the securing of concerted state action on any of these subjects is a slow and difficult process. The increased facilities of communication and travel are bringing the people of the United States into ever closer social and commercial relations. Every large manufacturer is compelled to conduct his business under the laws of half a hundred independent commonwealths. As a step in the right direction too much praise cannot be accorded to the Interstate Trades Commission whose recent study of the commercial and corporation laws of the various states has led the Commission to renewed efforts towards standardization.

The Multiplication of Crimes.

PERHAPS no phenomenon of modern life is more marked than the prevalent mania for penal regulation of the petty details of conduct. There seems to be no human action that somebody does not want to prohibit. With the intemperate exponents of temperance we have become familiar; the cohorts of Cotton Mather have reincarnated in Sunday observance leagues. But around these central figures of sumptuary legislation circles a host of minor meddlers. Prohibitions under penalty of fine and imprisonment of the use in hotels of bed sheets of less than a statutory length and of the use of cracked china in like institutions are but samples of the absurdities that have already found their way on the statute books. And the craze grows apace. Among the bills reported as introduced in various assemblies are those prohibiting the exhibition by any merchant of a clock which is too fast or too slow, and of the use of face lotions by a woman under forty years of age. A recent bill makes it a penitentiary offense for a man to put his feet on the desk while dictating to a woman stenographer. And it is rather more than a joke. Thoughtful people complain of the growing disrespect for law. Who could avoid disrespect for such laws, and how few can or will discriminate between wise laws and foolish when both are of equal authority. And the mischief does not stop there. With the multiplication of trivial crimes involving no moral turpitude arrests inevitably increase. It is said by an investigator of repute that of the 125,000 people arrested in Chicago in 1914 over half were charged with committing crimes which were unknown in 1894. Now every unnecessary arrest is an unmixed evil. Every time that a reputable man or boy is arrested, haled through the streets and thrust into a police station cell, his self-respect suffers an injury that makes him a worse citizen. Will the refined woman who is treated as a common criminal, as in one state she may be, because her hat pin projects more than half an inch beyond the crown of her hat, ever recover from the shame of it? It is about time the robust common sense of the American people put a summary stop to this "verboten" business.

Personal Property Taxes.

THE hearings of the New York Legislative Tax Commission have afforded an opportunity for another airing of views on personal property taxation. While no state has ever reached the point of abolishing this kind of taxation, none has ever been satisfied with it. Every personal property tax presents a dilemma with two horns of equal sharpness. If the administration of the law is lax, it becomes a farce. "Swearing off" of taxes becomes an annual formality, destructive of civic morality. If the law is enforced rigidly, large property owners promptly seek residence in some more accommodating jurisdiction, and large investments seek the securities of

other states. The making of good tax laws and their honest enforcement is not at all impossible. But as soon as it is accomplished the large owners of personal property become, legally, nonresidents, while enjoying all the prerogatives of residence except the suffrage, which seems to be prized chiefly by those who do not have it. The crux of the difficulty lies in the peculiar relation of the states to each other. Each has its own tax laws, and citizenship in one is of no particular business or personal advantage worth maintaining it if a lower tax can be secured elsewhere. We deny to the general government the power to tax for the benefit of the states, and deny to the states the right to make their citizenship valuable by discriminating legally against citizens of other states. Having thus tied the watch dog, we appoint commissions to inquire why he doesn't catch the tax dodger. The ultimate abolition of taxes on personalty seems inevitable, but its successor remains to be discovered. The suggestions made by financiers and economists before the New York Commission cover a stamp tax, the single tax on land and a state income tax. No tax can be devised which will be popular, but it should be possible to impose one which will be just, equitable and not subject to evasion.

Blaming the Lawyer.

The bench, the bar, the law and its administration have become favorite subjects for attack and adverse criticism in recent years, and that some of it hits the mark is admitted by those high in its priesthood. Such criticism usually comes from the public at large, and to their credit be it said, from the members of the judiciary and the bar itself. Now the client has joined the ranks, and certain indicted railroad officials, paraphrasing the biblical injunction that the sins of the fathers will be visited upon the children, assert that the sins of the client should be visited upon his lawyer. Such is the novel plea of the indicted New Haven railroad officials, claiming that if they are guilty they are not to blame because they were advised by their lawyers that they were within the law. Ignorance of the law being no excuse it will doubtless be held that ignorance of the lawyer is equally unavailing. To hold otherwise would provide an easy exit for the wrongdoer. To the client who seeks legal advice of his attorney so that he may keep within the law, both in letter and spirit, and who through the ignorance of his attorney, is led to violate that law which he seeks to obey, much sympathy is due; but where the advice of a lawyer is sought in order that the law may be evaded, the client may expect neither sympathy from the public nor mercy from the courts if through the ignorance of his attorney he fails to do legally that which is really prohibited by law. We hold no brief for the lawyer who uses his knowledge of the law to aid in its evasion. The condemnation heaped upon him by the press is richly deserved. But we have less sympathy with the lawbreaker, who, when caught, points to his lawyer and says, "He told me I could break it, I am not to blame." Such a plea smacks of cowardice, and should receive the little respect it deserves.

A Law School for Policemen.

The law faculty of Northwestern University, headed by Dean Wigmore, the distinguished authority on evidence, have suggested the establishment in Chicago of a law school for policemen, designed to instruct the members of the department in certain elementary principles of the law and police science. Under the proposed plan the school is to be established with the consent of the mayor and chief of police and is to be conducted by members of the law faculty of the university at no cost to the officer or at a very nominal one. Such a school is a novelty in America, though European cities have had schools of instruction for their police along these lines and they have met with an encouraging degree of success, notably in Paris, and it is claimed that such a course of instruction as has been mapped out for the Chicago schools will double the efficiency of the department. The instruction as proposed will be in the nature of a short course in elementary law under the active direction of Dean Wigmore and will include the application of psychology to the detection of crime; the analysis of crime and its detection and probably a course in physiology to give the pupil a broader outlook on medical testimony and its value in the courts. Dean Wigmore, very fittingly, will teach the bluecoats the elements of evidence, and other members of the faculty will give courses in the various branches outlined, all of whom have volunteered their services without charge. Various beneficial results are predicted by the advocates of the plan, among others that it will give Chicago the most intelligent police force in the world, and as expressed in the common parlance of the day by the chief justice of the municipal court, "It will result in fewer bonehead arrests." If it can impress the bluecoated guardians of the law with the value of preventive protectiveness as opposed to that of vengeance for wrongdoing and instil a wholesome spirit of obedience to the law within the force itself it will have accomplished much. To prevent crime, or to apprehend the criminal where prevention was not possible, is the first and chief duty of the police, but unfortunately the tendency of the modern police department has been to magnify the duty of obtaining a conviction to abnormal proportions, due doubtless in part to the public demand for results, but reprehensible, none the less, and if forced attendance on a school of law would instil in the police such a wholesome respect for the legal rights of others as to put an end to the infamous practice known as the "third degree" whereby confessions are forced from prisoners through the use of means unlawful and abhorrent to right thinking men, the school will have justified itself in the eyes of the bar and the public. Such results are probably too much to expect, but nevertheless the experiment will be watched with interest by all who are interested in criminology and the enforcement of the laws.

An Editorial.

And here we give place to an editorial in the *Brooklyn Eagle* which will stimulate thought on this subject:

Granted a growing girl in a street car, having the vivid imagination of her age, stimulated by many movie shows, and things may happen. A girl jumped off a car, rushed melodramatically to a policeman, declared she had been "annoyed," and insisted that the bluecoat follow up the car. Then she "identified" a man, the policeman complaisantly arrested him, and he was subjected to an ordeal most intolerable to a person of standing in the community.

A minor or a woman traveling on a city surface car is not at the mercy of an occasional drunken man or degenerate. A conductor is on board, authorized by rule and by law to

eject any disorderly person. It is not on record that this child made any complaint to the conductor, or any protest to fellow passengers, who could see what was going on.

The late Justice Gaynor laid down sharply the rights and duties of policemen. Having reason to believe that a felony has been committed, a policeman may arrest a suspected person without seeing anything himself. In case of an alleged misdemeanor he may arrest, if he has seen the act; not otherwise. The policeman in the above case had seen nothing.

We are inclined to think that the Police Commissioner should look into this sternly and impartially. The law does not contemplate the subjection of everybody's reputation to the mercy of allegations made by some other person, whether minor or adult. The wrong done by an unjust arrest is too grave to be tolerated.

Manifestly, the illegality of the arrest does not concern the police magistrate. He is right in probing the precise facts. He cannot distinguish between this and an instance in which a warrant has been asked for and granted, which is the regular and orderly way of bringing an accused person to the bar. And *The Eagle* has no desire to pass on the case in question in advance. It only seeks to point out the peril liable to spring out of such complaints and such arrests, which students of child psychology and the movies will fully understand.

"Judicial Protection of Private Rights."

ELSEWHERE in this issue of LAW NOTES we print a communication from one of our subscribers, referring to the article on the "Judicial Protection of Private Rights" which appeared in our October number. Our correspondent takes issue with Mr. Davids's statements in the article referred to, asserting that judicial power to annul statutes exists and long has existed elsewhere than in the United States. Of course, we know that vigorous judges from the earliest times have not hesitated to restrict or even to nullify by interpretation the enactments of the legislative branch of government, and also that Lord Coke and other judges assumed to limit the authority of the king. Again, in the case of a constitution which divides sovereign power between a federation and its component provinces or states, it is imperative that somewhere there be lodged the power of determining whether legislative enactments are intra or ultra vires. This we understand to be Mr. Davids's point. His contention is that the framers of our Federal Constitution contemplated only a review by the courts of acts that could be claimed to be in excess of the powers of the nation or state—an encroachment of one upon the province of the other—and not such as are alleged to be violative of the rights of individuals: *separation of powers of government* as contradistinguished from *protection of private rights.* This position seems to be an attempt to reconcile the view of those who advocate unlimited judicial control, and the assertion made by some publicists that the courts without warrant have usurped the power of reviewing statutes. The latter position was expressed in an address to the Law Department of the University of Pennsylvania on April 27th, 1906, delivered by the Honorable Walter Clark, Chief Justice of North Carolina, as follows: "Such power does not exist in any other country, and never has. It is therefore not essential to our security. It is not conferred by the Constitution; but, on the contrary, the convention, as we have seen, after the fullest debate, four times, on four several days, refused by a decisive vote to confer such power. The judges not only have never exercised such power in England, where there is no written constitution, but they do not exercise it in France, Germany, Austria, Denmark, or in any other country which, like them, has a written constitution. A more complete denial of popular control of this government could not have been conceived than the placing of such unreviewable power in the hands of men not elected by the people and holding office for life."

'The Law's Delay"—Again.

SEVEN hundred years ago on the plain of Runnymede, Magna Charta, the foundation of much that is common to both English and American law, was wrung from King John. In that great instrument the basic principle was laid down, "to none will we sell, to none will we deny, to none will we delay right or justice." This extract from the charter contained a guaranty against a continuance of three of the most prevalent judicial abuses of the day,—the sale, the denial and the delay in justice. America has been ever free from any serious charge, except in isolated instances, that justice is either sold or denied among us. But we are not so certain that the delays which are proverbially common in our courts do not, at times, result as disastrously to litigants as might a denial or even a sale of justice. Lawyers throughout the land are awake to this weakness in our judicial system—or rather in its processes. Bar associations everywhere are devoting much time and thought to the subject. It is questionable whether any relief can be obtained except by the enactment of laws that will go to the roots of court procedure. Substantial as opposed to technical rights must be given pre-eminence not only in actual trials but in the pleadings and processes preceding the trial. It can hardly be doubted that there should be less of intricate and special lawmaking by which the difficulties in the way both of lawyers and judges are being constantly increased. In this connection it might be well to encourage for awhile a line of legislators who would be satisfied with a record based on the defeat and blocking of bad measures in the legislatures, rather than on the very questionable and often pernicious industry on the lines of modern lawmaking. It is well known that a legislator nowadays has but little chance of forcing his measures through committee and legislature except on a trading basis. This custom, taken in connection with the common basis of appraisement of a legislator's record, and the false value put on the volume, as opposed to the quality, of legislation, has cumbered the statutes, confused the courts, and made the way of the litigant,—however worthy his case may be,—hard, discouragingly tedious and expensive. An era of repeals might help somewhat; but even here we need a degree of statesmanship that is sadly lacking in most of our capitals.

War and the Law of Necessity.

AMERICANS are generally appalled by many of the ignoble phases of the European war and find it difficult to understand how any great nation can under any circumstances, or any degree of so-called necessity, adopt a policy of massacre and terrorism. That such a policy has been adopted in some quarters has hardly been denied —rather it is sought to justify it on the plea of necessity. Civilization is treated to the spectacle of men claiming the

[illegible] There is a most [illegible] saying to the effect that he who would save his life shall lose it, and on the other hand he who would lose his life shall save it. This is paradoxical, and yet it is the experience of nations as of individuals that a deep and [illegible] truth lies at the heart of this saying, for immediately upon "saving" one's life at the expense of another the apparent victor has in reality lost more than he has gained. [illegible] to retain life he has lost honor and the qualities of mercy and justice. By what right can any man or host of men weigh even one life—especially if it be that of the defenseless—over against the lives of others however numerous, and, in the exercise of [illegible] take that life? And who can forget? And above all, who can ever excuse or justify, though in mercy he may, in some far time, forgive?

An Old Case and its Lesson.

On this point, when our laws and many of our ideals are menaced by modern changes and events, it might be well to revive an old case and take bearings anew from its unanswerable reasoning and its noble sentiments. The case of *Queen v. Dudley*, 14 Q.B.D. 273, is one of the most tragic in the annals of the law. In 1884, Thomas Dudley and Edward Stephens, with one Brooks, all able-bodied English seamen, and the deceased, also an English boy, between seventeen and eighteen years of age, the crew of an English yacht, a registered English vessel, were cast away in a storm on the high seas 1600 miles from the Cape of Good Hope, and were compelled to put into an open boat belonging to the yacht. On the eighteenth day out, and after many days had been spent without food, Dudley proposed to the other men that the youth be killed, that they might thereby be enabled to save themselves by eating his flesh. As a result of this revolting purpose on the part of Dudley and Stephens—(not of Brooks, for this man nobly protested), the boy after being invited by Dudley to go to sleep was murdered by him. A peculiar and common feature in most all such events is found in the fact that both of the murderers offered up a prayer for "himself" before the deed was committed. The boy's throat was cut while he slept, and the murderers fed on his flesh. Four days afterward the survivors were chanced to be picked up by a passing vessel. They were taken to England and tried and convicted for murder. They pleaded "necessity"—the doctrine of self-defense. Lord Coleridge, in affirming for the court the judgment of conviction of murder, in the course of his noble and unanswerable argument said: "Now it is admitted that the deliberate killing of this unoffending and unresisting boy was clearly murder, unless the killing can be justified by some well-recognized excuse admitted by the law. It is further admitted that there was in this case no such excuse, unless the killing was justified by what has been called 'necessity.' But the temptation to the act which existed here was not what the law has ever called necessity. Nor is this to be regretted. Though law and morality are not the same, and many things may be immoral which are not necessarily illegal, yet the absolute divorce of law from morality would be of fatal consequence; and such divorce would follow if the temptation to murder in this case were to be held by law an absolute defense of it. It is not so. To preserve one's life is generally speaking a duty, but it may be the plainest and the highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live, but to die."

An American case not quite as revolting in its details but equally tragic is that of *United States v. Holmes*, 26 Fed. Cas. 360 (No. 15383). While the reasoning of the court in this case is not quite so impressive or placed on such a high plane as that employed in the case of Dudley, the import and the lesson are the same. It was decided in the Holmes case that seamen have no right even in cases of extreme peril to their own lives, to sacrifice the lives of others for the sake of preserving their own. After all that law is more imperative than even the cases make it. When men deny it or defy it, then it may be seriously questioned whether all our civilization, its boasted claims and even its religion, are not at an end.

THE PASSING OF ILLEGITIMACY

A CHILD born out of wedlock has been deemed by our law to be illegitimate offspring—not lawful issue—not entitled to the legal rights of a child born of parents that have submitted themselves to the form of marriage. If born the day after the performance of the ceremony the child will be legitimate, but if born the day before such event it will be forever damned as a "bastard"—a rather fine line of demarcation.

One of the principal distinctions, if not the most important distinction, between legitimate and illegitimate offspring, is the right of the child to inherit from its parents. No matter how certain it may be that a man is father of an illegitimate child, the child may not under the common-law doctrine take the parent's property on the latter's death. Father and mother may have lived together during all their mature years,—they may have been models of fidelity,—yet if the element of marriage was lacking, the offspring will be incapacitated to have or share in his parent's personal and real property. The hardship of this rule of the common-law courts is very obvious, and there has been a tendency on the part of legislatures to modify it in some respects at least.

Especially in the more advanced countries of Continental Europe have the disabilities of birth out of wedlock been abolished. In some of the Continental nations, from eight to ten per centum of children born are the offspring of parents who have not been married. It is said that in Germany at the outbreak of the Great War there were one million illegitimate children under fourteen years of age. There seems to be a steady tendency to dis-

pense with marriage. Nor is this practice peculiar to people of any particular class, trade or profession, though it exists almost entirely in the cities. In the fact of increasing illegitimacy no doubt may be found the reason for ameliorating the harsh rule against illegitimates. The law finds it necessary to modify itself to meet changed social conditions. What seems to be a most advanced position is that of a law recently enacted in the kingdom of Norway. This law, which was framed by the Norwegian Department of Justice, contains in substance the following declarations:

A child whose parents have not married each other has a right to the surname of the father. The child is entitled to demand from his parents support and education in accordance with the financial circumstances of the one who is economically the better situated of the two. The parent with whom the child does not live discharges his obligations by paying a sum of money, the amount to be fixed by the court. In general, the child is entitled to receive from his father and mother the same kind of support as if he were a legitimate child. The amount to be paid by the parent with whom the child does not live, or by both parents in case the child lives with neither but with some other person, shall be fixed by the authority designated for that purpose. The cost of the child's education shall fall, so far as possible, on both parents. If one of them dies without leaving any property, the other must assume the full responsibility. Also, if one of the parents is unable to pay his share and the other is in a position to bear the whole expense, the latter may be required to do so.

The child is entitled to support and education until the age of sixteen. However, the authority may extend this period if he is mentally or physically incompetent, or if there is reason for continuing the child's education and the parents are able to afford it. The father is required to pay the expenses of the mother's confinement. This is also obligatory in the case of a still-birth. The father is further required to maintain the mother, if, by reason of pregnancy or confinement, she is compelled to give up her work. She is entitled to this maintenance only during three months of pregnancy and six weeks following confinement. But if the mother keeps the child with her and nurses it for nine months, the support may be continued for this length of time. In case it is not possible to determine who is the father of the child, the foregoing parental obligations shall rest upon the person who has had sex intercourse with the mother at such a time that in the course of nature he may be the father of her child. If it happens that several persons answer to this definition, then each of them must contribute to the child's support, the amount paid by each to be determined by the authority prescribed. The same pro rata rule applies to the payment of the mother's confinement expenses.

The court has full power to clear up doubtful paternity by inquiry and the summoning of the necessary evidence. If the man whom the mother has named as the father is found to have had sex intercourse with her at the probable time of the impregnation and if there is no reason to suppose that any other man has had sex intercourse with her during this period, the court may declare the man to be the father. If the court continues in doubt of the actual paternity of the child, the man is still held responsible for the child's support if it is found that he had sex intercourse with the mother at the probable time of impregnation. In all those cases in which actual paternity has been established and the court's final decision to that effect has been made, the child whose parents have not married each other has exactly the same rights of inheritance as the legitimate child. The law requires the mother of the illegitimate child to name its father under oath and makes her liable to a heavy fine and imprisonment, as well as a suit for damages by the man, if she makes a false accusation.

What will be the tendency of this legislation toward the formation of the loose unions that are so numerous in some Continental cities? The advocates of the statute above set forth assert that it will not undermine marriage. According to their argument anonymous paternity is an offense against the child and against the State. The child has a right to know who his father is, has a right to be supported by his father, and a right to inherit from his father if the latter is a man of property. Therefore the mother should not be permitted, by concealing the child's paternity, to connive at its disinheritance. The State has the obligation to inquire officially into the circumstances of the child's birth, and to protect him against one of the greatest cruelties to which childhood can be exposed, the suffering which comes from not knowing its parentage. War, as everyone knows from the experience of the existing conflict in Europe, is a startlingly efficient promoter of illegitimate births, and it may be expected as one of the results of this war, that the legislatures of all the European nations will adopt laws similar to the statute referred to above.

New York. BERKELEY DAVIDS.

LAW AND LAWYERS IN LITERATURE

THE philosophy of literary criticism has, within recent years, undergone a great change. While all of its essential principles remain of course the same, its spirit, its "thinking consideration" and its method of estimate and judgment are not what they were, and happily so. The spirit of criticism to-day would not justify the "Who killed John Keats?" epigram of Byron. A contrast between the reviews of the early Scotch magazines and the work of our best critics of to-day measures the degree of this change. Too often the criticisms of those days knew no limitation other than the prejudices or idiosyncrasies of the reviewer. It was the personal method wholly. Now our criticism, except when it deals with subject-matter which is the expression of personality, is rather non-personal and based on those broad principles which underlie all great literature. Instead of the scorpion stings and viper tongues of an *Edinburgh Review*, we have the no less brilliant and vigorous and infinitely more fair and just "Appreciations," "The Personal Equation" and "Obiter Dicta." Surely a commendable change in the method and spirit of literary criticism.

Likewise the day of captious criticism has gone by. A critic who would now object to Akenside viewing "the Ganges from Alpine heights" would be a self-invited subject for ridicule, an "admirable connoisseur" who knew not the "pleasures of the imagination." And a reviewer who would seriously criticise Cervantes for giving the party at the Crescent two suppers in one evening, would probably be condemned to dine with the cross-legged host ever after. Errors like these should not come

within the purview of serious criticism; they do not mar the logic of truth. The mediæval cycles are a mélange of anachronisms, but this fact in no way lessened the influence of their romances on subsequent literature, and Tristram and Isolde, Launcelot and Elaine are typical forevermore.

There is not a great work of genius invulnerable in this regard. The sublimating and refining process necessary to eradicate all error would emasculate a great work. Perhaps later years have not produced a more precise or perfect work than Pater's "Marius the Epicurean," yet who would not wish that its rare delicacy were marred by some error that might give it energy and enable it to take hold of the heart and soul. Certainly the absolutely perfect is quite intolerable. Whether we agree with Schopenhauer that this is the worst possible of worlds, or with the famous dictum of Leibnitz that it is the best possible to creation, we all rejoice that it is not perfect. While as for its inhabitants—would not the perfect man be a very mediocre man? And as for woman—but man embraces woman.

Venus had a mole on her cheek and Helen had a scar on her chin, *cas amaris* to Paris. The sun, all glorious, has spots on his disc and Homer slept while Pegasus ambled in the side paths. If Paderewski cannot express the full power and virility of Beethoven, he can sing with divine perfection the romanticism of Schumann's melodies and weave with infinite grace and beauty the "airy fairy" ornamentations of a Chopin sonata.

The "icily regular, faultily faultless, splendidly null" is a nuisance and a bore. Kick it out. Shall we say it? Yea, verily. The "inexpressive she" has always sufficient earth to keep her a woman.

So, let Angelo give us the bark of Charon in his "Last Judgment" and Allison call *droit de timbre,* timber duties. Let Longfellow crown life with asphodels and death with amaranth. Let Shakespeare project Galen six hundred years before his time, present the Romans with clocks and Bohemia with a seacoast. Let Socrates, if Spenser says truly, drink a hemlock toast to his dear belamy, and Dido, per Morgia, sigh for a cockney dandiprat. These and countless others known to every reader, are little things—faults that become their authors, whom we love because of them.

It is in this spirit, mingling with one of intellectual recreation and amusement, that the writer points out a few of the many mistakes, often very ludicrous, into which nearly all authors invariably fall when they invoke "the majesty of the law." Of course technical perfection in any science or art is impossible to the lay mind. Hall Caine had twenty experts pass on "The Christian," yet his picture of St. Martha's Hospital provoked a storm of adverse criticism from the medical press and the nursing profession in England. Wilkie Collins's staff of consulting doctors could not save him from an occasional medical mistake.

But there is so much romance, so much tragedy, in the law, and its web

"Seems fair and glitters in the sun,"

that the author or other victim is wound in its toils before he dreams of danger or mistake.

The most famous of legal novels is Warren's "Ten Thousand a Year," and although it was written by a very distinguished lawyer and law writer, it contains a very palpable legal error. In the celebrated trial which was to decide whether Mr. Tittlebat Titmouse was to become a gentleman with ten thousand a year or whether his sublime soul should be crucified in a linen draper's shop, a deed is produced and offered in evidence which would have given the grinning jackanapes his quietus and rendered his brilliant array of counsel immediately hors de combat. What happens? The learned counsel, Mr. Subtle, rises (it is a pregnant moment when counsel rises) and objects to the deed because of an erasure which had been made by a clerk when he copied it. The honorable attorney-general argues for the sufficiency of the deed, all the time talking good law, though contra spem, we are told. Lord Widdrington, after consultation with brother Grayley, solemnly sustains Mr. Subtle and declines to allow the deed. It was never the law that an erasure vitiated a deed if made when engrossed and no authority from Coke down ever held so. And yet Mr. Samuel Warren, Q. C., not only makes this blunder but commits it in the interest of a Tittlebat Titmouse.

Dickens was prolific of lawyers and lawsuits, but while he would send boys out to hoe vegetables in winter he never was guilty of contumacious contempt of court. His splendid isolation in this respect is due in part to his service as an attorney's clerk and also to his reportorial manner. He described what he saw. Nevertheless there is generally an element of caricature in his descriptions of lawyers and court scenes. The late lamented Arthur Lockwood, Q. C., declared the speech of Sergeant Buzfuz in the cause célèbre of *Bardell* v. *Pickwick* to be the greatest in legal annals. Yet it is, as is much of the art of Dickens, a grotesque exaggeration. But after all if Dickens did sometimes forget fine distinctions, if he sent queen's counsel into common-law courts with blue bags, where is the citizen in the Republic of Letters who can go into court with clean hands and present information against him?

Anthony Trollope and Charles Reade both studied law, yet in "Orley Farm" and "Griffith Gaunt" each respectively ignores every rule of evidence.

If the giants of other days were not immune, how is it with our moderns? Take "A Modern Instance." Surely William Dean Howells, the American Isaiah and Messiah of Realism, will describe a thing as it is. What do we find? Probably nowhere in fiction has a court's proceedings been so fustianized and made ridiculous as in the divorce case of *Hubbard* v. *Hubbard,* reported by Mr. Howells in "A Modern Instance." It is as exaggeratedly unreal and melodramatic as anything Mrs. Southworth, Mrs. Henry Wood, or Augusta J. Evans Wilson ever did. Indeed it is, if anything, more pathetic than the trial scene in the latter's "At the Mercy of Tiberius." Mr. Howells' travesty is committed in Tecumseh, Indiana, in 1879. Bartley J. Hubbard has sued his wife Marcia G. Hubbard for divorce. The legal proceedings on his part are all regular, there is no appearance for the wife and a default judgment is taken. On the day the decree is granted and entered by the clerk, Squire Gaylord, of Equity, Equity County, Maine, rushes into the court room and without ever having legally appeared in the action moves to open the default, and thereupon, as if issue had been actually joined, delivers a ranting harangue until he collapses in the throes of his own paroxysm. And upon this wild and frenzied delirium the whole matter becomes res adjudicata and Bartley Hubbard is driven into exile. Not a single legal and necessary formality is complied with. Of course such a thing never happened in Indiana or anywhere else. As if realizing the literary crime he was about to commit, Mr. Howells, in a sort of anticipatory apology, naïvely declares that "the administration of justice is everywhere informal with us." There is a mocking devil in that unconscious sarcasm. Only litigants grown gray in the shadow of a court house fully realize how rigidly and eternally formal the administration of justice

really is. Nevertheless it is a pleasure to know that Mr. Howells frequently departs widely from his own pet theory of fiction and that Squire Gaylord, of Equity, Equity County, Maine, suffered death (by paralysis) for his flagrant contempt of court.

Then there was that delightful cosmopolite, albeit an American first, Marion Crawford. He has been brought to book for an alleged error in canon law in "Via Crucis." The point is somewhat obscure, dealing with an age hardly accurate historically. "The Ralstons" contains an indubitable error in connection with the extraordinary will of Robert Lanisdale. It is only a matter of millions, nevertheless there are those who desire to break the will and get the cash. The will was properly executed and the testator had full capacity. Mr. Crawford succeeds in breaking the will on the remarkable theory that it could not be proved that a third witness signed the instrument in the presence of the other two, and that such third witness was a probable legatee. Of course this is absurd. Such was never the law in New York State, the locus in the case. The fact of witnesses not having signed in the presence of each other would not invalidate the will. The absence of the entire attestation clause would not necessarily do so. And the fact of a witness being a legatee would not debar a will from probate. Moreover only two witnesses are required by statute, and prior to the statute proof by two attesting witnesses was sufficient. Mr. Crawford's theory of fiction would be an extenuating circumstance, something which could not be pleaded in behalf of Mr. Howells.

There are now no black patches in the dark night of the American literary firmament. At least in the zodiacal sign of fiction there is a reflection of stellar glory. One of the serenest and brightest of new-born stars is Miss Ellen Glasgow. Her first book, "The Descendant," though dealing with a dangerous theme, is remarkable for its balance, its sanity and concreteness, but her almost scientific precision did not prevent her falling into a technical legal error. Michael Akershem, an iconoclastic hero, commits homicide. He is tried by a jury and convicted. When the jury report he is in his cell and the verdict is brought to him there by his counsel. Now, as a matter of law, when a defendant is tried on an indictment for felony such defendant must appear in person when the verdict is received. Were it not that Miss Glasgow killed off her hero she might be persuaded to have the verdict set aside on the ground of this irregularity and give us a sequel to the altogether admirable "Descendant." In "The Voice of the People," perhaps her best work, Miss Glasgow has given us several fine lawyers, and she treats of law and its next of kin, politics, with a sure and perfect hand. Her fine novel, however, is spared absolute perfection by its report of a miracle. The author is describing with brilliant touch the "summer dawns of Eugenia's childhood." "There were hours when awaking, wide-eyed, Eugenia would rise on her elbow and look out to the western horizon where the day broke in a cloud of gold." But it is all very beautiful, and no mocking bird ever sang half so exquisitely "the lyric ecstasy of dawn."

If an author owes an obligation to his hero, Paul Leicester Ford more than fulfilled his. Perhaps many a young law-student plodding along for several years and dreaming of that far-off time, when he can chase ambulances for accident cases and pursue hearses for wills to probate, has envied the Honorable Peter Sterling, of the New York bar, who never had to study law or serve a clerkship. The redoubtable and composite Peter sprang a full-armed and admitted lawyer right from the brain of Mr. Ford like Pallas from that of Jove. He graduates from a literary college in one state, goes into another, and immediately sets up as a lawyer on his own account. No law reading, no clerkship, no examinations. No flight of time, nothing. Friends advise him to go into an office. Peter "shakes his head." Perhaps he had some secret "pull" with the examining board or misled the bench with false affidavits. Ugly suspicion! In any event, though the Hon. Peter Sterling is a brilliant ornament to the bar of which he is improperly a member, some fine day he may be compelled to show cause why he should not be punished for contempt of court.

It would hardly be expected that the accurate and precise "scholar in politics," Senator Henry Cabot Lodge, would lapse not only in the description of a trial but in the statement of a fact connected with it. He has certainly done the former and apparently the latter in his excellent biography of Alexander Hamilton. He describes a murder trial in which Hamilton appears for the defense. The chief witness for the prosecution was suspected by counsel of the murder. In order to confound the witness and demonstrate his guilt, candles were brought in and so placed as to throw their light on the suspected person's face. Then Hamilton cross-examined him, called the attention of the jury to his guilty countenance, and the witness rushed from the room, covered with the calumny of guilt. So, in substance, says the Senator. Now it is true that such a coup de théâtre was successfully resorted to in that case. But it was not the ingenious device of Hamilton. The credit belongs to his associate counsel for the defense, Aaron Burr. It was Burr who cross-examined the witness and who, in closing for the prisoner, seized two candles, held them so as to throw their glare on the face of the witness, and exclaimed, "Behold the murderer, gentlemen."

In the recent discussion of the revival of Revolutionary fiction, and the comparative merits of that fine trilogy, "Hugh Wynne," "Richard Carvel" and "Janice Meredith," the statement has been made repeatedly, that every incident in the first of these can be verified. Hardly, for the accomplished, and now greatly lamented, Doctor Mitchell broke the neck of Pegasus at least once. Perhaps it will be sufficiently apropos to point this out. The author is picturing beautifully the gathering of the first Continental Congress which convened in Philadelphia, September 5, 1774. Among the well-known figures mentioned, he speaks of the "lean, bent form of Mr. Jefferson, deep in talk with Roger Sherman." Thomas Jefferson was not a delegate to that Congress and did not attend it. Of course, Jefferson was there—in spirit, so perhaps the good doctor saw "the lean, bent form" subjectively. Only on that theory, a touch of the new symbolism in fiction perhaps, can the statement be verified.

The perfect picture of a trial and court scene which Thomas Nelson Page has given us in his "Red Rock" is but a single characteristic of the judicial spirit which animates and pervades that fine novel by an accomplished lawyer and diplomat.

However, the titles cited, especially the newer fiction, suggest, not so much opportunities for captious criticism, as the practical use that is being made of the opportunities the novelist may find in our history and in our national life. Our Colonial, Revolutionary and Reconstruction periods, heroic all, afford the richest material, as has been foreshadowed, for a series of novels that will be the glory of prose fiction, and furnish wealth for another world epic. Assuredly a Wizard of the West will arise to mould and fashion it, breathe into it the divine afflatus and usher in the Golden Age of our national literature. And as the greatest writers of every age, almost without exception, have either been lawyers or studied law, it is not at all unlikely that the modern Cassandra on her tripod would hazard the prophecy that the mantle will fall on an American lawyer.

OTTO ERICKSON.

THE "MASQUERADER"

THE impostor is a psychological phenomenon. He is the most interesting, versatile and wonderful actor among men. His theater is the world, his auditors and spectators the impressionable, gullible human race. He is a Roscius and an Æsopus—a comedian and a tragedian—in one; combines extraordinary mental resourcefulness with quick intelligence and is protean in his adaptability to every rôle, whether of tragedy, comedy, burlesque or farce. He has been accounted for on grounds of insanity, due to a perversion of the intellectual faculties, but while insanity claims universal pity, the mania of imposture invites only ridicule and contempt. There is a distinction between moral and intellectual insanity, and if the moral nature of the impostor could be subjected to histologic investigation as the human anatomy is to a post mortem, doubtless it would reveal a moral lesion indicating megalomania in its most aggravated form. This type of mania, an insane desire for notoriety, a monomania of self exaltation, a delirium of personal grandeur, which the French so aptly term *maine des grandeurs,* is the dual parent of most, if not all, the great impostures of history. Sometimes indeed this self-mythomania is combined with the sordid motives of self-aggrandizement and pelf.

History records many instances of imposture of romantic and sometimes of pathetic interest. Often we find it stranger than the most extravagant fiction. Such an instance is found in the case of Martin Guerre, surnamed herein the Masquerader.

In 1539 in a little town in France, one Martin Guerre married Bertranda de Ralz. They were respectively eleven and ten years of age. Ten years later a son was born to them and Martin suddenly disappeared. Eight years rolled away, their child grew into boyhood and Bertranda, like Penelope, waited. In the ninth year of his absence Martin returned. He was joyfully received. His wife "devoured him with kisses," the people of the little town, all of whom knew and recognized him, welcomed him with open arms. He explained his absence by saying he had enlisted in the King's service in the war against Charles the Fifth, and that after the truce of Vancelles, he was seized with a longing desire to revisit his wife and family and his native town. During his absence Martin's father had died, leaving him a considerable estate the management of which now devolved upon him. In three more years his family increased to three children. Martin was a devoted father and husband. All went as merry as a marriage bell until—one day a new Martin Guerre appeared in the little town. Unlike Enoch Arden, he was incapable of the "great renunciation," he did not conceal his identity. He recognized his house, his neighbors and friends, they recognized him. "A miracle!" the people exclaimed. He asked for his wife. She threw herself in his arms, imploring pardon for the fault committed by allowing herself to be deceived by a pretender. The false Martin, stoutly insisting on his identity as the only real and genuine Martin Guerre, was haled into court at Toulouse, where it was proved that he was Arnauld du Tilke, called Pansette, and an impostor. On the 12th of September, 1560, the court rendered judgment condemning him to make the *amende honorable,* to be hanged, quartered and burned.

This interesting and authentic case of imposture is one of French judicial record, reported by Jean de Cora, a celebrated lawyer and the then Chancellor of the Queen of Navarre.

One very pertinent question arises touching the faithful wife Bertranda who all along was "deceived" by the false Martin Guerre. It was established on the trial, and it was the crucial evidence on which the question of identity turned, that whereas the false Martin Guerre was sound in all his limbs, the true and genuine Martin, from his boyhood, *had a wooden leg!* O. E.

POINTS IN LEGAL ETHICS

From the New York County Lawyers Association Committee on Professional Ethics.

Question. A borrowed from B the sum of $100.00 and gave his three months' promissory note for $125.00, the increased amount being a "bonus." Upon default made in the payment of the note, the holder thereof requests an attorney to sue upon the same.

Would the fact that usurious interest was exacted preclude the attorney from accepting the claim?

Answer. In the opinion of the Committee, it is not improper for the attorney to accept and prosecute the claim, unless it appears from the circumstances disclosed to him that the exaction of the usurious interest was in its nature extortionate or oppressive. Usury is a defense and may be waived. The attorney should, however, advise his client fully that the defense of usury may be set up, and, if established, may defeat the claim.

Question. In the opinion of the Committee is it improper professional conduct for A, the attorney of record and counsel for the administrator of a decedent's estate, while continuing as such, to accept a retainer in behalf of the wife of one of the next of kin to institute and prosecute for her an action for divorce, and in connection with his proceedings in the divorce action, and in order to secure alimony and counsel fees for the plaintiff, to make application to enjoin the husband from disposing of his interest in the decedent's estate? A has not sustained any direct relations to the defendant husband in the administration proceeding; A's immediate client therein, the administrator, being a relative of the defendant husband, has criticised the act of his attorney as unprofessional.

Answer. In the opinion of the Committee, the attorney's course is not essentially improper; he is the attorney for the administrator, but as such no direct relation exists between him and the husband; it would be improper for him to assail his own client, but the remedy invoked is not directed against his client and the question does not disclose that he has taken any steps inconsistent with his duty.

Question. After an action had been begun by the service of a summons and complaint, representatives of the defendant voluntarily called upon the attorney for the plaintiff, and in the course of the discussion as to the merits of the case the said representatives made certain vital admissions. No agreement had been made that said conversation should be without prejudice, and the conference was sought by the defendant's representatives.

Under these circumstances would it be considered ethical from a professional standpoint for the attorney for the plaintiff to take the stand upon the trial and testify concerning the admissions made to him as aforesaid.

Answer. In the opinion of the Committee, assuming that the alleged admissions are not privileged in law as made in the course of negotiations for a settlement, the attorney is not precluded by any professional requirement from testifying, but it is not a proper practice for him to act as trial counsel and assume the position of arguing as counsel upon the credibility of his own testimony; these two positions are deemed inconsistent. (See Canon 19, American Bar Assn., approved by N. Y. State Bar Assn.) The Committee, however, recognizes as an exception a

case of surprise at the trial, where ... is material, and there is no ... of trial counsel.

Question. Is it improper for a lawyer ... his client and give him credit for it in ... lowing circumstances:

The money is derived from a collection made ... for his client as the result of a compromise of a ... debtor; pending the collection the client retained ... to sue out an attachment against another debtor of ... for an agreed compensation, larger than the said sum now ... held; the attorney prepared the papers, but the client abandoned the cause, promising, however, to pay the agreed compensation. The client will not hold any further communication with his attorney, despite the attorney's repeated efforts to communicate with him; the attorney has now brought suit against the client to recover the agreed compensation, and his reasonable compensation for the actual collection; he has learned that on a former similar occasion, another attorney, after recovery of a judgment against the same client, and issuing execution, discovered that the client's first name had been removed from the sign on his former place of business, and his wife claimed to own the business; in apparent anticipation of the same device, the client's first name has again disappeared from his place of business, since the institution of the pending suit against him.

Answer. The inquiry involves questions of law, on which the Committee expresses no opinion. Assuming that the lawyer has satisfied himself of his legal right to assert a lien or counterclaim, then, in the opinion of the Committee, he may properly withhold the moneys, by reason of the facts set forth. In this case, however, as in general when a lawyer withholds a client's funds, the moneys should not be mingled with the lawyer's own, but should be held in a special account, so that the lawyer will at all times, until the controversy is ended, be in a position to account and pay over, should his client prevail against him.

Question. A, an attorney practicing in this City, writes to B, a judgment creditor of C, stating that he has information whereby he can collect a judgment of B against C, and states in the letter that if he succeeds in collecting the judgment, he is to receive as his compensation a sum equal to forty per cent. of the amount collected, and if he fails to collect, then no charge is to be made against B. B writes to A, stating that if he is not called upon to bear any part of the expense, that then A may proceed. Without a written answer to the communication last mentioned A proceeds to enforce the collection of this judgment.

May I take the liberty of asking the views of your Committee on this transaction?

Answer. In the opinion of the Committee the conduct of the attorney is improper in two aspects, namely: that he solicits the employment and impliedly agrees to bear the expenses.

Question. In the opinion of the Committee, is there professional impropriety in lawyers instituting a suit in this State upon promissory notes in the name of a client to whom the notes have been assigned after maturity and without consideration, the assignor and holder at maturity being a domestic corporation, and the assignee and plaintiff being also a domestic corporation and a subsidiary of the first corporation; the assignment having been made for the convenience of the parties, and with a view to the institution of a suit in the name of the assignee instead of in the name of the assignor?

In this connection we call the Committee's attention to the decision in McBride *v.* The Farmers' Bank, 26 N. Y. 450, from which we conclude that it is the view of the Court that such an assignment is not illegal.

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morals, or safety. It, therefore, cannot be upheld as a ... measure. We also think the act special legislation. ... applies to cities of ten thousand population or over. ... houses or commercial establishments in other cities and ... may keep open at all hours of the day or night, and sel... not otherwise forbidden by law. The act further ex... ...ores, and commercial houses dealing exclusively ... portion of stock consists of, foodstuffs, meat... ...perishable nature. . . . We think it also c... ...ual rights to enjoy, acquire and possess ... ...le of which is that of alienation, the ... ...re are things the sale of which m... ...en prohibited by the legislature, a... ...rieted, regulated, and controlled ... rest on the police power of the ... health, public morals, public s... ...l welfare. The act here h... ...tends to promote or pr... ...safety, convenience, co... ...and an unwarranted ...

Answer ... torneys ... the legal ... having ... attorneys ...

Question. Is it ... professional impropri... for a Bankrupt, viz.:

The Bankrupt has filed ... of twenty per cent. His ... to all of the creditors of the ... the offer and enclosing to them blank ... out by the creditors, stating to them ... for them with the Referee in Bankruptcy ... their dividends free of charge, in case they ... respective proofs of claim to him.

Answer. Although the question does not disclose how ... torney will collect the dividend, it would seem that his ... is to suggest the giving of a proxy or power of attorney ... the acceptance of such proxy in the usual form, the attorney would at once be authorized to act for both debtor and creditor ... charged with conflicting duties. Unless his circular letter makes it entirely clear that the attorney, in offering to file proofs of claim, does not seek to assume the relation or duties of an attorney to the creditors, the Committee disapproves the practice suggested. Of course, no such communication should be sent direct to creditors who are represented by counsel.

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Cases of Interest.

WHAT CONSTITUTES A "PASSENGER TRAIN."—A railway train operated on a fixed schedule is a "passenger train," within the contemplation of a contract using that term, if the train includes one or more cars for the accommodation and carriage of passengers under the regulations imposed by law for the transportation of passengers, notwithstanding it may include cars used exclusively for the transportation of freight. Power *v.* Gainesville etc. R. Co., (Ga.) 86 S. E. 61, wherein the court said: "So far as our opportunity for investigation has extended, we have been unable to find a case in which it has been decided whether a train which carries both freight and passengers comes under the definition of a passenger train."

RIGHT OF PROBATE JUDGE TO COMPENSATION FOR JANITOR SERVICE PERFORMED BY HIMSELF.—It would seem from the case of Hale *v.* Texas County, (Mo.), 178 S. W. 865, that there is

at least one thrifty probate judge in Missouri, the facts therein showing that a probate judge in Texas County put in a bill for services performed by him as janitor. He was held entitled to recover, it appearing that a statute imposed on the county the duty to furnish a janitor for the probate courtroom. Judge Blair writing the opinion of the court said: "Can his honor recover reasonable compensation for necessary janitor work he did himself over and beyond that he employed others to do? The statute, as construed in the Motley Case, makes it the county's duty to furnish the probate court with a janitor. Nor is this confined to term time, as defendant's counsel suggest. It is common knowledge that the probate courtroom must be practically always open to the public and in use, and it follows that it must be kept in a reasonably sanitary condition all the time, and this entails services of a janitor in vacation as well as term time. The duty to furnish a janitor being imposed upon the county by the statute, it is not reasonable to say that the probate judge must assume the burden of finding a janitor for his rooms, or himself do the janitor work without pay. If he does such work without any intent to charge for it, he cannot afterwards collect therefor, but there is not, as the court declared, any presumption that he performed it gratuitously."

WHAT CONSTITUTES MISBRANDING OF MACARONI.—In United States *v.* 267 Boxes of Macaroni, 225 Fed. 79, it was held that certain boxes of macaroni libeled in the case were misbranded in that the macaroni purported to be a foreign product whereas it was not. The label on each of the boxes read: "Gusto Igiene Nettezza Pastificio Moderno Elettrico Con Prosciugazione Artificiale Vitello Brand Torre Annunziata (Italy Method) Mfg. U. S. A." Commenting on this label the court said: "We find from its appearance that it is very distinctly Italian. The label proper is of the dimensions of 8½ inches by 6¼ inches, bearing pictorial representations of three persons, a dining scene, etc., with a very narrow white margin, from one-eighth to one-sixteenth of an inch in width. The name of the manufacturer and the place where the macaroni is made do not appear. Nearly all of the wording on the label proper is in the Italian language. The exceptions are in the use of the words 'Vitello Brand' and 'Italy Method.' Between the words 'Vitello' and 'Brand' is the picture of a cow or calf. The testimony shows that the word 'Vitello' is the Italian word for calf. The words 'Torre Annunziata' are the name of a city in Italy where it appears macaroni is extensively manufactured. There is no doubt that the general purchaser, looking at that label, with its distinctly Italian caste and written in the Italian language, with nothing whatever thereon to indicate that it was of American manufacture, would at once conclude that it represented a foreign, and, in this case, an Italian product. It is claimed that the letters 'Mfg. U. S. A.' in small type within less than an inch of space, on the very narrow white margin on the lower edge of the label, would be notice to the purchaser of the fact that the product was manufactured in America. It seems clear to the court that the makers did not intend bona fide to convey such notice to the purchaser by the use of these letters, but rather that they were endeavoring to protect themselves from the charge of violating the act of Congress. If it was intended that the purchaser should be informed as to where the food product was manufactured, certainly some words sufficiently conspicuous would be placed upon the label to strike the eye of the purchaser and convey the desired information. I do not think that the letters on the margin which I have quoted save the label or brand from the charge that it deceives and misleads the purchaser and purports to be a foreign product when not so."

VALIDITY OF STATUTE REGULATING CLOSING OF PUBLIC PLACES ON SUNDAY.—From a perusal of the case of State *v.* Nicholls, (Ore.), 151 Pac. 473, it is clear that the Supreme Court of Oregon is not inclined to abuse its power to declare statutes unconstitutional, for in that case it held valid a statute which read: "If any person shall keep open any store, shop, grocery, bowling alley, billiard room, or tippling house, for the purpose of labor or traffic, or any place of amusement, on the first day of the week, commonly called 'Sunday' or the 'Lord's Day,' such person upon conviction thereof shall be punished by a fine not less than $5 nor more than $50: Provided, however, that the above provision shall not apply to theaters, the keepers of drug stores, doctor shops, undertakers, livery stable keepers, butchers, and bakers." It will be seen that the public places excepted from the prohibition of the statute included "theaters" and yet the court ruled that the classification of occupations in the statute was reasonable. Judge Burnett for the court said: "The general rule laid down by the enactment forbids keeping open any store, shop, grocery, bowling alley, billiard room, or tippling house for the purpose of labor or traffic. An exception is found in the proviso excluding the occupations already named. A good reason for this may be found in the fact that drug stores, doctor shops, undertakers, butchers, bakers, and livery stable keepers minister to wants that are more imperative as a rule than those supplied by the general run of business in the occupations named, while theaters afford mental diversion conducive to rest and relaxation. The emergency involved gives color and sanction to the exception. The law applies to all persons coming within the class described and limited in the statute. Many situations are pointed out in the argument of the defendant illustrating possible absurdities. For instance, a carpenter shop may be closed, but the carpenters themselves might be working on the outside; or the store of the defendant, where cigars and candy are sold, might be closed, yet the same articles might be purchased in a drug store. These contentions are properly addressed to the legislative branch of the government. We are concerned only with the authority, and not with the wisdom, of the lawmakers. The question of whether an institution which vends both drugs and candy is a drug store or a candy shop is not before us. We are convinced that the classification set out in the statute is reasonable, and that the legislation is a proper exercise of the police power."

VALIDITY OF STATUTE IMPUTING CONTRIBUTORY NEGLIGENCE OF OPERATOR OF AUTOMOBILE TO OCCUPANT.—In Birmingham-Tuscaloosa, etc. Utilities Co. *v.* Carpenter, (Ala.), 69 So. 626, the court had under consideration the validity of a statute providing as follows: "The contributory negligence of the person operating or driving any motor vehicle in this state shall be imputed to every occupant of said motor vehicle at the time of such negligence in actions brought by such occupant or his personal representatives for the recovery of damages for death or personal injury, whether the relation of principal and agent exists between such person operating or driving such motor vehicle and such occupant or not, provided that the provisions of this section shall not apply to passengers paying fare and riding in a motor vehicle regularly used for public hire." This statute was held invalid as denying to persons similarly situated the equal protection of the law. Anderson, C. J., for the court said: "It may be that the motor vehicle, because of its mechanism

and capacity for speed, as well as its rather recent appearance and general use, is considered more dangerous than other vehicles in common use before it became such a general instrument of use and travel—as was the case when the coal oil lamp succeeded the tallow candle; yet it is a vehicle of most common use, and is recognized as having the right to the use of our highways in common with all the other modes of travel, possessing the same general rights and subject to the same general rules as to the duties and liabilities owing to the public, and the occupants of same should enjoy the same legal protection accorded to persons riding or traveling in other vehicles. We do not mean to hold that the legislature cannot enjoin upon motor vehicle operatives certain duties and restrictions not placed upon other vehicles of an inherently different nature and character, for the protection of the public. But the right to do this does not authorize the penalizing of people who ride in same, by depriving them of a legal right enjoyed by persons riding in any other kind of vehicle, and such a discrimination cannot be justified upon the basis of a reasonable classification. Section 34 not only discriminates against persons riding in motor vehicles in favor of those riding in all other vehicles under similar conditions, but it discriminates between those who ride in motor vehicles for hire. In other words, if a person rides in a motor vehicle which is regularly used for hire, he is not responsible for the negligence of the driver or operator; yet if he rides in one for hire he is responsible, unless said vehicle is regularly operated for hire. The section denies an equal protection of the law to all persons similarly situated, and is an unwarranted discrimination."

VALIDITY OF STATUTE REGULATING HOURS OF SERVICE OF MERCANTILE ESTABLISHMENTS.—A statute was declared invalid in Saville *v.* Corless, (Utah), 151 Pac. 51, which provided as follows: "All mercantile and commercial houses, either wholesale or retail, or both, in the cities of ten thousand population and over, shall close at six o'clock in the evening of every business day of the year, except for the period of six business days immediately preceding December 25, of each year. . . . This act exempts all commercial and mercantile houses that deal exclusively in, or whose major portion of stock consists of, foodstuffs, meats and other provisions of a perishable nature, which are regarded as, and are, public necessities. . . . This act also exempts drug stores, which are regarded as, and are, public necessities." As reasons why the statute was invalid the court said: "The act is defended on the ground that it is a police measure, and that as such it was competent for the legislature to fix and regulate working hours of employees of mercantile and commercial houses and establishments. . . . One of the plaintiffs is a merchant engaged in selling men's clothing, furnishing goods, boots, shoes, jewelry, etc., in Salt Lake City. He conducted his business without help. The other plaintiff is engaged in selling cigars at retail in Salt Lake City. Both of them sold goods after 6 o'clock P.M. That, and that only, constitutes the alleged violation. It also is averred and admitted that commercial houses or establishments in Salt Lake City, and in other cities of ten thousand or more population, and exempt under the act, deal in and sell, after 6 o'clock, the same kind of goods dealt in and sold by the plaintiffs after that hour. . . . The business conducted by the plaintiffs does not affect the health or safety of those engaged in it. Nor is the act directed to enterprises affecting health, morals, safety, or general welfare. It strikes at all commercial houses and establishments, not within the exemptions, and forbids them to be open after 6 o'clock, regardless of the character of the business carried on, and regardless of whether it does, or does not, affect health, or morals, or safety. It, therefore, cannot be upheld as a police measure. We also think the act special legislation. It only applies to cities of ten thousand population or over. Business houses or commercial establishments in other cities and towns may keep open at all hours of the day or night, and sell anything not otherwise forbidden by law. The act further exempts drug stores, and commercial houses dealing exclusively in, or whose major portion of stock consists of, foodstuffs, meats, and provisions of a perishable nature. . . . We think it also offends against constitutional rights to enjoy, acquire and possess property, the most valuable of which is that of alienation, the right to vend and sell. There are things the sale of which may be restricted, regulated, or even prohibited by the legislature, and enterprises which may be restricted, regulated, and controlled. But such legal interference must rest on the police power of the state to promote or preserve public health, public morals, public safety, public convenience, and general welfare. The act here has no such purpose, and in no sense tends to promote or preserve public health, morals, peace, order, safety, convenience, comfort, or welfare. It is but an arbitrary and an unwarranted interference with a merchant's business."

LIABILITY OF CARRIER TRANSPORTING DEAD BODY TO PERSON IN CHARGE THEREOF.—In Osteen *v.* Southern Ry. Co., (S. C.) 86 S. E. 30, the action was for damages for alleged negligent and wilful conduct of the defendant in matters complained of. The plaintiff in substance alleged: That on February 9, 1914, he bought six tickets from Greenville to Gaffney for the transportation of a funeral party, consisting of himself and four others and the dead body of his sister-in-law, Mrs. Peace; that the ticket for the corpse was handed to the station baggage agent by the undertaker, who gave him a check for the coffin; that on the train he presented to the collector the five tickets for the living members of the party; that he did not think to present the baggage check "representing the right of transportation for the corpse;" that, although he protested that he had bought a ticket for the corpse, the collector demanded and collected fare for it, and collected 70 cents in excess of the legal rate; that the conduct complained of was a violation of "the rights and feelings of the plaintiff as a passenger," to his damage $2,000. The answer of the defendant was a denial of allegations of the complaint. There was a verdict in favor of the plaintiff for $600, a judgment entered thereon, and an appeal which resulted in an affirmance of the judgment. The court through Judge Watts said: "While it has been decided in Griffith *v.* Railway Co., 23 S. C. 25, 55 Am. Rep. 1, that under the common law there can be no property in a corpse, and that decision was correct in the facts presented in that case, it is to be remembered that the common law of England had nothing to do with burial of deceased persons, etc., but that the ecclesiastic court had jurisdiction over such matters, and not the courts of common law. This court will not commit itself to such a barbarous and savage doctrine as to hold that, when a person dies, no one has such a property interest in the body as to see the body decently interred, and resting place uninterfered with; and a relative or friend has a right to see that the body is protected, and these feelings in relation thereto protected. The case at bar shows that Osteen had a peculiar interest as custodian by appointment of the husband and as a relative to carry the body to its final resting place, and that the demands of the ticket collector to extort illegal and unreasonable demands for additional fare, and even 70 cents in excess of regular fare, was enough to show that an incompetent agent of the defendant was allowed to do this, and was sufficient to sustain the verdict of the jury to actual and punitive damages. It was held in Kelly

v. Tiner, 91 S. C. 41, 74 S. E. 30, that a relative or friend had the right to prevent the desecration of a graveyard where relatives or friends were buried, and certainly in the case at bar the plaintiff under the facts of the case had the right to prevent any indignity to the corpse which was being transported for burial under threat of compulsion by the ticket collector, and by means of such compulsion money was wrongfully and unlawfully extorted from plaintiff. These exceptions are overruled."

BELIEF IN SPIRITUALISM AS EVIDENCE OF INSANITY IN WILL CONTEST.—In the case of In re Hanson's Estate, (Wash.) 151 Pac. 264, which was a proceeding to set aside a will, the question arose whether a belief in spiritualism which the testatrix was shown to have was evidence of her insanity and sufficient to invalidate the will. It was held that it was not. The pertinent part of the court's opinion was as follows: "While it is true that a belief in spiritualism, or in any other religious creed, if played upon by one designing to influence and thereby actually influencing the believer's testamentary disposition of his property, may invalidate the will on the ground of undue influence, the belief is of itself no evidence of insanity. Opinions on religion and things occult are essentially speculative in their nature. However little they may appeal to the common judgment, and however devoid of objective sustaining evidence, alone they are not badges of insanity. 'Manifestly, a man's belief can never be made a test of sanity. When we leave the domain of knowledge, and enter upon the field of belief, the range is limitless, extending from the highest degree of rationality to the wildest dream of superstition; and no standard of mental soundness can be based on one belief, rather than another. What to one man is a reasonable belief is to another wholly unreasonable; and while it is true that beliefs in what we generally understand to be supernatural things may tend to prove insanity, under certain circumstances, it is a well-known fact that many of the clearest and brightest intellects have sincerely and honestly believed in spiritualism, mind-reading,' etc. Whipple *v.* Eddy, 161 Ill. 114, 122, 43 N. E. 789, 792. In re Siebs' Estate, 70 Wash. 374, 126 Pac. 912, Ann. Cas. 1913 E. 125, in passing upon the sanity of a man whose mental and physical condition, as shown by the evidence, was strikingly similar to the most extreme evidence as to the deceased in this case, we said: 'It was shown also that, for a time at least, Mr. Drury attended spiritualistic gatherings and seemingly had faith in the doctrine of spiritualism; that he believed in the materialization of spirits, and apparently other spiritualistic phenomena, and sometimes spoke of having communed with his deceased wife. But it is not necessarily an evidence of insanity to believe in spiritualism. The great majority of civilized human beings believe in a life beyond the grave. Based upon that belief, many widely different religious creeds have been established, and the fact that an individual may believe in one of these and discard others is not evidence of unsoundness of mind, even though the creed selected may be the less common belief, and, to the majority of mankind, less capable of being defended than some that are more common. No one belief has a monopoly of men of intellectuality. It is well known that many of the clearest and brightest intellects have firmly believed in the doctrine of spiritualism, and in the reality of spirit manifestations that ordinarily accompany the practice of its teachings. But it is said that Mr. Drury, while alone in his room, would read from the Bible in a loud tone of voice, would engage somewhat vociferously in prayer, and would sing hymns whose wordings were not altogether congruous, to tunes not found in the hymnal. But this was nothing more than the manifestation of a deeply felt religion. Mr. Drury was fast approaching the end of the span allotted to the life of man. It is to be supposed that his faculties had become somewhat dimmed, that his memory would not at all times recall the words of songs as they were written, and that his voice had lost some of the freshness of youth. But this is not insanity.' See, also, Middleditch *v.* Williams, 45 N. J. Eq. 726, 17 Atl. 946, 4 L. R. A. 738; Brown *v.* Ward, supra."

ADMISSIBILITY OF HUMAN HEART AS DEMONSTRATIVE EVIDENCE. In an interesting case arising in Maine, namely, Thompson *v.* Columbian Nat. L. Ins. Co., (Me.), 95 Atl. 229, the action was on an accident insurance policy, and the question in issue was whether or not the insured met his death by accident so as to entitle the plaintiff to recover on the policy. The plaintiff claimed that the death was due to an accident, to wit, a rupture of the heart, whereas the defendant claimed that it was due to bloodpoisoning and that there was no rupture of the heart. There was evidence that autopsies showed a slit or rupture of heart muscles, and there was a dispute as to whether the slit was due to a rupture before death or as contended by the defendant to a cut after death. At the trial, which occurred over a year after the death of the insured, the defendant offered the heart as demonstrative evidence so that the jury might see for itself that there was no rupture but a cut after death. The trial judge refused to allow the heart to be received in evidence and his ruling was sustained by the law court. Chief Justice Savage said: "The defendant contends that as the prime question at the trial was whether there was a rupture of the heart before death, or a cut upon the heart after death, the heart itself would be the best evidence of the truth. It would be good evidence, it must be conceded, if the heart remained in the same condition as it was at death, and would be properly admissible if the jurors, who were nonexperts, were competent to judge of a question the answer to which must depend to a considerable degree upon expert knowledge. Whether demonstrative evidence of this character should be admitted depends, within well-defined limits, upon the discretion of the presiding justice. And, unless the discretion is abused, exceptions do not lie. Ordinarily a preliminary question is whether the thing offered is in substantially the same condition it was at the time in question. The determination of this fact is for the justice, and to his finding exceptions do not lie. This is so well settled that the citation of authorities is unnecessary. In this case the justice in excluding the heart gave no reason. We must therefore inquire whether there was any good reason. We think there was. It is complained that he excluded the heart without examining it himself. But he had listened to reams of testimony about it. It is evident that there was a bona fide dispute as to whether the heart was in the same condition as to the rupture or cut at the time of the trial as it was at the first autopsy. If the justice believed the witnesses for the plaintiff, he was authorized to find that the condition was changed. And we cannot revise his finding on exceptions. Besides, the length of time that had elapsed since the body was exhumed and the susceptibility of matter of that kind to decay and degeneration may have led him in the exercise of a wise discretion to withhold it from the jury, even though there was testimony that it had been 'scientifically preserved,' and had not degenerated. Again, it admits of serious doubt whether nonexperts are in a condition to judge a year and a half after death whether a slit in a human heart was caused by a rupture before death or by a cutting after death. If not, then such demonstrative evidence is not proper to be submitted to a jury of nonexperts. We suggest this question. We have no occasion now to decide it. We think the exceptions are not sustainable."

LIABILITY OF MANUFACTURER OF CHEWING TOBACCO TO CONSUMER FOR INJURY FROM BUG CONTAINED IN PLUG.—A novel case is that of Liggett & Myers Tobacco Co. *v.* Cannon, (Tenn.) 178 S. W. 1009. The facts show that Cannon, the plaintiff, purchased of a retail dealer in the city of Memphis a five-cent plug of Star-Navy chewing tobacco, the product of one of the factories of the defendant company, which tobacco had come into the possession of the retailer through intermediate wholesale dealer or dealers. Cannon bit a "chew" from the plug, and within a few minutes his mouth and lips began to smart. Examining the remnant of the plug, he found impressed and imbedded under its top wrapper or leaf cover a large black bug, which he had just bitten in two. He took the partly masticated quid from his mouth, and found "a black something mashed up in it"—a part of the bug he had chewed. Cannon's face was soon in a swollen condition; he became dizzy, and sent for a physician to alleviate his pain. The theory of the plaintiff in his pleading and proof was that the bug had been negligently manufactured in the plug of tobacco by the defendant company. In the trial court there was a motion by the defendant for a directed verdict, which was refused; but on the appeal it was held that the directed verdict should have been entered, the court saying: "In the absence of a duty owed by the defendant company as manufacturer of the plug of tobacco, the failure to observe which would be actionable, a case of liability can only be made by a showing of knowledge, or a reasonable means of knowledge from anything brought to the notice of the manufacturer, that the use by the consumer would be dangerous. In that event knowledge or notice disregarded gives to the transaction the color of fraud, with consequent liability to the distant consumer injured. In the instant case there is no proof or contention that the tobacco was put on the market with knowledge on the part of defendant that the bug was so imbedded. On the contrary, the proof shows that the plant of defendant was sanitary in its appointments, that the process of manufacture was under continuous inspection until the tobacco was put into plug form, and that there were maintained appliances for keeping the tobacco until completed as to manufacture clear of dirt or any foreign substances." The court further said: "The general and true rule undoubtedly is that laid down in the recent case of Burkett *v.* Manufacturing Company, 126 Tenn. 467, 150 S. W. 421, that ordinarily the manufacturer of an article or commodity placed by him on the market for sale and sold by another to an ultimate consumer is not liable to the last-named for injuries due to defects or impurities in the article or commodity. But to this rule there are well-recognized exceptions, as is there set forth; one of these being foodstuffs. Boyd *v.* Coca Cola Bottling Works, 132 Tenn. 177 S. W. 80. The contention of plaintiff, Cannon, is that tobacco is to be classed as a food, and is thus to fall within an exception to the general rule. . . . The term 'food' includes everything that is eaten or drunk for the nourishment of the body—any substance that is taken into the body, which serves, through organic action, to build up normal tissues or to supply the waste of tissue. . . . We think it manifest that tobacco is not a foodstuff. It does not tend to build bodily tissue, and as to the average adult its tendency is widely thought to retard the building up of fatty tissue. In respect to its use by the young, it cannot be doubted that it tends to stunt normal development and even growth in stature. The desire or appetite for food is natural and common to all of the human race, while the desire for tobacco must be created. . . . The admission of foodstuffs among those classes of commodities excepted from the general rule of nonliability to the ultimate consumer on the part of the manufacturer is comparatively recent, and this was done because of the close analogy of such commodity to drugs. Thus, in Bishop *v.* Weber, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715, it was said that the furnishing of provisions which endanger human life or health stands 'clearly upon the same ground as the administering of improper medicines, from which a liability springs irrespective of any question of privity of contract between the parties.' Such inclusion of foods among the excepted articles of commerce was based upon public policy and compelling necessity."

New Books.

Law of Wills, Executors and Administrators. By James Schouler, LL.D., author of treatises on "Domestic Relations, "Bailments," "Personal Property," etc. Fifth edition. In two volumes. Vol. 1. Wills. Vol. 2. Executors and Administrators. Albany, N. Y.: Matthew Bender & Company, Incorporated. 1915.

In 1883 Mr. Schouler brought out a work on "Executors and Administrators" and in 1887 a work on "Wills." The success attendant on their publication has led to several editions, the one at hand being the fifth. The author in his preface says that he has brought the later cases, American and English, down to date, and has re-edited the entire work. His care in the preparation of the edition is given in his own language as follows: "As usual, the Tables of Cases are prepared by others; but, except for the assistance of a competent member of the bar in collecting the new cases for volume two, the entire revision of the present edition is the personal work of the author. He has gone over every page of text and footnotes of these two volumes, altering, omitting or expanding, as seemed desirable, so as to give full scope to the newly added material." It is unnecessary to speak of the merits of Mr. Schouler's volumes. Earlier editions of the subjects before us have been so long in use by the profession that they know what to expect of a new edition. Mr. Schouler's reputation as a ripe scholar and a painstaking author justifies the belief that he has put his best into his latest literary effort and that previous standards have been maintained.

The Criminal Imbecile. An Analysis of Three Remarkable Murder Cases. By Henry Herbert Goddard, Director of Department of Research, Vineland Training School. New York: The Macmillan Company. 1915.

The murder cases analyzed in this little book of one hundred and fifty pages are those of Jean Gianini, acquitted by a jury of the Supreme Court of Herkimer County, New York, in May, 1914, on the ground of criminal imbecility; Roland Pennington, convicted by a jury of Delaware County, Pennsylvania, in June, 1914, of murder in the first degree, and Fred Tronson, convicted by an Oregon jury in December, 1914, of murder in the second degree. The author claims that these cases are typical of a large proportion of criminal cases, and he hopes by the analysis to make clear important points, often misunderstood, relative to the criminal and to the imbecile, with the expectation that a clear conception of the nature of the imbecile and of his relation to crime will inevitably result in a most desirable change in our criminal procedure. "Imbecile" is used in the legal sense which includes the moron and often the idiot as scientifically classified. The cases analyzed are thought by the author to be unique in that they were the first court cases in which the Binet-Simon tests were admitted in evidence, the mental status of the persons under indictment being largely determined by this method. The

author reaches the conclusion that the men convicted were not guilty of murder because they were imbeciles, the victims of arrested mental development, not knowing much about right or wrong, and having the mentality of a child of not over twelve years. On the question of what shall be done with criminal imbeciles Mr. Goddard says: "Of all persons in the world, the criminal imbecile should be placed in custody under conditions that will forever make it impossible for him to repeat his offense. The man who commits murder in a fit of insanity may recover from his insanity and be a useful citizen for the rest of his life. The man who commits murder under a strong impulse of anger or in calm meditation as the result of perverted reasoning may recover normal reasoning and be a useful citizen. This is not true of the imbecile. He will never recover; he will never have more mind than he has now; he will never be free from the danger of following the suggestion of some wicked person or of yielding to his own inborn and uncontrolled impulses. It will never be safe for him to be at large. This is so obvious that it is highly probable that the imbecile once committed to life custody would never be released, and even that there would never be any attempt at such release. When these facts are understood, the public will undoubtedly be satisfied to have such persons imprisoned for life or committed to an institution for mental defectives, where they will be constantly guarded and prevented from doing injury." The author makes the startling statement that somewhere in the neighborhood of fifty per cent of all criminals are feeble-minded, and offers helpful suggestions for detecting and segregating the feeble-minded before they have the opportunity of becoming criminals, and for exterminating in a few generations feeble-mindedness as related to crime. The book is thoroughly interesting and calls attention to what many of us seem to be little concerned about but which is a matter needing intelligent consideration.

Outline of International Law. By Arnold Bennett Hall, J.D., Assistant Professor of Political Science, University of Wisconsin. La Salle Extension University, Chicago. 1915.

This volume is, as its title indicates, a brief statement of the underlying principles of international law, designed as the author says not for the specialist, but solely for the general student and reader who is interested in the world problems of the day. It contains chapters dealing with general conceptions of the subject, the independence and equality of states, territorial domains and jurisdiction, relations between states in peace, war, and neutrality. The text covers something over a hundred pages and the important propositions laid down are as a rule supported by authorities such as the United States Supreme Court, the Hague Convention and various well known text books. Appendices contain a sufficient though not exhaustive classified bibliography, the Declaration of London, and matters considered at the different Hague conferences. Altogether there are some over two hundred and fifty pages of matter pertaining to the subject. For a clear and satisfactory nontechnical treatment of International Law Professor Hall's volume can be commended.

Report of the Board of Statutory Consolidation in Simplification of the Civil Practice in the Courts of New York. Prepared by the Board of Statutory Consolidation consisting of Adolph J. Rodenbeck, John G. Milburn, Adelbert Moot, Charles A. Collin. 3 vols. Albany: J. B. Lyon Company, Printers. 1915.

In the year 1913 the Board of Statutory Consolidation of the state of New York was directed by the legislature to prepare and present to it "a practice act, rules of court and short forms" as recommended by the board in its report to the legislature of 1913. In accordance with that direction the board made a report to the legislature of 1915 and that report is before us. For years New York has been burdened with an unscientific mass of statutes regulating practice, embodied in a volume called the Code of Civil Procedure. Time after time it has been held up to ridicule and contempt by prominent members of the bar of New York, but until recently no determined effort has been made to get rid of it. Now, however, New York seems in a fair way to substitute a short practice act of 71 sections, and 401 rules of court to accompany the short practice act. The report will be acted on by the legislature at its next session and it is to be hoped that the legislators will enact into law at least the substance of the proposed act. It is suggested by the board that the act be made to take effect in September, 1916. As said above the proposed Practice Act is composed of 71 sections. The English Judicature Act of 1873 has 100 sections and the New Jersey Practice Act of 1912 has 34 sections. The provisions of the proposed act are said to be "more like those in the New Jersey act than those in the English Judicature Act, the latter being composed largely of matter relating to the organization and jurisdiction of the courts, the former to provisions defining and shaping the character of the procedure in the courts." The proposed act is confined to provisions designed to lay down the course that the simplification of the practice should take and to enunciate some of the fundamental principles that should control the new practice. It leaves the working out of the details of the practice to the court rules, thus placing the responsibility for legal procedure upon the courts. The present Code of Civil Procedure contains much substantive law and also special and local practice. Provision is made in the report for the disposition of this matter elsewhere than in the Practice Act. The report is divided into three volumes. Volume one consists of the general practice, namely, the Civil Practice Act and the Civil Practice Rules and the notes thereto; volume two consists of the special practice, such as that of the surrogate's court and of justices of the peace, together with notes; volume three consists of the substantive law now in the Code of Civil Procedure, which has been transferred to new or existing Consolidated Laws. The notes show the sources of the text of the Practice Act and Rules. A table is yet to be prepared by the board showing the disposition of each provision of the Code of Civil Procedure. The proposed revision would not disturb the practice in the Surrogate's Court, Justices' Court, Municipal Court of the City of New York, City Court of the City of New York or the practice in any other city court, but the same would remain as heretofore until changed to conform to the new practice. Statutes relating to evidence found in the present Code of Civil Procedure would be brought together to form a new chapter of the Consolidated Laws to be known as the "Evidence Law." So statutes relating to costs, fees, disbursements and interest found in such code would be brought together to form another chapter of the Consolidated Laws to be known as the "Costs, Fees, Disbursements and Interest Law." We note an omission in the table of contents in Volume III, in that there is no reference to "Town Law" found on page 463.

Eighth Annual Report of New York Public Service Commission, Second District. Vol. I. Albany. 1915.

The eighth annual report of the New York Public Service Commission of the Second District, which includes the work of the Commission for the year 1914, shows that of the 957 cases pending before it during the year 775 have been disposed of, and of 1747 informal complaints pending during the same time 1420 have been disposed of. From January 1, 1914, to January 1, 1915, the Commission held 630 hearings, of which number 274 were held in Albany, 41 in New York city, 145 in Buffalo, and

170 in various other places in the state, 298 entire days have been actually devoted to the hearings. On December 31, 1914, the Commission had upon its records the names of 1015 corporations, municipalities, and individuals engaged in serving the public in some capacity, or incorporated for the purpose of rendering such service. The report seems complete in every detail and contains information of prime importance relative to public service corporations and their obligations to the public.

News of the Profession.

THE NEVADA STATE BAR ASSOCIATION held its annual convention at Reno, Nev., on Oct. 1 and 2.

THE WEST VIRGINIA BAR ASSOCIATION will hold its annual meeting at Clarksburg, W. Va., on December 28, 29 and 30.

MISSOURI JUDGE RESIGNS.—Judge Robert Schorer of the county court of Montgomery county, Mo., has resigned from the bench.

MUNICIPAL JUDGE APPOINTED.—Governor Hammond of Minnesota has appointed W. H. Smallwood to the bench of the Municipal Court of Duluth.

DEATH OF PENNSYLVANIA JURIST.—Justice John P. Elkin of the Pennsylvania Supreme Court died at Philadelphia, Pa., on October 3, aged 55.

NEW DEAN FOR HARVARD LAW SCHOOL.—Austin W. Scott, professor of law at Harvard Law School, has succeeded the late Professor Thayer as dean of the school.

TEXAS JUDGE DEAD.—Judge John Arthur Read of the Sixty-first Civil District Court of Texas died at Asheville, N. Car., on September 27, aged 42.

FORMER TENNESSEE JUDGE DEAD.—John A. Tinnon, aged 92, at one time judge of a branch of the Tennessee Supreme Court, died at Pulaski, Tenn., on September 25.

JUDICIARY CHANGE IN TEXAS.—County Judge T. J. North of Baylor county, Texas, has resigned from the bench and Bert King of Seymour has been appointed to fill the vacancy.

NEW TEXAS JUDGE.—Henry J. Dannenbaum of Houston has been appointed judge of the Sixty-first Civil District Court of Texas to succeed the late Judge John A. Read.

NAMED COUNTY JUDGE.—Governor Philipp of Wisconsin has appointed Perry Niskern of Berlin to the bench of the County Court of Green Lake County, to succeed Judge S. G. Potter, deceased.

NEW JUDGE IN OHIO.—Judge Almon M. Warner has been appointed by Governor Willis of Ohio to fill the vacancy on the bench of the Court of Common Pleas caused by the death of Judge Williams L. Dickson.

DEATH OF MARYLAND JUDGE.—Col. Albert B. Cunningham, one of the judges of the Appeal Tax Court of Baltimore, Md., and formerly a journalist of national reputation, died at Baltimore on September 29, aged 69.

CHOSEN CHIEF JUSTICE.—Judge Reynolds R. Kinkade of Toledo has been chosen chief justice of the judges of the courts of appeals of Ohio for the year 1916. Judge Albert H. Kunkle of Springfield has been re-elected secretary.

APPOINTED ATTORNEY GENERAL OF ARKANSAS.—Governor Hays has appointed Wallace C. Davis, son of the late Senator Jeff Davis, as attorney general of Arkansas to fill the vacancy caused by the death of Judge William L. Moose.

DEATH OF PROMINENT CHICAGO ATTORNEY.—Benjamin Stickney Cable, a prominent Chicago attorney and assistant secretary of commerce and labor under President Taft, was killed in an automobile collision near Ipswich, Mass., on September 27.

FEDERAL CIRCUIT JUDGE APPOINTED.—John A. Aylward of Madison, United States Attorney for the Western District of Wisconsin, has been appointed United States Circuit Judge to fill the vacancy caused by the death of Judge William H. Seaman.

ASSISTANT UNITED STATES ATTORNEY RESIGNS.—Grover M. Neeze, assistant United States attorney for the northern district of Iowa under United States Attorney Frank O'Conner of New Hampton, resigned on October 1, and Seth Thomas of Fort Dodge was appointed to fill the vacancy.

ALABAMA JUDGE DEAD.—Judge Henderson Middleton Somerville, chairman of the National Board of Customs Appraisers since 1890, and for ten years previous thereto an associate justice of the Alabama Supreme Court, died at Edgemere, N. J., on September 15, at the age of 78.

APPOINTED TO BUREAU OF CHEMISTRY.—William Parker Jones, a member of the bar of Massachusetts and the District of Columbia, has been appointed assistant chief of the Bureau of Chemistry of the Department of Agriculture of the United States. Mr. Jones has served seven years as solicitor for the department.

CHANGES IN NEW YORK CITY JUDICIARY.—Mayor Mitchel of New York city has appointed Edwin L. Garvin a Justice of the Court of Special Sessions in Brooklyn, Edgar M. Doughty a Justice of the Municipal Court, Sixth District, Brooklyn, and John F. Cowan a Justice of the Municipal Court, Eighth District, Manhattan; Aaron J. Levy has resigned as municipal judge.

HARVARD LAW DEAN DROWNED.—Professor Ezra Ripley Thayer, dean of the Harvard Law School, was drowned in the Charles River at Boston on September 15. Professor Thayer was forty-nine years old and had been connected with the Harvard Law School since 1910. About two years ago he was named by Governor Foss to be associate justice of the Massachusetts Supreme Court, which position he declined on account of failing health.

MISSOURI BAR ASSOCIATION.—The annual meeting of the Missouri Bar Association was held at Kansas City, Mo., as announced in our last issue, on September 28, 29 and 30. The address of welcome was delivered by Hunt C. Moore, president of the Kansas City Bar Association, and was responded to by D. W. Harris of Fulton. Judge Henry Lamm, formerly of the Missouri Supreme Court, delivered the president's address. Other addresses on the program were as follows: "The Constitutional Aspect of Government Ownership," by Senator George Sutherland of Utah; "A Street View of the Lawyer," by Rev. George H. Combs of Kansas City; "Bacon's Lost Rules and Decisions," by William A. Gardner, ex-editor of the *Central Law Journal*, of St. Louis; "The Practice of the Law," by William H. H. Piatt of Kansas City; "The Relation of the People to the Courts," by Judge John S. Farrington of Springfield; "Law and Lawyers," by Judge Charles G. Revelle of the Missouri Supreme Court; "Experiences in the Practice of Law in the Ozarks," by Judge Henry D. Green of West Plains; "Peculiar Cases," by Judge Sylvester W. Rush of Omaha. Officers for the ensuing year were elected as follows: President—F. M. McDavid, of Springfield; secretary—George H. Daniel, of Springfield; treasurer—A. Stanford Lyon, of Kansas City.

English Notes.

GERMAN PROPOSAL TO LIMIT BEQUESTS.—When Mr. John Stuart Mill propounded his theories on the limitation of bequest, the proposal was looked on as startling, but Professor Bamberger, the German economist, has put forth a project considerably in advance of that of the English philosopher. In the *Taegliche Rundschau*, Professor Bamberger, discussing the means of raising funds to meet the present requirements, advocates the reintroduction of a bill which was before the Reichstag in 1908 and 1913, the object of which is to make the state the sole beneficiary of all persons dying without direct relations. The proposal seems to have been favorably received by the German Press.

LONGEVITY ON THE BENCH AND AT THE BAR.—The completion by Lord Halsbury, on September 3, of his ninetieth year reminds one of many remarkable cases of longevity both on the Bench and at the Bar. The illustrious Sergeant Sir John Maynard was at his death in his eighty-ninth year, having been within a few months of his death Lord Commissioner of the Great Seal. The Right Hon. James Fitzgerald, the Prime Sergeant of Ireland, died in 1834, in his ninety-fourth year, after a great career at the Bar in Ireland and in the Irish and English Houses of Parliament, being requited with the offer of a peerage, which was, however, declined. Mr. Robert Holmes died in 1859, in his ninety-fourth year, as Father of the Irish Bar, of which he was an acknowledged leader although a stuff gownsman, having refused the highest promotion and the office of Solicitor-General. Lord Plunket, Lord Chancellor of Ireland, died in 1854 in his ninetieth year; Lord Lyndhurst at his death in 1864 was ninety; Lord Brougham at his death in 1869 had all but completed his ninetieth year; and Lord St. Leonards at his death in 1875 was ninety-four. The Right Hon. Thomas Lefroy, Lord Chief Justice of Ireland, who presided over the Irish Court of Queen's Bench in 1866 when he was past ninety, died in 1869 in his ninety-third year. Vice-Chancellor Bacon, who died in 1895 in his ninety-seventh year, continued to discharge the duties of Vice-Chancellor till 1886. In Canada, Sir James Robert Gowan, who died in 1910 in his ninety-sixth year, had the unique record of sixty years of judicial work.

MAILS ON NEUTRAL SHIPS.—The opening, detention, and, in some cases, the destruction of French and British mails by Germans when found on neutral mail boats constitutes a flagrant violation of Convention XI., arts. 1 and 2, of the Hague Conventions of 1907. It tends to give irony to these acts that it was on the motion of Germany that it was agreed that the postal correspondence of neutrals and belligerents, whether found on board a neutral ship or enemy ship on the high seas, should be inviolable. If the ship was detained, correspondence, according to the provisions of the Hague Convention, was to be forwarded by the captor with the least possible delay. Correspondence with a blockaded port was excepted, and it was provided that the inviolability of postal correspondence did not exempt a neutral mail ship from the laws and customs of naval war respecting neutral merchant ships in general. The ship, however, might not be searched except when absolutely necessary, and then only with as much consideration and expedition as possible. Immunity from capture or search generally allowed to mail bags in neutral vessels was extended to those found even on enemy ships, and it was not even laid down as a condition that the vessel should be a regular mail boat. The privilege granted even to official correspondence was very wide. It is on the face of it somewhat remarkable that a belligerent must allow to pass or (if the ship is detained) actually forward correspondence to or from his enemy's Government departments. The German delegate in supporting his proposal urged that it was hardly possible that belligerents having telegraphs and wireless at their disposal would use the ordinary mails for official military correspondence, so that the disadvantage to a belligerent of being forbidden to open, examine, or delay mail bags would be slight compared with the consequent advantage to neutrals and noncombatants in securing a regular and punctual service. The Convention XI. of 1907 was ratified on the part of Great Britain in November, 1909.

ENGLISH FICTION AND THE LAW.—Apropos the discussion that has been raised as to the greatest English works of fiction from the lawyer's point of view, a writer in the lay press declares emphatically for Samuel Warren's Ten Thousand a Year, but at the same time makes the somewhat remarkable confession that he has never read Bleak House, which some had collocated with Warren's novel and George Eliot's Felix Holt as a competitor for a place in this category. Of course, no one can read everything, but, although Bleak House may not be one of Dickens's greatest efforts, it certainly is one which, by reason of its attack, trenchant and efficacious, on the iniquities of the old Court of Chancery should scarcely have been neglected by anyone entering on a discussion as to the relative merits of works of fiction from the legal point of view. Indeed, the story of Jarndyce *v.* Jarndyce forms a landmark in connection with Chancery reforms. In this connection it is interesting to note Lord Cozens-Hardy's recent citation in Rex. *v.* Carson Roberts, Ex parte Stepney Borough Council (1915) 3 K. B. 313, at p. 315, of "the great case of Bardell *v.* Pickwick" as "high authority" for the use before 1867 of the word "apartments" as applied to "lodgings." This reference to Pickwick is by no means the first instance in which it has been cited in a law report. At least on one occasion Lord Russell of Killowen took "judicial notice" of the fat boy; and Mr. Justice Darling, who delights to sprinkle his judgment with illustrations culled from the masterpieces of English literature, has not overlooked the claims of Pickwick. It may also be recalled that Judge Pitt-Taylor, in his treatise on the Law of Evidence, sets out in a long footnote Sam Weller's evidence in the famous trial leading up to Mr. Justice Stareleigh's well-known ruling that "what the soldier said" is not evidence; but it may not be so generally known that the author, ever humorously prone, not only set out this extract, but likewise included Bardell *v.* Pickwick in his Table of Cases Cited prefixed to his volumes, an entry which, however, was ruthlessly excised by a later editor.

INJURED WORKMAN ASSISTED BY MEMBERS OF FAMILY.—Among the batch of Workmen's Compensation cases that came recently before the Court of Appeal was one in which a novel question arose, because of the services of members of the family of a workman being invoked in order to assist in the carrying out of the employment of the workman. In that case, Roper *v.* Freke, it appeared that a workman who was employed in managing a dairy farm found it necessary to obtain assistance in his work, as it was more than one man could perform. Accordingly, two younger sisters who lived with him gave part of that assistance. To them the workman attributed, in the shape of money and board, a specified sum per week. There was no contract between the workman and his sisters for payment of wages as such. On the workman suffering "injury by accident arising out of and in the course of" his employment, within the meaning of sect. 1, sub-sect. 1, of the Workmen's Compensation Act 1906 (6 Edw. 7, c. 58), the question raised was what deductions, if any, ought to be made from his remuneration for the purpose

of ascertaining his "average weekly earnings," so that the maximum amount which he could receive as compensation might be arrived at. In other words, were the sums attributed to the services of the workman's younger sisters to be taken into account? The workman could not have earned the wages that he did without the help that his family afforded him. On that ground, therefore, it was clearly much open to argument that, before his "average weekly earnings" were capable of being computed, the money that such help cost him ought to be deducted therefrom. But that was not the view that either the learned county court judge or the Court of Appeal could be prevailed upon to adopt. The absence of an express contract between the workman and his sisters weighed with the Court of Appeal as a reason for the disallowance of the deduction in question. The money disbursed in rewarding the sisters for the services which were rendered by them was regarded in the same light as cash paid for the food that he consumed and the clothing that he wore. Neither could be dispensed with. To enable the workman to perform his duties to his employer both were essentially requisite. But in no case has it ever been ventured to be asserted that the cost of food and clothing ought to be deducted before assessing "average weekly earnings." Again, it was not able to be established that the payments made to the sisters were so necessary to the performance of the workman's duties that it ought to be taken that part of his wages was intended to be so applied. There being nothing, therefore, to show that part of the wages was paid to the workman for any purpose other than his remuneration personally, no deduction in respect thereof was permissible.

A CONSTITUTIONAL ANARCHISM.—The letter of Lord Hugh Cecil protesting against what he calls the unconstitutional theory that it is the business of a member of the House of Commons to express the opinions of his constituents, or of a majority of his constituents, is itself of interest as a constitutional anarchism. Lord Hugh Cecil's contention that a member of the House of Commons is not bound to reflect the opinion of his constituents, or to take parliamentary action in conformity with their views, is a quaint conceit as far removed from the practical working of the Constitution as the doctrine that the Government as the servant of the King should hold office when they have lost the confidence of the people. Lord Hugh Cecil's doctrine was propounded with great skill by Edmund Burke in his speech at the Guildhall in Bristol in 1774, where, in defending himself for his outburst in reference to the liberation of Ireland from restraints imposed on her trade and commerce by British legislation, he urged unsuccessfully that constituencies should give a free hand to their members, basing his claim on grounds no longer applicable—special knowledge and experience presumably possessed by the members not available to the ordinary citizens, who should rely on their member and trust to his judgment in arriving at the conclusion most conducive to the public interest. Before, however, the time of Burke, whose ideal was a House of Commons which should be the express image of the Commons at large, pledges as to the Parliamentary action were both presented and taken by members of Parliament for popular constituencies, while members for nomination boroughs, who did not purchase their seats from the patrons of these boroughs—as in the case of Sir Samuel Romilly, who aspired to be independent—were bound in honor to vote in accordance with the wishes of their patrons on cardinal measures of public policy or to resign their seats. The spread of education, the rapid transition of information, the educational power of the Press, the frequency of public meetings, the close relationship between a member and his constituents, and the publication of division lists have powerfully tended, and more particularly within the last thirty years, to make the member of the House of Commons the delegate of his constituents. In 1865 Mr. Bagehot wrote that the House of Commons selected the Prime Minister and controlled the Government. In 1904 Sir Sidney Low in his Governance of England strongly maintains, and his contention is supported by the authority of Sir William Anson, that the House of Commons no longer selects the Prime Minister, but that the selection is made by their constituents, and that the House of Commons no longer controls the Government, but the Government controls the House of Commons by its own power over the constituencies, which it can exercise by a dissolution.

LOANS BY NEUTRALS.—The statement cabled from Washington, that Mr. Lansing, the Secretary of State, has made it plain to inquirers that in the view of the United States Government no violation of domestic or international law is involved in the proposed loan by citizens of the United States to the allies, is consistent with the attitude of that Power from the first towards loans by neutral individuals as distinguished from neutral States to belligerent Powers. Kent no doubt declares that even a loan to one of the belligerent parties is considered to be a violation of neutrality, but he emphasizes the fact that he is referring to State loans by citing Pickering's instructions to Messrs. Pinckney, Marshall, and Gerry, the American envoys, as to a proposed loan from the representatives of a neutral State to a belligerent one: (Commentaries, i., p. 116). Under such instructions the American envoys declined to consider the application of the French Directory for a loan of thirty-two millions of Dutch florins to France, then at war with Great Britain. Mr. Webster declared in 1842 that "as to advances and loans made by individuals to the Government of Texas or its citizens, the Mexican Government hardly needs to be informed that there is nothing unlawful in this so long as Texas is at peace with the United States, and that these are things which no Government undertakes to restrain." Mr. Lansing adopted this unquestionably sound position in referring to the fact that "some time ago (in Oct., 1914), his Government had announced its expression of disapproval of such loans as being inconsistent with the spirit of neutrality." The new loan was, however, essentially a credit loan to pay for obligations, and was regarded as a private transaction not differing from traffic in contraband or other war supplies over which a neutral Government had no obligation to exercise any control. When Canning in 1823 called on the British law officers of the Crown for advice as to the legality of loans and subscriptions for the use of one of the belligerent States by individual subjects of a nation proposing and maintaining strict neutrality between them, the reply was that "while voluntary subscriptions of this kind were inconsistent with neutrality, loans, if entered into merely with commercial views, would not, according to the opinion of writers on the law of nations and the practice that has prevailed, be an infringement of neutrality." During the Franco-Prussian War the French Morgan Loan and a part of the German Confederation Loan were issued in England, and during the American Civil War the loan of the Confederate States was taken without interference in London, Paris, Frankfort, and Amsterdam. Some publicists of great eminence, including Bluntschli, Phillimore (who considers such loans as a manifest frittering away of the important duties of the neutral), and Halleck, maintain the doctrine, entirely discredited by usage, of the denial to individuals composing a neutral community of the right of making loans to belligerent Powers withheld for obvious reasons from the State as such. Mr. Lansing's statement that the loan was issued merely as a private commercial transaction shows that he appre-

ciates the distinction drawn by Vattel between a case in which a loan is made in the ordinary course of business for the sake of gaining an interest on it and a case in which a loan is made for a distinctly hostile purpose.—*Law Times.*

Obiter Dicta.

ANIMAL INSURANCE.—Tomuschat *v.* North British, etc., Ins. Co., 77 N. H. 388.

PLAYING BOTH SIDES AGAINST THE MIDDLE.—Merrimack River Bank *v.* Clay Center, 219 U. S. 527.

PROBABLY THE PLAINTIFF TRIMMED THE DEFENDANT.—Nashville Lumber Co. *v.* Barefield, 93 Ark. 353.

NO LEGS TO STAND ON.—In State *v.* Nolegs, 40 Okla. 479, the appellate court held that the state had no cause of action.

MATTERS OF TASTE.—Sweet *v.* Bean, 67 Barb. (N. Y.) 91; Sweet *v.* Converse, 88 Mich. 1; Sweet *v.* Newberry, 92 Mich. 515; Sweet *v.* Porter, 12 Iowa 387.

SPEED RACES.—Swift *v.* Carr, 145 Mass. 552; Swift *v.* Crow, 17 Ga. 609; Swift *v.* Hare, 1 Rob. (La.) 303; Swift *v.* Hart, 35 Hun 1; and last, but not least, Swift *v.* Cobb, 10 Vt. 282.

INELEGANT BUT EXPRESSIVE.—In the recent case of Reed *v.* State, 168 S. W. 541, the record shows that the trial court charged the jury as follows: "Some of us imagine that all of the contrariness and arbitrariness in the world wears dresses. That is a mistake. Some of it wears pants."

THEORY, NOT PRACTICE.—We would never have believed this, if the court hadn't said it: "Jurors are not sensitive plants from which every slight breeze or breath of incompetent evidence must be scrupulously excluded in order to maintain their qualifications to decide a case."—Per West., J., in Barker *v.* Missouri Pacific R. Co., 89 Kan. 575.

THE FOOLISH VIRGINS.—"We shall take judicial notice of the value of a light to the human eye in the night time in running along an unknown runway. A brother suggests that Diogenes used a lantern in the daytime, but that was on a special quest, to wit, to find an honest man, and the precedent is without weight. Matt. xxv. 2 to 10, is more in point."—Per Lamm, J., in Williams *v.* Kansas City Southern R. Co., 257 Mo. 113.

THE VALUE OF A DISSENTING OPINION.—"I sincerely regret that I cannot agree with the conclusion reached by the other members of this court in this cause. I fully realize that a dissenting opinion establishes no legal principle, but it is a consolation to the dissenter and a medium of expressing his personal views in which he alone is interested—a kind of shady avenue leading to an imaginary goal of personal vanity."—Per Cunningham, J., in Steinfeld *v.* Nielsen, 15 Ariz. 454.

AT THE OFFICE BOY'S SUGGESTION.—The office boy in digging through the books came upon this in Collier *v.* Lattimer, 8 Baxt. (Tenn.) 711, which interested him: "Upon like reasons and for similar purposes, it has been held by this court in a recent case that a jackass is a horse within the meaning of said acts"—referring to exemptions. The court, through Justice Deaderick, cited Vincent *v.* Vincent, 1 Heisk (Tenn.) 333, as supporting this proposition. Turning to Vincent *v.* Vincent, supra, we find that the court with commendable reserve spoke of a "mule" and not a jackass. However, Justice Deaderick was the attorney for the complainant in Vincent *v.* Vincent, lost the case and undoubtedly knew his zoology as well as his law. That he, as judge, could adopt a decision against him as an advocate and on the strength of it give a widow whose children were all adults and married, and who was living alone, the right to an exemption as a "head of a family," shows that he was both able and magnanimous. The office boy offers a toast to Justice Deaderick—and we, hoping he is still living—join in.

AN ENGLISH PRACTICAL JOKE.—The devotion of a large part of the recent Long Vacation by the Lord Chancellor of Ireland to the visiting of lunatic asylums, may recall a good story told by Mr. Daniel O'Connell when speaking at a public meeting in 1843, with respect to Lord Chancellor Sugden. "The Lord Chancellor," said Mr. O'Connell, "had made an arrangement with Sir Philip Crampton, the Surgeon-General, to visit without any previous intimation Dr. Duncan's lunatic asylum at Finglas, near Dublin. Some wag (supposed to be Mr. O'Connell himself) wrote word to the asylum that a patient would be sent them in a carriage that day, a smart little man, who thought himself one of the judges or some great person of that sort, and he was to be detained by them. The doctor was out when the Lord Chancellor arrived. He was very talkative, but the keepers humored him and answered his questions. He inquired if the Surgeon-General had come. The keeper replied, 'No, but he is expected immediately.' 'Then I shall inspect some of the rooms till he arrives.' 'Oh, sir,' said the man, 'we could not permit that at all.' 'Well, then, I will walk for awhile in the garden,' said his Lordship. 'We cannot let you go there either,' said the keeper. 'What!' said he, 'don't you know I am the Lord Chancellor?' 'We have four more Chancellors here already,' was the reply. He got enraged, and they were thinking of a strait-waistcoat for him when luckily Sir Philip Crampton arrived. 'Has the Lord Chancellor come yet?' said he. The man burst out laughing and said: 'Yes, sir, we have him safe; but he is by far the most violent patient in the house.'" (Fitzpatrick's Correspondence of Daniel O'Connell, ii., pp. 306-307).

A VALUABLE RECOMMENDATION.—The following tale is said to have been told by Judge Rhodes E. Cave of the Missouri Circuit Court: "When the late Benjamin Harrison retired from the presidential chair his finances were rather depleted, a state of affairs not unknown to his many friends. They were equally aware that any offer of financial help would be indignantly declined, as Harrison was one who believed strongly in 'paddling his own canoe' without any outside assistance. At that time Philander C. Knox, later secretary of state, was the legal representative of several of the large steel companies in Pennsylvania. One of these companies was engaged in some litigation in Indiana and Knox decided that Harrison would be the man to handle it. Harrison, who had returned to Indianapolis and resumed his law practice, accepted the commission which Knox tendered and fought the case to a successful conclusion for his client. When it came time to present a bill for his services Harrison wrote Knox, asking if it would be all right with Knox if the Harrison bill were sent direct to the company, and not through Knox. The latter replied that it made no difference how the bill was sent, as all the interest he had in the matter was to see that Harrison was paid for his work. It was nearly two years after that before Harrison and Knox met, and Harrison at once referred to the matter. 'I trust,' he said to Knox, 'that you did not take it as an affront that I did not send my bill through you, but I felt that I had done some good work, and I wanted to charge a stiff fee, more, in fact, than I thought you might think it worth.' Knox assured the former chief executive that he had not given the matter second thought and his action had been perfectly agreeable. 'By the way, though,' said Knox, 'what

did you charge them?' 'Well,' responded Harrison in a half apologetic way, 'I charged them a pretty stiff fee. I got $25,000 for that case.' 'My! my!' said Knox, 'that's a pity. Why, I charged $100,000 for recommending you.'"

AN UNFAIR WILL.—The following will was before the Supreme Court of Indiana for construction in Carnahan *v.* Freeman, 108 N. E. 955:

"I Alererander S. Freeman do Make My last Will and Testement

"First I give and bequeth to Mrtha An Carneghan One hundred Dollars

"2. I give and bequeth to Clarance Freeman Marry Inize Freeman. Ama Leona Surfice Edman Homer Freeman. Lewis Freeman Rosco Freeman and Margret Narcisus Freeman at my deth the above to share and share alike. And each of the Boys one Hors except Clarance has received his Horse The Girls is to receive One Cow and Bed each except Ama Freeman she has received hir Cow and Bed.

"3. To be divided after all Funeral expenses and other depts are paid.

"4. I if Marrgret Nnarcisus and Marry Ineze Freeman if they Care for Me through My sickness at my deth they shall receive Fifty Dollars, each.

"5. I heae uppon Edman Hommer Freeman an Clarance Freeman Executors of this Will

"In testimony whereof I have hereunto Set My hand this 12 day of August 1912

"A. S. FREEMAN.

"Subscribed by Alickjander Freeman in our presence and declared to be his last Will and Testament and attested by us as such in his presance and in the presance of each other this 12th day of August, 1912.

"Witness: H. H. Hilkey.

"Anson P. Green."

A point apparently unnoticed by either court or counsel occurs to us: In view of the infinite pains taken by the testator to see that each girl should have a bed, were the boys expected to sleep on horseback?

Correspondence.

JUDICIAL PROTECTION OF PRIVATE RIGHTS.

To the Editor of LAW NOTES.

SIR: In answer to the article in your October number, "Judicial Protection of Private Rights," asserting among other things that "judicial review" "as it exists in America to-day is unique. In the whole history of the world, among all of the nations of antiquity, of the middle ages and of modern times, the like cannot be found;" further suggesting that "judicial protection of private rights has, in truth, no place in a government like ours," and advocating apparently that each of our 49 legislative units (1 federation and 48 states) should be given plenary and absolute legislative power, without suggesting any federal council as in the German Empire to settle the inevitable conflicts.

The author is evidently unaware that the whole subject was recently considered by the New York State Bar Association, which approved the unanimous report of its committee upon the duty of courts to refuse to execute statutes in contravention of the fundamental law (Senate Document 941, 63 Congress, 3 Session). This report shows that in England from Magna Charta down to the American Revolution, the common law courts enforced the principle laid down in Magna Charta and Lord Chief Justice Coke, Hobart and Holt's decisions that acts of Parliament against common right or in violation of the natural liberties of Englishmen were void. Our American Revolution was a successful attempt to enforce this rule of English constitutional law as against the unconstitutional Stamp Act (Quincy, Massachusetts Reports, 474, 521-7; McElwain High Court of Parliament, 54-65, 309-10).

In recent years the Privy Council on appeal from Canada, Australia, South Africa or any British Colonies or possessions, has held laws ultra vires as readily as any American court of last resort would do. In 1895 the Privy Council held a Manitoba education act ultra vires (Appeal Cases [1895] 202, 217, 226-8); in 1896 it held a Dominion temperance act ultra vires (A. C. [1896] 348, 366-7, 271); in 1899 it held a British Columbia anti Chinese labor law ultra vires (A. C. [1899] 580, 587-8, and in 1903 it held an Ontario Sunday law ultra vires (A. C. [1903] 524, 528-9). Australian decisions, or Privy Council decisions on Australian appeals, from D'Emden *v.* Pedder, 1 Commonwealth Law Reports, 91, 97-8, 106-7, 111, 117, to the Tramway's Case, 18 Commonwealth Law Reports 54, 58, 65-7, 81-3, 85-7, are no less assertions of judicial review.

Judicial review also exists in the bulk of South and Central America (Annual Bulletin of the Comparative Law Bureau of the American Bar Association for 1914, pp. 69, 86-9, 92, 98, 101, 104, 121-2, 148), as well as to a limited extent on the Continent of Europe.

In the government of federations with a written constitution, judicial review's only rival is the Federal Council of the German Empire, which (in conjunction with the Kaiser) possesses plenary and absolute power, alike in war and peace.

New York City. HENRY A. FORSTER.

UNLAWFUL PRACTICE OF THE LAW.

To the Editor of LAW NOTES.

SIR: As Secretary of a Committee appointed by the local Bar Association to secure the enforcement of the recent act of our State Legislature, entitled "A Bill to Regulate the Unlawful Practice of the Law" (Laws of 1915, page 99), I was inter-

ested in an editorial in your October number concerning this act. As you pointed out in your editorial, this act was not passed for the benefit of the lawyers. The Kansas City Bar Association was instrumental in securing the passage of this act because they thought and still think it provides an effective remedy for the evils resulting from the doing of law business by laymen, runners, fixers, snitches, corporations and jack rabbit courts. After the act became a law the Bar Association appointed this committee to enforce the law, and we have a great many concrete case now pending before the committee. This statute vitalizes sections 27 and 28, Code of Ethics of the American Bar Association, and is aimed not only at the pernicious practices which have grown up among the lawyers, but also at those corporations and individuals who have for some time past been usurping to themselves the functions of a licensed practitioner at the Bar.

A. STANFORD LYON,
Secretary of Committee.

Kansas City.

POWER TO ANNUL STATUTES.

To the Editor of LAW NOTES.

SIR: Permit me to express my thanks to you for publishing in your September issue that scholarly address of Judge N. Charles Burke, before the Maryland Bar Association on July 7, 1915, in which the Judge takes issue with Senator Owens, and also with Chief Justice Walter L. Clark of North Carolina, in regard to the power of the courts to declare void, legislative acts contrary to the Constitution. Judge Burke quotes Senator Owens as saying: "No one pretends that the jurisdiction is expressly given, and John Marshall ought to have known it was expressly refused." Judge Burke also quotes Chief Justice Clark as saying that the power exercised by the courts to declare an act unconstitutional, was "without warrant, express or implied in the constitution." Judge Burke has placed all students of this question under obligation for the historical information contained in his address.

I ask the privilege of adding the weight of another great name to those expounders of the constitution, who hold that the courts have the power, and are under sworn duty, to declare void legislative acts in contravention of the constitution. That name is none other than John C. Calhoun, the recognized champion of state rights, representing on many points the extreme opposition to John Marshall; but upon this particular point, Calhoun and Marshall both agree, as will appear from the following extract from an address which I had the pleasure of delivering before the State Bar Association in Georgia in 1909:

"John C. Calhoun possessed one of the greatest minds that ever labored in the field of American statesmanship. His intellectual bent was severely logical. Even when he was wrong, he was logically right—that is to say, any error of his conclusion would be found hidden in an unproven premise, and not in his process of reasoning. Facts and first principles were the only materials he needed to build the most elaborate structure. His 'Discourse on the Constitution and Government of the United States,' an elaborate philosophical treatise, comprising nearly three hundred printed pages, is substantially without a quotation from any source except from the instrument he was analyzing, with occasional reference to the *Federalist*, a contemporary production. His mind seemed to scorn the aid of other minds in deducing the truth from any given state of facts. This champion of the doctrine of nullification, the most extreme assertion of State Rights within the Union, agreed in substance with John Marshall, upon that once mooted question whether it was within the power and duty of the Supreme Court to declare void a law that was in violation of the Constitution. He declared in his famous 'South Carolina Exposition' of 1828 that such power rested upon an inference, but an *'inference so clear that no express provision could render it more certain'*—though he also maintained that the decision was operative only between the parties to the case and could not bind a sovereign state."

When Calhoun and Marshall agree on a constitutional construction there ought not to be much room for other men to doubt.

WM. H. FLEMING.

Augusta, Ga.

A CORRECTION.

To the Editor of LAW NOTES.

SIR: In the October LAW NOTES, among illustrations given in my article entitled "The Misuse of Precedent," the case of Carrigan *v.* Stillwell, 97 Me. 247, 54 Atl. 389, 61 L. R. A. 163, was referred to as one "carrying the legal mind to an exalted state of efficiency" and stating that "some one discovered that it did not sufficiently appear that a man was dead where the complaint merely set forth in this respect that the deceased 'was then and there burned to death and consumed by fire and then and there lost his life.'" It should have more explicitly appeared that the "some one" referred to was the demurring attorney in the case. By inadvertence it was made rather to appear that the decision favored this objection. In justice to the Maine court it should be said that the objection was not regarded as well taken. In this particular instance the soft impeachment is directed against those who argue demurrers on such grounds. I think all the remaining cases cited apply to those who decide.

JOHN G. JURY.

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CONTENTS

Government by Lawyers.

THE press occasionally sounds a note of alarm based on the preponderance of lawyers in legislative and executive office. It is perhaps a sufficient retort that most of these legal gentlemen were elected by popular vote over lay competitors, including some of the journalistic profession. It needs, however, but little consideration of the subject to vindicate the popular choice. Government is the making, interpretation and enforcement of law. Who, in the nature of things, is so competent for the task as a lawyer? Can a government by other than lawyers be a government of law? In the sixth year of Henry IV. there assembled at Coventry the "Parliamentum Indoctum" elected under an ordinance requiring that no lawyer should be chosen knight, citizen or burgess, "by reason whereof," says Coke, "this parliament was fruitless and never a good law made thereat." 4 Inst. 48. It may be said that there have been "lack-learning parliaments" since that day, but not a one, we venture to say, which would have been improved by the absence of its legal members.

The Effect of Codification.

A RECENT report of the Bureau of Corporations discloses the fact that 47 states have now adopted the uniform negotiable instruments act. There is no desire to minimize this achievement or the benefits of uniformity in a matter so closely related to the commercial life of the nation. But with the accomplishment of codification of this department of the law, the question arises how far it has been effective in reducing litigation. The American Digest topic "Bills and Notes" for the six months from April 1 to Sept. 30, 1901, contained 248 paragraphs. For the corresponding period in 1907 there were 274 paragraphs, while the digest covering the period from June 1 to Nov. 30, 1914, shows 325 paragraphs. In other words, the number of questions of negotiable instruments law determined by the appellate courts has kept pace in its growth with less favored subjects, quite unaffected by the clearness and certainty which the act was supposed to impart. We hazard no speculation as to the cause, but note, as affording a suggestive comparison, that the topic of "Negotiable Instruments" in Mews' Case Law Digest of England for the sixteen years from 1898 to 1914 inclusive shows a total of five paragraphs.

Courts of Conciliation.

WE are not far removed from the time when the law offered no remedy for youthful offenses but vindictive punishment, no relief from domestic discord but divorce. Juvenile courts are now beyond the experimental stage, and domestic relations courts are winning popular approval in several of the larger cities. Cannot the same idea be applied profitably to much petty civil litigation? Most small lawsuits grow out of misunderstanding; they cause expense to both parties out of all proportion to the amount involved; they leave ill feeling and bitterness in their train. A wise magistrate with the parties before him could in nine cases out of ten bring them to a satisfactory agreement in a fraction of the time required to try in due form a litigated issue between them. Small collections likewise would be vastly simplified if the parties were heard informally, a fair adjustment announced and a judgment entered accordingly by a judge having full power to fix the terms of payment in accord with the debtor's means. Some can still remember the oldtime squire, whose best and noblest judgments were never recorded in his docket, but were perpetuated in friends reunited and neighborhood feuds healed by his kindly counsel. It is not beyond possibility to restore him in lieu of his far less attractive successor, the modern city magistrate.

The Mentally Defective Criminal.

ACCORDING to Presiding Judge Harry Olson of the municipal court of Chicago the slight advance which has been made in the suppression of crime has been due to the fact that we have relied on legislation prescribing penalties instead of doing what we should long ago have attempted, study the individual himself who commits crime, the result being that apparent criminals affected with some inherited lesion of the mental processes or else afflicted with a congenital deformity of the mind have been given the prescribed punishment of the law and again turned loose on humanity only to appear time and again to answer to the same charges. Said the judge in an address on insanity and its relation to crime, recently delivered before the annual meeting of the Cincinnati Bar Association, "At the present time the remedial agencies and the police and courts, for lack of ability to sort out the unfit, are turning them over and over again at frightful expense and without beneficial results, either to the in-

dividual or to society. It is like the turning over of a wheel, bringing up again and again the same material. We have paid too much attention to the environmental factors and not enough to heredity." With the advent of the criminal anthropologist and sociologist our conceptions as respect the sphere of criminal responsibility and the proper measures to be taken against delinquents have undoubtedly been greatly modified. We no longer permit recognized idiots and madmen to be punished with severity as was done in the seventeenth and eighteenth centuries, and it is now a well-recognized principle that if the best interests of society are to be conserved offenders who err through deficient mentality must be treated in an entirely different manner from the really morally vicious.

Who Are the Crazy?

IN applying this benevolent doctrine, however, the difficulty is to ascertain just what constitutes insanity, idiocy or feeblemindedness, and while the psychopathologist may be of service in enabling the court to detect the more pronounced and easily recognizable types of mental defectiveness, thereby making it possible on first arrest to take as to them truly remedial steps looking to their regeneration or segregation, until the cloud of conflicting theories in which this pseudo-science is enwrapped has been definitely lifted no great change in our present system of punishments can be expected. The controversy between the free-willists and the determinists who look upon all crime as a pathological phenomenon is still being waged, but meanwhile, despite the fact that some savants class all criminals as only creatures of misfortune, sick people, damned by heredity or anatomical predestination or victims of mental obsessions and nervous organizations, society for its own protection must still with iron heel strike them down the same as it does the viper that rears its poisonous head regardless of the fact that the moral responsibility for the existence of the poison may theoretically be lodged elsewhere. Aside from this a large portion of the medical world has long ago given up the idea of a sharp line of division between the sane and the insane. When do indecision, irritability, sorrow or other emotional disturbances pass over into mental abnormality? On this point there are doubtless very nearly as many varying opinions as there are individual experts. For example, Judge Olson's view that mental defectiveness is much more general than is usually supposed may be true enough, but a further statement contained in his address to the effect that the lack of great generals to head the armies in Europe now fighting is due to such cause is a sweeping assumption to which, while it may possibly be true, many sober-minded persons would hesitate to subscribe. With all due deference to the judge it reminds us in its doleful pessimism of the Quaker who remarked to his wife, "All the world is crazy," adding reminiscently, "and methinks sometimes even thee is a little queer."

The Real Cowardice of the Court Room.

BUT in one respect the legal profession is truly liable to indictment for cowardice. Fortunately the ancient privilege of bullying a witness under the protection of the great guns of the court is not now so freely exercised, but certainly it has not yet been properly laid to rest with the other dead things of the common law. The profession is still liable to indictment at least for the maintenance of the nuisance. Not that lawyers indulge in the disgraceful practice of insulting and browbeating witnesses with any consciousness of the disadvantage they are taking of the witness, nor that every lawyer who exercises this "privilege" is a coward. On the average, we venture to say, it never occurs to him that the witness will take the matter personally, and if he did we believe he would usually be found waiting at the court house door in order to give the witness a chance "to take the matter up." We have heard of several lawyers that made a practice of giving the witness satisfaction after the trial. But the cowardice is not in the fear to fight. It is the cowardice manifested in the thoughtlessness, arrogance, and self-assurance that so often characterizes those in high places. The lawyer is an officer of the court, a part of the machinery of justice. He is "at home" in the court room. He represents his client's interests. He is at war with the opposing attorney, whose witnesses constitute the enemy's forts, trenches, army, and guns. Small wonder, then, that he lets loose his heavy batteries upon the poor witness for the other side and attempts to shrapnel him with abuse and asphyxiate him with ridicule! No, it is not so much the fault of the lawyer as of the system. As long as a lawsuit partakes so much of the nature of an encounter, the lawyer who pays too much attention to amenities is liable to lose his case. As we have recently had occasion to say, many of the abuses common to the practice of law are due to the dual capacity in which a lawyer acts, viz., as an officer of the court on the one hand and a private agent on the other, which usually results in the official being submerged by the private capacity. The remedy, then, for witness baiting must be found in a change of the system, coupled with a keener appreciation on the part of the lawyers of their official oaths and their capacity as trustees of justice. The hopeful feature of the whole matter is that the tendency of the profession is strongly in this direction, of which we have frequent evidence not only in the courteous demeanor of the average lawyer in dealing with a witness, but in the readiness of the court to "try the case" when the attorneys indulge too freely in time-honored barbarisms or otherwise fall too far away from their high position as gentlemen learned in the law.

Judicial Discretion as a Part of Legal Valor.

COMMENTING upon the sudden exit of lawyers during a recent *inquirendo de lunatico,* when the *enquirendee* began to furnish demonstrative evidence on the issue, a lay contemporary suggests drills for lawyers, whereby members of the profession can be trained to conduct themselves in seeming fashion in the face of peril. It is suggested that fake dangers be staged, somewhat in analogy to the false alarm that starts the fire drill in the schools, and that thus may the lawyers be offered opportunity to display their courage, or else acquire it in such measure as they may lack it. In reply to these kindly intimations, however, we would suggest that no one has greater right than a lawyer to exercise that discretion which is a part of valor, for sound and judicial discretion is well known to the law, though it must be admitted that it is sometimes abused. Perhaps the court, in the instance in question, should, *sua sponte,* have issued a writ of *ne exeat* to prevent the members of the bar from leaving before lunch time. But, seriously, we resent somewhat the intimation of cowardice among lawyers, and beg leave to return in

earnest garb our said contemporary's declaration that "the records of the world's past doings show that the lawyer holds his own in the front rank when big and dangerous things are on."

Pre-Election Promises as Bribery.

IT is not an unheard of thing for a candidate for public office to promise, if elected, that he will return a portion of the salary attached to the position to the city, county or state electing him or give it to the poor or some other deserving form of charity. Such pre-election promises have been made from time to time by aspiring candidates for office, but as a rule they have been classed along with the various other promises made before election and given little or no weight. It is rare indeed, however, to hear of a candidate making such a promise being threatened with prosecution for bribery. The matter generally begins and ends with the promise. Cases are on record, however, where the candidate, sincere in his intentions, has attempted to fulfil his promise after election, and this has raised the interesting question whether such promises are valid in the eyes of the law, even if they are not criminal in their nature. Two rules seem to have been adopted as applicable to such cases. The first is to the effect that a contract whereby a public officer agrees to perform the services required of him by law for a less compensation than that fixed by law is contrary to public opinion and void. If this were the sole result candidates for office could make such pre-election promises with impunity. But under the second rule applicable to this class of cases it is declared that a promise by a candidate for office, made to the electors generally, to serve, if elected, for less than the fees allowed by law, constitutes bribery, and this puts quite a different aspect on the case. Only recently a candidate for the office of sheriff of New York county stated that if elected he would return to the public $60,000 in fees attached to the office, and only retain the $12,000 salary, with which he thought he could keep the wolf from the door. Whereupon he was warned that he was running perilously near to the dividing line between that which is lawful and that which is not. The legislature has enumerated the purposes for which a candidate for office may spend or promise to spend his money, and the promise by a candidate to contribute, in case of election, his salary or fees of his office in order to reduce taxation is not among them. It is further provided that the candidate violating these provisions shall be guilty of bribery and liable to various and sundry punishments under the penal code. And the supreme court of New York intimated strongly that such a promise constitutes bribery in a similar case which arose as long ago as 1881. There was this difference, however; the salary in that case was $2500, and the offer, which was actually carried out, was to return $1300 to the poor fund. The court in that case condemned the practice in no uncertain terms, saying: "In view of the numerous cases, both in England and in this country, in which the subject of selling offices and of the bidding for offices has been under discussion, we must hold such promises and pledges as were made by the defendant to the electors of the county in this case to be reprehensible in the extreme, being against public policy, and in fact criminal, being no less than an offer in the nature of an intended bribe to the electors to whom they were made." *People ex rel. Bush* v. *Thornton,* 25 Hun (N. Y.) 456. A recent Michigan case (*Anderson* v. *Barnstrom,* 173 Mich. 157) supports the general principle that it is contrary to public policy to divide an official salary. There a partnership formed between a prosecuting attorney and a brother lawyer having come to grief, an action for a partnership accounting was brought, and under the partnership agreement one partner claimed he was entitled to a part of the salary of the other as prosecuting attorney. This the court denied him on the ground that the partnership agreement amounted to an assignment of unearned emoluments of public office which is looked upon with disfavor by the courts as contrary to public policy. Prosecuting attorneys are usually young men, and it might be of great advantage to the public if they had the benefit of being associated with a lawyer or lawyers of greater experience, and it is difficult to see how the public would be harmed by such a contract, and such were the views expressed in a dissenting opinion in that case. The same reasoning, however, would not seem to apply to the case of a candidate for office offering as an inducement for his election to return a part of the salary allowed him. At any rate the courts have not looked on it in that light in the cases that have come before them.

Ratio Decidendi.

IN these days of multitudinous and ever increasing numbers of legal reports it is rare indeed to hear complaint that a judge has failed to give his reasons for his decision. Such however is the plaint of an Illinois attorney who, having lost his case in the appellate court, demanded to know why the court decided against him, and on the refusal of the judge rendering the decision to comply with his request petitioned the judge of a circuit court to issue an order compelling the appellate court judge to do so, a proceeding almost as strange as the demand for a written opinion. Aside from the very questionable power of a judge of an inferior court to compel a judge of a superior court to file an opinion, the question of the propriety of giving the reasons therefor, upon pronouncing judgment, has long been deemed to rest in the discretion of the court, as well as whether, if the reasons were given, they should be oral or in writing. But the practice of giving the reasons in writing for judgments has grown into use in modern times (to what extent the overcrowded law libraries bear silent witness) and in many states statutes have been enacted providing that the opinions of the judges of the appellate courts or a court of last resort shall be in writing, and these statutory requirements are generally complied with. However, the courts have not always been inclined to give a ready obedience to such legislative encroachment on their special prerogatives, and the power of the legislature to compel the courts to give the reasons on which they base their judgments has been denied in no uncertain terms by more than one indignant tribunal, jealous of its independence. "The legislature can no more require this court to state the reasons of its decisions," said Judge Battle in *Vaughn* v. *Harp,* 49 Ark. 160, "than this court can require, for the validity of the statutes, that the legislature shall accompany them with the reasons for their enactment." In the judicial records of the King's courts, "the reasons or causes of the judgment," says Lord Coke, "are not expressed, for wise and learned men do, before they judge, labor to reach to the depths of all the reasons of the case

in question, but in their judgments express not any; and in truth, if judges should set down the reasons and causes of their judgments within every record, that immense labor should withdraw them from the necessary services of the commonwealth, and their records should grow to be like Elephanti Libri, of infinite length, and, in mine opinion, lose somewhat of their present authority and reverence; and this is worthy for learned and grave men to imitate." Coke's Reports, part 3, pref. 5. And authority is not lacking for the position taken by the recalcitrant judge in his own state. See *Speight* v. *People,* 87 Ill. 595, where the court rather tersely refused, after having reached a conclusion on a given question affecting a class of cases, to answer at length and expose a fallacy in any subsequent argument in which counsel may imagine they had successfully demonstrated the inaccuracy of their conclusions.

It is related that an English layman whose duties as incumbent of a high office in India required the exercise of judicial power, sought the advice of legal friends. His highly successful career, he afterwards stated, was due solely to the friendly monition, "Always decide according to common sense, but never attempt to give reasons for your decision."

The Slavery of the Anti-Narcotic Acts.

"AND the Lord said unto Cain, Where is Abel thy brother? And he said, I know not: Am I my brother's keeper?" Genesis iv. 9. Evidently Judge Pollock of the federal bench thinks he is not, if we are to credit him with the following statement reported to have been made by him at a hearing on a dope seller's case in the federal court at Wichita, Kansas:

"Because a few of the many have not the manhood, the strength of character to resist the baneful effects of narcotics, our people voluntarily put themselves in regard to those matters in slavery to protect somebody who is not worthy of being protected from their use; will sacrifice those who are self-respecting to protect or bolster up some worthless scoundrels who are of no earthly use to themselves or their government."

Since we do not believe that the judge holds a brief for either the cocaine seller or the opium joints, we are prone to think that his possibly too ardent espousal of the doctrine of free will and his possibly too firm belief in the advisability of giving free sway to the cruel natural law of survival of the fittest has led him into an intemperateness of language the force of which we are fain to admit we cannot altogether recognize and to which we do not believe many people will subscribe. The brilliant essayist Thomas De Quincey first resorted to opium as a cure for severe rheumatic pains in the head, but despite heoric efforts the habit grew upon him rapidly, he never being able entirely to shake it off. Likewise the poet Coleridge who in Mill's phrase possessed the greatest "seminal mind" of his time, from taking opium as a relief from rheumatic pains became so enslaved that in De Quincey's opinion it "killed him as a poet." From the judge's point of view they may have been "worthless scoundrels" because they did not possess the Count of Monte Cristo's iron self-control, he seemingly being able to indulge in "hasheesh" with impunity, but most lovers of literature at least think they would have been worth the saving. The "slavery" involved in obtaining a doctor's prescription before we can procure such habit-forming drugs as opium, morphine or cocaine, which have no legitmate use except for medicinal purposes, is irksome to but very few of us. Before it becomes necessary to employ them we have a physician anyway. Nor do we recognize the great sacrifice involved in punishing those "self-respecting" mortals who have generally forfeited all claim to anyone else's respect, by their in the main conscious violation of a benevolent though restrictive law, thereby possibly assisting in railroading to the human scrap heap those who, however weak, erring and sinful may originally have been worth the saving. In any event when the latter do become "worthless scoundrels" by their use of habit forming drugs it seems that we must still very often "bolster" them up in some prison, insane asylum or poorhouse at immense cost to the community. Had we not then better for our own good as well as theirs protect them against what are generally recognized as the most insidious and overpowering of drugs? The state cannot assume to be guardian of morals, but it is undoubtedly its function to enact measures calculated for the suppression of such forms of vice as threaten its welfare by generating disease, pauperism and crime.

Human Leeches.

IN our October number we recorded in these columns the scathing denunciation by Magistrate Corrigan of New York city of that class of shameless shyster lawyers who as "licensed pests" will undertake any "strike" suits that malice or cupidity can inspire. In running down the vultures who unfortunately too often beset the criminal courts of our large cities, Magistrate Corrigan will find an able sympathizer and coadjutor in Chief Justice Richard E. Burke of the criminal court of Chicago who, it appears, has inaugurated a campaign against professional bondsmen who obtain from poor persons several fees in payment for bonds only finally to permit the person for whom the bond is given to be locked up. In holding for a further hearing one accused of surrendering to the county authorities a certain person charged with embezzlement after he had received from the latter's wife two fees for signing certain bonds looking to the latter's liberation pending a preliminary hearing, Judge Burke said:

"I have had knowledge for some time that such conditions existed . . . and I am going to clean out the criminal court building and the county jail of these human leeches—these leeches who prey upon the unfortunate. From time to time since I was made chief justice of the criminal court similar complaints have come under my observation. Unfortunately I have been unable to gather sufficient evidence, but in the case in question I deem it necessary that the defendant appear before me at 4 o'clock Monday afternoon and explain his position."

To Justice Burke we extend our best wishes for the complete success of his crusade and we trust that his example will be emulated by the judges in all our cities. Too long have such persons as Justice Burke describes fattened on the misfortunes of others.

An Opportunity.

HERE is a tip to some ambitious legislator who would win a niche in the legal hall of fame. Let him go carefully through the reports of the highest court of his state (page by page, if he is possessed of time, patience and industry) and set down those instances in which the

court has decided that a remedial statute has failed to accomplish its obvious purpose. The reports of all states are full of such instances. Again and again he will find that the purpose of certain legislation has been defeated because the court, following the accepted rules of construction, declared that the statute under consideration missed the target at which it was aimed. And thereby old rules intended to be abolished, and deplored by the court, have been perpetuated, no one apparently taking the interest to see that proper amendatory legislation is proposed. Let our legislator draft an act providing these amendments, entitling his bill "An act to correct injustice in the state of ——— as declared by the Supreme Court." And if he does not make a hit we will present him with a life subscription to LAW NOTES.

PRICE CONTROL BY MANUFACTURERS.

BUYING a safety razor, a phonograph record or some similar article, one's eye is occasionally caught by an inscription threatening with penalties for infringement of patent any person who at any time sells the article in question for less than a stated price. Doubtless many have speculated momentarily as to just what the carefully worded notice was good for. The answer, as pronounced by the federal courts of last resort, is very simple—it is good for absolutely nothing. But, unnoticed amid more spectacular litigation, around those notices by which a manufacturer seeks to control the reselling price after he has parted with the title, has raged one of the fiercest battles which the forces of commercial monopoly have waged against the Sherman Anti-trust Act. The battle is lost; the "thin red line" which stands for the public weal has held, and the time is come to chronicle the battle and enumerate the slain. The final surrender took place on September 29th last when the Kellogg Toasted Corn Flakes Co. consented to the entry of a decree in the suit of the government against it, enjoining the vending of its product in packages carrying a price control notice.

The economic argument on behalf of price control by manufacturers was perhaps never stated more tersely than in *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*, 224 Fed. 566, wherein Judge Hough said: "The doing of what plaintiff wishes [selling Cream of Wheat at a reduced price at certain stores] would take from every groceryman near an 'Economy Store' the last incentive to buy any Cream of Wheat, and collectively such grocery keepers are more important to the public and the defendant than is the plaintiff." A similar view was stated at more length in *Fisher Flouring Mills Co.* v. *Swanson* (Wash.) 137 Pac. 144, the court saying in conclusion: "It will not do to say that the manufacturer has no interest to protect by contract in the goods after he has sold them. They are personally identified and morally guaranteed by his mark and his advertisement." Obviously, the fallacy of all this lies in the view point which makes the interest of the manufacturer the supreme consideration. There never was a monopoly so atrocious that it could not show a clear benefit to its members, if that were admitted as a justification. It is somewhat difficult to comprehend the view that "seems to us an economic fallacy to assume that the competition which, in the absence of monopoly, benefits the public, is competition between rival retailers. The true competition is between rival articles." *Fisher Flouring Mills Co.* v. *Swanson, supra.* Clearly, competition is of two sorts: competition between manufacturers for the trade of the retailer and competition between retailers for the trade of the ultimate consumer. The public is entitled to the benefit of both; to every price reduction which economy and efficiency of administration may enable either manufacturer or retailer to offer. As was pointed out by Judge Lurton in *Park & Sons Co.* v. *Hartman,* 153 Fed. 24, "That the suppression of even unreasonable competition will sanctify an agreement or combination to restrain trade will not be claimed. The whole economic system which has made our civilization is founded upon the theory that competition is desirable, and the common-law rules against restraints of trade rest upon that foundation."

The argument in favor of price control has some elements of plausibility and a few state courts and United States Circuit Courts have been led to endorse it. (See *Dr. Miles Med. Co.* v. *Platt,* 142 Fed. 606; *Edison Phonograph Co.* v. *Pike,* 116 Fed. 863; *Victor Talking Machine Co.* v. *Fair,* 123 Fed. 424; *Com.* v. *Grimstead,* 111 Ky. 203; *Garst* v. *Harris,* 177 Mass. 72; *Park* v. *National Druggists' Assoc.,* 175 N. Y. 1.) But the federal Supreme Court, whose pronouncements are final as to all transactions forming a part of interstate commerce, has never suffered itself to be deceived. In the leading case of *Dr. Miles Med. Co.* v. *Park & Sons Co.,* 220 U. S. 373, the court went directly to the heart of the economic question involved. Mr. Justice Hughes said: "The bill asserts the importance of a standard retail price and alleges generally that confusion and damage have resulted from sales at less than the prices fixed. But the advantage of established retail prices primarily concerns the dealers. The enlarged profits which would result from adherence to the established rates would go to them and not to the complainant. It is through the inability of the favored dealers to realize these profits, on account of the described competition, that the complainant works out its alleged injury. If there be an advantage to a manufacturer in the maintenance of fixed retail prices, the question remains whether it is one which he is entitled to secure by agreements restricting the freedom of trade on the part of dealers who own what they sell. As to this, the complainant can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions, and thus to achieve the same result, by agreement with each other. If the immediate advantage they would thus obtain would not be sufficient to sustain such a direct agreement, the asserted ulterior benefit to the complainant cannot be regarded as sufficient to support its system."

The legal aspect of the right of price control was first asserted before the Supreme Court by virtue of the monopoly of production conferred by a copyright. In *Bobbs Merrill Co.* v. *Strauss,* 210 U. S. 339, the right to fix the reselling price of a copyrighted book was denied, the court saying that while the copyright gave an exclusive right to vend, the power to control the price at a future sale could not be asserted. In *Strauss* v. *American Pub. Assoc.,* 231 U. S. 222, this holding was reiterated. In *Dr. Miles Med. Co.* v. *Park & Sons Co.,* 220 U. S. 373, the right of a manufacturer to project his control of the price beyond his own sales was asserted on the ground that the

article in question was one produced by a secret process. The court promptly pushed aside the false issue, saying: "But, because there is monopoly of production, it certainly cannot be said that there is no public interest in maintaining freedom of trade with respect to future sales after the article has been placed on the market and the producer has parted with his title." In *Bauer* v. *O'Donnell,* 229 U. S. 1, the same argument was made with even more plausibility in behalf of price control over a patented article, but the court reiterated its position that no legal monopoly of the right to make and sell would warrant a control of the price in case of a resale. Throughout all the decisions of this eminent court runs one clear and uniform rule: That whatever right may exist to control the production and sale of an article, once it is sold the price in case of a resale must be fixed by the competition of the open market and cannot be dictated by the original vendor.

Some small exceptions to the rule that price control contracts or notices are illegal remain to be noticed. A patentee may of course deal through an agent or licensee and control the price at which the latter shall sell. (*Fowle* v. *Parke,* 131 U. S. 88; *Bement* v. *National Harrow Co.,* 186 U. S. 70; *Virtue* v. *Creamery Package Co.,* 227 U. S. 8.) But the agency or license must be genuine and not a mere subterfuge designed to cover a sale. In *Dr. Miles Med. Co.* v. *Parke & Sons Co., supra,* and again in *Bauer* v. *O'Donnell, supra,* the court brushed aside an elaborate disguise and pronounced the transaction a sale. As was remarked in *U. S.* v. *Kellogg Toasted Corn Flakes Co.,* 222 Fed. 725, "Indirection will not afford escape."

It has been held in a few cases that the rule forbidding price control does not apply where the article sold is not monopolized by the vendor, but is one readily obtainable from other sources, such as ground chocolate (*Ghirdelli* v. *Hunsicker,* 164 Cal. 355) or flour. (*Fisher Flouring Mills Co.* v. *Swanson,* (Wash.) 137 Pac. 144.) The federal Supreme Court has never passed on this point. An amusing side light was thrown on commercial methods by a recent case wherein, seeking to obtain the benefit of the rule just stated, the makers of a well-known breakfast food contended that its much advertised product was nothing but "purified middlings."

Some glimmer of hope has been brought to the advocates of price restriction by the recent case of *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.,* 224 Fed. 566. In all the prior cases the question has come up either by an effort of the original vendor to enforce the price restriction or in a proceeding by the government for violation of the Sherman Act. In the Cream of Wheat case the manufacturer refused to sell to a certain dealer because of the latter's persistent refusal to maintain a standard retail price, and sent out circulars to the jobbing trade pointing out the "cut rate" practices of the retailer and asking the recipients to see to it that "no quantity [of Cream of Wheat] at any price shall reach directly or indirectly the [retailer] to enable them to continue their present menace to the legitimate trade." The retailer brought suit, alleging violation of the Clayton Act. (Fed. Stat. Annot. Pamph. Supp. July 1915, p. 118.) The court held that the manufacturer had the unquestionable right to refuse at his pleasure to sell to any person, and that no illegality was imparted to the transaction by the circulars sent to the trade. The soundness of the latter part of the decision is open to serious question. The right to refuse to sell is too clear to need citation of authorities, but when the court says that "if it had good right to refuse dealings itself with plaintiff, and without malice asked other people to do the same thing, so far only as Cream of Wheat was concerned, defendant was within its rights," its view seems to run counter to the fundamental rules as to conspiracy.

To illustrate a familiar rule by a well-known case, no right could be more absolute than that of Samuel Gompers to refuse to install a Bucks range in his own kitchen. But when he "without malice asked other people to do the same thing" he fell foul of the law, and only an error in the procedure by which he was prosecuted saved him from incarceration. (See *Gompers* v. *United States,* 221 U. S. 418, Id. 233 U. S. 604.) It is therefore quite probable that when the Cream of Wheat case gets to the Supreme Court the manufacturing interests will experience the unpleasant sensation of being fed on the broth they have brewed for their economic antagonists.

W. A. S.

COLLEGE FRATERNITIES AND THE LAW.

IT is a perverse characteristic of the human mind to be more receptive of an evil report and less ready to believe the truth about things in which it has no or merely an impersonal interest. Gossip has wide circulation because people in a *blasé* world look upon evil in other people who mean but little to them as an intensely more interesting subject to talk about than their virtues. The college fraternity has been presented to the American public, who as a vast majority have no interest in its existence and less in its welfare, by a kind of printed gossip in the form of readable novels with a consequent wide circulation. And like all gossip, as Thoreau says, it is unrepresentative. Such social novels as *The Ice Lens* and *Stover at Yale* present the evils of isolated cases in unrepresentative colleges so far as fraternities are concerned. But with this interesting source of information—the exclusive source beyond the tales told by the occasional type of returning freshman subdued with the idea that to be dissipated is to be manly—the misinformed are so positive in their convictions that it is about as fruitful to attempt to persuade them otherwise as it is to question the logical validity of woman's reasoning by intuition, which has been aptly defined as "the faculty that tells a woman she is right whether she is right or wrong."

To the mind impersonal to the life of the colleges, the fraternity is the incarnation of dissipation and profligacy reputed by the superficial to exist to an alarming extent at all colleges and universities. Doubtless there exist bad fraternities as well as good. But as Dr. David Starr Jordan says: "The fraternity system at its best is an aid to scholarship, to manners and to character; at its worst, it is a basis for vulgar dissension. The influence of a fraternity depends on the men who are in it. If these are above the average in character and work, it is lucky for the average man to be chosen into it. If they are below the average in this regard, the average man loses by joining his fortunes with it. When fraternities are sources of disorganization, there is something wrong in them or in the institution. The evil of dissipation exists in college outside of it. The average boy, or rather the boy a little below the average, believes that some degree of manliness inheres in getting drunk. Bismarck is reputed to have said that in the universities of Germany 'one-third the students work themselves to death, one-third drink them-

selves to death, and the other third govern Europe.' Something like this takes place in America, though the percentage of those who die of drink is less and the percentage of those who die of hard work is still lower."

Decidedly their general tendency is to make for order and to preserve discipline. Dean Thomas Arkle Clark of the University of Illinois, in a paper read before the Department of Higher Education of the National Educational Association in 1910, said: "Personally I have found the greatest help in the solving of disciplinary difficulties in the students themselves. I should have far more trouble than I do were it not for the reliance which I have upon individual students, and student organizations, to help control situations. One of the main reasons why I have favored fraternities, and other social organizations among students, is because I have found them of the greatest help to me in controlling and directing student activities, and in preventing dissipations and outbursts which might otherwise occur."

The truth of the matter, as is known by the legal profession who have in their ranks a large proportion of fraternity men, is that a "Greek" is certainly no less moral in his manner of living than the man whom circumstances or inclination have denied the benefits of university training.

But the author of this note holds no brief for the college fraternities. However much the general unpopularity of the college fraternities may be regretted, it has recently borne fruit in the passage in Mississippi of an "Anti-Fraternity Bill" entirely prohibiting them in any of the educational institutions of the state and providing that any student who is a member of one of them shall not be permitted to receive or compete for class honors, diplomas, or distinctions, or contend for any prize or medal, unless on matriculation in any of the state institutions he shall file with their officers an agreement in writing that he will not, during his attendance at the school, affiliate with his fraternity or attend its meetings or in any wise contribute any dues or donations to it. The statute expressly provides for the removal of any trustee or member of the faculty if he fails or refuses to enforce the act, from which we may infer that the legislation was not passed as a result of any efforts of theirs to suppress the organizations.

In *University of Mississippi* v. *Waugh*, 105 Miss. 623, the first case to construe that statute, it appeared that the complainant applied for admission to the law school of the university but was rejected because he refused to sign a pledge renouncing his allegiance and affiliation with the Kappa Sigma Fraternity at Millsaps College, although he was willing to pledge himself not to join or encourage any of the prohibited organizations at the university. The court, in dissolving an injunction order restraining the trustees from enforcing the act on the ground of the unconstitutionality of the statute, said:

"If complainant desires to enter the university, all he has to do is to promise obedience to the law of the state and the doors of the university will be open to him. But complainant says that by requiring him to sign a pledge to obey the law of the state while he is a student in the educational institutions of the state, and to renounce his allegiance to, and affiliation with, secret societies at other institutions, he is denied a right guaranteed to him by the Fourteenth Amendment to the Constitution of the United States. We fail to see any force in this contention. The Fourteenth Amendment to the Constitution of the United States was never intended to act as an accomplice to any young man who wanted to take advantage of the gratuitous advantages offered the youths to obtain an education, and yet refuse to obey and submit to disciplinary regulations enacted by the legislature for the welfare of the institutions of learning. The right to attend the educational institutions of the state is not a natural right. It is a gift of civilization, a benefaction of the law. If a person seeks to become a beneficiary of this gift, he must sumbit to such conditions as the law imposes as a condition precedent to this right. The act in question is not class legislation. It is quite the reverse, and seeks to destroy the possibility of the existence of any class at the educational institutions. No state or federal constitution is violated by this act in any way. Complainant is not deprived of any constitutional right, unless complainant can be said to have a constitutional right to breach the discipline of the school and set at naught the laws of the state. If it be true that the board of trustees, or the legislature, have extended the operation of the rule beyond what would seem to be the necessities, they have done it in order to effectuate the purpose of the legislature in prohibiting the existence of Greek-letter fraternities at any of the educational institutions in the state. The trustees, and the legislature, both have the right to say that any student who desires to enter the university shall not only promise not to affiliate with any Greek-letter fraternity while there, but that he shall not encourage the organization of any Greek-letter fraternity elsewhere, by paying dues, etc., while a member of that institution. If this were not true, there might be organized at the university, although the dues were paid elsewhere, as complete a Greek-letter fraternity, save the meetings, as if it were organized at the institution. Young men attending the educational institutions of the state, if allowed to hold their memberships in fraternities at other institutions while attending the state institutions, could as effectually carry on their fraternity relation as if an organization existed at the particular place. The legislature knew this, and to make the law effective prohibited all affiliation with secret societies while a student at a state institution. . . . We can see nothing in the act which is violative of any section of the constitution. Whether the act was a wise one, or an unwise one was a question for the legislature to determine. The legislature is in control of the colleges and universities of the state, and has a right to legislate for their welfare, and to enact measures for their discipline, and to impose the duty upon the trustees of each of these institutions to see that the requirements of the legislature are enforced; and when the legislature has done this, it is not subject to any control by the courts."

On appeal to the federal Supreme Court in *Waugh* v. *Board of Trustees of University of Mississippi*, 35 Sup. Ct. 720, it was held that the statute does not deny the student due process of the law or the equal privileges and immunities of a citizen of the United States, the court saying: "It is said that the fraternity to which complainant belongs is a moral and of itself a disciplinary force. This need not be denied. But whether such membership makes against discipline was for the state of Mississippi to determine. It is to be remembered that the university was established by the state, and is under the control of the state, and the enactment of the statute may have been induced by the opinion that membership in the prohibited societies divided the attention of the students, and distracted from that singleness of purpose which the state desired to exist in its public educational institutions. It is not for us to entertain conjectures in opposition to the views of the state, and annul its regulations upon disputable considerations of their wisdom or necessity. Nor can we accommodate the regulations to the assertion of a special purpose by the applying student, varying, perhaps, with each one, and dependent alone upon his promise. This being our view of the power of the legislature, we do not enter upon a consideration of the elements of complainant's contention. It is very trite to say that the right to pursue happiness and exercise rights and liberty are subject in some degree to the limitations of the law, and the condition upon which the state of Mississippi offers the complainant free instruction in its university, that while a student there he renounce affiliation with a society which the state considers inimical to discipline, finds no prohibition in the Fourteenth Amendment."

In the Mississippi case, it will be observed, the exclusion of the student from admission to the university on account of fraternity affiliation was under the express authorization of the state statute.

But it seems that the trustees of a college may validly enforce a similar rule against secret societies without express legislative authority. Thus in *People* v. *Wheaton College,* 40 Ill. 186, it appeared that the trustees of a privately endowed college, the charter of which invests them with the authority "to adopt and enforce such rules as may be deemed expedient for the government of the institution," expelled a student for violating a rule by becoming a member of a secret society, although it was incorporated by the state legislature. The court held that the rule was reasonable as being within the discretionary power conferred upon the trustees to regulate the discipline of the college. In reply to the contention that a student has the right to affiliate himself with a secret society in the same manner as any other citizen may do, the court said: "We do not doubt the beneficent objects of the society, and we admit that any citizen has a right to join it if the society consents. But this right is not of so high and solemn a character that it cannot be surrendered, and the son of the relator did voluntarily surrender it when he became a student of Wheaton college, for he knew, or must be taken to have known, that by the rules of the institution which he was voluntarily entering, he would be precluded from joining any secret society. When it is said that a person has a legal right to do certain things, all that the phrase means is, that the law does not forbid these things to be done. It does not mean that the law guaranties the right to do them at all possible times and under all possible circumstances. A person in his capacity as a citizen may have the right to do many things which a student of Wheaton college cannot do without incurring the penalty of college laws. A person as a citizen has a legal right to marry, or to walk the streets at midnight, or to board at a public hotel, and yet it would be absurd to say that a college cannot forbid its students to do any of these things. So a citizen, as such, can attend church on Sunday or not, as he may think proper, but it could hardly be contended that a college would not have the right to make attendance upon religious services a condition of remaining within its walls."

Previous to the Waugh case, a distinction had been made between the power to exclude a student because of membership in a fraternity and the power to compel a student after admission to forego active association with his fraternity. Thus in *State* v. *White,* 82 Ind. 278, 42 Am. Rep. 496, it appeared that the trustees of a state university passed a rule without express statutory authority making membership in a Greek-letter fraternity a disqualification for admission. A prospective matriculate refused to sign the following pledge: "I do hereby state upon my honor that in the month of April last, when I applied for and received an honorable dismission from Purdue University, I was not a member of any so-called Greek fraternity, or other college secret society, and at the time I connected myself with a chapter of the Sigma Chi fraternity I did not intend returning to Purdue University. I do solemnly promise that I will disconnect myself as an active member of the Sigma Chi fraternity during my connection with Purdue University." The application for a mandamus to compel the college officials to admit the student alleged: "And said relator avers that said Sigma Chi fraternity is one of a class of secret societies, which are and for many years have been established, permitted and encouraged in very many of the oldest and best colleges of the United States; that such societies are commonly known as 'Greek Fraternities,' from the fact that they are usually named from letters of the Greek alphabet; that such societies embrace among their members presidents and professors in colleges, senators and representatives in Congress, judges, lawyers, physicians, ministers of the gospel and very many persons of almost every calling, distinguished for their intellectual and moral worth; that the object and aim of such societies is to elevate the standard of education, and to secure among their members advanced culture in the classics and in the liberal arts and sciences; that the basis of such societies is morality; that there is nothing in the constitutions, aims or objects of such societies which is inimical to the constitution and laws of the United States, or to the constitution and laws of the state of Indiana, and that the tendency of such societies is to promote the moral and educational interests of their members, the true interests of learning, and the highest and best interests in every department of the institutions with which they are connected."

The appellate court, in reversing the action of the lower court in striking out as irrelevant and immaterial the part of the complaint set forth above, said:

"The admission of students in a public educational institution is one thing, and the government and control of students after they are admitted, and have become subject to the jurisdiction of the institution, is quite another thing. The first rests upon well established rules, either prescribed by law or sanctioned by usage, from which the right to admission is to be determined. The latter rests largely in the discretion of the officers in charge, the regulations prescribed for that purpose being subject to modification or change from time to time as supposed emergencies may arise. Having in view the various statutes in force in this state touching educational affairs, and the decisions of this court, as well as of other courts, bearing on the general subject, we think it may be safely said that every inhabitant of this state, of suitable age, and of reasonably good moral character, not afflicted with any contagious or loathsome disease, and not incapacitated by some mental or physical infirmity, is entitled to admission as a student in the Purdue University. . . . It is clearly within the power of the trustees, and of the faculty when acting presumably, or otherwise, in their behalf, to absolutely prohibit any connection between the Greek fraternities and the university. The trustees have also the undoubted authority to prohibit the attendance of students upon the meetings of such Greek fraternities, or from having any other active connection with such organizations, so long as such students remain under the control of the university, whenever such attendance upon the meetings of, or other active connection with, such fraternities tends in any material degree to interfere with the proper relations of students to the university. As to the propriety of such and similar inhibitions and restrictions, the trustees, aided by the experience of the faculty, ought, and are presumed to be, the better judges, and, as to all such matters, within reasonable limits, the power of the trustees is plenary and complete. . . . But the possession of this great power over a student after he has entered the university does not justify the imposition of either degrading or extraordinary terms as a condition of admission into it. Nor does it justify anything which may be construed as an invidious discrimination against an applicant on account of his previous membership in any one of the Greek fraternities, conceding their character, object and aims to be what they were averred to be in the complaint. Every student, upon his admission into an institution of learning, impliedly promises to submit to, and to be governed by, all the necessary and proper rules and regulations which have been, or may thereafter be, adopted for the government of the institution, and the exaction of any pledge or condition which requires him to promise more than that operates as a practical abridgment of his right of admission, and involves the exercise of a power greater than has been conferred upon either trustees or the faculty of Purdue University. Regulations adopted by persons in charge of a school are analogous to by-laws enacted by municipal and other corporations, and both will be annulled by the courts when found to be unauthorized, against common right or palpably unreasonable. . . . If mere membership in any of the so-called Greek fraternities may be treated as a disqualification for admission as a student in a public school, then membership in any other secret or similar society may be converted into a like disqualification, and in this way discriminations might be made against large classes of the inhabitants of the state, in utter disregard of the fundamental ideas upon which our entire

educational system is based. Membership in an inherently immoral society or fraternity might perhaps be urged against the admissibility of a student, upon the ground that such relation to such a society or fraternity tended to establish a want of moral character or moral fitness in the applicant, and in that view the allegations of the complaint as to the character, objects and aims of the Sigma Chi society, and other kindred Greek fraternities, became material and ought not to have been struck out."

The members of a high school Greek-letter fraternity may be denied the privileges of other students without excluding them from the class-rooms. Thus in *Wayland* v. *Board of School Directors*, 43 Wash. 441, 7 L. R. A. (N. S.) 352, wherein the evidence clearly showed that the fraternity involved in the litigation was productive of insubordination and breach of discipline, the court held that the school board directors have the power to deny a student all the privileges of the high school other than attendance at classes, as long as he retains his membership, even though the fraternity meetings are held outside of the hours and precincts of the school and under parental protection.

The ladies likewise have been drawn into litigation involving their fraternity, but justice has been meted out to them according to the uniform graciousness of man-constituted tribunals. Their disagreements, however, have been among themselves. As the facts appear in *Heaton* v. *Hull*, 59 N. Y. S. 281, 28 Misc. 97, affirmed 64 N. Y. S. 279, it seems that a Browning society in a college at the request of the Kappa Kappa Fraternity was transformed into the local Beta Beta Chapter of the fraternity. Everything went on serenely for about seventeen years when the grand president made a short visit to the chapter. Leaving the hospitality of Beta Beta with no intimation of hostile intention, she returned home and preferred charges against the standing and lack of culture and refinement among the women of the college and the town. She quietly used to advantage her persuasive influence with the officers and when an injunction order was served on her, she then sent a notice during the college vacation to the secretary of the local chapter, who was two hundred miles from the place appointed for the prospective proceedings, that the grand council would pass on the question of the withdrawal of the charter. No official action could be taken by the scattered members of the local chapter during vacation and no correspondence could be had with the members of the other chapters because a directory of the members was refused by the national officers. As a result of the "hearing" the charter was revoked and Beta Beta instituted injunction proceedings to prevent the consummation of the expulsion. The court in granting the injunction complimented the ladies as follows: "Nor was it claimed upon the trial that the charges on which the original prosecution of the chapter was founded were ever sustained, nor was proof here offered of the truthfulness of those accusations. On the contrary, so far as the masculine judgment of feminine culture and refinement, limited as it is in the finer lines, can judge of such delicate subjects from the appearance of the ladies who were witnesses upon the trial, the members of other chapters would need to be of a rare order, to justify holding themselves so superior in acquired and natural qualities as to render uncongenial to them the active and alumnæ members of Beta Beta Chapter." And this, it is felt, is a conclusive finding of fact and sound law.

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"I was asked to assume, in the absence of evidence, that the law in Monte Carlo is the same as in England as regards gaming, but I decline to make this assumption; it is notorious that at Monte Carlo roulette is not an unlawful game." *Per* Bray, J., in Saxby *v.* Fulton, (1910) 2 K. B. 211.

Cases of Interest.

VALIDITY OF STATUTE PROVIDING FOR CENSORSHIP OF MOVING PICTURE FILMS.—A statute appointing a state board of censors to regulate the operation and exhibition of moving picture films was upheld as valid in Buffalo Branch, Mutual Film Corporation *v.* Breitinger, (Pa.) 95 Atl. 433, on the ground that the promotion of public morals and public health is a chief function of government, to be exercised at all times as occasion may require; that the method by which the result may be accomplished depends upon the circumstances of the particular case, and that the largest legislative discretion is allowed.

LIABILITY OF PHYSICIAN FOR FAILURE TO PERFORM CONTRACT TO ATTEND PATIENT.—The Supreme Court of Mississippi in Hood *v.* Moffett, 69 So. 664, applies a well-settled rule of contracts to a contract made by a physician to attend a patient at the time of her confinement, holding that he is not excused from performing the same by reason of the fact that when his services are needed he is attending another patient who is in a precarious condition and cannot with safety be left. The court says: "If a person assumes obligations to different parties, the performance of which may become incompatible with each other, both parties being entitled in equal right, is it an excuse for a default to one party that both obligations could not be performed, and that the person bound chose to perform his obligation to the other? In Heirn *v.* McCaughan, 32 Miss. 17, 66 Am. Dec. 588, this question was answered in the negative. Appellant's contract in this respect was without qualification, and a rule is that 'as a man consents to bind himself so shall he be bound.' . . .3 Elliott on Contracts, § 1891."

DAMAGES FOR FAILURE TO FURNISH MULE WITH WHICH TO CULTIVATE SOIL AS INCLUDING DIMINISHED YIELD.—The case of Perry *v.* Kime (N. C.) 86 S. E. 337, holds that in an action for damages for a failure on the part of the defendant to perform a contract to furnish the plaintiff a mule with which to cultivate the soil, a recovery on account of the diminished yield of the crop will not be allowed, upon a mere comparison of the crop yield of one year with that of another. Allen, J., for the court says: "We have been confronted, on one hand, with the legal principle that, when there is a breach of contract or a tort, and damage ensues as the direct and natural result, the party injured is entitled to just compensation, and that the uncertainty as to amount is not more doubtful than in other cases in which recoveries are sustained here and elsewhere, such as profits in business under certain conditions and physical pain and mental anguish, and, on the other, with the knowledge that so many and such diverse circumstances affect the yield of crops that it is almost impossible to find out the cause or to estimate the result. The character of the soil and its condition, the kind of seed used, when planted, and how, the preparation of the soil for planting, the quality of fertilizer, the quantity and the time and manner of its application, the cultivation of the crop, the harvesting of the crop, the seasons, and other circumstances enter into the estimate of what ought to be made, and, when all are favorable, it is rare that the owner of land gathers in the fall what he expected in the spring. A delay of a week in planting may make or destroy the crop, and sometimes, under apparently similar conditions, there is a good crop on one side of the road and a poor yield on the other side. These considerations have led to the conclusion that a recovery of damages on account of the diminished yield of the crop will not be allowed upon a mere comparison of the crop yield of one year with that of another."

STATEMENT BY PRIEST THAT MONEY COLLECTED BY CHURCH COULD NOT BE ACCOUNTED FOR AS SLANDER.—In an action for slander reported in Laurent *v.* Van Somple, Wis. 154 N. W. 366, the complaint charged in substance, that the plaintiff was a blacksmith and wagon maker in business as such at Lena, Oconto county, Wis.; that the defendant was a priest and the pastor of the Catholic Church at Lena; that in January and February, 1913, the plaintiff was a trustee of said church and secretary of the board of trustees having charge of the collection of the accounts of the parish; that on January 18, 1914, the defendant while speaking to the congregation about the accounts of the church, and the moneys collected and handled by the trustees and the plaintiff, after reading the accounts, maliciously spoke of the plaintiff in the presence of the entire congregation the following words: "What was done between January and March, 1913, I am not responsible for; there was sixty-odd dollars collected that I cannot account for. I have nothing to show; this is for accounts of January and February, 1913. The books show that this was collected, but there is no account to show what became of it"—meaning to charge, and being understood by the hearers to charge, the plaintiff with larceny and embezzlement of the funds of the church. It was also alleged that by reason of the speaking of the words the plaintiff had been damaged in his business and lost numerous customers and had been greatly injured in his reputation, all to his damage in the sum of $3,000. A demurrer ore tenus to the complaint being sustained the plaintiff appealed to the Supreme Court which affirmed the judgment below, Winslow, C. J., saying: "(1) The words alleged do not in their natural and ordinary meaning charge a criminal offense, but merely slovenly or imperfect bookkeeping; (2) if it be held that they are defamatory in their nature, and hence slanderous, because special damage is alleged (Servatius *v.* Pichel, 34 Wis. 292), the answer is that loss of customers by a blacksmith cannot be held to be the natural or proximate result of a charge of bad bookkeeping."

LANGUAGE USED IN SERMON AS CONSTITUTING BREACH OF PEACE.—That a breach of peace may result from language used in a sermon is the holding of the Kentucky Court of Appeals in Delk *v.* Com., 178 S. W. 1129, which affirmed a judgment of the Circuit Court convicting the defendant of that offense. The facts showed that the appellant, James L. Delk, a minister of Nazarine Revival Mission, while preaching to a large audience at Science Hill, Pulaski county, in November, 1914, used the following language: "Some men will stand around the depot, stores, the post office, and street corners, and watch the women pass, and size them up, the foot, ankle, and form, and they would be willing to give five dollars for the fork." For using these words appellant was convicted and fined $67.50 for having committed a breach of the peace, under a warrant issued by the judge of the Pulaski county court. Appellant appealed to the circuit court, and upon a trial in that forum the appellant was again found guilty, and fined $62.50 and the costs. He then appealed to the court of appeals. In affirming the judgment of the court below the Court of Appeals, through Miller, C. J., used language as follows: "The term 'breach of the peace' is quite broad, and includes, not only all violations of the public peace or order, but acts tending to the disturbance thereof, including acts of public turbulence or indecorum, in violation of the common peace and quiet. Applying this definition to the nasty and obscene words used by appellant, we are of opinion they come within the definition, and constitute a breach of the peace. There was no possible excuse for the use of such language in the pulpit or elsewhere; and that fact alone is sufficient to incite all right-thinking persons to indignation, if not violence. People *v.* Burman, 154 Mich. 150, 117 N. W. 589, 25 L. R. A. (N. S.) 251; State *v.* White, 18 R. I. 473, 28 Atl. 968. The appellant's excuse that he was merely rebuking the sin of impurity, that he did not intend to disturb or embarrass any one, but made the statement as a warning and rebuke to sin, is wholly without justification. It does not avail appellant for him to say he has a right to propagate his religious views. That right is not denied; but one will not be permitted to commit a breach of the peace, under the guise of preaching the gospel. If one be licensed to use the pulpit for such disgraceful performances as the appellant admits he was guilty of in this case, then women and children are to be insulted with impunity by the use of the most obscene vulgarity in places where they go to worship. It is well known that an act which, if committed at a certain time or place, would not amount to a breach of the peace, might well be considered as a crime, if committed at another time or place, and under different circumstances. People *v.* Johnson, 86 Mich. 175, 48 N. W. 870, 13 L. R. A. 163, 24 Am. St. Rep. 116. If this be not an act of public indecorum, in violation of the common quiet, and consequently a breach of the peace, within the meaning of the definitions above given, it would be difficult to imagine such a breach, short of actual violence. That it tended to provoke violence at the hands of outraged parents and right-thinking men there can be little doubt."

ANNULMENT OF MARRIAGE FOR FAILURE TO DISCLOSE INSANITY TAINT.—In Allen *v.* Allen, N. J. Ch. 95 Atl. 363, which was a proceeding begun by bill to annul a marriage on the ground that at the time of the marriage the defendant knew that he was afflicted with a taint of hereditary insanity, but stealthfully concealed the fact from the complainant, the bill was dismissed. The defendant was insane at the time the bill was filed. The reason for the dismissal was that such concealment did not warrant an annulment, Leaming, V. C., saying: "In considering what misrepresentations can be deemed to affect an essential of the marriage relation, the learned Chancellor, at page 26 of 62 N. J. Eq., page 736 of 49 Atl., in the reported case, says: 'Misrepresentation as to freedom from disease in general or concealment of the existence of a disease, although one in common apprehension communicable and transmissible to offspring, cannot, in my judgment, be so regarded. They fall within the line of false representations as to family, fortune, or external condition, declared by Mr. Justice Bedle [in Carris *v.* Carris, supra] to be insufficient to justify the annulment of marriage. As to such and like matters the parties take each other for better or for worse. 1 Bishop, Mar., D. & S. § 457.' From the above quotation it is obvious that in the opinion of that learned Chancellor the ground upon which the bill in the present case seeks a decree is insufficient. The adjudicated cases in other states afford little aid. In a recent case in the Supreme Court of New York (Sobol *v.* Sobol, 88 Misc. Rep. 277, 150 N. Y. Supp. 248) tuberculosis, concealed at marriage, was held to afford ground for annulment. While the opinion in that case refers to the effect of the disease upon offspring, the primary ground of the decision appears to be that the danger of infection from tuberculosis, like syphilis, renders contact dangerous, and accordingly effects an essential of the marriage relation. A somewhat extended review of earlier cases will be found in Lyon *v.* Lyon, 230 Ill. 366, 82 N. E. 850, 13 L. R. A. (N. S.) 996, 12 Ann. Cas. 25. I think it will be found that, in the absence of statutes specifically authorizing a decree of annulment, or declaring the marriage unlawful at the time it was contracted, no satisfactory authority exists to support the view that a marriage contract, voidable only, can be annulled by a court of equity for fraudulent concealment by a party touching his or her physical con-

dition, except in the extreme instances already referred to of disease of either party of a nature to render contact seriously dangerous to the other or pregnancy of the wife. The importance of healthful offspring cannot be over-estimated, but that consideration appropriately belongs to the legislature. In cases of impotency, involving, as they do, total failure of issue, this court has refused relief by either decree of annulment or dissolution of the marriage contract until our legislature authorized a divorce on that ground. Anonymous, 24 N. J. Eq. 19."

VALIDITY OF STATUTE PROHIBITING THE ADVERTISING OF TREATMENT OR CURE OF VENEREAL DISEASES.—The length to which courts go in upholding legislation in the interest of public morals is strikingly shown in the case of State *v.* Hollingshead, Ore. 151 Pac. 710. The defendant in the case was indicted for the violation of an act in part as follows: "Any person who shall advertise or publish any advertisement intended to imply or to be understood that he will restore manly vigor, treat or cure lost manhood, lost power, stricture, gonorrhea, chronic discharges, gleet, varicocele or syphilis, or any person who shall advertise any medicine, medicinal preparation, remedy or prescription for any of the ailments or diseases enumerated in this act shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than $100 nor more than $1,000, or by imprisonment in the county jail for a period of not less than six months nor more than twelve months, or by both such fine and imprisonment." The indictment charged the defendant with having violated this law by advertising a certain proprietary remedy, guaranteed to cure gonorrhea or gleet. The defendant demurred to the indictment, assigning as the only ground therefor that the act was unconstitutional and void. The trial court overruled the demurrer, and, the defendant refusing to plead over, a judgment of conviction was entered against him from which an appeal was taken to the Supreme Court of Oregon which affirmed the judgment below for reasons stated by it as follows: "The next point presented is that the act is unconstitutional and void, in that it is class legislation, and is a violation of the constitutional guaranty of equal protection of the law. This may well be considered in connection with the final proposition that the act is void because it is not within the legitimate scope of the police power of the state and is a violation of the constitutional provision that no person shall be deprived of life, liberty, or property without due process of law. For many years it has been recognized by publicists and legislators that some drastic action is necessary to check certain social evils and to protect youthful and inexperienced humanity, not only from easy access to vicious and immoral practices, but also from the schemes of designing men, who, for the sake of financial profit, would prey upon the calamities of the unfortunate who have sowed the wind and reaped the whirlwind. Further than this, it has been thought that the act of spreading broadcast, by means of advertising, the idea that certain venereal diseases are easily and cheaply cured, is against public policy, in that it has a decided tendency to minimize unduly the disastrous consequences of indulging in dissolute action. These views were evidently the moving principle of our legislators in the passage of the act under discussion. The purpose of the act is clearly in the interest of public morals. It is not class legislation, for it applies to all who may be engaged in a like business."

CONTRIBUTORY NEGLIGENCE OF HUSBAND DRIVING AUTOMOBILE AS IMPUTABLE TO WIFE RIDING WITH HIM.—There is some conflict of authority on the question whether a wife injured while riding in an automobile driven by her husband can recover damages, although the injury is the result of the negligence of a third person, where it also appears that the husband was guilty of contributory negligence. Some authorities hold that the negligence of the husband must be imputed to the wife. But in Knoxville, etc., Light Co. *v.* Vangilder (Tenn.) 178 S. W. 1117, a contrary rule has been adopted. The opinion contains a valuable discussion of the question, and in part is as follows: "The rule that the occupant of a vehicle will be imputed with the negligence of the driver has for its basis the leading case of Thorogood *v.* Bryan, 8 C. B. 115; but the authority of that case has often been denied in other jurisdictions and was overruled finally by the English courts. The Bernina, L. R. 12 Prob. Div. 58. The doctrine of Thorogood *v.* Bryan has now been quite generally discarded as unsound, and the negligence of the chauffeur or driver of an automobile or carriage is not imputable to the person riding in the vehicle. . . . The better rule in cases of husband and wife, and the one now most generally accepted by the courts, is that the negligence of the husband cannot be imputed to the wife to prevent recovery by her for injuries she has received. . . . We see no reason why the negligence of the husband should be attributable to the wife under the circumstances in this case. The reasoning applied in cases holding that the negligence of the driver will be imputed to the rider in some instances was that the driver was the servant of the one riding with him and under the control of the master. That is undoubtedly a sound distinction, where the one driving is under the control of another person and is only carrying out that person's orders, and the one riding in such case should be held chargeable with the negligence of his servant. This distinction, however, cannot apply as between husband and wife, because the wife has not that direction and control, and is not chargeable with the manner of driving, or in directing how the driving shall be done, as appears in the cases referred to. It is not supposed that the wife has charge over matters of this kind. She rather relies upon her husband, and trusts to his guidance and protection. If he blunders, why should she be chargeable, when she is without fault? Of course, if an adult, who while riding in a vehicle driven by another sees, or ought by due diligence to see, a danger not obvious to the driver, or who sees that the driver is incompetent or careless, or is not taking proper precautions, it is his duty to give some warning of danger, and a failure to do so is negligence. Ordinarily, however, a driver is intrusted with caring for the safety of a carriage and its occupants, and unless the danger is obvious, or is known to the passenger, he may rely upon the assumption that the driver will exercise proper care and caution. Schultz *v.* Old Colony St. R. Co., 193 Mass. 309, 79 N. E. 873, 8 L. R. A. (N. S.) 597, 118 Am. St. Rep. 502, 9 Ann. Cas. 402; Colorado, etc., R. Co. *v.* Thomas, 3 Colo 517, 81 Pac. 801, 70 L. R. A. 681, 3 Ann. Cas. 700. We think this rule that the rider should exercise diligence when proper to do so would also devolve upon the wife riding with her husband. If the wife should see a danger not apparent to the husband, or observe that he was about to run into danger, it would be her duty to notify him, or else she would be chargeable with neglect of her own safety, which in some cases might bar her right of recovery for injuries received. But in the present case there was nothing that the wife could have done in the emergency presented which would have altered the situation, trusting as she was to her husband's guiding the car in safety, and we think that his negligence cannot be imputed to her under these circumstances."

LIABILITY OF BOTTLER OF BEVERAGE TO CONSUMER WHO IS MADE SICK BY REASON OF FOREIGN SUBSTANCE THEREIN.—In LAW NOTES for June, 1914, we commented on the case of Jackson Coca-Cola Bottling Co. *v.* Chapman (Miss.) 64 So. 791,

which affirmed a judgment of the lower court in favor of the plaintiff for damages, the facts showing that he purchased a bottle of Coca-Cola from a retailer and was made sick on account of the presence therein of a decomposed mouse. The defendant was the bottler of the beverage and was held liable. Another case with similar facts recently arose in Tennessee, namely, Crigger *v.* Coca-Cola Bottling Co., 179 S. W. 155, the facts being as follows: The plaintiff drank a bottle of Coca-Cola, a beverage sold generally on the market as wholesome and harmless. In doing so he took into his mouth, and partially swallowed, a decomposed mouse, which caused him to become very sick, and he sued for damages. The defendant did not make the beverage, but bought it in barrels from the manufacturer and bottled it. The bottle in question was sold by defendant to a local dealer and by him sold to plaintiff. The question presented was whether a bottling company engaged in bottling Coca-Cola, a beverage made by another, warranted to the ultimate consumer that its bottle contained no injurious, harmful, or deleterious substance, or was the bottling company liable only for negligence, or the omission to use proper care in the work? The proof showed that the method used at the bottling plant was fully equal to the best. The empty bottle was passed through vats of strong caustic soda solution and then rinsed under pressure with water as hot as the bottle would stand, then inspected by the use of a strong electric light, then brushed out with a rapidly revolving brush and again rinsed; the bottle was again inspected over a brilliant electric light, and then filled with Coca-Cola, using a fine strainer, when it was capped, and finally inspected. The trial judge charged the jury on the theory that if the defendant was free from negligence in the bottling of the beverage there was no liability. The jury found in favor of the defendant, and judgment was accordingly entered. The Court of Civil Appeals affirmed the judgment on the ground that the declaration averred negligence and that the jury had found against plaintiff on that question. The Supreme Court likewise affirmed the judgment and after reviewing the authorities reached conclusions as follows: "That one who prepares and puts on the market, in bottles or sealed packages, foods, drugs, beverages, medicines, or articles inherently dangerous owes a high duty to the public, in the care and preparation of such commodities, and that a liability will exist regardless of privity of contract to any one injured for a failure to properly safeguard and perform that duty. This liability is based on an omission of duty or an act of negligence, and the way should be left open for the innocent to escape. However exacting the duty or high the degree of care to furnish pure foods, beverages and medicines, we believe with Judge Cooley, as expressed in Brown *v.* Marshall, supra, that negligence is a necessary element in the right of action, and the better authorities have not gone so far as to dispense with actual negligence as a prerequisite to the liability. In fact, there is no logical basis of liability for personal injury without some negligent act or omission. In the present case, the mouse may have gotten into the bottle by some unavoidable accident, but proper inspection should have disclosed the fact, and if in the light of the finding by the jury it were fairly inferable that the mouse was bottled up at the bottling company plant, we would consider it our duty to reverse the case, because of the high duty resting on the defendant. But the jury was told to inquire whether the mouse was in the bottle when it left the hands of this company, and, if so, whether its presence there was due to the negligence of the company. The court suggested to the jury the theory of the defendant that there was opportunity for malevolent persons to open this bottle and put the mouse into it before or after it left the factory, and they should use their common sense as men in deciding the issue. In view of the extraordinary care shown to exist at the bottling plant and the verdict of the jury, it may be that this thing occurred without the fault of the defendant. There are sufficient inferences that may be drawn from the facts to sustain the finding."

New Books.

Voting Trusts. A Chapter in Recent Corporate History. By Harry A. Cushing of the New York Bar. New York: The Macmillan Company. 1915.

The voting trust which has been referred to as a "comparatively modern and useful device in corporate management" has assumed so much importance as fully to warrant a book on the subject and this we have in the volume at hand. There are two hundred and fifteen pages within its covers exclusive of the index, thirty-six of which are given up to a chapter entitled "The Significance of Voting Trusts." Here the history of voting trusts is sketched and its importance in present day affairs impressed on the reader. Then follows a chapter devoted to an examination of the contents of typical voting trust agreements. The third chapter deals with the law of the subject, and the fourth and last chapter contains a collection of forms, namely, voting trust agreements, certificates, extension agreements, documents incident to extensions and notices of termination. The author states that in its early form the typical voting trust agreement evidenced little more than the stockholders' transfer of their certificates absolutely to trustees, or in some instances to a trust company, and the undertaking on the part of the trustees to deliver stock certificates on the expiration of the trust and in the meantime to distribute to the holders of trust certificates the amount of any dividends paid upon the stock. The powers of the trustees were, for the time being, those of owners of the stock, and the absence of restrictions indicates the complete dependence then placed on the trustees, both to meet any unforeseen contingencies and to take all steps which might seem to them appropriate. The development from the occasional use of this simple arrangement has been marked, however, both by a great variety of detailed provisions and by the application of such trusts to many concerns of substantial importance. The adoption of a voting trust has usually been incident to the rehabilitation of a corporation without foreclosure or to its reorganization through foreclosure, and the device has served as a form of prudent control either of the existing stock or of the newly issued stock of the successor corporation. The author further says that it is rare that a voting trust is so formed as to tend to insure a perpetual or even an unduly prolonged control by the voting trustees. Indeed, it is noteworthy that in few instances does it appear that such a trust has been created primarily for the purpose of maintaining control in the hands of those who might not otherwise be able, or entitled, to exercise it. On the contrary, in practically all instances of importance it is obvious that the design has been to secure and maintain control not for its sake alone, but to insure conservative conduct of the corporation's affairs for the benefit both of the security holders and of the stockholders themselves. In the great majority of instances the voting trust has been only for the period of five years, a limit apparently adopted in recognition of the New York statute, and elsewhere used in imitation of what there has become practically a universal term, due to regarding as restrictive what may possibly be deemed a

permissive phrase in the law. Commenting on the value of voting trusts Mr. Cushing has this to say: "The use of a voting trust has been criticised as readily tending to undue concentration of power, and while this criticism is in a measure correct, it is significant that in no important instance has power so acquired been abused. Indeed, responsibility has been more specifically located, and a small body of trustees has naturally been more solicitous of acting correctly than is always the case with a temporary proxy committee or with a large board whose size alone tends to minimize the feature of personal responsibility. Moreover, the use of the voting trust has unquestionably produced fixity of well-considered policies, the maintenance of harmonious administration for a period sufficient to test such policies, and at the same time has secured the more consistent personal attention of advisers commanding the confidence of those whose capital was involved. Rarely, if ever, has a justified attack been made on the conduct of a well chosen group of voting trustees." We do not take it that Mr. Cushing has intended his book for the lawyer merely, for the topic and its handling suggest a wider appeal. Certainly bankers, business men and students generally would profit from an understanding of railway trusts which the volume before us is so admirably calculated to afford.

A History of Currency in the United States, with a Brief Description of the Currency Systems of All Commercial Nations. By A. Barton Hepburn, LL.D. New York: The Macmillan Company. 1915.

Mr. Hepburn's experience and high standing in the financial world are a sufficient guarantee of the authoritativeness of a work by him on the currency. By virtue of services rendered as a former Comptroller of the Currency and as the present chairman of the board of directors of the Chase National Bank, not to mention services rendered in other important offices, he has qualified as an expert on money matters. The aim of Mr. Hepburn in this book of his has been to place before the public all the essential facts as to currency, coinage, and banking, from the wampumpeage currency of the Colonies to the notes of the Federal Reserve Bank together with the indispensable political history connected therewith. The author calls the volume a "busy man's library." There is, however, a Bibliography pointing the way to further and more extended research. Concerning the scope of the work, Mr. Hepburn says: "The basis of this book is 'The Contest for Sound Money,' published in 1903; but that earlier work has been rewritten and supplemented so that as now issued it covers the period from the adoption of the United States Constitution down to the present time. It deals fully and explicitly with our coinage laws and coinage by our mints; it gives the complete history of the national banking system, and contrasts and compares the banking systems of the various states; it relates the history of the legal tender notes and discusses them as a substitute for taxation, touching upon the political history of the period inasmuch as the question of the legality of these notes was made a political issue; the history of the silver controversy is fully told, especially from the so-called 'crime of 1873,' when the silver dollar was demonetized, down to the gold standard act of 1900; the various international efforts in favor of the bimetallic standard are likewise set forth." An appendix contains various important statutory enactments affecting currency since 1866, the Aldrich plan for monetary legislation and the Federal Reserve Act. The currency question has been so prominently before the people since the nomination of Mr. Bryan for the presidency in 1896, that a work of the character of the one before us should be warmly welcomed by a large number of readers.

The Neutrality of Belgium. A Study of the Belgian Case under Its Aspects in Political History and International Law. By Alexander Fuehr. New York and London: Funk & Wagnalls Company. 1915.

This volume comes from the press at a time when practically the whole of the Western world and some of the Eastern have strong notions regarding the justice or injustice of the invasion of Belgium by Germany. In the heat of battle we have taken sides, we have made up our minds for the time being, and it would require very convincing evidence indeed to cause us to make a shift. We want to believe that on the moral questions which have arisen in this Great War our side is right. Because of this it is doubtful if any book like the one at hand will for the present make many converts. When the war is over and we see things from a distance we will be better able to weigh the evidence presented by such a book in favor of the one side or the other. Dr. Fuehr is clearly of opinion that Germany is right in the contention that it committed no wrong to Belgium in invading the latter's territory, and he argues the question at length. The manner of treatment is stated by him as follows: "This study treats the subject of Belgium's neutrality under two aspects —the aspect of political history and the aspect of international law. The first part will outline the origin of that legal institution, as well as its breakdown, revealing, in either phase, the traditional deep concern of Great Britain in Belgium as her continental bulwark. The second part will deal with the question whether, under the established rules of international law, Germany, by her invasion of Belgium, violated international obligations, and whether, under the said rules, her action presents itself as right or wrong."

Dr. Fuehr traces the early history of Europe so far as it concerns the government of the country which eventually came to be known as Belgium, giving particular attention to the Quintuple treaty of 1839 wherein Belgium was declared to be an independent and perpetually neutral state, and her neutrality was guaranteed by the great powers. The author then traces the alleged breakdown of Belgium's neutrality by virtue of secret and inconsistent acts, giving considerable space to the working out of a contention that the Quintuple treaty was terminated by "changed conditions" and certain temporary treaties made in 1870. There is a chapter devoted to the question whether "self-preservation" is a justification for a belligerent nation invading a neutral country, and as to this the attitude of the writer is well summed up in language as follows: "The critics of Germany's invasion of Belgium affirm that, whatever breaches of her perpetual neutrality vows that country might secretly have committed, Germany, being unaware of them, having, at any rate, never formally protested against them, is not free to adduce them as an exculpation of her action in August, 1914. Without subscribing to the soundness of such reasoning, it must be emphasized that, even if the guarantee under the treaties of 1839 could be considered still as of binding force, and even if all the parties to those treaties had faithfully fulfilled the duties incumbent on them, Germany's action would yet be perfectly justifiable, by the 'right of self-preservation,' universally recognized in international law. As a matter of fact, the German Chancellor, in the first official statement on the invasion of Belgium by German troops, has justified this action exclusively by invoking Germany's right of self-preservation. In his speech in the Reichstag, on August 4, 1914, the text of which, as far as it refers to Belgium, will be found in the Appendix, he said nothing about a violation of the Quintuple or any other guarantee of Belgium's neutrality. He merely spoke of the neutrality of Luxembourg and Belgium, as he might have spoken of that of Holland and, with the utmost frankness, characterized Germany's invasion of their territories

as, in itself, contrary to the rules of international law, though warranted by Germany's right of self-preservation. It will be seen from the following expressions of most prominent authorities on international law, that the right of self-preservation precedes and underlies every other obligation. All treaties are subordinated and subject to this basic and inherent right. It is implied, and read into, every treaty and contract, anything to the contrary notwithstanding. This primary right cannot be lost or bargained away; it is unalienable." Dr. Fuehr has made out a case for Germany which satisfies him as to her guiltlessness, and his book will no doubt be pleasing to her supporters.

News of the Profession.

FEDERAL JUDGE NAMED.—President Wilson has appointed Tillman D. Johnson of Ogden, Utah, United States district judge for Utah.

ATTORNEY GENERAL OF INDIANA DIES.—Richard M. Milburn, attorney general of Indiana, died at Indianapolis on November 9. He was 50 years of age and had held office since the first of the year.

THE PROBATE JUDGES' ASSOCIATION OF MISSOURI will hold its second annual meeting at Sedalia, Mo., on December 6 and 7. It is expected that former judge Henry Lamm will make the principal address.

NEW OREGON JUDGE.—D. V. Kuykendall of Klamath Falls has been appointed by Governor Withycombe to succeed the late George Noland as circuit judge of the Thirteenth Judicial District of Oregon.

DISTINGUISHED NEW YORK LAWYER DIES.—Andrew J. Shipman, aged 68, a distinguished lawyer and Regent of the University of the State of New York, died at New York city on October 17.

DEATH OF WASHINGTON JURIST.—Justice Herman D. Crow of the Washington Supreme Court died at Olympia, Wash., on October 22. Judge Crow was 64 years of age and had been on the Supreme Bench since 1905.

APPOINTED TO BENCH IN WASHINGTON.—Frederick Bausman, a prominent attorney of Seattle, has been appointed by Governor Lister to the bench of the Washington Supreme Court as successor to the late Herman D. Crow.

RESIGNS AS COUNSELOR TO STATE DEPARTMENT.—Chandler Anderson of New York, special counselor of the State Department at Washington, resigned from the government service on October 12 to resume the practice of international law.

ASSISTANT TO FEDERAL ATTORNEY RESIGNS.—John E. Byrne, who for the past eight years has been connected with the office of the United States Attorney at Chicago as indictment expert, resigned on October 18, to engage in private practice.

PROBATE JUDGE APPOINTED IN MISSOURI.—Governor Major of Missouri has appointed J. H. Dickbrader, former Mayor of Washington, to the bench of the Probate Court of Franklin County, to fill the vacancy caused by the death of Judge Oscar E. Meyerseick.

MONTANA JUDICIAL APPOINTMENT.—Joseph C. Smith, a member of the Montana state board of education, has been appointed judge of the Fifth Judicial District of Montana by Governor Stewart. He succeeds Judge Poindexter, who resigned to become attorney general.

FEDERAL JURIST DEAD.—John H. Baker, aged 84, a retired judge of the United States District Court, died at Goshen, Ind., on October 21. Judge Baker's son, Francis E. Baker, is a judge of the United States Circuit Court of Appeals, sitting in Chicago, Ill.

DEATH OF OKLAHOMA JUDGE.—Gibson A. Brown of Magnum, associate justice of the Oklahoma Supreme Court and pioneer Oklahoma jurist, died suddenly at Oklahoma City, Okla., on October 25. Justice Brown was 66 years of age and had had a long and successful career on the bench both in Texas and Oklahoma.

FORMER MISSOURI JUDGE DIES.—Warwick Hough, formerly a judge of the Missouri Supreme Court and from 1882 to 1884 the Chief Justice of the state, died at St. Louis, Mo., on October 28, at the age of 80 years. After the expiration of his term on the Supreme Bench, he served as circuit judge at St. Louis for six years.

NEVADA BAR ASSOCIATION.—At the recent annual meeting of the Nevada Bar Association, held at Reno, Nev., Cole L. Harwood of Reno was elected president for the ensuing year. The other officers elected were J. L. Campbell of Winnemucca and C. R. Chandler of Reno, vice-presidents; A. Grant Miller, treasurer; and E. W. Cheney of Reno, secretary.

IOWA JUDGE DIES.—Charles E. Granger, former chief justice of the Iowa Supreme Court, died at Long Beach, Cal., on October 26, aged 80 years. Judge Granger retired in 1900, after having served on the Iowa circuit, district and supreme benches since 1872. He was regarded as one of the highest authorities on Masonry in the country, having been grand master of the Grand Lodge of Iowa.

THE OHIO STATE BAR ASSOCIATION will hold a mid-winter meeting at Cincinnati, O., on December 28 and 29. One of the principal social features will be a dinner in honor of past presidents of the association, at which the ladies will be present. Addresses will be made by John G. Milburn of New York on "The Concentration of Power," by James Parker Hall, dean of the University of Chicago, on "The Selection of Judges," and by Judge E. B. Follett, on "Reforms in Our Procedure."

JUDGES AND WIVES ENTERTAINED.—The Illinois State Bar Association tendered separate banquets to the Justices of the Illinois Supreme Court and their wives at Chicago, Ill., on November 6. Nathan William McChesney was toastmaster at the judicial banquet; and speeches were made by Edgar A. Bancroft on "The Bar," by Judge Clyde E. Stone of Peoria, on "The Trial Court," by Justice George A. Cooke of Aledo, on "The Supreme Court," and by Horace Kent Tenney on "The Illinois State Bar Association."

MASSACHUSETTS BAR ASSOCIATION.—The annual meeting of the Massachusetts Bar Association was held at Boston, Mass., on October 29 and 30. Judge Henry N. Sheldon delivered the annual address. A paper read by William G. Thompson dealt with the question whether there is inefficiency in the administration of justice in the courts of Massachusetts. William A. Blatt read a paper on the "Dead Hand of Precedent in the Administration of Justice." The following officers were elected: President, Henry N. Sheldon; vice-presidents, John W. Hammond, Frederick P. Fish, Dana Malone; treasurer, Charles H. Beckwith; secretary, Frank W. Grinnell; executive committee—Elisha H. Brewster, William A. Burns, Henry T. Limmus, Walter Coulson, James E. McConnell, Henry V. Cunningham, Henry C. Mulligan, Frank F. Dresser, George R. Nutter, Frank M. Forbush, Richard

W. Nutter, Frederic B. Greenhalge, Amos T. Saunders, Frederick S. Hall, John H. Schoonmaker, Heman A. Harding, Charles E. Ware, Robert Homans, Roger Wolcott, James A. Lowell and Sydney R. Wrightington.

THREE GENERATIONS AT SUPREME COURT BAR.—The chamber of the Supreme Court of the United States was the scene on October 25 of a unique ceremony, when the dean of the bar of that court, Judge George W. Paschal, of Washington, D. C., and a half-blood Cherokee Indian, presented his son, George Paschal of Muskogee, Okla., and a quarter-blood Cherokee, for admission to the bar, making three generations of the family to have representatives at that bar. The first representative of the family to practice in the Supreme Court was Judge George W. Paschal, who was admitted in 1858 and who was the author of "Paschal's Digest of the Laws of Texas" while a resident of Austin, in that state, and who was later a justice of the supreme bench of Arkansas. He was wedded to a daughter of Chief Ridge of the Cherokees who had been educated at a northern convent. His son, Judge George W. Paschal of Washington, D. C., graduated from Georgetown University Law School in 1876 with the degree of LL.B., and at the same time the father was given the degree of Ph.D. The father was dean of the law school in that year, and became the first dean of the National Law School in the following year. George Paschal, who was admitted to the bar of the Supreme Court on October 25, is also a graduate of Georgetown University Law School, and for some years has been practicing before the courts of Oklahoma.

English Notes.

WAR AND CRIME.—One of the most remarkable results of the war in Ireland is the almost complete disappearance of all forms of crime. The police admit that they have never known the country to be so peaceable, and the County Court judges now sitting at quarter sessions are receiving white gloves in the vast majority of cases. The fact that the civil business in the counties has not been prejudicially affected is accounted for by the prosperity of the farmers and those depending on agricultural work. Prices for cattle and horses, and all sorts of farm produce, have been abnormal, and the tendency is still upwards, but labor is expensive and sometimes impossible to obtain.

DEATHS.—Sir Thomas Bucknill, formerly a judge of the King's Bench Division, died on October 4 at Hylands House, Epsom, aged seventy, after a long period of bad health. He was the second son of the well-known doctor, Sir J. C. Bucknill, F.R.S., who was from 1862 to 1876 one of the Lord Chancellor's visitors in Lunacy. He was educated at Westminster and at Geneva. He was called by the Inner Temple in 1868 and became a Bencher in 1891. In 1885 he took silk, and in the same year became Recorder of Exeter and held that office until his promotion to the Bench in 1899.

Sir George Farwell, Privy Councillor, and formerly a Lord Justice of Appeal, died on September 30, at his residence, Knowle Dunster, Somerset, aged seventy. Sir George Farwell was a son of the late Mr. Frederick Cooper Farwell, of Tettenhall, Staffs, and Totnes, Devon. He was educated at Rugby and Balliol, where he obtained a First Class in Classical Moderations and a Second Class in Literæ Humaniores. He was called by Lincoln's-inn in 1871, and three years later published his Concise Treatise on Powers. He took silk in 1891, was made a Bencher of Lincoln's-inn in 1895, and a judge of the High Court in 1899. In 1906 he was promoted to be a Lord Justice of the Court of Appeal, in succession to Lord Justice Stirling, and held the post until 1913, when he retired on account of illness and was granted a pension of £3500. He gave one historic decision, which left its mark, by holding that the Taff Vale Railway Company could sue the Amalgamated Society of Railway Servants, but the Court of Appeal reversed it. The House of Lords unanimously reinstated his judgment, and the Trade Disputes Act in 1906 to reverse the law as thus laid down was then passed.

FALSE UNIFORMS.—A semi-official statement issued in Rome on October 12 says that soldiers who engaged one of the Italian patrols in the Lugana Valley wore complete Italian uniform, while other patrols which were in the neighborhood were attired in the Austrian uniform and kept always far away from the patrol which was wearing the Italian uniform. It is further announced in this semi-official statement that a high Italian commander, having received an authorized report of this fact gave orders that if Austrian soldiers wearing Italian uniform were captured they should be shot immediately. A course of procedure of this character would be in consonance with the principles of international morality. It is a cardinal rule of international law, although formerly, in times not far distant historically, even as late as the Revolt of the Netherlands, the exception was the rule, that quarter should be given to an enemy when he offers to surrender, or when, by wounds or other circumstances, he is rendered incapable of further resistance (Hague Conference 1899, Second Convention, art. 23). Being placed *hors de combat*, he ceases to be a combatant, and from that time no one has the right to treat him as a foe. War, says Calvo, cannot silence conscience. The only exception now recognized is when a combatant, as in the case of the Austrian soldiers, has committed some flagrant breach of the laws of war, as by fighting in his enemy's uniform or by refusing quarter himself. The American regulations mention another exception which is so contrary to humanity that it cannot be recognized as international law, and this is that troops may refuse quarter when they are in such straits as to render it impossible that they should encumber themselves with prisoners. A false uniform or flag is permissible on land or sea as a means of bringing on or escaping a conflict, but it must be abandoned before the delivery of fire, and captured uniforms worn by enemy soldiers must have in battle some distinguishing mark.

EMPLOYMENT OF PRISONERS OF WAR.—A statement in an Amsterdam newspaper that the French prisoners of war working in the coal mines have gone on strike, on the ground that the work which they had been ordered to perform was against the interest of their country, will call attention to the principles of international morality in reference to the employment of prisoners of war. It is indisputable that such prisoners may be employed at work not unsuited to their condition and not directly hostile to their own army or country, and this Bluntschli construes into an authorization for their employment on distant fortifications—a claim properly condemned on principle. Prisoners should not be employed to strengthen their captor's military position, for this tends to release a corresponding number of his soldiers for service at the front. The more modern practice confines their labor to what contributes to their own welfare. The Hague rules authorize a state to utilize the labor of prisoners of war according to their rank and aptitude. Their tasks shall not be excessive and shall have nothing to do with military operation. Prisoners may be authorized to work for the public service, for private persons, or on their own account and work done for the state shall be paid for according to the

tariffs in force for soldiers of the national army employed on similar tasks. When the work is for other branches of the public service or for private persons the conditions shall be settled by agreement with the military authorities. The wages of the prisoners shall go towards improving their position, and the balance shall be paid them at the time of their release, after deducting the cost of their maintenance (Hague Conference, 1899, Second Convention, art. 1). It has been sometimes the practice, now sanctioned by The Hague Conference, for officers to receive their regular pay or some proper pay from their captors, who in their turn balance accounts on this score with the enemy. Thus in 1870 the Germans paid French officers and the French paid captive officers and men also (Hague Conference 1899, Second Convention, art. 17).

HOMICIDE BY NEGLIGENCE.—Great dissatisfaction is being expressed by members of the railwaymen's executive at the sentences passed upon the two signalmen adjudged responsible for the Gretna Green railway disaster, and the National Union has been asked to attempt to obtain some mitigation of the sentences. Three years' penal servitude and eighteen months' imprisonment may be said to be heavy punishment for neglect of duty of a kind which, though probably of almost daily occurrence in various workshops and offices of a different nature, are not usually attended by such disastrous results, and consequently entail but slight, if any punishment upon the offenders. When, however, the fact is realized that these men by their misconduct have been directly and solely responsible for the greatest railway disaster which this country has ever experienced, the sentences cannot be regarded as unduly severe; rather the culprits may be considered fortunate in having escaped still heavier punishments. The men were charged with causing the death of a number of persons by negligence in duty. Anyone who has by contract taken upon himself any duty tending to the preservation of life, and who neglects to perform that duty, and thereby causes the death of any person, commits the same offense as if he had caused the same effect by an act done in the state of mind, as to intent or otherwise, which accompanied the neglect of duty (Stephen's Digest of Criminal Law, art. 232). In order to justify a conviction of manslaughter, the death must result directly from the culpable negligence of the prisoner. Thus in Reg. *v.* Rees (C. C. Ct. Cas., June 1886), where a person's death was alleged to have been caused by the negligence of a fireman in being absent from his post when the alarm was given, it was held that there was not sufficient connection between the negligence alleged and the cause of death to warrant a conviction. On the other hand, an engine-driver who left his engine in charge of an ignorant boy, by whose lack of skill a person was killed, was convicted of manslaughter (Reg. *v.* Lowe, 4 Cox C. C. 449). What amount of negligence can be called culpable is a question of degree for the jury, depending on the circumstances of each particular case. In general, deliberate or gross neglect of the rules of a railway company would, but honest errors of judgment would not, amount to culpable negligence sufficient to warrant a conviction of manslaughter (Reg. *v.* Trainer, 4 F. & F. 105). In cases where no loss of life results, proceedings may be taken against a railway servant under sect. 13 of the Railway Regulation Act 1840 (3 & 4 Vict. c. 97), which makes any breach of the rules or regulations of a railway company, or any wilful or negligent act or omission whereby the life or limb of anyone on the railway shall or may be injured or endangered, an offense punishable with fine or imprisonment.

BEQUEST TO MAINTAIN BUILDINGS AS PERPETUITY.—Testators not infrequently make provision in their wills for the repair of houses and other buildings for an indefinite period, forgetting that they are liable to be defeated on the ground of perpetuity. As long ago as Lloyd *v.* Lloyd (2 Sim. N. S. 255) it was decided that a gift for the repair of a vault not in a church was bad. There a testator by a codicil gave a house on trust for the minister and churchwardens of St. Mary's, Cheltenham, to apply the rents as follows (*inter alia*): To take £5 per annum for the churchwardens out of the rents to keep a certain tomb in repair. It was held that the gift was void as a perpetuity. In Re Wrigley's Trusts (36 L. J. 147, ch.) the facts were very shortly as follows: The testatrix bequeathed £800 to her trustees for (among other purposes) repairing her family vault in the churchyard, and the tombstone over the same, and the yew tree growing near the same. It was held that the gift was void. It is not stated in the judgment, as reported, that it was deemed void on the ground of perpetuity, but that must have been the reason. In Toole v. Hamilton (1901, 1 Ir. 385) a testator by his will, dated the 10th Sept., 1890, provided as follows: "I will and bequeath to the incumbent and churchwardens for the time being of the parish of Boyle £50 to be by them invested in Government or other solvent security, and the interest or dividends thereon to be applied by them to keeping in nice order and repair the inclosure round the graves of the late Rev. S. S. and his family, in the graveyard adjoining the parish church of Boyle." It was held that the bequest, not being charitable, was void as a perpetuity. The master of the Rolls said: "The money is not to be spent at once, applied in keeping the graveyard, or inclosure round the grave, in order, in which case the money would be spent once and for all; but the dividends are to be for ever applied in keeping the graves in order, and therefore, unless it is for a charitable purpose, the gift is void for perpetuity . . . the gift is unquestionably void as creating a perpetuity, not charitable." The question came before the Judicial Committee of the Privy Council in the comparatively recent case of Kennedy *v.* Kennedy (109 L. T. Rep. 833). There a testator appointed his son and his two granddaughters as his executors and trustees, and devised a dwelling-house and its contents to his son J. H. K., subject to each of his granddaughters being entitled to live therein as a home until she married. After certain other devises and bequests the testator bequeathed the residue of his estate to his trustees to be used by them in maintaining the house and premises, with power to sell any real estate, and to devote the proceeds to maintain G., the said residence, in the manner in which it had been theretofore maintained. And if it should be necessary to sell the house, the residuary estate then remaining was to be equally divided among the pecuniary legatees under his will. It was held (affirming the decisions of both the courts below), that the devise of the residue offended against the perpetuity rule and was void. An attempt was made on the part of the respondents to bring the case within Re Clark; Clark *v.* Clark (84 L. T. Rep. 811; (1901) 2 ch. 110), but it failed. That was a case of a bequest "to the committee for the time being of the Corps of Commissioners in London, to aid in the purchase of their barracks, or in any other way beneficial to that corps;" and the gift was held good on the ground that the money could be applied in any way in which the committee thought best for the benefit of the corps.

WILLS OF SOLDIERS IN ACTUAL MILITARY SERVICE.—The Wills Act (1 Vict. c. 26, s. 9) requires all wills to be in writing, and to be signed by the testator, or by some person in his presence, and to be attested by two or more witnesses. But by sect. 11 an exception is made in favor of any soldier in actual military service, who may dispose of his personal estate as he might have done before the making of the Act. Sect. 23 of the Statute of

Frauds (29 Car. 2, c. 3) contains a similar exception. Therefore the execution of the will of a soldier in actual military service depends on the law prior to the Statute of Frauds, under which no attestation at all was required. Any soldier, coming within the exceptions referred to, if over the age of fourteen years, may dispose of his goods and chattels either by a written, or by a nuncupative, will. A nuncupative will is when a testator without any writing declares his will before a sufficient number of witnesses. But the term is often applied to an informal written will made by a soldier on active service: (see Jarman on Wills, 6th edit., p. 102). The will of a soldier in active service may be of a most informal character. Thus in Gattward *v.* Knee (86 L. T. Rep. 119; (1902) P. 99) a letter from a private soldier contained the following expressions: "If you have a letter to say that I am killed, then the lot is for you. . . . You will receive the lot if I am killed in action, for I shall make out my will in your favor." It was admitted to probate as a soldier's will within the meaning of sect. 11 of the Wills Act. Again, the will need not be signed, or even seen, by the testator. Thus in the Goods of Scott (89 L. T. Rep. 588; (1903) P. 243) the commanding officer in South Africa directed squadron officers to summit rolls to the orderly room showing the next of kin of all men under their command, or the person to whom they desired their effects should go in the event of death. In compliance with such order, a private soldier made a declaration to the squadron sergeant-major to the following effect: "In the event of my death in South Africa, I desire my effects to be credited to my sister." It was held that the declaration was a valid testamentary document. The term "soldier" includes officers and surgeons: (see Jarman, p. 103). What is "actual military service" is sometimes a question. At any rate, it commences when mobilization takes place: (see Gattward *v.* Knee, before cited. So if a soldier is on his way to join his regiment on active service, that is actual military service: (see Re the goods of Thorne, 34 L. J. 131, P.) The question came before Mr. Justice Sargant in Re Limond; Limond *v.* Cuncliffe (1915) 2 Ch. 240). There on the conclusion of certain frontier operations in India, part of the force remained as an escort to the party engaged in the delimitation of the frontier. The testator was an officer forming part of this escort. Whilst so serving he was mortally wounded, and in that state he dictated a will to his brother-in-law, to whom he left the bulk of his estate, and died on the next day. The will was signed by the testator and attested by his brother-in-law and another officer, and it was held that the testator was in "actual military service," within the meaning of sect. 11 of the Wills Act, at the time when he made his will; that, notwithstanding the attestation by two witnesses, it was a soldier's will and required no attestation; that sect. 15 of the Act, which renders gifts to an attesting witness void, did not apply to such a will; and that the gift to the attesting witness was therefore valid. The testator left no real estate.

Obiter Dicta.

NEVER DID AGREE.—Lamb *v.* Fox, 5 B. Mon. (Ky.) 94.

A STRONG CASE.—Onyons *v.* Cheese, 1 Lutwyche 530, 125 English Reprint 278.

WANTED HIS SHARE AND GOT IT.—Share *v.* Coats, 32 S. Dak. 604.

TWIXT LOVE AND DUTY.—The case of In re Robert Love Estate, 19 Hawaii 154, arose from the disinclination of certain persons by the name of Love to pay a stamp duty.

A SWEEPING OBJECTION.—In Johnson *v.* Clements, 25 Kan. 376, it appeared that on the trial counsel objected to certain evidence "on all the grounds ever known or heard of."

STATING IT MILDLY.—"It is a matter of common observation that it is often impossible for two related families to live happily together under one roof."—Per Preston, J., in Hirschl *v.* Hirschl, 161 Iowa 650.

JUDICIAL NOTICE OF FISH STORIES.—"We own to being a little inclined to take judicial notice that, barring a mild and (it may be) innocuous form of exaggeration in narrating personal exploits (noticed by close observers and slyly commented on now and then in private discourse), neither huntsmen nor fishermen are addicted to the venal vice of fraud for gain in matters pertaining to their associated dealings."—Per Lamm, J., in Cummings *v.* Parker, 250 Mo. 440.

A COURT VALET.—Chapter 156 of the Public General Laws of North Carolina (1911) provides as follows: "The fireman of the Supreme Court building . . . when not engaged in his duties as fireman shall act as assistant janitor of the Supreme Court and shall assist in the cleaning and care of the Supreme Court and perform such other duties as may be designated by the said justices of the Supreme Court."

HOW DID COLEMAN BREAK IN?—From the *Brooklyn Eagle's* account of a proposed law school moot court we lift the following: "The attorneys on both sides have been working on the case for the past ten weeks and promise an interesting legal battle. The plaintiffs' attorneys are Lindner & Helfand, who have had the experience of several moot trials last year, and the defendants appear by Rosenstein & Rosenzweig, two well-known legal lights in the law school. The plaintiffs' witnesses are Steinlauf, Wackerman and Geertseind and the defendants' Coleman and Ancotta."

A MEAN TRICK.—A case tried before the Recorder of Galway, Ireland, not long ago, revealed rather amusing facts. It seems that marriages among the peasantry in the country districts are very often arranged, and something in the nature of an inquiry and personal investigation takes place beforehand as to means. In the case mentioned, the husband investigated the stock, goods, and chattels on the farm belonging to his intended wife, and was apparently satisfied, but later discovered that sheep and other property were borrowed to make a good show on the date of his visit. The court held that it had no power to give relief in the circumstances.

NOTWITHSTANDING.—Sir Robert Romer, who retired from the English Court of Appeal a few years ago, had a keen sense of humor and occasionally it flashed forth in pleasant fashion. The story has recently been recalled how, when sitting in the Court of Appeal with Lord Justice A. L. Smith and Lord Justice Collins, he sent a ripple of quiet laughter through that tribunal. Lord Justice A. L. Smith had delivered judgment dismissing an appeal. Lord Justice Collins said, "I agree." "I also agree," said Lord Justice Romer. "One moment," said Collins, "I haven't finished yet," and then proceeded to state his reasons at length. All now waited for Romer, who, with a merry twinkle in his eye, quietly remarked, "I still agree."

NOVEL CHARACTER EVIDENCE.—In one of the criminal courts of Ireland recently, a man was charged with loitering, and there was not much of a case against him apparently. He was asked if he could produce any witness to give him a character, and the prisoner said he had nobody in court who knew him or anything about him. A man in the body of the court said he was prepared to give evidence as to character, and, by direction of

the judge, the witness was sworn. To the amazement of everybody in court, the witness said he had never seen or heard of the accused before, but he went on to say that he knew all the evildoers in the locality to which he belonged, and the accused was certainly not among them. The learned judge thought that this novel evidence was entirely in favor of the prisoner, and directed his discharge.

THE VALUE OF CENSUS RETURNS.—In Maher *v.* Empire Life Ins. Co., 110 N. Y. App. Div. 727, the court made the following interesting observations respecting certain census returns: "The court did not err in excluding the census returns. Their probative force was *nil.* On their face they demonstrated that they were teeming with untruths. They were unreliable, irreconcilable and at variance one with another. They show, among other things, that Patrick Vahey had lived twelve years in ten, for his age is given as eight years in 1841, while in 1851 he had become twenty. The widow Vahey, evidently his mother, lived seventeen years in ten, for in 1841 her age was thirty-three, and ten years later she is stated to have been fifty. The case of the widow Hines is still more remarkable, for she lived twenty-one years in six; in 1841 she was sixty years old, but in 1847, when she died, she had attained the age of eighty-one. These are but a few instances of the many remarkable discrepancies with which these so-called census returns abound."

APPLYING AN EQUITY MAXIM.—Kimple *v.* Schafer, 161 Iowa 659, was an action for an injunction to compel the defendants to restrain and keep their chickens from trespassing on the plaintiff's land. In stating the issues in the case, Judge Deemer of the Iowa Supreme Court found opportunity not only for displaying his erudition but for perpetrating a ghastly pun. Said he: "This appeal involves the duties of an owner of, what Milton styles, the 'tame villatic fowl,' or in common parlance the 'Iowa hen.' Plaintiff says that the owner must clip her wings or otherwise imprison and keep her upon his own domain; and that she has no right to take even her daily dust bath upon the country highway, or to stubbornly cross the roads in front of a rapidly approaching vehicle. On the other hand, defendants say that outside of cities and towns chickens are free commoners, and that an owner of improved or cultivated land must fence against them. They also assert that plaintiff has no remedy, because his land is not inclosed by a lawful fence and for the further reason that, if he has a remedy, it is to impound the trespassing animals, or to sue at law for the damages done, and that in no event is plaintiff entitled to any relief because his hands are foul in that he, too, owns chickens which he permits to roam at will."

A DREAM.—Our office-boy is making himself decidedly conspicuous these days. Induced, as he thinks, by his constant association with law books, and, in spirit at least, with the judges whose opinions appear therein, he dreamed this dream: The state courts of last resort were by decree of the people all abolished, and the judges found themselves out of jobs. Being peculiarly congenial as individuals, they decided to form a community and live by themselves. To carry out their plan, abundant material was available and they utilized it in the following manner: Mason (Kan.) erected the buildings, and Whiting (S. Dak.) gave them a coat of whitewash. Two Turners (Okla. and Ky.) constructed the furniture. Potter (Pa.) made the dishes from both Stone (Mich.) and Clay (Ky.). Weaver (Iowa) wove the cloth which Taylor (Fla.) made into wearing apparel. Carter (Ill.) did the trucking, and Porter (Kan.) the carrying. Beard (Wyo.) opened a barber shop, and Graves (Mo.) hung out his sign as an undertaker. Parsons (N. H.) did the preaching, and Carroll (Ky.) the singing. Settle (Ky.) was made paymaster. Three Millers (N. Y., W. Va., and Ky.) ground the corn and wheat grown by Farmer (Ill.). Chase (N. Y.) did the hunting for the crowd, using Spear (Md.) as a weapon, and seeking as his prey Hart (Ark.), Fish (Ga.) and Birds of both the Michigan and Maine species. For other food, there was Bean (Oregon), and Rice (Del.), prepared by Cook (Miss.) and Cooke (Ill.), in addition to Bunn (Minn.) furnished each morning by Baker (R. I.) The community was made to blossom into a garden spot by the efforts of Gardner (Ala.) who set out Rose (Neb.), in the midst of Green (Tenn.). King (Me.) was naturally chosen as the head of the community. Three races were represented in White (Colo.), Black (N. J.), and Brown (Pa. and Tex.). The gentler sex found exponents in Hanna (N. Mex.), Hannah (Ky.) and Nunn (Ky.), while youth was represented by Ladd (Iowa), Young (N. H.), Prentice (Conn.), and Newman (Ohio). There were four habitual Walkers in the bunch (Mo., N. H., N. J., and N. Car.), and they tramped to their hearts' content through the Gates (S. Dak.), on the Land (La.), across the Beach (Conn.), through the Wood (Ark.), over the Mount (Wash.), and over the Hills (Colo. and Ga.). Constable (Md.) was appointed town watchman, and directed to keep an eye on Savage (Me.), Robb (D. C.), Lynch (W. Va.), and Hurt (Ky.). When any of the latter were arrested, Bond (Mo.) saw that they got out of jail. As in every community, there were indolent and fussy people to be found, namely Whittle (Va.) and Musser (Colo.). Dunn (Ill.) was a handy man to have around in case anything needed to be accomplished. And finally, the only problems that confronted the community were how to make Budge (Idaho) move, and what under the sun and earth to do with Riddle (Okla.).

Correspondence.

THE COURTS AND THE CONSTITUTION.

To the Editor of LAW NOTES.

SIR: I have noted several references, in your columns, from different parties, as to my speech before the University of Pennsylvania in April, 1906, and at Cooper Union, New York, in January, 1914. They, and you, seem to have misunderstood my position. I am sending you both speeches and also an article contributed by request to the *Michigan Law Review*, "Some Myths of the Law."

My view is that the Federal Constitution did not give the Courts the power to annul an act of Congress, nor did any State Constitution give any State Court the power to annul an Act of the State Legislature. If this was done in either Constitution, let those who assert it *point out the words that confer it*, and that will end the controversy.

Certainly so great a power as that of permitting a majority of lawyers on the highest court of the Union to negative the action of Congress approved by the President would not have been left unexpressed.

Of course the U. S. Constitution does provide that the Constitution of the U. S. and laws passed in pursuance thereof shall be supreme over the action of any state, but that is a very different matter, and the fact that that power is expressly given of itself shows that the Convention of 1787 did not give the "Judicial Veto" to the Courts, as claimed by Judge Marshall in Marbury *v.* Madison.

I have never favored the Recall of Judges and I see very plainly that the agitation therefor has come from the assertion of supreme and irreviewable power by the Courts.

Notwithstanding the arguments which have been based upon certain rare criticisms by the English and other courts upon legislation, and their occasional nullification of statutes by construction, more or less forced, there has never been any direct denial of the power of the lawmaking body outside of the United States, save by that Court in England for which Chief Justice Tressilian was hanged and his associates exiled to France.

Of course we all understand that the great Interests are anxious that the Courts shall assert and amplify this doctrine in order that there may be a means of nullifying legislation which is not agreeable to them, but which has been passed in spite of the efforts of their lobby. They know that the influence of public opinion is stronger in the legislatures and Congress and even upon the executive than it is over the courts, many of whose members often owe their appointment to corporate influence or who have been in the employ of corporations before going upon the Bench. This in nowise impeaches the integrity of Judges who sincerely entertain after their advent to the Bench the same views that they urged as attornies for corporations when at the Bar.

But I have long seen that this doctrine of judicial supremacy over the other two departments of the government is not only without historical precedent, and without authority in the Constitution of the Union or of the States, but that its continued assertion—especially to the unlimited extent to which the courts were going—will result in the assertion by the people of their supremacy over the Courts whose members are public servants as much as the other two departments of the government, and who are not the infallible and irreviewable sovereigns which complacent lawyers will fain make them believe that they are.

The Income Tax case, when the change of opinion by one Judge uprooted the decisions of 100 years and transferred more than 100 millions of taxes annually from those best able to bear it, and upon whom Congress had placed it, to the backs of the toiling producers of the country was a great strain upon the law abiding people of this country.

The "Lochner case" when the Supreme Court at Washington, reversing the Court of Appeals of New York, set aside an Act of the legislature of that State, passed within the limits of the police power, and forbade any limitation of the hours of men condemned to work in superheated apartments was another shock to the American people. This was aggravated by the reason, untruly assigned, that it was done in assertion of the right of the men to contract. This was an insult to the intelligence of the public, for every intelligent man knew that this was not the true reason, which was an unwillingnesss that capital should be hampered by legislation in favor of the laborer.

Then there was the "Dartmouth College case," which held that every charter granted to a corporation instead of being, as every man knew, a revocable privilege to a fictitious body was an "irrevocable contract." The evils that lurked in this decision were so great that the decision was corrected by amendments to the several state constitutions making all charters revocable.

Then there was the decision in Chisholm *v.* Georgia, which was corrected promptly by the 11th Amendment, and the Dred Scott case, which was corrected by other amendments, as the Income tax case has been corrected by still another. And other cases will be readily recalled by any lawyer. It is because I do not believe in the wisdom of the Recall of the Judges that I think there should be some limitation put upon the assertion of the irreviewable and infallible hegemony of the Judiciary over the other two departments of the government and therefore over the people themselves and that I urge such limitation. It is very certain that the public have grown restive under the doctrine that five men on the Supreme Court at Washington are infallible, when the other four are not, though with the other four is the action of the two Houses of Congress and the President.

It is true that we have a written Constitution. When the Congress or a State legislature disregard it there is no authority given the courts to so declare. The reviewing body is the people themselves in the election of a new lawmaking body.

The only restraint in this direction upon Congress, or a State legislature, is the power given the executive to veto the action of the legislative department and that is made subject to the power of the legislature to overrule. Most certainly if it had been intended that the other department of the government should also have the power to veto legislative action it would have been expressly conferred like the executive veto and would be subject to being overruled by a specified portion of the legislative body. This is what Mr. Roosevelt advocates under his "Recall of Judicial Decisions."

A pyramid cannot stand on its apex, and the ultimate sovereignty of the hundred millions of American people does not rest in the infallibility and irreviewability of five judges against four—a majority of one—when there is no expression to that effect in the Constitution, and its origin rests in the *obiter dictum* of the Court itself in Marbury *v.* Madison, creating for itself an irresponsible hegemony. Charles I did not claim so much and he lost out.

It will be wise for the Judges not to press such assertion of power too far. Lawyers, when they have a case to gain, sometimes use the art of courtiers, but even they do not really believe that the judges are infallible (whatever they persuade the judges to believe) and certainly no one else believes it.

Under our form of government "all power resides in the people themselves and should be exercised for their good only." It is the duty of the legislature to observe the Constitution. They are sworn to do so and they always have in their ranks an aggregate of intelligence equal at least to that possessed by the heads of the other two departments. If the legislature mistake the meaning of the Constitution, the Governor can review legislative action by his veto subject to being reviewed himself by the legislature. No such power is vested in the Courts. Each of the three departments of the government is separate and distinct with no supremacy over the other, and each and all are subject to only one reviewing body and that is the Sovereign—the people themselves.

Raleigh, N. Car. WALTER CLARK.

JUDICIAL PROTECTION OF PRIVATE RIGHTS.

To the Editor of LAW NOTES.

SIR: In Mr. Davids' article in the October number of LAW NOTES occur these words: "Judicial protection of private rights has in truth no place in a government like our own. Guaranties of private rights appertain to monarchies."

Most of us will not agree with this sentiment. Some of us

think there is more danger of the impairment of private rights by legislative action in a republic by reason of tyranny of the majority than in a limited or absolute monarchy. I suppose we will agree that but for the provisions of the 14th amendment of the United States Constitution, the rights of freedmen in many of the states would have been greatly impaired.

Some of us think it would not be unwise to provide in every state constitution that no act of the General Assembly should be held void because in conflict with provisions of the state constitution *unless* it be in conflict with the Bill of Rights. The great annoyance now experienced from the exercise of the power to declare statutes unconstitutional arises from the uncertainty as to what is the law. The provision that the subject of an act shall be expressed in its title, and the like provisions bring about a thorough uncertainty; while the provision that no special act shall be enacted where a general law can be applicable increases the uncertainty. These provisions and provisions like them should be regarded as addressed to the legislature; for the Constitution is as binding on Senators and Representatives as on Judges. No man could tell whether an act punishing barbers for working on Sunday is void until the Court of Appeals declared that it was void because a general law could have been made applicable.

There seems no reason why legislatures cannot be chosen which will comply substantially with the provisions of the constitution, *except those* which relate to protection of private rights; and where they disregard provisions not relating to private rights, the only reasonable remedy to some of us seems the election of a new legislature. In some of our States, legislative apportionment acts have been held void. In such cases the mass of the people to be affected by the decisions are not and cannot be parties to the action, and have no opportunity to present evidence. If a candidate for office file suit against a chairman of a party committee and a clerk of a County Court seeking to enjoin them from holding a primary election for a representative for a certain district, on the ground that the act dividing the state representative districts is unconstitutional and void, because the districts are grossly unequal in population and area, the case is tried out with only three persons parties to the action; and the great mass of the people who are to be affected by the decision have no opportunity to be heard.

It is an anomaly of our system that the courts should have power in such cases.

If the power of the courts to hold acts of the legislature void as being in conflict with the state constitution were confined to such acts as are in conflict *with the Bill of Rights*, much of the uncertainty of our laws would be done away with.

Louisville, Ky. C. B. SEYMOUR.

THE RIGHTS OF ILLEGITIMATES.

To the Editor of LAW NOTES.

SIR: The November issue of LAW NOTES contains an article entitled "The Passing of Illegitimacy." In this connection it may be of interest to note that the following sections of the Virginia Code have been on the statute books for over fifty years:

Sec. 2553. If a man, having had a child or children by a woman, shall afterwards intermarry with her, such child or children, or their descendants, if recognized by him before or after such marriage, shall be deemed legitimate.

Sec. 2554. The issue of marriages deemed null in law, or dissolved by a court, shall nevertheless be legitimate.

The Supreme Court of this state (the court of last resort) has never been called on to decide what shall constitute proof of the paternity of the children, other than the acknowledgment or recognition of the putative father, who intermarried with their mother; and it is believed that such acknowledgment and intermarriage, in the interest of decency, will preclude any further inquiry into the paternity of the child or children.

Sec. 2252. prohibits marriage between a white person and a negro, and pronounces void such a marriage.

Sec. 2253 also pronounces void marriages between colored and white persons leaving the state to marry contrary to the provisions of the preceding section, with the intention of returning into the state, and who do so return, and cohabit as man and wife.

In the case of Greenhow et als. *v.* James' Ex'r., 80 Va. 636, decided April 16, 1885, by a divided court of three to two, it was decided that sections 2553-4, supra, do not apply to and legitimate the offspring of a co-habitation in this state between a white person and a negro, when the parents subsequently have celebrated between them a ceremony of marriage, outside of this state, in some place where marriage between such persons is lawful.

While two of the judges dissented—one writing a vigorous dissenting opinion—the conclusions announced by the court have not been attacked subsequently, either by an act of the Legislature or by a court decision.

All bastards are capable of inheriting from their mother.

Manassas, Va. ROBT. A. HUTCHISON.

THE STRIKE CASES IN COLORADO.

To the Editor of LAW NOTES.

SIR: In the October number of LAW NOTES I notice a brief article in reference to the decision of the Supreme Court of the State of Colorado, restraining Judge Hillyer from sitting as trial judge in any of the cases growing out of the recent coal strike at this point. A perusal of this article indicates that you are laboring under the misapprehension that the point decided in the recent Lawson Case was one of first impression in this state. Such is not the case.

In the case of Erbaugh *v.* People, 57 Colo. 48; 140 Pac. 188, which was decided more than a year prior to the Lawson Case, the precise question involved in the Lawson Case was discussed, and the same interpretation of the statute was then made, so I am at a loss to understand why an affirmation of the doctrine laid down in the Erbaugh case should occasion so much comment in the Lawson case. In this connection I will say that the Erbaugh case did not grow out of the strike, and for that reason it was not necessary for certain interests to raise a "hue-and-cry" about it. The reason I am calling this to your attention is because the inference might arise from your editorial that the decision was influenced by reason of the fact that it was a "strike case" that was involved.

Trinidad, Colo. DAVID M. RALSTON.

Law Notes

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Europe's Problem in Eugenics.

AT Rome the husband was permitted to lend his wife to another, and Cato, who was most law-abiding, is reported to have lent his wife to Hortensius. Yet a husband was punishable for connivance at his wife's adultery. "These laws," says Montesquieu, "seem to contradict each other, and yet are not contradictory. The law which permitted a Roman to lend his wife was visibly a Lacedæmonian institution, established with a view to giving the republic children of a good species; the other had in view the preservation of morals. The first was a law of politics, the second a civil law." This distinction seems pretty fine, but in it may lie at least a suggestion as to how the European nations may carry out their avowed design to encourage repopulation, without totally discrediting matrimony.

Plain English for Court Records.

WE borrowed this heading. It is good enough as far as it goes. Unfortunately, however, it is difficult to say what constitutes plain English in some connections. The source from which we borrowed the above attractive suggestion as to simplifying legal terminology congratulates certain authors who are said to "have taken the language of the law and put it into every day English, so that every person may understand it." It is fortunate that the names of these gentlemen were not given, for most assuredly there would have been a war to the death among the law publishing houses to secure the services of the gentlemen who possess this open sesame of the legal treasure house. Fortunate, too, for the lawyer it is that the name of this work is still a secret. But our sympathy is rather with the worthy aspirants who would thus render the law in terms understandable by the common mind. We are fond of those terse, incisive terms of the law which require volumes to explain but which when once understood verily sparkle with vitality. Indeed, we have often bewailed the fact that the law was not an exact science, that its terminology was equivocal. But we will make a *bona fide* surrender, cease to talk of the *res* of *caveats, fori, loci,* and *emptores,* and allow the aforesaid gentlemen to take judgment *nil dicit,* if they will vouchsafe to express in plain English so that "every person may understand it," even so simple a little phrase as *damnum absque injuria.*

Reforming the Indictment.

YET there are even men "learned in the law" who would have criminal indictments framed in "popular language"! As well might we compel the disciples of Æsculapius to write their prescriptions in Bowery slang, set Wagner to ragtime, asexualize Byron and translate Shakespeare into salt-water lingo. Cut out the superfluous "saids" and "aforesaids," the "languishing and did lives," the "did then and theres," and anything else that seems useless, and, if you will, adopt the exquisite simplicity of our Canadian neighbors and charge Richard Roe with "murdering" John Doe, or "stealing" his horse, or "burglarizing" his house; but when the trial comes off Mr. Roe's attorney will surely insist that the prosecution must prove all the essentials of "murder," "larceny," or "burglary" as the case may be. Well might New York's District Attorney-elect hesitate, as reported by the press, before attempting to popularize the form of criminal indictments. Doubtless he much prefers that the thing should be done by an omnipotent legislature. Or, more likely, being a lawyer, he realizes that, despite more or less of ancient verbiage, human rights are guarded by these forms. And he and every other lawyer, and also every legislature which is importuned to simplify the law, must bear in mind that true reform goes deeper than phraseology, which means that swifter, surer justice can come only from broader, bigger ideals at the bar and judicial poise and courage on the bench.

"Shyster"—A Derivative Anomaly.

HOW odd it seems that "shyster," which now stands for bold-faced unscrupulousness, is derived from "shy" and is even close akin to "scrupulous." The term is manufactured from the word "shy," which, in turn, is derived from Anglo Saxon *sceoh,* meaning timid, through Middle English *skyg,* meaning scrupulous. It was first applied to lawyers who hung around the police courts and solicited cases from *les misérables,* the practice being supposed to involve the slyness or shyness of one consciously engaged in evil practice; but now it is significant of any grave departure from the standard of professional conduct adopted by the legal profession or even by laymen, particularly the gentlemen of the press.

Getting after the Shysters.

WE agree with the newly elected president of the Kansas City Bar Association that it would never do to adopt Jack Cade's ancient advice and kill all the lawyers as the best method of reforming them. Likewise we subscribe to his defense of the profession against the muckraking of the so-called yellow journals. Albeit though this very muckraking may largely be responsible for the general renaissance of legal ethics, yet to judge the legal profession by its shysters is manifestly as unfair as to judge the press by its yellow journals. In only one event would either judgment be justified—if the sore were allowed to spread until the whole body became unclean. It needs no prophet to forecast that the question whether the legal profession is eventually to be found guilty of the charges now so freely preferred by the muckrakers, by no means depends on whether it cleanses itself of police court traffic, ambulance chasing, damage and divorce suit solicitation, and other practices savoring more or less of violation of the old standards of legal ethics. These have always been condemned and occasionally punished by the profession; but the general public will most likely see more of regulation for mutual benefit within the profession in a cleansing of these sins than of any real awakening of the professional conscience, and will base its verdict rather upon the standard of personal honesty which the legal profession shall erect for the measure of its members. We hope and believe that the business world will soon discredit the time-honored refuge of "business is business," and likewise we believe that the day is not distant when the lawyer's oath of office will become to him a living thing, and also to the client who approaches him with an unclean cause. Not that a lawyer shall judge his client's cause; but that he shall seek no more than justice for his client and shall not in his interest seek to pervert either the law or the facts, seems already to be demanded by the general policy, and will soon, we believe, be one of the ten commandments which the profession will give unto itself, if not, indeed, its golden rule. In the meantime let the good work of getting after the little shyster go on! But let it not be forgotten that the less vulgar offender is usually the more dangerous. It is by such that standards are changed and institutions destroyed. So by the honor of his name, the height on which he stands, the brilliancy of his legal exploits, the size of his clientèle, and the wealth he has amassed—by these should be taken the measure of his shortcomings. A shyster was not made in an hour, nor dies in a day.

Legality of Solicitation of Legal Business.

IT is not so easy to determine just how far the crusade against shysterism in its primary sense is animated by *esprit de corps* as distinguished from considerations of general public policy. In *Ingersoll* v. *Coal Creek Coal Co.*, 117 Tenn. 263, decided in 1906, it was held that an attorney who went to the scene of a disaster and solicited cases was guilty of "acts of impropriety inconsistent with the character of the profession and incompatible with the faithful discharge of his duties," and hence that he could not collect fees when a case so obtained was compromised. This decision, the only one, it seems, at that time on the precise point, was based on both professional ethics and public policy. "We cannot agree," said the court, "that the practice of law has become a 'business' instead of a 'profession,' and that it is now allowable to resort to the practices and devices of business men to bring in business by personal solicitations;" which declaration, however, was qualified by the peroration of "under the facts of this case." So the question was left open as to whether under the facts solicitation might not be at least legal, even if unethical; and now, in a case as yet unreported, the Court of Appeals of Kentucky, on facts identical in general outline and precisely identical on the issues, decides that a contract of retainer in a damage suit is not void as against public policy because procured by solicitation. Thus, the question whether solicitation is *per se* shysterism seems to be in doubt; and certainly many of the younger members of the profession will voice the doubt as long as those who have risen to the heights of an established business continue to solicit indirectly, thus procuring the business without prejudice to their professional standing. It may also be questioned whether advertising and soliciting within reasonable and decorous bounds is not now as legitimate to the lawyer as to the business man.

Division of Public Salaries.

THE recent appointment by the Governor of Indiana to fill the vacancy in the office of attorney-general caused by the death of the former occupant gives occasion for further comment on the validity of agreements for the division of public salaries. In the last issue of LAW NOTES we discussed the validity of a promise made by a candidate for office to return a portion of his salary if elected, particularly from the viewpoint of such promises as constituting bribery. While the appointment just made cannot be said to come within the class subject to that criticism, it might well be subject to criticism under the second rule mentioned in that article. The appointee in this case is reported to have agreed to turn over to the widow of the late attorney-general one-third of his salary for the remainder of the unexpired term. This agreement for the division of a public salary, while commendable from the standpoint of humanitarianism and doubtless prompted by the highest motives, would seem to run counter to the trend of judicial authority in its application of the widespreading doctrine of public policy—that conveniently elastic rule of law by virtue of which the regulation of the daily life of man and the curtailment of his most cherished personal liberties are justified. Applying this doctrine, it might well be said that when the legislature provided a salary of seventy-five hundred dollars for the office of attorney-general, the people were entitled to have it filled by a man of sufficient ability to command such a salary, and the appointment of one who was willing to take the office for five thousand dollars was a perversion of the intent and will of the people as expressed by their representatives. That it sets a precedent which could be used by unscrupulous persons to the detriment of the public cannot be denied, but happily in the present instance there is no basis for such an objection, the new attorney-general being rated as an able lawyer, his appointment receiving the highest commendation of the press of his state. But as said in a

recent case, wherein it was held to be against public policy to divide an official salary, "the test of the validity of such an agreement is not, I think, whether, if it was faithfully carried out, the public would be harmed, but its validity must be measured by its tendency."

Taxation of Professional Men.

IN St. Louis, where it appears there is a dearth of funds available to pay the city's manifold expenses, they are discussing, we are informed, the advisability of imposing a tax on doctors and lawyers, no less a person than the license commissioner of the municipality being responsible for and apparently favoring the suggestion. The following clipped from the *Times* of that city is typical of the arguments advanced in support of the proposed tax:

"The members of both professions are considered by many a sort of unnecessary evil—an evil constantly growing larger. With no capital invested, no license to pay and only books as an available asset, subject to taxation, our doctor and lawyer friends have been treated rather kindly to date. The same is equally true of dentists, and why any one of the three should be exempt when every other form of business, profession or calling is taxed, is difficult to explain."

While many doubtless regard doctors and lawyers as an undesired but necessary evil we have yet to learn that there are any sound-minded persons, barring possibly the Christian Scientists *in re* the doctors, who in the present state of our civilization regard either as exactly unnecessary. This aside, however, it may be seriously questioned whether the imposition of such a tax is advisable or expedient, although it prevails in a number of states. The experience of Missouri, itself, the state having formerly had such a tax (see *Simmons* v. *State,* 12 Mo. 269, 49 Am. Dec. 131; *St. Louis* v. *Sternberg,* 69 Mo. 289), would seem to indicate that its legislature subsequently came to the conclusion that lawyers as a class were too poor to have imposed on them a special tax. As everyone knows, newly admitted members of the bar find it hard to get a foothold and usually for many years their returns are not sufficient to provide decent support. To such novitiates in St. Louis we extend our sympathy if the proposed tax is adopted. Fortunately, most of them already have learned how "to labor and to wait," so we can only trust that a little heavier burden, even if severely onerous, will not be too discouraging or prohibitive. Certainly the lawyers (and we believe the doctors also) ask no privileges not granted to others. Necessary evils though they be, no body of men are more public-spirited, as is evidenced by the vast amount of charity work they do. If more funds therefore are necessary in St. Louis, tax professional men in proportion to their earnings, and if other occupations are similarly taxed no objections will be raised we feel certain. But it has thus far been a cardinal American principle to keep the door leading to the learned professions wide open to all possessing the necessary intellectual qualifications, and a special tax on the privilege of entering and continuing therein is to that extent unduly restrictive.

Standards of Honesty.

BY the muckraking of the lay press, and likewise by the great house-cleaning which is going on in the legal profession, we are moved to say that in our opinion the lawyer will soon set up for himself the standard which has been forced upon the business man. The business standard of some years ago is fairly represented by a verbal picture judicially framed in a prosecution for obtaining property by false pretenses. Said Senator Perkins, in *People* v. *Haynes,* 14 Wend. (N. Y.) 546, 28 Am. Dec. 530, decided in 1835: "The principle that has been advanced in the opinion we are reviewing is, that 'where falsehood has had a material effect to induce a person to part with his property, the offense has been committed.' Apply this rule not only to the great exchange of property, but to the innumerable and comparatively insignificant dealings of men—to every swap of horses—in fine, to every transaction by which property is transferred, a note given, or money paid—and no man could count the cases it would reach. . . . What scheme of criminal jurisprudence could carry out this principle? What prisons could contain the convicts? We have it from the highest authority that by nature 'all men are liars'; and a master judge of the human character has said that 'to be honest as the world goes, is to be one man picked out of ten thousand.' To punish as a crime, then, what the multitude of offenders made a custom, is to attempt what we can never hope to execute. . . . How inconsistent would it be, when the law will not receive a man's oath if he has sixpence at stake upon it, that it should send him to the state's prison for an untrue answer to an inquiry into his pecuniary affairs, which he may have the strongest motive for concealing."

Caveat Curia.

BUT the law has nevertheless advanced far beyond the limitations which the honorable senator thought necessary in order to prevent the jailing of the whole populace, and though Caveat Emptor, the "bastard of the law," survives, his operations have been greatly restricted by an enlightened public conscience which is reflected in the many laws which now hold us criminally responsible for almost every conceivable false pretense by which another is deceived to his detriment. No longer is the veracity of a witness measured in pence. No more is a deacon, or anyone else for that matter, allowed to lie while swapping horses (*State* v. *Stone,* 95 S. C. 390). Our statute books are filled with laws which not so much compel as enable tradesmen to be honest. None have been before the lawyer in pioneering and establishing these changes, and likewise he has greatly raised his own standards. But, lest we preach, we will not say to him that in one thing he may be lacking. Rather let us quote from a more common, though, perhaps, not more familiar source. "An attorney," said the court in *Planters' Bank* v. *Hornberger,* 4 Coldw. (Tenn.) 531, "is a man set apart by the law to expound to all persons who seek him the laws of the land, relating to high interests of property, liberty, and life. To this end he is licensed and permitted to charge for his services." We will not interpolate "alas" before the word "permitted" in this definition; but we must admit that there is sometimes occasion to substitute "confound" for "expound," especially if we should also substitute "the court" for "all persons." In *Minor* v. *Natchez,* 4 Smed. & M. (Miss.) 602, 43 Am. Dec. 488, the question was whether an execution sale would be held void because of the irregular-

ities in the notice of sale. Said the court: "In the case of *Doe ex dem. Van Campen* v. *Snyder,* 3 How. 66, the counsel who now insist that this sale is void succeeded in maintaining that a sale of land made under an execution which was afterwards quashed was valid." This mild rebuke is the only instance that has come to our notice of judicial protest against attempts of lawyers to "put it over on the court." Indeed we have known of a number of instances in which an *amicus curiæ* abused his official friendship in the interest of a client. Wherefore—and all that precedes is mere preface—we think it behooves the legal profession frankly to face the question whether any of its members shall feel privileged to sell their countenance to legal propositions which they do not believe to be the law. In other words, now that Caveat Emptor is condemned to die, shall Caveat Curia be allowed to live?

Student Practice of the Law.

IN the two years which have passed since the University of Minnesota law school instituted the plan of teaching "practice" to its senior students by attaching them as assistant attorneys to the staff of the free legal aid bureau of the Associated Charities of Minneapolis, Dean William R. Vance reports that seven thousand cases, not involving more than one hundred dollars each—this being the restriction imposed on the bureau by the Associated Charities so as to keep out unworthy cases—have been disposed of and some thirty-four various classes of complaints have been handled more or less regularly. The practice has been, it appears, to send out the senior students in relays of two and three for several weeks each semester, they actually handling alimony cases, desertions, frauds, crimes, injuries and so forth, although at all times under the supervision of a member of the law faculty, and each student is held personally responsible for the cases with which he is entrusted throughout all their different stages until final settlement is reached. The success which has attended this experiment ought to prompt many other law schools throughout the country to follow the precedent thus established and demonstrably practicable. By so doing they would not only render a great service to the communities at large in which they are situated, the same as the free medical, dental, and hospital clinics throughout the country now do, but they would confer on the students themselves a benefit from being thus brought into actual contact with the kinds of cases and the actual conditions with which they will be forced to deal after graduation, that cannot be too greatly emphasized. That such is the case the thousands on thousands of lawyers who have been hustled through our leading law schools, received their diplomas, passed their state boards and been admitted to the bar without ever having been forced even to poke their noses into a real court room, without ever having actually been there, and without ever having seen a real summons and complaint and only knowing of their existence in a vague theoretical sort of a way, can abundantly testify. Moreover, even if a student had had a certain amount of practice in the mock courts of his college or university, such a scheme as that employed by the University of Minnesota Law School lends to his work a touch of realism and a zest and interest that no "moot" court practice ever can, for throughout he is dealing with actual litigants and vital if small interests, while besides he is gaining incidentally, according to Dean Vance, that intimate acquaintance with the misfortunes of the poor and the weak members of society which cannot but have the effect of preparing him to undertake his life work with a keener appreciation of the claims of society.

The Fining of Judge Lindsey.

COMMENT has been made in these columns recently on the plea of privilege asserted by Judge Ben Lindsey as to communications made to him in confidence by a boy under the supervision of his court. Since that time his plea has been overruled and a fine of $500 imposed on him for contempt. Granting that no privilege existed, it is still difficult to justify this sentence. Judge Lindsey, whatever of fault may be charged against him, is one of America's distinguished men. His contribution to the welfare of humanity is large. Violating in this instance an order of court, which we must consider as lawful, he did so for no selfish purpose, animated by no contumacious spirit, but in obedience to a principle which he considered essential to the success of his own judicial work. The cases in which a nominal sentence has been imposed for an undoubted contempt committed in defense of a principle or under a mistake as to a legal right are too numerous to need citation. The only precedent to the contrary which is now in mind is the fine of $1000 imposed by a New Orleans judge (we have forgotten his name) on Andrew Jackson. It is of interest to note in this connection that a privilege similar to that asserted by Judge Lindsey has recently been claimed by Warden Osborne of Sing Sing prison, who refused to testify before a grand jury as to statements made to him by prisoners, saying that such a breach of confidence would jeopardize the work of his Mutual Welfare League. According to press reports, the court, while not admitting directly the validity of the asserted privilege, refused to compel the warden to answer. Comparing the relation which such public servants as Mr. Osborne and Judge Lindsey bear to the persons under their charge with other relations whose confidential character is secured by express statute, it may at least be said that if the privilege claimed by them does not exist it ought to.

Saving the Defectives.

THE ethical aspect of the much discussed case of the Chicago physician who refused to perform an operation on an infant by which it would have lived, but only as a deformed idiot, is beyond our province. Some interesting legal considerations are however presented. It is of course elementary that a person who inflicts an injury which is the immediate cause of death is none the less guilty because his act but hastens an end which is imminent from disease or injury. (*Hopkins* v. *Com.,* 4 Ann. Cas. 957.) "For he doth not die simply by the visitation of God, but the hurt that he receives hastens it and an offender of such a nature shall not apportion his own wrong." (1 Hale P. C. 428.) It is likewise well settled that the failure of a parent to provide needed medical attendance for his child may support a prosecution for manslaughter. (See *Stehr* v. *State,* Ann. Cas. 1914A, 573 and note). In a recent English case (*Oakey* v. *Jackson* [1914] 1 K. B. 216) it was held that the duty of a parent to provide

needful medical attendance may make a parent criminally liable for a refusal to consent to a needful surgical operation on his child. From a synthesis of these holdings it would seem, superficially, that the parent, and perhaps the physician, in the Chicago case are subject to a prosecution for manslaughter. The apparent demonstration is however fallacious. As was recognized in the English case, to impose a duty to have a surgical operation performed it must be reasonably necessary and reasonably certain of success. Certainly an operation which will preserve the life but leave the patient a deformed idiot cannot be said to come within this category. In a country where hundreds of normal children die each year from preventable causes it is difficult to escape a doubt of the good faith behind the clamor in the instance under discussion. It is however probably due less to criticism of the particular case than to an instinctive effort towards social adjustment. The social organism has adjusted itself on conventional lines as to many matters, and accordingly treats them with indifference. A new situation however awakens something of social conscience to struggle for its solution. Once let an accepted platitude cover the situation, and social conscience will slumber through the death of a hundred babies.

Limitations on Power of Governor to Commute Sentence.

THE recent case of Leo Frank is but one of the many instances in which the power to commute a capital sentence has been exercised in such a manner as to evoke popular disapproval. An interesting question arises in this connection as to the possibility of a review of the governor's action. In *Henry* v. *State,* 10 Okla. Crim. 369, the court took occasion to set out at length the limitations on the governor's power, declaring specifically that he has no right to commute a sentence because he is opposed to capital punishment. Quoting a statute excluding from murder juries persons who have conscientious scruples against capital punishment, the court declared: "This provision of law precludes the governor from commuting a death penalty, in a single case, upon the ground of his alleged conscientious scruples." Assuming a commutation avowedly made for the reason which the court condemns, being without legal right would it be void? Has the court power to issue its mandate to the sheriff to execute the sentence notwithstanding the commutation? A most unseemly conflict between the constabulary of the court and the military forces under the command of the governor can be imagined as the result of such a situation. It would seem, however, that the question turns on the distinction between the "right" of the governor and his "power." A principal has "power" to discharge an agent before the end of his contract term and the discharge is valid as to third persons, though being without legal "right" it leaves the principal subject to a liability for damages. Just so a commutation for any reason whatever is within the governor's "power" and its validity cannot be gainsaid by any person or tribunal, though it may involve an infraction of legal right which subjects him to impeachment.

Anti-Alien Laws.

THE Federal Supreme Court has recently held to be invalid an Arizona statute prohibiting private employers from having more than twenty per cent of alien employees. By a later decision the New York Act forbidding the employment of alien labor on public work was sustained. The opinions are not yet at hand for comparison but the distinction drawn by the court is clear and obvious. Private employment is essential to life; a substantial denial thereof is equivalent to an edict of deportation. Employment on public work, however, stands on a different footing. Like public office it is not a matter of right. As was said by the New York court in sustaining the statute of that state (*People* v. *Crane,* 214 N. Y. 154): "The statute has been frankly defended at our bar as a legitimate preference of citizens, not to promote the efficiency of the work, but to promote the welfare of the men preferred; and from that aspect, it will be frankest and safest for us to view it. To concede that such a preference was intended, is not to condemn the statute as invalid. The state in determining what use shall be made of its own moneys, may legitimately consult the welfare of its own citizens rather than that of aliens. Whatever is a privilege rather than a right, may be made dependent upon citizenship. In its war against poverty, the state is not required to dedicate its own resources to citizens and aliens alike."

WILLS OF SOLDIERS AND SAILORS.

THE existence of the present world conflict may well serve to turn the attention to the peculiar and infrequently invoked statutes regulating the wills of soldiers and sailors. These classes have, from very early times, enjoyed unusual rights and immunities in the way of exemptions from the ordinary rules regarding the testamentary disposition of their property, and to Julius Cæsar is ascribed the credit of first promulgating the doctrine when the military authority became the dominating factor in the Roman state, it being apparently unknown to the previously existing republic, nor does the privilege appear to have existed before that time. Under his rule soldiers were permitted to make valid wills without writing, and by his successors in power the privilege was subsequently extended to include the naval service, officers, rowers and sailors being in this respect esteemed as soldiers. In later years, however, the exemption was modified so as to exclude those at their own home; subsequently the power was further confined to soldiers engaged in an expedition, in military quarters or in camp, and ultimately by the Code of Justinian the privilege was limited to soldiers on an expedition or engaged in battle or siege.

The result has been that these privileges have been retained in practically all of the countries whose jurisprudence bears the impress of the civil law. This is true of Germany, France, Holland and England, including her colonies, Canada and Newfoundland, as well as the United States. And since it is to England that we look for the source of the body of our law, it is interesting to note that by the early common law all wills of personalty were permitted to be made without writing until the passage of the statute of frauds (29 Car. II., c. 2). One clause of this act—which is retained in substance in the present English Wills Act—provided that notwithstanding its passage, any soldier being in actual military service, or any mariner or seaman being at sea, might dispose of his movables, wages and personal estate as he might have

theretofore done, and the counterpart of this statute is to be found in several of the American jurisdictions. Nor is the reason for this somewhat peculiar exemption difficult to discover, for as Swinburne has said, "soldiers being better acquainted with weapons than books are presumed to have so much the less knowledge in the laws of peace, by how much they are the more expert in the laws of arms." And while this may not be so strictly true in modern times, yet there does exist a substantial basis for the privilege in the hazardous nature of their employment and their enforced inability to observe the formalities usually regarded as essential to testamentary matters. As one court very well said: "In respect to all but these two classes, the right to transmit personal property by means of an unwritten will was first greatly circumscribed, and then taken away altogether. The imminent dangers, the diseases, disasters, and sudden death, which constantly beset soldiers and sailors; the utter inability, oftentimes, to find the time or the means to make a deliberate and written testamentary disposition of their effects, seem, at all times, to have made them a proper exception to the operation of a rule, which the wisdom of later times has found it expedient, if not absolutely obligatory, to apply to all others." (*Hubbard* v. *Hubbard,* 12 Barb. 148, *affirmed* 8 N. Y. 196.) So clearly was this difficulty recognized that the early civil law, says Blackstone, went so far as to declare that "if a soldier, in the article of death, wrote anything in bloody letters on his shield, or in the dust of the field with his sword, it was a very good military testament." And while the common law has never extended the doctrine so far, yet no particular formalities are deemed essential to a will of this character. Indeed the most frequent examples are to be found in letters indicating the intention of the writer with respect to the ultimate disposition of his property, and such a document is a valid expression of testamentary intent, even though it is for the most part not testamentary, or the writer expresses an intention to make a will at a future time. Nor need the will be signed or even seen by the testator, for in the *Goods of Scott,* (89 L. T. Rep. 588; [1903] P. 243) it appeared that a commanding officer directed a squadron officer to submit rolls showing the next of kin of all men under his command or the person to whom they desired their effects to go in the event of their death, and in compliance with this order a private soldier made a declaration that he desired all his effects to be credited to his sister, and this was adjudged to be a valid testamentary expression. In one instance the court went even further and held that a valid will might be made by the answers to interrogatories propounded to the testator.

Inquiring as to the classes of persons who may avail themselves of this privilege, Swinburne quaintly says that "there be three sorts of men, which be termed in law by the name of soldiers. The first be *milites armati,* armed soldiers . . .; the second be *milites literarii,* lettered soldiers, as doctors of the law; the third sort be *milites cœlestes,* celestial or heavenly soldiers, as clergymen and divines: for so the law doth term them." And discussing the last class he argues that "much more then (by all probabilities) are those spiritual soldiers worthy of all privileges, by whose prayers and intercessions the wrath of God is appeased, and victory many times obtained, and without whose ministry Christianity would quickly be ruinated and subverted." Whatever may be the opinion of the modern jurists with respect to this classification the statutes have certainly received a most liberal construction, being deemed to embrace all soldiers and mariners regardless of their rank, the only restriction being, that under the English statutes the testator must be at least fourteen years of age.

By the doctrine of the civil law as it was finally codified by Justinian, the privilege of making wills of this character was confined to soldiers *in expeditione* and this limitation is adopted in nearly all Continental Europe and in America, either by statutory enactment or by judicial construction, and here arises the only real difficulty in applying the doctrine. While the modern statutes require the testator to be in "military service" or in "actual military service," and these phrases and *in expeditione* are synonymous, yet this leaves us but where we began, for while the former terms are the equivalent of the latter, the question of what shall be considered an expedition is largely one of fact depending on the circumstances of the particular case. The true test, it has been said, by which to determine whether one is in actual military service is whether he has taken some step, however small, toward joining the forces in the field (*Goods of Hiscock,* 84 L. T. N. S 61; [1901] P. 78, 70 L. J. P. 22; 17 L. T. Rep. 110). Hence it follows that mobilization, as was said in one instance by Jeune, P., "may be fairly taken as a commencement of that which in Roman law was expressed by the words *in expeditione.* These words meant something more than the English words, 'on an expedition,' because it is quite clear that when a force begins in a sense to engage in or to enter upon active service, it would be said to be *in expeditione.* I thought, . . . and I still think, that it is a fair test to ask whether or not the person whose testamentary dispositions are in question has done anything; but I am of opinion that if the order for mobilization has been received, although the man himself may have done nothing under it, yet that order so alters his position as practically to place him *in expeditione.* Such an order goes beyond a mere warning. I do not think a mere warning for active service would be sufficient; but when a force is mobilized I understand this to be that it is placed under military orders with a view to some step being taken forthwith for active service." (*Gattward* v. *Knee,* L. R. (1902) 99; 17 L. J. Prob. N. S. 34; 86 L. T. N. S. 119; 18 L. T. Rep. 163, 4 B. R. C. 895). These principles apply then to one who has received orders to report to his superior officer for duty in a foreign country, or to a soldier on board a vessel on his way to the front, as well as to a soldier who dies in a hospital to which he has been sent at the command of his superior officer. In a recent case (*In re Lemond,* [1915] 2 Ch. 240) it was shown that on the conclusion of certain frontier operations in India a part of the force remained as an escort to the party engaged in the delimitation of the frontier. One of the members of the escort was mortally wounded and before dying made his will. It was adjudged that the testator was in "actual military service" within the meaning of the statute, since military service once commenced did not cease until the conclusion of actual operations. However, there must be, in order for these provisions to be invoked, some actual tangible movements, for they do not apply to persons quartered at home or in barracks. And in this respect the modern construction is similar to that of the

modified civil law. The same broad construction given to the statutes regulating the wills of soldiers applies equally well to sailors, who in order to invoke the privileges of the various statutes must be "at sea," and it is not necessary that the ship be on the high seas in order for their wills to be valid. On the contrary, in several instances have privileged wills been sustained when the testators' ship, at the time of their making, was lying at a dock or in a harbor preparatory to sailing. Nor is it even essential that the testator be on board his ship when his will was written, so long as he is connected with the service, and there are to be found statements to the effect that a mariner is "at sea" as soon as his vessel leaves its dock, although it is in a river at the time the will is made. However, as opposed to these is the rather anomalous decision rendered in *Gauin's Will,* Tuck. (N. Y.) 44, wherein it was held that a will could not be considered as having been made "at sea" where it was executed by an officer on a gunboat stationed in the Mississippi river, above the ebb and flow of the tide. The court based its holding on the general definition of the sea as being confined to tidal waters, but it is obvious that such a construction would result in excluding from the scope of the statute many who would be justly entitled to its benefits, as, for example, sailors on the Great Lakes, and it is questionable whether, in the face of the adverse criticism that this decision has received, it would be considered as binding or even persuasive authority in modern times.

Wills of this character are free from yet another restriction, for while it was early declared by the English statute of frauds that no nuncupative will should be valid unless made during the last sickness of the deceased, it is now the generally accepted rule that this restriction does not apply to soldiers and sailors entitled, under the same act, or those similar to it, to make privileged wills, and that the testator need not be *in extremis* at the time of the declaration of his testamentary wishes, for the risk to which he is constantly exposed may very well instil in him the consciousness of approaching death which is supplied to others by the knowledge of an immediate dissolution. For as one court has said: "It is quite obvious that the fear of death which was supplied by sickness in the case of those who made oral wills at home was sufficiently furnished, in the case of sailors or soldiers, by the perils of the sea or the presence of the enemy. (*In re O'Conner's Will,* 65 Misc. 403, 121 N. Y. S. 903.)

While the civil law, certainly after the time of Constantine, required two witnesses to prove a will of this character, this requirement was not to the essence of the act, but only to the proof thereof, and it is no longer considered as essential, any satisfactory evidence being deemed sufficient, in this respect differing materially from the usual requirements as to the proof of testamentary documents. But no difference exists with regard to the duration of the wills once they are made, for they may continue effective many years, although it may be questioned whether a will made by one while in active service would be valid on his death after leaving the service, and on principle it would seem that such would not be the case, although apparently the question has not been presented for judicial decision. In this connection it should be observed, however, that under the civil law a privileged will of a soldier made while his name was inscribed on the list of the army was construed valid for one year after his name was taken off unless he was discharged *ignominiae causa,* and the wills of Dutch soldiers are valid for only one year after their return from active service.

What the harvest of the courts will be from the present conflict it is yet too early to state; certainly there should not be rendered nugatory by judicial distinctions and refinements the last wishes of those who go forth to give their all in defense of their country, and the courts should look with kindly eye at the testamentary expressions of those who have fought the good fight and whose memories are enshrined in the hearts of their countrymen.

L. R. BUSKEY.

THE LEGAL STATUS OF LEAP YEAR

IF Julius Cæsar, in reforming the calendar, had not made a mistake of eleven minutes to the year, the Pirates of Penzance never would have soothed the troubled breast, interesting fictions would have been lost to literature, divers statutes and sundry decisions would not illumine legal records, and the feminine prerogative of beguiling the hero of a single bedstead and inducing mere man to commit the bachelor's last folly would not obtain. Thus do we see the philosophy of history justified and sense a "reign of law" in the succession of human affairs, perceiving that great events and momentous institutions are the natural issue of times that have gone before.

In the cycle of the months February is distinguished. It is the shortest month with the largest number of holidays, gave the imperial Republic its two greatest Presidents, while Saint Valentine's Day mellows it with a romance peculiarly its own. But quadrennially it is unique. Somewhere from the great abyss of Time the calendar makers seized twenty-four hours and added them as a day to this midget of the months and straightway parliaments, legislatures and courts declared it to be no day at all despite the fact that February persisted in standing upon the order of its going the additional day.

What is the legal value of an intercalary day? Is the added day in February *another* day or is it merely a *double* day? This question has been provocative of some perplexity among lawyers, and as the whirligig of time has brought us to another bissextile year, an examination of the problem may have the interest at least of timeliness.

The Julian, or Old Style, calendar had its intercalated day, but the manner in which the Romans referred to it sheds no light in determining the legal or commercial value they attached to it. They numbered their days, and the fact of its having a numerical designation, *bis-sexto calendas,* might indicate that it was recognized as an independent day, while on the other hand, the fact that it was called an *intercalar* day might indicate its suppression by insertion, especially so since the preceding and succeeding days retained their original relative numbers.

Although Great Britain did not adopt the Gregorian calendar until 1752, the English Parliament, as early as the thirteenth century, by an act entitled Statute 21 Henry III, declared that "the day occurring in leap year and the next going before shall be counted as one day." As this statute has been the foundation of a few decisions in the United States, and as the question discussed depends largely on whether it has been made a part of the law of the various states, the statute itself, in its English version, as here given, is of interest.

"The King unto his Justices of the Bench, Greeting. Know ye, that where within our Realm of England, it was doubted of

the year and day that were wont to be assigned unto sick persons being impleaded, when and from what day in the year going before unto another day of the year following, the year and day in a leap-year ought to be taken and reckoned how long it was: II. We therefore, willing that a conformity be observed in this behalf everywhere within our Realm, and to avoid all danger from such as be in plea, have provided, and by the counsel of our faithful subjects have ordained, That, to take away from henceforth all doubt and ambiguity that might arise hereupon, the day increasing in the leap-year shall be accounted for one year, so that because of that day none shall be prejudiced that is impleaded, but it shall be taken and reckoned of the same month wherein it groweth; and that day, and the day next going before, shall be accounted for one day. And therefore we do command you, that from henceforth you do cause this to be published afore you, and be observed. Witness myself at Westminster," etc.

This statute has been recognized as a part of the law governing some of the states. In New York the statute law of England, introduced into the colony by consent, became a part of the common law. *Bogardus* v. *Trinity Church*, 4 Paige 178. But this English statute was explicitly adopted; 1 R. S. ch. 19, tit. 1, sections 1-3, which is the source of the present statute, General Construction Law, section 58, providing that "the term year in a statute, contract or any public or private instrument means 365 days, but the added day of a leap year and the day immediately preceding shall for the purpose of such computation be counted as one day. In a statute, contract or public or private instrument, the term year means twelve months, the term half-year six months, and the term a quarter of a year, three months." That the early revisers grounded this statute on the older English statute is indubitable, for in the Revision, Laws 1853, ch. 466, section 12, as amended by the laws of 1867, ch. 91, they annotated the third section as follows: "The third section of this title is founded partly on the common law as recognized by our courts and partly on the statute of 21 Henry III, which was included in the general repeal of British statutes and has never been re-enacted in this state, but as its provisions are necessary to the perfection of the rule, it has been deemed expedient to incorporate them in the proposed section."

What is the scope of this statute, and how is it to be construed? Does it embrace deeds, bonds, mortgages, contracts, commercial paper, public and private instruments and penal statutes? Is the intercalary day to be disregarded as of course, for all purposes commercially and legally, as a *dies non*? Suppose a broker borrows money on his note dated February 28, 1916, payable one day after date, may he retain the money until March 1, 1916, and without interest for the additional day? Has a lien filed or a judgment entered February 28th no priority over one filed or entered on the 29th? Could a saloon keeper, charged with a violation of the excise law for selling liquor on Sunday, February 29th, successfully defend on the ground that he was dispensing on a long drawn out Saturday, the twenty-eighth? Such questions would seem to suggest a *reductio ad absurdum* comparable to the ridiculous situation evolved by Gilbert, a lawyer by the way, in resorting to the legal fiction of disregarding the intercalary day in the Pirates of Penzance.

In the seeming absence of judicial construction the statute must be considered by itself and on analysis it will be observed that, like its earlier English prototype, it does not in express terms apply to contracts or obligations to be performed in a number of months or days. It makes no provision as to how the two days should be accounted in computing a number of days less than one year in which they might occur, and therefore it would not seem to furnish a rule for commercial paper or for contracts to be executed within a given number of days. In defining the terms of computation it refers only to year, half year and quarter of a year without application to the computation of days. By analogy therefore, *Commercial Bank of Kentucky* v. *Varnum*, 49 N. Y. 269, would seem to apply. In that case the court held that a statute as to commercial paper, payable in any number of days after date, did not apply to years or months. So conversely the same rule would logically apply as to the computation of days under the present statute. Story was of that opinion. Discussing the question in his Bills of Exchange, section 213a, he says: "Suppose a note dated on the 28th, 29th, 30th or 31st day of January, payable in one month, on what day will it become due? The true answer will be on the 28th of February if the year is not bissextile, and if it be, then on the 29th day of February." And Daniel, Negotiable Instruments, section 624, says: "A month dating from the 31st of January would expire on the 28th or 29th of February as the case might be; and in a leap year, a month counting from the 31st, 30th or 29th of January would end on the 29th of February and the last day of grace would be March third. But if a bill or note were dated January 28th, a month therefrom would terminate on February 28th and presentment should be on March the second." Other textbook writers are to the same effect.

In Pennsylvania it has been held that the English statute has no relation to the computation of time when a rule or statute fixes a number of days. *Harker* v. *Addis*, 4 Pa. 515. And in *Bell* v. *Lamprey*, 57 N. H. 168, the court gave the 29th of February recognition as an independent day when it held that it must be computed in the six years' residence within the state to create a bar under the statute of limitations.

So it may be said that there is nothing in the original statute nor in the adoption of it into the laws of New York that would make it applicable to commercial paper or to contracts to be performed within a given number of days or months.

Turning to Indiana, we find an interesting situation. In that state the courts have passed on the status of February 29th, in several cases. The Revised Statutes of 1824, 1831 and 1838 provided that the 28th and 29th of February should be counted as one day. This provision was omitted from the Revised Statutes of 1843. The question first arose in the courts, in *Swift* v. *Tousey*, 5 Ind. 196. In that case a judgment was rendered by the Mayor of Laurenceburgh on the 24th of February, 1852. An appeal was taken to the circuit court on the 25th of March following. The court held that despite the omission of the provision from the Revised Statutes of 1843, the 28th and 29th of February were in legal contemplation but one day and that the appeal was properly taken within the thirty days after the rendition of judgment. In *Craft* v. *The State Bank of Indiana*, 7 Ind. 219, a note, dated February 25, 1848, payable 90 days after date, was protested for nonpayment, on Saturday, May 27th, and notice given to the indorser. The court held that the note did not mature until the 29th of May and that the demand of payment was premature. The question again arose in *Kohler* v. *Montgomery*, 17 Ind. 220. Suit was brought upon a promissory note dated February 3, 1860, payable 120 days after its date. It appeared in evidence that the note was presented, and protested for nonpayment on June 5, 1860. The court held that the presentment and protest were premature by one day, as the month of February, commercially speaking, never had more than twenty-eight days. In another aspect, the question again arose in *Porter* v. *Holloway*, 43 Ind. 35. The point was whether a bill of exceptions, the time for filing which was 60 days, was properly in the record. Judgment was rendered February 5, 1872, and the bill of exceptions was filed April 6, 1872. It was contended that this was the sixty-

first day, but the court held that it was in time, as the 28th and 29th days of February must be regarded as one day.

But in *Helphenstine* v. *The Vincennes National Bank,* 65 Ind. 582, the court, after a severe struggle with itself, reluctantly overthrew, in part at least, the absurd rule of the earlier cases. That case was also a suit on a promissory note. The summons was issued and served on the 24th day of February. The law required the service of process at least ten days before the first day of the term of court, which in that instance was March sixth. The court below held that the service was sufficient. The supreme court affirmed the judgment but on another ground, namely, that it could not be attacked in a collateral proceeding which it declared the appeal to be, at the same time reiterating the doctrine that the 28th and 29th of February must be regarded in law as one day. This decision was severely criticised, and on a rehearing the court sent *Swift* v. *Tousey,* and its dependents, to the limbo of overruled cases, and affirmed the judgment on the broad ground that the 29th day of February constituted a day separate from the day preceding and therefore the service was sufficient. Referring to the English version of 21 Henry III, given above, the court said: "It will be seen from this statute that it simply provides that the 28th and 29th days of February as part of a year, which at common law consisted of 365 days, should be accounted for one day in computing the year and day that were wont to be assigned unto sick persons being impleaded. The statute makes no provision as to how the two days should be accounted in computing a number of days less than one year in which they might occur. Each of the 28th and 29th days of February in the leap year is a day of twenty-four hours' duration, and where these two days occur in any period of days less than one year, they ought to be and must be regarded as two days and not as one day for any purpose." And again: "Out of the statute of Henry has grown the notion that for all purposes the two days are as one. The correct rule is that in speaking of 'a year,' a 'quarter's' rent, and the like, the 29th day is not counted, but in marking off a fixed number of *days* it is to be counted." A later case, *Brown* v. *Jones,* 125 Ind. 375, which held that a thirty day bill of exchange drawn on February 11, 1884, and accepted on the same day, was properly presented for payment and protest on the 15th day of March, 1884, followed *Helphenstein* v. *The Vincennes National Bank.* These decisions, *quoad hoc,* overrule the earlier cases, and doubtless should the question arise in other phases, in Indiana or in other jurisdictions, the same reasonable rule will prevail.

There is no rational principle in law, logic or chronology why the 29th day of February should coalesce and merge with the preceding day, and particularly there is no reason, not technical and arbitrary, why it should not be regarded a full interim day in computing time for the purposes of commercial paper running in days, the service of process and the serving or filing of papers in the routine of procedure and practice. While the service of process, and legal papers generally, on certain holidays and Sundays is void, it is a fact that with the very few exceptions of short service, a Sunday, and occasionally a holiday, will intervene, and of course it is always counted. The same is true of the interim Sundays and holidays, in computing the maturity of commercial paper. Why then should this added day of February be ignored? It possesses no mystical properties that exempt it from the laws of nature. The unit of the measure of time, in law, is the sidereal day and as such the 29th of February must take its place in the procession of time. It may perchance be regarded, with some show of reason, as one with its predecessor, when another Joshua comes to judgment and the sun and moon stand at gaze, from February twenty-eight until March first, in some future vale of Adjalon. That time will doubtless be postponed, like lawyers' causes, *ad longissimum diem* and the leap year day referred to in the ancient statute as *dies ille* will become the threatened *dies iræ!*

OTTO ERICKSON.

MOTION FOR JUDGMENT ON THE PLEADINGS.

IT is not an uncommon thing for the general practitioner to overlook some of the most common and simple principles arising in the everyday practice. In this article we call attention to one frequently overlooked, and which, if insisted upon and applied, would often dispose of a given piece of litigation. It is this, that when a litigant interposes a motion for judgment on the pleadings, it is an election to have the controversy finally determined on the record, even to the granting of judgment against the mover should his own pleading be insufficient. If one will take the pains to observe the cases in which a motion is interposed, he will find that in nearly every instance the motion is treated and argued as a demurrer, and when denied, the moving party is permitted to reply to the pleading which he had contended was insufficient. We wish to call attention to the danger of using a motion for judgment on the pleadings to test out the sufficiency of a given pleading, instead of employing the more appropriate remedy of interposing a demurrer, and how such a motion is in fact often the proverbial "two-edged sword" that may be used to advantage against the maker of such a motion.

We lay down the proposition, that when a litigant interposes a motion for judgment on the pleadings, he thereby elects to have the cause finally determined upon the record. In support of that statement, we submit that when a motion for judgment on the pleadings is made, it is immaterial as to which party makes the motion: that such a motion having been made, the court will examine the record and give judgment for the party who appears to be entitled thereto from the allegations contained in the pleadings. Note the rule as laid down in 31 Cyc., at page 606, where it is said:

"A motion for judgment upon the pleadings is in the nature of a demurrer. It is in substance both a motion and a demurrer. It is a demurrer for the reason that it attacks the sufficiency of the pleadings; and it is a motion for the reason that it is an application for an order for judgment. Like a demurrer, it admits the truth of all well-pleaded facts in the pleadings of the opposing party. *It may be carried back and sustained against a prior pleading of the party making the motion, and the court will consider the whole record and give judgment for the party who, on the whole, appears entitled thereto.*"

In the case of *State ex rel. Herpolsheimer* v. *Lincoln Gas. Co.* (Nebr.) 56 N. W. 789, the court dismissed an application for a mandamus, the matter having been submitted upon the pleadings, upon the ground that the averments contained in the petition were insufficient. We also call attention to the case of *People ex rel. Carr* v. *Brown,* (Colo.) 48 Pac. 661, in which case there was a motion for judgment on the pleadings, and in the opinion of the court it is said:

"Upon the argument of the motion the respondent attacked the sufficiency of the information and asked that the motion be carried back to that pleading. The question, therefore, primarily presented, is as to the sufficiency of the information, since a motion for judgment on the pleadings cannot be sustained in favor of a plaintiff in a case, except where the complaint states

a cause of action and the answer fails to present a defense (citing cases). And such a motion by a defendant is proper when the complaint does not state facts sufficient to constitute a cause of action (citing cases). The inquiry, then, is whether the facts alleged in the information are sufficient . . . *The absence of an apt averment . . . is fatal to the information, and it follows, therefore, that for want of such an averment, the information herein fails to state a cause of action, and the motion must be carried back and sustained thereto, and the action dismissed.*"

Without stating the rule, the Supreme Court of Washington applied the principle in the case of *Rockford Shoe Co.* v. *Jacob*, 6 Wash. 421, wherein it is said:

"The judgment against the defendant in this case was rendered upon motion of the plaintiff upon the pleadings, and the only question raised by the appeal of the defendant is, as to whether or not the pleadings warranted the construction placed upon them by the court in its determination that upon the undisputed allegations contained therein the plaintiff was entitled to recover. . . . It follows that upon the pleadings as they stood the defendant, and not the plaintiff, was entitled to judgment. . . . The judgment will be reversed and the cause remanded with instructions to enter a judgment of dismissal in favor of the defendant against the plaintiff as above suggested."

Two other Washington decisions serve further to illustrate the proposition laid down by us: *State ex rel. Murphy* v. *Brown*, 83 Wash. 100, 145 Pac. 69, and *State ex rel. Brown* v. *Superior Court*, (45 Wash.) 151 Pac. 1126. We quote from the opinion rendered *per curiam* in the last case:

"The relator, J. J. Brown, seeks to recover the possession of $1000 in money and certain papers taken from his person and now held by the prosecuting attorney of King county for the purpose of using the same as evidence upon the trial of a charge of corruptly influencing of agent pending against him in the superior court of that county. The case was before us upon certiorari from the superior court, and disposed of upon the pleadings adverse to the contention of relator by our former decision reported in *State ex rel. Murphy* v. *Brown*, 83 Wash. 100, 145 Pac. 69. Upon the filing of the remittitur, the superior court being of the opinion that our decision reversing its decision was in effect a final disposition of the case calling for the rendering of a final judgment denying the relief prayed for by relator, judgment was entered accordingly, which also, in effect, denied the relator's claimed right to reply to the prosecuting attorney's answer to his petition and proceed to trial of the issues claimed to be so raised. .

"After the filing of relator's petition in the superior court praying for the return to him of the money and papers held by the prosecuting attorney, the order to show cause issued thereon and the prosecuting attorney's answer and return thereto, relator, without demurring, replying or pleading further, 'moved the court for an order for the return of said money and papers, upon the petition, order to show cause and return thereon.' This is the language of the trial court designating the motion in recitals in the order disposing of it in relator's favor. We have nothing more in the record before us showing the nature of the motion. In our former decision reversing the order of the superior court, this motion was regarded by us as in substance a motion for judgment upon the pleadings. We are still of the opinion that it must be so regarded.

"Counsel for the relator contend that the superior court erred in rendering judgment against him, dismissing the case, and in denying him the right to reply and proceed to trial upon the issues which might be so raised. In other words, that his motion for judgment amounted to nothing more than a demurrer to the prosecuting attorney's answer and return, from which it is argued that, upon the filing of the remittitur from this court in the superior court, the relator was entitled to reply as if a demurrer to the prosecuting attorney's answer had been overruled. We do not so view this motion. It seems to us that the motion was further reaching than a mere demurrer. *It was an invitation to the court to finally dispose of the case upon the record as it then stood. It called for the searching of the whole record, the petition as well as the prosecuting attorney's answer thereto. Manifestly, it sought to avoid the right to amend or further plead which the prosecuting attorney would have, had his answer been attacked and found insufficient upon demurrer only. To dispose of the motion in relator's favor would of necessity end the case and prevent any amendment or further pleading by the prosecuting attorney. The relator can have no just ground for complaint being held to be in the same position as he seeks to place his opponent in by such a motion, so far as the opportunity to amend or further plead is concerned. We think relator should be held to have submitted the case to the court for final decision, by his motion, whether such decision be for or against him.* These considerations would seem to answer the contention of counsel for relator if they are seeking to amend their petition, which they are not doing, but seeking to present new matter in a reply to the prosecuting attorney's answer. So while it is not a question of the relator's right to amend his petition, it is in principle the same. . . . By our former decision, the case was disposed of largely upon the facts stated in the relator's petition, but not wholly so, the prosecuting attorney's answer to the petition being also looked to. *In other words, the whole record was searched with a view of determining which party was entitled to final judgment as the record then stood.*

"We conclude that our former decision was a final disposition of the case against the contention of the relator, and that the superior court correctly entered a final judgment thereon and denied the relator's claimed right to reply and proceed to trial upon the issues sought to be raised by such reply."

For some reason or other, the question here discussed seems not to have been presented to very many courts of last resort, but it is to be noted that whenever and wherever it has been presented, it has been held, without exception, we believe, that a motion for judgment on the pleadings is an election to have the cause disposed of finally on the record; that such a motion searches the record, and judgment will be rendered in favor of the party entitled thereto on the entire record; and that having elected so to submit the cause, the party interposing such motion may not amend his pleading when the same is held insufficient and judgment granted against him, for he cannot complain of having the same rule applied to him that he was seeking to enforce against his adversary. The rule, as exemplified by the cases, is a salutary one, and one which, if insisted upon, would summarily dispose of a good many controversies.

W. F. MEIER.

EMERGENCY AS A JUSTIFICATION FOR TRESPASS

IN these troubled times, when all kinds of unforeseen emergencies arise through causes connected with the war, which have seldom arisen during recent times, it will be found instructive and useful to consider the question how far emergency and the exigencies of the case can be relied on as a justification for trespass. This question may arise in many different ways nowadays. It may be that some house is struck by a missile or bomb

and set on fire in the absence of its owner or occupier, or that, for reasons which the reader will have in mind, it becomes exceedingly desirable to extinguish the lights in a neighbor's house when that neighbor may be away or deterred from taking those steps himself. Again, it may happen that it becomes exceedingly desirable to take charge of some person's effects. A horse in a field may be thrown into such a state of terror from the sound of explosion that, to save it from destruction, it becomes necessary to enter the field and secure the animal. These are mere incidents taken at random. The reader himself—if gifted with an average power of imagination—can, no doubt, supply many possible occasions when trespass becomes almost a moral duty to the good citizen.

In this article it is proposed to review some of the authorities which throw light upon this question of justification for trespass. That necessity is a good defense to many torts—or, rather, to acts which would amount to torts were it not for the defensive plea—is clearly shown by the cases and the dicta of many duly qualified writers on our judicial system and our laws generally. This underlying principle outcrops in many places in our law. Speaking broadly, however, the authorities on the point which we propose to consider are not very numerous. Possibly this is a subject for congratulating ourselves as implying that our national character has a very large element of fairness in its composition —that the average British subject abhors the bringing of an action or even the raising of a complaint against some person who, with all the best intentions in the world, has caused the party whom the former intended to benefit some material harm.

Succor may be rendered on the spur of the moment in a way which, had there been an opportunity for maturer reflection, would have been discarded in favor of some other method of assistance. At the time, the party assisted will, no doubt, willingly recognize the good intentions with which the acts of assistance were proffered. Later, when he reflects on other methods which might have been taken by the party who came to his assistance, and finds that had those methods been adopted the benefits to himself would have been greater and the harm done less, his gratitude disappears and in place of it he fosters a feeling of annoyance which may culminate in his eventually suing his would-be benefactor for the damage. This leads to the question which is very far from having been clearly decided —how far the human element is to be taken into consideration in such a case, and how far the would-be benefactor is to be punished for negligence in applying the modes of assistance prompted by the spur of the moment.

In an old case tried at the beginning of the seventeenth century a ferryman had "surcharged" his barge. He had, presumably, overloaded it both with passengers and goods. The barge was to sail from Gravesend to London, but in the course of the passage a gale of wind sprung up which so frightened one of the passengers that he seized a large hogshead of wine and pushed it overboard. This barrel was not his property, and he was subsequently sued for trespass. His defense was that in the circumstances it was necessary to lighten the barge to save the passengers and the craft herself. It does not transpire whether the plaintiff, who was the owner of the jettisoned goods, was on board at the time. Possibly if he had been he would not have brought the action. However that may have been, the court decided in favor of the defendant, holding that, as the act was done for the safety of the passengers, he was not liable: (see *Mouse's* case, 1608, 12 Co. Rep. 63).

In the last-mentioned case the court seems to have taken the view that the act of the defendant was in fact necessary to save the passengers. It seems quite clear, however, that such a justification for trespass may be sufficient where it is a question of saving property only. In a case where a member of a volunteer fire brigade had sought forcibly to enter a burning house which was already in the rightful possession of another brigade, Mr. Justice Kennedy (as he then was) said: "I can conceive circumstances under which such an act might be justifiable; as, for instance, if it were necessary in order to save life, or perhaps also if there were an insufficient force on the premises for the purposes of extinguishing the fire, or if the duty of the persons employed in doing so were being neglected, and danger to life *or property* was the result": (see *Carter* v. *Thomas* (1893) 1 Q. B. 673, at p. 678).

There are a larger number of maritime cases which show that danger to property alone may justify trespass. In maritime cases no doubt there is usually the additional element of danger to life. But the comparatively recent case of *Cope* v. *Sharpe* (*No.* 2) (106 L. T. Rep. 56; (1912) 1 K. B. 496), to which we shall have occasion to allude more fully, has put the matter beyond doubt, and we may now lay it down as a sound proposition of law that danger to property alone may be a good justification for trespass.

It is conceived that the most important question in relation to the matter we have in hand is the question of the degree of necessity which must subsist to justify a stranger in entering upon the premises of another and doing some act to prevent further damage. This was the point that was very fully considered by the Court of Appeal in the last-mentioned case. It must be remembered that the slightest interference with the property of another amounts to a trespass, which must be justified if the party interfering is to escape the consequences of his acts. "Scratching the panel of a carriage," said Baron Alderson in the case of *Fouldes* v. *Willoughby* (8 M. & W. 540, at p. 549), "would be a trespass." Ordinarily speaking, a man would be well advised to avoid interfering with any other person's effects, however slight the act of interference may be.

It is stated in Williams on Executors (10th edit., p. 187) that there are many acts which a stranger may perform without incurring the hazard of being involved as an executor *de son tort*. As instances of such acts, the locking up of the deceased's goods for preservation purposes, the feeding of the deceased's cattle, and the repairing of his house are given. In *Kirk v. Gregory* (1 Ex. Div. 55) a near relative of a deceased person who was in the house at the time of the death removed some jewelry of the deceased from one room to another. The executors brought an action for trespass, and the jury found that the defendant had removed the jewelry *bonâ fide* for its preservation. But the court held that this was not a sufficient answer to the action, although, had a reasonable necessity for such interference been shown, the case would have been different. In the opinion of the court the defendant ought to have shown that the interference was reasonably necessary and that the articles were in such a position as to require the interference, and, further, that such interference was reasonably carried out.

The whole law on this point was dealt with both by Lord Wrenbury (then a Lord Justice of Appeal) and the late Lord Justice Kennedy in the case of *Cope* v. *Sharpe* (*No.* 2), to which we have already referred. The facts in that case may be briefly stated as follows: The plaintiff was the owner of land the shooting over which was let. The defendant was the head gamekeeper and bailiff of the lessee of the shooting. A fire broke out on a part of the land. At some distance there was a covert affording shelter to nesting pheasants. Some fifty persons were engaged in beating out the fire, when the plaintiff set fire to some strips of heather between the main fire and

the covert, with the view of preventing the main fire reaching and destroying the nesting pheasants. The fire was eventually put out by the fifty persons alluded to. An action was brought by the owner of the land against the defendant for trespass. The important point to note is that the setting fire to the heather between the main fire and the covert proved, as events turned out, to be unnecessary, however expedient it may have been to burn the heather.

Mr. Justice Phillimore and Mr. Justice Hamilton took the view that the defendant had not justified his trespass. In the court below, the judge had put these two questions to the jury: "Was the method adopted by the defendant in fact necessary for the protection of his master's property? If not, was it reasonably necessary in the circumstances?" The jury answered the first question in the negative, and the second in the affirmative. "The question we have to decide," said Mr. Justice Phillimore, "is whether a defendant relying on necessity as a justification of a trespass to land or goods, and possibly also of a trespass to the person, can be justified by anything short of actual necessity." His Lordship expressed the opinion that actual, not merely apparent, necessity for interference must be shown in justification. Mr. Justice Hamilton was of a like opinion.

The Court of Appeal, however, took a different view. It is true that Lord Justice Vaughan Williams dissented from the other Lords Justices, but the decision of the majority of the court is clearly more in accord with the authorities, and certainly more in accord with the dictates of justice than the opposing view. The majority held that, on the findings of the jury, the defendant was entitled to judgment. The basis of their Lordships' decision was that where there is imminent danger to property and it is reasonably necessary to interfere, interference is justifiable.

The judgment of the late Lord Justice Kennedy is particularly illuminating. He took the case of a house on fire, where the direction of wind creates an imminent danger for the occupant of the adjoining house, and he, to prevent the danger, pours water on the burning house. Then the wind changes, so that, as events turn out, the discharge of water into the burning house was not really actually necessary to preserve the adjoining building. His Lordship indicated that in such a case an action for damage caused by the water could not be maintained. After reviewing the authorities, the same learned Lord Justice said: "These cases do show that the law requires, in order to make good a defense in an action of trespass for interference with the property of another for the purpose of averting an imminent danger, that the defendant shall prove that such a danger existed actually and not merely in the belief of the defendant. They do not show that, even if the existence of such an imminent danger as to vindicate the reasonableness of the interference in order to preserve property exposed to the danger is proved, the defense must still fail, unless it is also proved that the interference was in the circumstances, as they eventually happened, actually necessary—that is to say, that the property sought to be preserved must, but for the interference complained of, have suffered injury or destruction."

We have given the words of Lord Justice Kennedy in the last-mentioned case at some length, as they seem to give the true effect of all the prior cases. It only remains to add that his Lordship and Lord Justice Buckley (as he then was) set up as the test in all these cases the reasonableness of the act done. The question must now always be whether the acts complained of were reasonably necessary, whether the acts were such as a reasonable man would properly do in the circumstances to meet a real danger.—*Law Times.*

Cases of Interest.

LIABILITY OF DIVORCED HUSBAND FOR ASSAULT ON WIFE COMMITTED DURING COVERTURE.—It is well settled that at common law a divorced woman cannot maintain against her former husband an action for damages resulting from an assault and battery committed by him upon her person while they sustained toward each other the relation of husband and wife. But what effect the liberal statutes of recent years giving to married women rights which they did not formerly possess has had on this common law rule is a question which is apparently new. Therefore the case of Lillienkamp *v.* Rippetoe, (Tenn.) 179 S. W. 628, which answers the question in the light of the Tennessee Married Women's Act, is worthy of attention. That act in part provides "that married women be, and are, hereby fully emancipated from all disability on account of coverture," and a married woman may "sue and be sued with all the rights and incidents thereof, as if she were not married." The Tennessee court holds that the common law rule has not been changed by the statute, saying: "We are not warranted in ascribing to the legislature by anything appearing in this act a purpose to empower a wife to bring an action against her husband for injuries to her person occurring during the coverture, thereby making public scandal of family discord, to the hurt of the reputation of husband and wife, their families and connections, unless such purpose clearly appears by the express terms of the act."

WHO ENTITLED TO ICE ON MILLPOND ABOVE DAM.—Chief Justice Bartlett of the New York Court of Appeals writing the opinion of the court in Valentine *v.* Schwarz, 109 N. E. 866, discusses in an interesting manner the legal proposition involved in that case, which was whether the right of flowage belonging to the owner of a dam carried with it the right to take ice from the water which the dam caused to collect over the land of an adjoining owner. The conclusion reached follows: "As against the owner of the easement of flowage, the owner of the soil has the right to remove the ice which forms over his land, subject to the qualification that he must not thereby damage the mill privilege. There was no question of damaging the mill privilege in the present case, as the owner of the mill privilege was the person endeavoring to remove the ice. A somewhat different view seems to have been entertained at one time by the courts of Connecticut. Thus in Mill River Woolen Mfg. Co. *v.* Smith, 34 Conn. 462, decided in 1867, it was held that the owners of the water of a millpond owned the ice formed upon it, and that the riparian proprietors had no right, as owners of the soil, to remove it. The doctrine thus declared, however, must later have undergone considerable modification in that jurisdiction, for in the case of Geer *v.* Rockwell, 65 Conn. 316, 32 Atl. 924, decided in 1895, we find Mr. Justice Baldwin, one of Connecticut's ablest judges, saying: 'Under an ordinary flowage petition the plaintiff acquires a perpetual right to build and maintain a dam, but this does not constitute him the proprietor of the ice which may be formed upon the pond. On the contrary, such ice belongs to the proprietor of the lands overflowed, subject only to the right of the millowner to have it left to melt where it is, if this be necessary to maintain a proper supply of water for his mill.' "

ELEMENTS OF DAMAGE IN CONDEMNATION PROCEEDINGS AS INCLUDING ADAPTABILITY TO PURPOSE FOR WHICH LAND COULD BE USED MOST PROFITABLY.—In condemnation proceedings the rule has been laid down that adaptability to the purpose for which the land can be used most profitably is to be considered

on the question of damages. But in New York *v.* Sage, 239 U. S. 57, which was a proceeding by the city of New York for the taking of land for the Ashokan reservoir, Mr. Justice Holmes writing the opinion of the court limited the rule by saying that adaptability is to be considered only so far as the public would have considered it if the land had been offered for sale in the absence of the city's exercise of the power of eminent domain. He further said, however, that "the fact that the most profitable use could be made only in connection with other land is not conclusive against its being taken into account, if the union of properties necessary is so practicable that the possibility would affect the market price. But what the owner is entitled to is the value of the property taken, and that means what it fairly may be believed that a purchaser in fair market conditions would have given for it in fact—not what a tribunal at a later date may think a purchaser would have been wise to give, nor a proportion of the advance due to its union with other lots. The city is not to be made to pay for any part of what it has added to the land by thus uniting it with other lots, if that union would not have been practicable or have been attempted except by the intervention of eminent domain. Any rise in value before the taking, not caused by the expectation of that event, is to be allowed, but we repeat, it must be a rise in what a purchaser might be expected to give."

RIGHT OF STATE TO DISCRIMINATE AGAINST ALIEN COLLATERAL HEIRS IN MATTER OF SUCCESSION TAX.—Under the treaty between Great Britain and the United States entered into in 1899 it is provided by article 5 that "In all that concerns the right of disposing of every kind of property, real or personal, citizens or subjects of each of the high contracting parties shall in the dominions of the other enjoy the rights which are or may be accorded to the citizens or subjects of the most favored nation." Treaties with Germany, Nicaragua and Argentine Republic provide in effect that the citizens or subjects of those countries shall not be discriminated against in the matter of taxes. By virtue of these various treaties it was held in Brown *v.* Daly, 154 N. W. 602, that the state treasurer of Iowa could not recover from alien collateral heirs who were subjects of Great Britain a collateral inheritance tax in excess of 5 per cent., it appearing that collateral heirs who were citizens of the United States were not required to pay such excess. The court per Evans, J., said: "It is contended by appellee, however, that article 5 has no application to the case. In support of this contention emphasis is put upon the first clause of article 5: 'In all that concerns the right of disposing of every kind of property.' It is argued that this article does not purport to deal with the right of receiving property. It will be noted that article 5 does not limit itself to the protection of 'the right of disposing,' but purports to apply to 'all that concerns the right of disposing.' The right of the donor to give and the right of the donee to receive the gift are interdependent. They are parts of the same thing. To abridge the one is to abridge the other. Surely, therefore, the right of a donee to receive is something which 'concerns the right of disposing.' We think, therefore, that the appropriate construction of article 5 makes it applicable to the case before us. If applicable, its effect is to give to subjects of Great Britain the benefit of the more favorable provisions, if any, of our treaties with other countries."

TAXATION OF SHARES OF STOCK IN FOREIGN CORPORATION.—There is plenty of authority to the general proposition that shares of stock in a foreign corporation are taxable in the state where the owner has his residence, but in Hawley *v.* Maldin, 232 U. S. 1, Mr. Justice Hughes delivering the opinion said: "Whether, in the case of corporations organized under state laws, a provision by the state of incorporation fixing the situs of shares for the purpose of taxation, by whomever owned, would exclude the taxation of the shares by other states in which their owners reside is a question which does not arise upon this record and need not be decided." This question left undecided by the Supreme Court of the United States has recently been presented to the Massachusetts Supreme Court in Bellows Falls Power Co. *v.* Com., 109 N. E. 891, wherein the state of Massachusetts sought to tax shares of stock in a Vermont corporation belonging to a resident of Massachusetts. The Vermont corporation had all its property and business in Vermont, and that state had power to tax all the shares of corporations organized under its laws, but it was held nevertheless that the state of Massachusetts had the right to tax shares of the corporation belonging to one of its residents. Chief Justice Rugg wrote an exhaustive opinion containing the following pertinent language: "The theory of taxation is that it is money exacted from the subject in return for the protection afforded by established government. It is the duty of governments to protect persons and property. These rights of the Massachusetts owner of shares of stock in the Vermont corporation pertain to his residence here and receive the protection of our laws. To that extent the shareholder resident here receives for the taxation imposed a return in governmental protection for the property rights incident to his ownership. These are incidents of property which necessarily follow the person of the owner of shares in foreign corporations, even though the shares may be taxed at the foreign domicil of the corporation. For these purposes the situs of corporate shares follows the domicil of the owner. This is the general rule. There appears to us to be no ground for the establishment of an exception to that general rule in the instant case."

POSSESSION OF BARREL OF WHISKEY AS AUTHORIZING CONVICTION OF OWNER OF KEEPING INTOXICANTS FOR PURPOSE OF ILLEGAL SALE.—The Court of Appeals of Georgia is divided on the question whether in the absence of any circumstance indicating the purpose for which it is to be used, mere possession of a barrel of whiskey will authorize a conviction for the violation of a municipal ordinance prohibiting the keeping of intoxicants for the purpose of illegal sale. The case wherein the division appears is Lewis *v.* Fitzgerald, 86 S. E. 531, and the majority of the court answer "No," their opinion being that the fact that the quantity of intoxicants in one's possession is unusually large is a circumstance which may be considered, with other facts and circumstances in a case, in determining the purpose for which the intoxicants are kept, and, in connection with proof that the possessor has sold or attempted to sell the intoxicants in question, it may authorize conviction. But they say that inasmuch as it is not unlawful to own intoxicants, no matter how large the quantity, mere proof of possession and ownership is as consistent with innocence as with the supposition that the custody and possession of the intoxicant was for the purpose of unlawful sale. Many will be inclined to agree with Judge Broyle, who dissented, that the circumstances surrounding the possession of the whiskey did not warrant the opinion of the majority that the judgment of the court below convicting the defendant of the offense of violating the ordinance was wrong. In his well-reasoned opinion he says: "The evidence shows that the defendant was a negro, and was employed in a poolroom. He was described by one of the state's witnesses as a 'suspicious character.' The undisputed evidence was that he had a barrel of whiskey in his possession. This court will take judicial cognizance that a barrel of whiskey costs considerable money, and the possession of such a large and costly quantity of intoxicating liquor by a negro who works in a poolroom and who is 'a suspicious character'

would, in my opinion, authorize the inference that he had the liquor, not for his own consumption, but for the purpose of unlawfully disposing of it. This inference, of course, could be rebutted; but in this case the defendant offered no evidence. He did not even go upon the stand to make a statement in the case, and offered no explanation whatever of why he had this large amount of whiskey. This court has repeatedly held that, where there is any evidence to sustain a conviction by the jury, or by the mayor, or recorder (sitting both as judge and jury), this court is not authorized to, and will not, interfere. Under the facts in this case, I do not see how it can be said that there is no evidence to sustain the judgment of the mayor and the judgment of the judge of the superior court."

VALIDITY OF ORDINANCE PROHIBITING LIQUOR ADVERTISEMENTS IN ANTI-SALOON TERRITORY.—An important decision involving the police power as applied to liquor advertisements has been made in Haskell *v.* Howard, (Ill.) 109 N. E. 992, wherein it was held that a municipality, though having the power to prohibit the sale of liquor within corporate limits had no power to prohibit by ordinance individuals from maintaining, displaying or posting on private property within such limits any sign or advertisement of any wholesale or retail liquor dealer and to declare the same a nuisance. This decision is likely to give joy to the liquor interests and gloom to the temperance advocates. The particular advertisement which caused the litigation appeared on a billboard placed on private property, but the ordinance declared illegal was not confined to billboard advertising. Farmer, C. J., wrote the opinion which contained the following language: "The briefs of counsel on both sides are devoted largely to a discussion of the power of municipalities to regulate the construction and use of billboards within the corporate limits. There is no doubt they have such power, but the regulation must be reasonable. . . . The object of the ordinance here involved was not the control and regulation of either the construction, location or use of billboards, but the purpose of its enactment was to prohibit any sign or advertisement of any wholesale or retail liquor dealer being displayed within the corporate limits of the city. The prohibition was not merely against the display of such signs on billboards, but was against their being displayed or posted upon any vehicle, or in, on, or about any building or premises in the corporate limits of the city. The ordinance purports to prohibit the posting or displaying of any advertisement of intoxicating liquor. No express power is given municipalities by the Cities and Villages Act to pass such an ordinance. If the power exists, it must be implied from the powers expressly conferred. The argument of appellees that the power to pass such an ordinance exists or is implied as incidental to the power to regulate or prohibit the sale of intoxicating liquors, or that it arises out of the statute which forbids taking orders for the sale and delivery of intoxicating liquors in anti-saloon territory, is untenable. The ordinance is not limited to advertisements for the sale of liquor in Villa Grove nor to advertisements for taking orders for the sale and delivery of intoxicating liquors in that city. The prohibition of such advertisements is unnecessary to and has no reasonable connection with the power to prohibit the sale of liquor in said city. If the power to prohibit such advertisements is to be implied, it must be because their display affects the public health, safety, morals, or welfare. By no stretch of the imagination could it be made to appear that such advertisements threaten or injuriously affect the public health or safety. If the ordinance can be sustained at all, it must be because they injuriously affect the morals or welfare of the public. It is a matter of common observation that a great many manufacturers extensively advertise their products by display signs in cities and along the lines of railroads and public highways. So far as we are aware, it has never been held that the advertisement of its beer by a brewery was so injurious to the public morals as to make it a nuisance *per se* and authorize it being prohibited. The use of intoxicating liquors is objectionable to a great many people; but so also is the use of tobacco, coca-cola, and chewing gum, but they are the products of lawful manufacture, and, so long as that is so, we do not see how their advertisement can be prohibited. It would seem inconsistent to say that a product may be lawfully manufactured for the consumption of all who desire it but the advertisement of it may be prohibited as an offense against public morals."

VALIDITY OF STATUTE REGULATING "JITNEYS."—The use of the "jitney" on the streets of municipalities as a competitor of the street car and the "taxicab" is a matter of common knowledge, and it is already the subject of legislation. Singled out as it has been for a regulation not imposed on other carriers of passengers it is not to be wondered at that complaint has already reached the courts that legislators have imposed burdens on the jitney that other carriers are not subject to and that it is the object of class legislation. We have such a complaint in City of Memphis *v.* Ry., etc., (Tenn.) 179 S. W. 631. The suit was begun by habeas corpus to secure the discharge of a person arrested for violating a Tennessee statute regulating jitneys, making them common carriers, and requiring that their owners get a license and give a bond conditioned that they would pay any damage that might be adjudged finally against them as compensation for loss of life or injury to person or property inflicted by them or caused by their negligence. The relator claimed that the legislation was arbitrary class legislation since the execution of an indemnity bond was not required in the case of automobiles privately owned or used, "taxicabs," or street railroad cars. The legislation was upheld as valid. The court gives a good definition of the word "jitney" saying that it may be defined to be "a self-propelled vehicle, other than a street car, traversing the public streets between certain definite points or termini, and as a common carrier conveying passengers at a five-cent or some small fare, between such termini and intermediate points, and so held out, advertised, or announced." On the question of the validity of the statute the court says: "The privately owned vehicle ordinarily has but a single destination, at which it comes to rest. Its use is not urged to or towards the limit in order to the reaping of profits. We are unable to see merit in the distinction taken by the circuit judge, when he intimated the opinion that a classification of the jitney from privately used automobiles might be sustained only so far as indemnity for damages done to passengers was concerned. Most of the dangers that surround such passengers in a substantial sense beset also the users of the street. Contrasting the jitney with street railway cars, to ascertain whether there be arbitrary classification: the street railway, by reason of its having tracks at definite places assigned it by municipal authority, on which tracks its traffic must move, is less liable to cause injury; and the substantial nature of its cars, and particularly the fixity, permanency, and great cost of its roadbed, afford an anchored indemnity in respect of its liability for negligence. Other marks for differentiation, appearing in the above outline of considerations imputable to the legislative mind, need not be reiterated. Assuming for test purposes (without meaning to decide or to intimate a decision) that taxicabs are common carriers, and that they are not included within the terms of the statute, does their exclusion operate to make the classification unreasonable and arbitrary? The word 'taxicab' is one of recent coinage, to describe a motor-driven conveyance that performs a service similar

to the cab or hackney carriage, held for hire at designated places at a fare proportioned to the length of the trips of the several passengers, who are taken to be carried to destinations without regard to any route adopted or uniformly conformed to by the operator. The jitney holds itself out to accommodate persons who purpose traveling along a distinct route chosen by the operator. Operators of taxicabs have not the temptation or necessity, we may assume, of choosing the most traveled streets, since those less traveled afford them better opportunities to serve the object their owners have in view. It may be that a larger investment is ordinarily required to enter the taxicab business than the other, and that the conveyances would be less in number on this account, as well as because of the greater fare charged, not to mention other differences to be drawn from the above summary. In New York an ordinance regulating the conduct of the business of public hackmen has been held not to be discriminatory, because it applied only to those engaged in transporting passengers for hire who solicit business on the streets, or because taximeters are required to be attached to motor-driven vehicles only. The Taxicab Cases, 82 Misc. Rep. 94, 143 N. Y. Supp. 279, affirmed under style Yellow Taxicab Co. *v.* Gaynor, 159 App. Div. 893, 144 N. Y. Supp. 299."

ACCIDENT TO EMPLOYEE AS INCLUDING TYPHOID FEVER RESULTING FROM DRINKING POLLUTED WATER.—The Wisconsin Workmen's Compensation Act makes the employer liable for any personal injury accidentally sustained by his employee, and for his death, in those cases where the employee is performing service growing out of and incidental to his employment and where the injury is proximately caused by accident. In Vennen *v.* New Dells Lumber Co., (Wis.) 154 N. W. 640, the question arose whether an employer was liable in damages for the death of an employee under circumstances as follows: The defendant was engaged in operating a manufacturing lumber establishment located on the Chippewa river, in the city of Eau Claire, Wis. In connection with its establishment it maintained an outhouse and two toilets for its employees working there and a toilet in its principal office building. All of the sewage from these toilets was discharged into the river near defendant's establishment. The pleadings alleged that the defendant, in supplying water for its boilers, not only secured water from the city waterworks, but also used water from the river, which was obtained by means of intake pipes; that the defendant was negligent in placing its intake pipes in such location that they carried into the boilers water that was contaminated by the sewage; and that this water, through defendant's negligence, became mixed with the water from the city waterworks, because of improper connecting pipes. It was further alleged that the defendant negligently permitted and caused the employees to drink of this polluted water, and thereby caused the deceased, Gerhard Vennen, to become sick with typhoid fever, which resulted in his death. A demurrer to the pleadings was overruled in the lower court and on appeal the judgment was affirmed by a divided court. The opinion of the majority of the court was in part as follows: "Do the allegations state a case showing that Vennen's death is attributable to 'accident' in the sense of the Compensation Act? It is urged that the contracting of typhoid disease under the facts and circumstances stated does not show that his death was due to an accidental occurrence. The term 'accidental,' as used in compensation laws, denotes something unusual, unexpected, and undesigned. The nature of it implies that there was an external act or occurrence which caused the personal injury or death of the employee. It contemplates an event not within one's foresight and expectation resulting in a mishap causing injury to the employee. Such an occurrence may be due to purely accidental causes, or it may be due to oversight and negligence. The fact that deceased became afflicted with typhoid fever while in defendant's service would not in the sense of the statute constitute a charge that he sustained an accidental injury, but the allegations go further, and state that this typhoid affliction is attributable to the undesigned and unexpected occurrence of the presence of bacteria in the drinking water furnished him by the defendant, as an incident to his employment. These facts and circumstances clearly charge that Vennen's sickess was the result of an unintended and unexpected mishap incidental to his employment. These allegations fulfil the requirements of the statute that the drinking of the polluted water by the deceased was an accidental occurrence, while he was 'performing services growing out of and incidental to his employment.' It is alleged that the consequences of this alleged accident resulted in afflicting Vennen with typhoid disease, which caused his death. Diseases caused by accident to an employee while 'performing services growing out of and incidental to his employment' are injuries within the contemplation of the Workmen's Compensation Act." Barnes, J., in a strong dissenting opinion said: "It is well-nigh a demonstrable certainty that the legislature never intended to provide compensation for sickness not resulting from external bodily violence. Wisconsin was one of the pioneers in this kind of legislation. It was known that it would entail large burdens on our manufacturers, who would thus be placed at a disadvantage in competing with employers in other states where no such law was then in existence. The law was an optional one, and is so yet. As was expected, there was a great deal of hesitancy on the part of employers about coming under it. Had it been supposed that it provided compensation for disease or sickness, it is probable that the purpose of the law would have been practically nullified. The effect of the decision in this case is, of course, conjectural, but it is not without the range of possibilities that some at least of those who are now under the act will exercise their election not to remain under it. It is now a generally accepted truism that many diseases attack those who are physically weak and run-down rather than those who are strong and able to throw off unwelcome disease germs. The weak must work as well as the strong, or else be taken care of by the public, and, should they be discriminated against in the matter of securing employment, much harm would follow. The question whether we should or should not have insurance against sickness is one of legislative policy. The manner of paying such insurance, if decided upon, is also a question of legislative policy within constitutional limits. I do not question the power of the legislature to pass an option law such as we have providing for indemnity against disease. What I do say is that the legislature has not done so, and that the act passed has been stretched by construction so as to add to it in all probability as large a class of claims and liabilities as that actually included in the original act."

RIGHT OF RAILROAD COMPANY TO FORFEIT MILEAGE BOOK.—While the right of a railroad company to forfeit a mileage book for a failure of the owner to live up to reasonable conditions contained in the contract of purchase where a forfeiture is expressly provided for, the case of Southern R. Co. *v.* Campbell, 239 U. S. 99, would seem to indicate a desire on the part of the courts to prevent a forfeiture when possible. The facts showed that this suit was brought by one Campbell against the Southern Railway Company to recover damages for the wrongful forfeiture of the plaintiff's mileage book. The company sought to justify the forfeiture under its tariff regulations which had been duly filed with the Interstate Commerce Commission. The defense was overruled by the state court. 94 So. Car. 95. The admitted facts were these: Mr. Campbell, being the owner of

a thousand-mile coupon book, or mileage book, purchased another mileage book of the same sort from the agent of the Southern Railway Company at Greensboro, North Carolina, and thereupon presented both books to the agent of the company and obtained, in exchange for coupons, two "mileage exchange tickets" to Greenville, South Carolina. With these tickets he and his wife traveled to Greenville, the tickets being accepted by one of the company's collectors. A few days later he presented his mileage books to the agent of the company at Greenville and obtained, for the proper number of coupons, two exchange tickets to Greensboro. When he presented these tickets for the transportation of himself and his wife, the ticket collector asked if he had mileage books and required him to produce them. Upon looking at the books the ticket collector returned one of them to Mr. Campbell but forfeited the other, which contained unused coupons for six hundred miles. The exchange ticket, which had been issued for the coupons taken from the book, was also forfeited, and the ticket collector demanded and received payment in cash of the fare for the plaintiff's wife. The tariff regulations and conditions which related to mileage books, or mileage tickets, and were filed with the Interstate Commerce Commission were as follows: "Exchange Requirement. Mileage coupons (except as noted below) will not be honored for passage on trains or steamers or in checking baggage (except from non-agency stations and agency stations not open for the sale of tickets) but must be presented at ticket office and there exchanged for continuous passage ticket, which continuous passage ticket will be honored in checking baggage and for passage when presented in connection with the mileage ticket. Non-Transferable.—If a mileage ticket or ticket issued in exchange for coupons therefrom be presented to an agent or conductor by any other than the original purchaser, it will not be honored but will be forfeited, and any agent or conductor of any line over which it reads shall have the right to take up and cancel such ticket or tickets." A jury was waived, and the case was submitted to the trial judge upon a stipulation that if judgment went for the plaintiff he should recover the value of the mileage book (twelve dollars) and twenty-five dollars damages. Judgment was entered accordingly. On the above facts the United States Supreme Court affirmed the judgment of the court below. Mr. Justice Hughes for the court said: "We are not concerned with the reasonableness of the rule; that, if challenged, would be a question for the Interstate Commerce Commission. The question now is as to the application of the rule. Nor need we consider the right of the ticket collector to demand payment for the transportation of the plaintiff's wife. The case, as the state court said, turns upon the right to forfeit the mileage book with its unused coupons. The condition expressed in the rule is that the mileage book, or mileage ticket, as it is termed, shall be presented by the original purchaser. The plaintiff was the original purchaser and presented it. The company seeks to construe the rule as if it read that the mileage book should be forfeited if presented by the original purchaser for the transportation of a person other than himself. The rule does not so read. It was not made a ground of forfeiture that the original purchaser asked for more than he was entitled to get. For example, when the plaintiff presented his books at the station to procure tickets for himself and wife in exchange for coupons, it could not be said that he forfeited either of the books, or both, because he asked too much. He was in no different position when he produced the books before the conductor, with the tickets which the company's agent had given him in exchange for coupons. He was still the original purchaser, and the provision for forfeiture when the mileage book is presented by some one else does not hit the case."

News of the Profession.

THE OREGON BAR ASSOCIATION met in annual convention at Portland, Ore., on November 18.

LOUISIANA JUDGE RESIGNS.—Hon. W. C. Barnett, judge of the Third Judicial District of Louisiana, resigned from the bench on December 10.

APPOINTED PROBATE JUDGE.—Governor Ferris of Michigan has appointed Fred E. Wetmore, of Hart, as probate judge of Oceana county to succeed F. W. Van Wickle, resigned.

MICHIGAN STATESMAN DEAD.—Julius Cæsar Burrows, distinguished lawyer and former United States Senator from Michigan, died at Kalamazoo, Mich., on November 17, aged 78.

INDIANA JUDICIAL APPOINTMENT.—Governor Capper has appointed George L. Hay of Kingman to succeed Preston B. Gillett, deceased, as judge of the twenty-fourth judicial district of Indiana.

NAMED ATTORNEY GENERAL.—Evan B. Stotsenburg of New Albany has been appointed by Governor Ralston as the new attorney general of Indiana to succeed the late Richard M. Milburn.

RETIREMENT OF KENTUCKY JUDGE.—Announcement was made in the lay press recently of the forthcoming voluntary retirement of Hon. J. B. Hannah from the bench of the Kentucky Court of Appeals.

ARKANSAS JUDGE DEAD.—Judge A. B. Grace, aged 67, for sixteen years judge of the Eleventh judicial circuit of Arkansas and a past grand master of the Masonic Grand Lodge of that state, died at Pine Bluff, Ark., on December 2.

NEW LAW MAGAZINE.—A new law magazine devoted especially to the needs of Louisiana lawyers will soon be issued by the Tulane Law School, at New Orleans. It will be known as the "Southern Law Quarterly."

DEATH OF DISTINGUISHED SOUTHERNER.—Dr. Allen G. Hall, dean of the law department of Vanderbilt University and one of the South's most distinguished educators and lawyers, died on November 28, at Nashville, Tenn., aged 53.

SUPERIOR COURT JUDGES ELECT OFFICERS.—The judges of the Superior Court of Chicago on December 6 elected Judge Charles A. McDonald chief justice. Judge John M. O'Connor was re-elected secretary.

FORMER SUPREME COURT JUDGE DEAD.—John V. Hadley, formerly of the Indiana Supreme Court, died at Danville, Ind., on November 17, aged 76. Judge Hadley was elected to the bench in 1898 and again in 1904. He retired in 1910 on account of ill health.

PROMINENT PENNSYLVANIA JUDGE DEAD.—Samuel A. McClung, for more than twenty years judge of the Common Pleas Court of Allegheny County, died at Pittsburgh, Pa., on November 12, aged 70. It is said that no decision by Judge McClung was ever reversed by a higher court.

NOTED INTERNATIONAL LAWYER DIES.—Paul Fuller, a noted international lawyer and President Wilson's special envoy to Mexico and Hayti, died at New York city on November 30, aged 67. Mr. Fuller was formerly dean of the Fordham University Law School, retiring in 1914.

DEATH OF BRILLIANT IRISH LAWYER.—Standish O'Grady died on November 15 at Hale, Cheshire, England. As poet, essayist

and historian O'Grady's work is generally regarded as the starting point of the so-called Celtic renaissance. O'Grady was in turn lawyer, journalist and author. He was a native of Tipperary and 60 years old.

APPOINTED TO BENCH IN NORTH CAROLINA.—Walter P. Stacy of Wilmington has been appointed by Governor Craig of North Carolina to the Superior Court bench of the eighth judicial district, as successor to Judge George Rountree. Judge Stacy is but thirty-one years of age, and is the youngest of the North Carolina judges.

EARLY CALIFORNIA SETTLER DIES.—Mark D. Wilber, formerly United States Attorney at Brooklyn, died at Darien, Conn., on November 20, aged 86. Mr. Wilber went west in the gold-seekers' rush of 1849, became a member of a vigilance committee, and assisted in the organization of the territorial and state governments of California.

CHANGES AMONG FEDERAL ATTORNEYS.—Stephen T. Lockwood has been appointed United States attorney at Buffalo, N. Y.—Samuel J. Reid, Jr., has resigned as first assistant United States Attorney at Brooklyn, N. Y.—William E. Leahy has been appointed assistant United States attorney for the District of Columbia to succeed Charles Bendheim, resigned.

DEATH OF KANSAS CITY LAWYER.—James Sherman Botsford, for thirty-six years an attorney in Kansas City, Mo., and United States attorney for Western Missouri under appointment by President Grant, died at Kansas City on November 15, at the age of 71. Mr. Botsford at one time sat with the judges of the Missouri Supreme Court in the decision of an important case, as to the merits of which the court was evenly divided.

DEATH OF RETIRED LAWYER AND AUTHOR.—Sydney Kerr Smith, a retired lawyer and textbook writer, died at Louisville, Ky., on November 26, at the age of 65 years. Several years ago Mr. Smith enjoyed the unique distinction of being the official reporter of the Supreme Court of Missouri and the Supreme Court of Kansas at the time time. He was the author of a book, "Ethics and Practice of Law," which attained considerable popularity among law students thirty years ago.

BAR PAYS TRIBUTE TO CLERK.—James D. Maher, clerk of the Supreme Court of the United States, celebrated on December 1 the fiftieth anniversary of his service in that court. He was first appointed as a page. As a token of their esteem members of the bar practicing before the Supreme Court presented to Mr. Maher a large silver vase, a reproduction of an ancient Greek vase, standing twenty-four inches high and costing more than $2,000. The presentation was made by Frederick D. McKenney, son of a former clerk of the court.

OHIO STATE BAR ASSOCIATION.—The mid-year meeting of the Ohio State Bar Association was held at Cincinnati, Ohio, on December 28 and 29. Among the scheduled addresses were the following: "John Marshall, His Personality and Development," by A. J. Beveridge of Indianapolis; "Proposed Reforms in Our Procedure," by Judge Edward B. Follett of Marietta; "Selection of Judges," by James Parker Hall, dean of the University of Chicago Law School; "The Jury System and its Preservation," by J. C. Hostetler, assistant city solicitor of Cleveland.

WEST VIRGINIA BAR ASSOCIATION.—The thirty-first annual meeting of the West Virginia Bar Association was held at Clarksburg, W. Va., on December 29 and 30. The program as announced included the following papers or addresses: "The Lawyer and the People," by J. W. Vandervort of Parkersburg, president of the association; "Law and Morals," by Roscoe Pound of Harvard University; "Has the Supreme Court of the United States Power to Enforce the Decision against West Virginia in What is Known as the Debt Case?" by Judge Thomas P. Jacobs of New Martinsville; "Constructive Contempt," by John C. Palmer of Wheeling; "The Lawyer as a Public Official," by Andrew Price of Marlinton; "History of Bench and Bar," by Judge George W. Atkinson of Charleston, member of the federal Court of Claims and former governor of West Virginia. The topic for general discussion was "Protection of Rights of Persons and Property."

English Notes.

APPOINTMENTS.—Sir Frederick Edwin Smith, K. C., has been appointed Attorney-General in succession to the Right Hon. Sir Edward Carson, resigned. Sir Frederick was called by Gray's-inn in 1899, and took silk in 1908.—Mr. George Cave, K. C., has been appointed Solicitor-General in succession to Sir Frederick Smith. Mr. Cave was called by the Inner Temple in 1880, and took silk in 1904.

RETIREMENT OF JUSTICE JOYCE.—The retirement from the Bench of the senior judge of the Chancery Division, after fifteen years' service, will be universally regretted by the Chancery Bar. Few judges have earned their right to repose better than Sir Matthew Ingle Joyce. He came up from Cambridge with a high mathematical degree, and in his earlier years at the Bar he fulfilled the duties of judge's secretary at a time when petitions were much more frequent than they are at present. He subsequently held the important and much-coveted office of Junior Counsel to the Treasury. That he was a sound lawyer goes without saying, and, if he sometimes suggested that it would be better for persons to settle their differences, no judge ever tried a case with greater care, or with a more accurate result. Very few of his judgments were reversed. He occasionally sat in the Court of Appeal, and he would have been a very fitting permanent member of that court. His presence will perhaps be more especially missed by those who, like himself, began life at the Bar before the Judicature Act of 1875.

BEQUEST OF MONEY AS PASSING REAL ESTATE.—If there was any doubt on the point whether a bequest of money will pass real estate, it has now been set at rest by the decision of Mr. Justice Eve in Re Tribe; Tribe *v.* Dean and Chapter of the Cathedral Church of St. Mary in Truro (113 L. T. Rep. 313). There a testatrix had a general power of appointment by will over a freehold house and certain personal estate. By her will, dated the 2nd day of Sept., 1901, after giving certain pecuniary legacies, she gave "the rest of the money of which I die possessed to Truro Cathedral," and her will did not purport specially to exercise the power of appointment. The testatrix died in Aug., 1914, leaving a considerable amount of personal property (including the personal estate over which she had the aforesaid power of appointment) in excess of the pecuniary legacies. It was held by Mr. Justice Eve that the freehold house over which the testatrix had a general power of appointment did not pass under the bequest of "the rest of the money of which I die possessed." It was argued that in the New English Dictionary one of the meanings given to "money" is "property or possessions of any kind viewed as convertible into money, or having value expressible in terms of money." But that is not the legal signification of the word, and, as pointed out by the learned

judge, it would be going far beyond any reported case if he were to hold that the bequest of money in a will would pass real estate, especially where the testatrix had only a general power of appointment over the real estate in question which she did not express any intention of exercising.

NEUTRALS AND PASSAGE OF TROOPS.—A letter in the *Westminster Gazette*, entitled "Neutrality and Greece," maintains that, according to the old rules laid down by the founders of international law, the Entente Powers have the right of debarking troops on the Greek littoral without violating the neutrality of Greece. The writer cites the cases of the landing of Spanish troops sent against the Netherlands at Genoa, a state at peace with the Dutch; the traversing of Lorraine, while it retained its neutrality, by the troops of France and Spain, then at war; and the similar case of Savoy. It is no doubt true that Grotius was simply describing the practice of the seventeenth century when he said that the right of passage not only existed, but could be taken by force when denied unjustly: (De Jure Belli ac Pacis, 11, ii., 13, and 111, xvii., 2). The idea that a neutral state could grant a passage through its territory to a belligerent army without a violation of its neutrality, certainly if such passage were granted impartially to both belligerents was upheld by leading publicists such as Kent down to the earlier part of the nineteenth century. It has not, however, if we refrain from reference to recent transactions, been exercised since 1815, when the allies forced the Federal Council of Switzerland to grant permission for the passage of troops across its territory on their way to invade the south-eastern portion of France. The opinion of most publicists that the right no longer exists may be said to obtain, and the landing of troops in Greece is no doubt a territorial violation of neutrality, while the formal protest of Greece, unaccompanied with resistance, would technically fall within the category of unneutral conduct. Mr. Hannis Taylor considers that the right of passage through neutral territory was gradually extinguished by the same sentiment that forbade recruiting.

OBSOLETE STATUTES.—It is stated in a message from Washington published in the lay press that the British Ambassador is surprised to hear of the conviction of two Englishmen in San Francisco for engaging Englishmen there to go to the front, says the *Law Times*. It appears, the message states, that they violated an obsolete statute which is admittedly contrary to the interests of the United States if it were enacted by foreign nations in the event of the United States being in a state of war. It is understood that there will be an appeal, and that the matter will be dealt with diplomatically. The incident is of juridical interest as evidence that the curious conservatism of English legislators, who have continually preferred to allow a bad or unpopular law to become dormant rather than repeal it, has affected likewise "our kin beyond the sea," as Mr. Gladstone once designated the American public in the title of an article written by him for the purpose of expounding to the people of the United States the working of British institutions in England, on whose Constitution the Constitution of the United States has been framed with a desire to make it an improved version of the original. Sir Edward Creasy states that the first statute of Henry V., expressly ordaining that persons elected to the House of Commons by counties should be dwelling and resident within their counties is almost a solitary instance in the law of England wherein the principle of desuetude has been avowedly set up against an unrepealed enactment: (Creasy's Rise and Progress of the English Constitution, p. 258). This statute, which was suffered to be absolutely obsolete for centuries, was at last removed from the statute-book in 1774 (14 Geo. III, c. 58). The law for slowly pressing to death prisoners who refused to plead was only repealed in 1772 (12 Geo. III, c. 20), and the law for punishing Irish witches with death was only repealed in 1821. Several other almost equally striking instances of the retention of dormant laws on the English statute-book may be adduced. The mediæval appeal of murder, which enabled the heir of the deceased person to challenge the alleged murderer to battle after his acquittal by a jury, and which took away from the Crown all power of pardoning the accused if he were defeated, was recognized by English law during the whole of the eighteenth century. It was eulogized in Parliament by Dunning in 1774, and was only abolished in 1819 (59 Geo. III, c. 46) on account of an appellee having in the previous year thrown down his glove in the Court of King's Bench and demanded his legal right of trial by battle: (Ashford v. Thornton, 1 Bar. & Ald. 405).

ENLISTMENT OF PRISONERS OF WAR.—The German proposal to enroll Irish prisoners of war in a German Irish Brigade, of which full particulars are published in the lay press—the prisoners rejecting the proposal with scorn and indignation and joining in a protest which they pray should be submitted to the German Emperor—will call attention to the fact that the question has been much debated as to the enlistment of prisoners of war in the army of the enemy, which was in former times customary. After Breitenfeld, Gustavus Adolphus was able not only to fill up the gaps in his ranks, but even to create new regiments out of his numerous captives. While enlistment of prisoners of war, if voluntary, in the enemy's service is no more objectionable than the acceptance of deserters, such recruits can expect no quarter if they fall into the hands of that old sovereign. The reprobation with which the coercing of prisoners of war to serve in the enemy's forces would be regarded in its violation of international morality may be estimated by the rules under which, if prisoners of war desert and proffer information, it may be received, while such prisoners cannot be compelled to give it or be punished for false information when given. The Hague rules, however, while authorizing a state to utilize the labor of prisoners of war according to their rank and aptitude, expressly provide that such labor shall have nothing to do with military operations: (Hague Conference 1899, Second Convention, art. 6). Compulsion by threats of death to join the enemy's army could not be set up as a defense by a prisoner of war who falls into the power of the Sovereign to whom he has sworn allegiance if tried by court-martial. The defense of compulsion in a criminal trial is seldom raised. "There is very little authority," writes Sir Fitzjames Stephen, "on this subject, and it is remarkable that there should be so seldom occasion to consider it. In the course of nearly thirty years' experience at the Bar and on the Bench, during which I have paid special attention to the administration of criminal law, I never knew or heard of the defense of compulsion being made except in the case of married women, and I have not been able to find more than two reported cases which bear upon it. One of them is the case of a man compelled by threats of death to join the rebel army in 1745 (R. v. McGrowther, 18 State Trials, p. 394). The other that of a man (R. v. Crutchley, 3 C. & P. 133) compelled (I suppose by threats of personal violence) to take a formal part in breaking threshing machines by a mob of rioters so employed."

SUMPTUARY LAWS.—On November 9, Captain Bathurst asked the Prime Minister whether, in view of the serious state of the nation's finances and of the thoughtless extravagance and unnecessary luxuries still indulged in by many persons to the annoyance of their neighbors, he would consider the advisability of passing forthwith through Parliament drastic sumptuary laws

which would ensure the strictest domestic economy and put all classes upon a footing, during the war, of greater equality in their mode of living. The reply of the Prime Minister was that this subject was engaging the continuous attention of the Government, and that he would be glad to consider any suggestions with reference thereto. The contemplated revival of the old system of sumptuary legislation, of which the recent statute against treating seems to be an indication, may render it of interest to reproduce Blackstone's reference to sumptuary laws in his Commentaries, whose first edition appeared in 1765. Under the head of sumptuary laws may also properly be ranked all sumptuary laws against luxury and extravagant expenses in dress, diet, or the like. Concerning excess in apparel, there were formerly a multitude of penal laws existing, chiefly made in the reigns of Edward III., Edward IV., and Henry VIII., against piked shoes, short doublets, and long coats, all of which were repealed by stat. 1 Jac. 1, c. 25: (Blackstone's Commentaries, iv., p. 170). The eleventh statute of Edward III. in the fourth chapter amusingly regulates the quality of the apparel by the state of the pocket. It directs that neither man nor woman who cannot afford to spend £100 a year should wear furs under a penalty of forfeiting the furs, and the offenders are likewise made liable to an indictment. It would appear from ancient portraits that, before the manufacture of gold or silver or lace, furs constituted the greatest finery in dress. Blackstone observes that, while the sumptuary laws had been almost wholly repealed, the 10 Edw. III, s. 3, still remained in the statute-book. This statute recites great inconvenience to the more opulent by excess in eating, and likewise the ruin of those of less affluent fortunes from an absurd endeavor to imitate this extravagance. It therefore ordains that no one should be allowed, either at dinner or supper, above three dishes in each course and not above two courses, and it is likewise expressly declared that soused meat is to count as one of these dishes. Certain feasts and company days are, however, excepted in which three courses may be allowed. This singular statute, which had been long dormant, was at length expressly repealed by 18 & 20 Vict. c. 64.

Obiter Dicta.

WHAT THE REPUBLICANS NEED.—Goodman *v.* Wilson, 129 Tenn. 464.

THE TORTOISE AND THE HARE.—Crawl *v.* Dancer, 180 Mich. 607.

A VIOLATION OF NEUTRALITY.—State of Louisiana v. Jermany, 134 La. 94.

A NEW COLOR.—The full name of the defendant in State *v.* Blue, 134 La. 561, was Ivy Blue.

NO CAUSE OF ACTION.—Smith *v.* Silence, 4 Iowa, 321, being an action for slander, should have been dismissed by the trial court at first sight.

HARD TO PLEASE.—Reg. *v.* Wilson, 3 F. & F. 119, was a prosecution of a woman for marrying a second time while her first husband, Jonathan Gotobed, was living.

DISAPPOINTING.—We thought we had a good one when we saw the style of the case of Stealer *v.* State, 10 Okla. Crim. 460, but it turned out to be a prosecution for manslaughter.

THE MOTHER OF INVENTION.—"Practicing law is a necessary and honorable profession."—Per Furman, J., in Price *v.* State, 10 Okla. Crim. 437. Which, doubtless, accounts for the amazing ingenuity of some lawyers.

ALCOHOL IN THE RADIATOR.—Section 12628-1 of the General Code of Ohio (Laws 1913, p. 133) provides as follows: "It shall be a misdemeanor for any person to operate a motorcycle or motor vehicle of any kind upon any public highway or street while in a state of intoxication.

BRUTE!—We have no desire to be discourteous, but when we saw in the *Women Lawyers' Journal* for December, a statement by one of the editors to the effect that "there has been but few prosecutions for the violation of the eight-hour law for women" —well, we just didn't read any further in that issue.

HELP!—In Case *v.* State, 10 Okla. Crim. 502, a judgment of conviction of grand larceny was reversed because contrary to the evidence. In other words, the state was mistaken in thinking it had a good case against a bad Case, while the accused succeeded in making out a good case against the state on behalf of a good Case.

ANOTHER ONE.—On Thanksgiving Day, a young woman was arrested for speeding in Evanston, Ill. The officer testified that she was driving her automobile at the rate of twenty-six miles an hour when he arrested her. The defendant pleaded that she did not know she was speeding. "I merely passed a Ford," she said.

ONE POINT OF AGREEMENT.—We are indebted to a Canadian correspondent for the following: In argument before the Appellate Division of the Supreme Court of Ontario on November 6, Mr. Wallace Nesbitt, K. C., had "locked horns" with Mr. Justice Riddell on the law of fraud. Mr. Nesbitt said, "I could tell your Lordship a thousand lies," and paused. Mr. Justice Riddell said: "The court is with you so far, Mr. Nesbitt—go on." The argument did not proceed for some minutes.

REDUCTIO AD ABSURDUM.—In Updike *v.* State, 9 Okla. Crim. 133, the court answered the objection of counsel to one particular instruction taken by itself alone in the following neat manner: "The absurd consequences which would result from this line of reasoning can be well illustrated by quoting three passages of Scripture without reference to the connection in which they are used. In one place the Bible says: 'Judas Iscariot went out and hanged himself.' In another place the Bible says: 'Go thou and do likewise.' And in another place the Bible says: 'And all the people said Amen.'"

"THE UNDESIRABLE CITIZEN."—"As a rule, a jack is kept for one purpose only, and that is, the propagation of his own species and mules. He has a loud, discordant bray, and, as counsel say, frequently 'makes himself heard, regardless of hearers, occasions or solemnities.' He is not a desirable neighbor The purpose for which he is kept, his frequent and discordant brays, and the association connected with him bring the keeping of him in a populous city or town 'within the legal notion of a nuisance.'" Per Battle, J., in Ex parte Foote, 70 Ark. 12. Herein may be

found the meaning of the term "undesirable citizen" as applied to human beings, namely—an undesirable citizen is an ass.

FAITH WITHOUT HOPE.—"A more serious question arises out of an expression used by the public prosecutor in his closing argument to the jury. In the course of his remarks he avouched his faith in the state's case by declaring that he believed the defendants guilty and that he hoped God would send lightning from heaven to strike him dead if he did not so believe. Considerable allowance is made for professional enthusiasm even in criminal cases, but it is not permissible to ground an appeal for conviction upon facts not given in evidence at the trial. We do not attach much importance to the offer of counsel to test the truth of his statement by ordeal. What he said in that behalf had no real significance; it was a mere rhetorical flourish. Calling spirits from the 'vasty deep' or levin from the sky is, in this materialistic age, a perfectly harmless diversion, for however vehement the call may be, no answer is expected."—Per Sullivan, C. J., in Reed *v.* State, 66 Neb. 189.

THE NASAL SALUTE.—The following opinion, delivered recently by one of New York City's judges, deserves reproduction in full.

Roy, J.—Is it disorderly conduct for one individual to publicly greet another by placing the end of his thumb against the tip of his nose, at the same time extending and wiggling the fingers of his hand? That momentous question is involved in this appeal. What meaning is intended to be conveyed by the above-described pantomime? Is it a friendly or an unfriendly action; a compliment or an insult? Is it a direct invitation to fight, or is it likely to provoke a fight? Doctor Holmes, that delightful wit and philosopher of a former generation, remarks in his "Autocrat of the Breakfast Table" that "there are a good many symbols that are even more expressive than words." In the Knickerbocker History of New York we read that when William the Testy sent an expedition to treat with the belligerent powers of Rensselaerstein, the ambassador who accompanied the expedition demanded the surrender of the fortress. "In reply the Wachtmeester applied the thumb of his right hand to the end of his nose, and the thumb of his left hand to the little finger of the right, and spreading each hand like a fan, made an aerial flourish with his fingers." No breach of the peace ensued, but this was apparently owing to the fact that the ambassador was ignorant of the significance of the Wachtmeester's salutation. It is, however, recorded that the practice became widespread, and that up to the author's day the thumb to the nose and the fingers in the air is apt to be a reply made by tenants to their landlord when called upon for any long arrears of rent. The practice still persists, and is not limited to tenants who are indisposed to pay their rent. Among boys it serves as a harmless vent for injured feelings, which lack the proper vocabulary to relieve themselves through audible speech. But when boys become men they should "put away childish things." In the case at bar the circumstances attending the enactment of the nasal and digital drama aforesaid tend to show a design to engender strife. Moreover, the defendant had committed the same offense toward the complaining witness on previous occasions, thus indicating a determination to annoy him to the limit of patient endurance. My answer to the question stated at the beginning of this opinion is: It depends on circumstances. And under the circumstances disclosed I am satisfied the magistrate was fully warranted in reaching the conclusion he arrived at, and I therefore affirm the conviction. (People *v.* Gerstenfeld, 54 N. Y. Law Journal 801.)

RIGHT TO RETURN CHRISTMAS GIFT.—Those who are restive at this season under the weight of unwelcome Christmas gifts, particularly if employees, will do well to ponder the law as expounded in a recent decision of Justice Philbin of the New York Supreme Court.

"The plaintiff," said Justice Philbin, "sues to recover damages for a breach of a contract of employment caused by the alleged wrongful discharge of the plaintiff. The defendant conducted a dental office and employed the plaintiff as a dentist therein for a term which had yet some months to run at the time of said discharge. The sole cause assigned by the defendant for such dismissal was the writing by the plaintiff of the following letter in relation to a Christmas gift, and which the defendant characterized as insulting and disobedient in tone:

'December 24th, 1913.

Am returning, with many thanks, your valuable set of cuff links, because I have at least four sets of diamond-set buttons which are practically doing no service whatsoever, and since they will only have to lay around I would prefer to have you give them to someone who could make use of them. Again thanking you for your generosity, I remain,

DR. M. FRACHTMAN.'

"Upon the close of the plaintiff's case the defendant's counsel moved to dismiss the complaint for the reason that the plaintiff was rightfully discharged because of the writing of said letter. The court in granting the motion took the view that said letter was insolent and furnished sufficient reason for the discharge of the plaintiff.

"The plaintiff certainly had a right, without violating a duty under said contract, to decline any gift his employer sought to bestow. The acceptance of a gift in such circumstances, or even an increase in compensation, is not compelled by law, but must be entirely voluntary. Due courtesy to the employer, however, may often require acceptance, particularly in the season of peace and good will. It might well be supposed that the employee would not, unnaturally, be inclined to encourage such manifestations on the part of his or her employer. The attitude taken by the appellant here, however, shows that that is not always the case. The protection the law gives in such instances should be stated, lest others may suffer from compulsory acceptance of such favors through ignorance of their legal rights. Where the relation exists, it justifies only such social and sentimental manifestations on the part of the employer as the employee may willingly accept. The former by his position acquires no right not strictly incidental to the business of the employment.

"The said letter cannot be regarded as disobedient or wanting in due courtesy and respect in the exercise of the appellant's right to reject the gift, and therefore neither it nor such refusal furnished adequate reason for the discharge. The tone of the communication would rather indicate a desire to make the performance of an unpleasant duty as painless as possible, in accordance with the spirit and practice of the important and exacting profession of which both the appellant and the respondent were members. Judgment reversed and new trial ordered, with costs to the appellant to abide the event."

Law Notes

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Practice of Law by Collection Agencies.

THE bar is not particularly jealous of intrusion into its professional sphere. If any proof is needed, let the inquirer compare the number of cases involving illegal practice of law with that of the cases wherein it has been sought to exclude persons from the practice of medicine. And the absence of such cases is not due to the lack of offenses against the law. Trust companies, for example, habitually draw deeds and wills, and examine titles, and it is indubitable that such acts constitute the practice of law by a corporation, which is of unquestioned illegality. *In re Co-operative Law Co.,* 198 N. Y. 479, 19 Ann. Cas. 882, 139 Am. St. Rep. 839, 32 L. R. A. (N. S.) 55. But in such cases the business is usually conducted by responsible and capable persons, and no public interest suffers by reason of the waiver by the bar of its prerogatives. As much cannot be said of the frequent incursions into the domain of legal practice by collection agencies. Such agencies are often irresponsible and sometimes dishonest. They deal, among others, with the poor, ignorant and distressed, where the opportunities for fraud and oppression are great. The Missouri court of appeals is reported to have administered a deserved rebuke to these gentry in a recent case wherein it held to be void a contract by which the agency agreed to furnish among other things "free legal advice on commercial matters." The court said: "The practice of law is not limited to the conduct of cases in court. It embraces . . . in addition conveyancing, the preparation of legal instruments of all kinds, and in general all advice to clients and all actions taken for them in matters connected with the law." In the same opinion there is a timely suggestion as to legal ethics. Referring to the employment of attorneys by the agency in question it was said: "The bar, which is an institution of the highest usefulness and standing, would be degraded if even its humblest member became subject to the orders of a money-making corporation engaged, not in conducting litigation for itself, but in the business of conducting litigation for others. The degradation of the bar is an injury to the state."

Uniform Conditional Sales Laws.

IN the agitation for uniform legislation but little mention has been made of conditional sales. The need of uniform laws on that subject is well illustrated by the recent case of *Fuller* v. *Webster,* (Del.) 95 Atl. 335. In that case it appeared that an automobile was conditionally sold in Massachusetts, the seller fully protecting his rights in that state. The conditional purchaser sold the car before paying for it, and his vendee took it to Pennsylvania and again sold it. The last vendee took it to his home in Delaware, where the original Massachusetts seller later discovered it and brought replevin. In Pennsylvania a reservation of title in a sale of goods is void as to purchasers and creditors. In Massachusetts and Delaware it is valid. The court held that as the rights of the last purchaser were acquired under a contract made in Pennsylvania, the transaction was governed by the laws of that state and that he took a good title as against the original vendor. If the machine had been sold in New York and taken to Delaware the same rule would have awarded it to the original seller. If, though bought in Pennsylvania, it had been taken to New Jersey instead of to Delaware, the original seller would have prevailed, for the New Jersey courts refuse to enforce the Pennsylvania rule on grounds of public policy. *Marvin Safe Co.* v. *Norton,* 48 N. J. Law 410. Several other possible complications could be suggested. In fact the vesting and divesting of rights in respect to an automobile conditionally sold, as it journeys across the continent, would make a good joke did it not involve so serious a defect in the law governing an important class of commercial contracts.

Bona Fide Purchasers of Goods.

THE conflict of authority as to the rights of a bona fide purchaser from a conditional vendee is not remarkable, for there is much to be said on both sides. It is an undoubted hardship that a vendor who has done all within his power to protect his rights should lose his security in the event of his vendee taking the goods into another state and selling them. On the other hand an equal hardship results to a person who pays full value to one in possession, with no record or other source of inquiry available to put him on notice. As between these two innocent persons, one of whom must suffer, some courts argue that the original vendor by parting with possession

has made the fraud possible and must bear the loss. Such is the policy of the English sale of goods act. Others take the view that the innocent purchaser, being under no compulsion to buy, must take the risk of his vendor's title. It is certain at least that a legal system which affords no solution except to cast a serious loss on a person dealing in good faith and with due diligence according to the usual mercantile practice is far from perfect. The difficulty might easily be cured by a uniform requirement of a bill of sale on all sales of goods exceeding a certain value, coupled with a provision that any person subsequently buying without requiring an exhibition of the bill of sale should purchase at his peril. An "unwritten law" somewhat similar to this with respect to the sale of horses was once enforced most summarily in the Southwest.

Intent of Draftsman of Statute.

THERE has been some comment in the press on a recent attempt in Minnesota to introduce the opinion of the draftsman of a statute in aid of its interpretation. It appears that a statute in that state relating to the abatement of houses of ill fame has been construed as placing the burden on the state to prove scienter in a proceeding against the owner of the property, and the affidavits of the authors of the statute were subsequently filed as part of an effort to secure a reversal of the holding. While the procedure has been referred to as novel, as a matter of fact it has been resorted to several times and always without success. In *Combined Saw & Planer Co.* v. *Flournoy,* 88 Va. 1029, it was sought to introduce the certificate of a state senator who was the draftsman of a statute to show that certain words of exception were omitted as "the result of a clerical error at some stage of the bill's progress." The court said: "This cannot be allowed. It is forbidden by law, reason and public policy." Under similar circumstances several courts have quoted with approval the language of Chancellor Zabriskie in *Keyport Steamboat Co.* v. *Farmers Transp. Co.,* 18 N. J. Eq. 13: "The intention of the draftsman of an act, or the individual members of the legislature who voted for and passed it, if not properly expressed in the act, it is admitted, has nothing to do with its construction; the only just rule of construction, especially among a free people, is the meaning of the law as expressed to those to whom it is prescribed, and who are to be governed by it."

Extraterritorial Effect of Workmen's Compensation Act.

IN the absence of a provision giving a broader scope, workmen's compensation acts have been held to be applicable to such injuries only as are received within the state (*Gould's case,* 215 Mass. 480, Ann. Cas. 1914D, 372). A like construction has been given to the English act (*Tomalin* v. *Pearson,* [1909] 2 K. B. 61.) The New York Court of Appeals is, however, reported to have held in an opinion as yet unpublished, that the act of that state is applicable to the servant of a local employer who is injured while working temporarily in another state, and that the act as so construed is valid. Such a construction certainly has many practical advantages, avoiding as it does the diversity of rights among the servants of a railroad company or a contractor who are subject to be sent temporarily to various fields of labor.

A Sociological Digression.

SOCIOLOGY as such is beyond our province, but we cannot refrain from reproducing an argument which we recently overheard concerning the advertisement of a New York café whereby it was heralded that nightly a very fine dinner would be served in one of its dining rooms for a dollar and a half per cover, while service *à la carte* could be had in the other room. Of course there is nothing seriously wrong about that, but from it our philosopher drew a suggestive parallel somewhat as follows: "The basis of a democracy is equality. Absolute equality is impossible, almost unthinkable, but it is nevertheless the ideal of all democratic or republican forms of government, and we may approximate a conception of social equality by a comparison. A family's happiness depends on equality among its members. If one child gets more than another, even though he works for it, jealousies arise; wherefore there should be some arrangement whereby all the members are kept upon somewhat the same plane. So the happiness of a social organism depends on the maintenance of much the same kind of equality, and everything which encourages wide departures from equality is vicious, creating rivalry for unequality, with consequent jealousies, hatred, and dishonesty. It has always been the mark of happy governments when the great sat down with the small, the strong with the weak. If the great and the strong lose anything by this, they give their loss to the small and the weak, and the whole is made healthier, with a slower but sounder growth. Or, to take a practical example, if there were no parlor cars the general service would be better." We will not comment on this argument except to say that it reminds us of a clause of the Declaration of Independence which declares that all men are born free and equal, and which has called forth much ingenuity of argument to the end that it was not intended to interfere with the sacred right of every man to get as much as he can and to use it as he pleases.

Progress.

ALL of which suggests the query: What is progress? For to the argument above quoted is sure to be heard the answer that such a doctrine is inimical to progress. In this connection we would say that under the present conception progress seems to be measured by increase of architectural height, municipal girth, and national aggrandizement on the one hand, and individual accomplishment on the other, with a "superman" as a near prospect, if, indeed, he is not already on the job. England fears "the subordination of the masses to discipline," lest she become a "nation of house servants." Yet in the very ideal of individualism, which is an Englishman's religion, there lies the possibility of the superman who shall rule, not by right of kingship but after the "Made in America" plan. The average American will have none of the king business, but he rather cherishes the superman idea, at least until he gets old enough to realize that he can never be "it."

More of Legal Reform.

BUT Senator Sutherland is reported as interpreting modern progress as synonymous with "change" born of the notion that what is is wrong, and what is not ought

to be, at least until it is. And when someone comes and says that the common counts in assumpsit are rot and should give way to "colloquial English," we refrain from explaining how these counts were invented to prevent perfectly good causes of action from being colloquially defeated, and quote further concerning the senator's remarks: "Senator Sutherland's modern definition of 'progress' is accurate but not complete," says a western journal. "It means also 'buncombe.' It has come to mean the official slogan of attempts to climb into public office by offering nostrums that strike the popular fancy. Every 'out' with a yearning to be 'in' hoists the oriflamme of 'progress' which but means, in the last analysis, that he wishes to 'progress' into office and those who support him wish to 'progress' into jobs. 'Progress' means so much which is deceptive and distasteful that the word itself is becoming so." We do not say that all the cries for reforming legal procedure, laws, and the lawyers are attributable to the cause thus indicated, but undoubtedly many of them are.

A Doubtful Defense.

IT is unfortunate that one of the few instances in which the press has defended the lawyer relates to a practice which cannot successfully be defended, whether it is indulged in by lawyer, merchant, priest, or anybody else. No greater truth was ever uttered than that no man can properly serve two masters, wherefore, it follows, he should choose which one to serve. Yet when recently a prominent attorney publicly confessed that he was trying to serve a municipality and a railway company at the same time, and found great difficulty in so doing, a certain newspaper seemed to think that he deserved sympathy in his dilemma, and took occasion to defend similar attempts in all walks of life, concluding the defense with:

"And in each instance, he who is halting between two paths realizes that no matter which he shall take he will fail to be fully understood by the master to whom he is striving to the utmost of his ability to be just, and he will have the unhappy knowledge that each is accusing him of unfaithfulness."

Perhaps the time may come when the practice of law shall be relieved of the necessity of partisan representation, but until then we can see no excuse for any attempt to represent clients with adverse interests. The lawyer must choose between the two clients, which he shall serve, rather than between two paths while trying to serve both.

Newspapers Please Copy.

WE are becoming fond of borrowing newspaper headlines. At least, we borrowed one last month, and we borrowed the above, though this time we are going to fit the head to another body, and that body is nothing more or less than a newspaper confession that a modern "practice act" is a failure. Yet that act was doubtless the result largely of lay and press agitation against antique forms and phraseology. Says the maker of the aforesaid confession, of and concerning the aforesaid act:

"It gives form, uniformity of form to the excellently formal formalities of getting into court with proper dignity. What will become of the case—in common parlance, what they'll do to you after getting you into court—is, to judge by its comparative simplicity, a matter of far less consequence. To the 'mere layman' it sometimes seems amusing to the degree of ridiculousness to note the seriousness with which men take those formalities which to the 'mere layman' are so inconsequential in comparison with the rules of law, equity, and common sense which are to settle the case finally—if the practice act lets them."

All of which, we confess, does sound foolish; the "which" referring to the comment or to the act, accordingly as the reader may be a lawyer or a layman, for nearly always what one cannot understand sounds foolish to him.

Official Experts Again.

PRESS agitation is not always an index to the true attitude of the public. Often it is a mere surface ripple which has no knowledge of the depths below. But when a matter keeps on bobbing up on the agitated bosom of the press and refuses to be swept away, we naturally conclude that it is anchored by serious thought. This in a measure applies even to the ill-advised and hysterical attacks on the legal profession. It is unqualifiedly true of such suggestions that there should be official experts to take the place of those now employed by the parties, or at least that expert witnesses should be called by the court, or, perhaps, chosen from a panel somewhat in the fashion that a jury is chosen. Certainly science should be made to serve both the plaintiff and the defendant without fear or favor. And in order to accomplish this end it will be found also necessary that the hypothetical questions put to the experts should be framed by the court, or at least under its supervision somewhat—again to draw an analogy from the jury system—as instructions are requested and given. "Such questions," said the court, in *Estate of Dolbeer,* 149 Cal. 227, 243, "themselves are always framed with great particularity to meet the views of the side which presents the expert. They always eliminate from consideration the countervailing evidence which may be of a thousand-fold more strength than the evidence upon which the question is based. They are astutely drawn, and drawn for a purpose, and that purpose never is the presentation of all the evidence. It is never to present the fair and accurate view, but the purpose always is to frame a question such that the answer will announce a predetermined result. This kind of expert testimony, given under such circumstances, even the testimony of able and disinterested witnesses, as no doubt these were, is in the eye of the law of steadily decreasing value. The remedy can only come when the state shall provide that the courts and not the litigants shall call a disinterested body or board of experts who shall review the whole situation and then give their opinion with their reasons therefor to the court and jury regardless of the consequences to either litigant." This declaration was made as long ago as 1906, and the trend of thought since that time has been steadily toward the conclusion indicated. It is true that such an attempt was declared unconstitutional in *People* v. *Dickerson,* 168 Mich. 148, and likewise that the court in that case seemed to think that the remedy is to be found in a livelier sense of responsibility in the administration of justice rather than in "revolutionary legislation." But though we have often subscribed to the declaration that true reform must be found in an awakened conscience, nevertheless we see nothing revolutionary in the official expert idea, nor do we believe that it will be found unconstitutional if it is framed with due regard to procedure, which was not done in the Michigan case.

Fraud and Deceit between Attorney and Client.

IN our November issue we commented on the novel situation of certain clients trying to escape criminal responsibility by hiding behind the skirts of the lawyers whom they employed to do the work. As we then said in effect, we have no sympathy with a man who employs another to do his dirty work, and when caught seeks to throw the blame on the hired man. None have been more ready to condemn the dishonest lawyer than we have; but we think we have made it plain that, in our belief, for every dishonest lawyer there are a score of dishonest clients, and we will now add that many a man who has esteemed himself honest has sought out a dishonest lawyer when he had an unrighteous cause. Moreover, we take sharp issue with those who say that a client cannot deceive his lawyer as to the facts in the case. We venture to say that were we to ask for the returns we would be flooded with incidents in which attorneys have been much astounded, and likewise mortified, legally injured, and materially damaged, by deception, ranging all the way from innocent to deliberately fraudulent, on the part of their clients. And all so foolish and to no end, because the average client seems to think that if he can get a lawyer to take the case he will pull it through some way. So we will say that for one lawyer who deliberately deceives his client there are two score clients that deceive their own lawyers. It was refreshing, therefore, to read, though with satirical press insinuation, of a judge who took occasion to reprimand a litigant who had indulged in this practice. However, we wish to be fair, and we are going to suggest a remedy. The law of actionable fraud is plain. If one standing in a confidential and advantageous relation to another deceives him to his hurt, even in a matter of law, he may be made to answer in damages. Why, then, cannot a client sue his attorney in such case? We think he can. But, on the other side, the case is even more plain, for we have misrepresentation of fact, on which the lawyer often relies to an extent far beyond the value of the agreed fee—a case taken on contingent fee, for example. Why, then, should not the client sue his attorney or the attorney the client, as the case may be? We are inclined to think a few cases of this kind would clear the air.

The Use and Misuse of Precedent.

IN our October number of LAW NOTES we printed an article by Mr. John G. Jury on "The Misuse of Precedent," in which he spoke of the practice of the law as a game of dialectics in which the immediate wrongs are dealt with only and accordingly as precedent may permit, the latter being more potent than and often substituted for reason in the determination of the particular case. To him and others to whom the words *"stare decisis"* have come to bear an evil import Judge Jacob Fawcett of Nebraska offers consolation. Speaking recently before the Lancaster County Bar Association of that state he ventured the opinion that pin-point technicalities and hoary precedents are losing their power in modern legal procedure and are becoming less and less controlling in the courts of this country. But while regarding this as a hopeful sign in all cases where no doubt exists as to what justice dictates, safety often lies, he maintained, in following the beaten path, and to those who favor an entire departure by the courts from precedent he sounded a note of warning. While contending that precedent should not be permitted to defeat justice, he admitted that the adoption of such a course "is fraught with danger." Said he:

"It is a course that must be pursued with caution lest we strike a rut which may wreck the machine. There may be cases where, in the record before us, precedent will point one way and justice the other, in which, if we disregard precedent and do what appears to be justice in that particular case, we may, after all, uphold a wrong. The reason for this is that the records do not always speak the truth. The record may correctly set forth the evidence and yet not disclose the truth; and, if we knew the real facts, *dehors* the record, we would find that even in that case safety would lie in following the beaten path of precedent. For this reason courts should be very careful indeed in ignoring well-settled principles of law and procedure for the purpose of doing justice in a particular case. To justify doing so the case should be so clear as to leave no room for doubt; but when such a case is presented the court should not hesitate as to its course. When the application of a technical rule of construction will defeat a clear equity the rule should not be applied."

Divorces in Pennsylvania.

IN 1913 the legislature of Pennsylvania adopted a new divorce law allowing a person who was married outside of the state and who alleges a cause of divorce committed outside thereof to establish a residence in Pennsylvania and then obtain a divorce without giving any notice to the other party other than that which he or she might happen to gather from a published subpœna. Thus, by this act, one seeking a divorce does not have to be a citizen of Pennsylvania, but must live there merely long enough to enable him or her to claim residence in the state, while the other party to the marriage contract need not be personally served or even heard from in the proceeding. The validity of this gift to citizens of other states of the facilities of her courts is still being contested in a case now before the Superior Court of the state. It is, however, pleasant to note that a committee of the Philadelphia Law Association, which has been investigating the nature and effect of this act, in its report recently published denounces the law. Views as to easy divorce are usually tinctured by individual moral, ethical, or religious conceptions, but most sound thinking persons deem it undesirable that such a system should prevail as that now existing in this country, whereby one to whom the marriage yoke has become distasteful may, disregarding the laws of his legal or matrimonial domicile, flee therefrom and, by temporarily taking up his residence in a sister state, free himself from his marital obligations without the latter state gaining jurisdiction over the person of his whilom life-partner and frequently without the latter even being aware of the proceedings. We do not know whether Pennsylvania is seeking to enter into competition with Nevada for a share of the divorce business, but if the present act is sustained, we see no reason why it may not do so successfully. In truth, if the peculiarly "liberal" features of this act become generally known it may become the Mecca for all the matrimonial malcontents east of the Mississippi at the least. We wish the Philadelphia Law Association Godspeed in their fight against the act and hope for its speedy repeal.

The Best Method of Appointing Judges.

ACTUATED by a desire to see on the bench the highest type of man, industrious, honest, learned in the law, independent, and freed from the sordid claims of partisan politics, many have of late been suggesting reforms in the method of selecting the judiciary looking to the adoption of an appointive as opposed to the elective system. In vindication of their claim that the appointive system is superior they refer by way of example to the Federal courts, remind us of the success of the early appointive system in New York, and from these, among other facts, deduce the conclusion that, if the best results are to be obtained, it is necessary definitely to fix on an individual, as the chief executive, the responsibility for the selection of the judges, and to hold him directly accountable therefor. In other words what is everybody's business is nobody's business. In opposition to their demands, however, they find themselves confronted with a deep-seated distrust of the people (a sentiment cleverly exploited by the "bosses") in any schemes looking to the curtailment of their accustomed political privileges. As a contribution to this question it is interesting to note that James Parker Hall, Dean of the University of Chicago Law School, recently announced to the Ohio State Bar Association that the appointive system by and with the advice of an independent official body was the best. As probably the most desirable plan for adoption Dr. Hall suggested that of California, where the governor appoints the judges, but the confirmation or rejection of the appointments is left to the people. Of all the various appointive systems proposed this plan ought undoubtedly to prove most palatable to the electorate since it possesses the merit of not interfering with their prerogative to determine the men whom they wish to sit on the bench.

FALSE OR OBJECTIONABLE ADVERTISING.

IT is a matter of some gratification in these days of many movements to observe the increasing tendency of society as a whole to protect its members from those who seek to impose on the credulity of their fellows through the medium of false and misleading advertisements. At a comparatively early date some slight attempt was made in this direction, but it is only within recent times that the question has received the attention it deserves. And the agitation has come none too early, for the purchases of the great mass of people are guided, even suggested, by the advertisements which form a large part of the modern newspaper and magazine, and, because of the competition existing under business conditions of the present day, each merchant strives to outdo his competitors in describing the advantages and superior qualities of his wares. Recognizing this fallibility of human nature, as well as the fact that most of us have a decided weakness in the direction of buying where we can get the most—or think we can—for the least money, the legislatures of a number of states have recently passed statutes with the avowed end in view of stamping out advertising which contains any assertion, representation or statement which is untrue, deceptive or misleading. It is true that in some instances the legislatures have blunted their own weapon by requiring that the advertisement be "knowingly" false, thereby requiring proof of evil intention as well as lying before the offender can be punished, but an issue might be raised as to the necessity of a recognized evil intention preceding a false statement. A "saving clause" in a few cases prevents the application of the statutes to the owner or publisher who accepts such advertisements for publication without knowledge of their untruthfulness.

A few states have gone still further in the right direction and enacted statutes rendering it unlawful to publish either in newspapers, or other circulated publications, or in signs, cards, labels or other media, advertisements containing statements regarding the quality, quantity, method of production, cost, present or former price or the reason for the price, which have the appearance of an offer advantageous to the purchaser and are untrue as calculated to mislead. Akin to these statutes are those prohibiting advertising whereby merchandise shall be falsely represented as stocks damaged by fire, water or otherwise, as bankrupt stock or that of a receiver's or judicial sale, or offered as closing out or sacrifice sales. So far there has been but little light shed on the status and meaning of these enactments by judicial decisions. There seems no reason however why they should not be upheld, as undoubtedly they will be as a class. Certainly the time has come for discarding the ancient doctrine of *caveat emptor* and protecting the long suffering public from fraudulent imposition. It should not be a burden imposed on every buyer to investigate the truthfulness of every advertisement on which he relies, any more than he is called on to verify his physician's prescription, and in many cases the one is as impossible as the other. However, one cannot but speculate as to whether the female lawmaker—when and where there be such—will find herself of sufficient moral strength to prohibit advertisements of sacrifice sales or "bargain days," and whether if it is ever done, the prohibitions will not conflict with the constitutional guaranty of the pursuit of happiness.

Following close on the general temperance movement throughout the country have come statutes forbidding the advertising of intoxicating liquors or places where they can be obtained, and these have very generally been sustained. The Alabama "Anti Advertising Liquor Law" of February 10, 1915, was attacked as being unconstitutional in *State* v. *Delaye,* 68 So. 993, L. R. A. 1915 E 640, and in *Advertiser Co.* v. *State,* 69 So. 501, but in each case it was sustained. The Arkansas statute of 1907 was sustained in *Zinn* v. *State,* 88 Ark. 273, 114 S. W. 227 and in *Hancock* v. *State,* 99Ark. 38, Ann. Cas. 1912C 1032, 133 S. W. 181, and the validity of the statutes of Maine and Oklahoma has been judicially affirmed. The argument most frequently advanced is that advertisements of this character are beyond the scope of the police power of the state, but it has met with but little favor, for the state having the power to regulate the sale of intoxicating liquors within its borders may certainly regulate or even prohibit advertisements thereof. This view was taken in the Maine statute in *State* v. *J. P. Bass Pub. Co.,* 104 Me. 288, 71 Atl. 894, 20 L. R. A. (N. S.) 495, wherein the court said: "The defendants further urge that newspapers and magazines published in other states, and containing advertisements of intoxicating liquors for sale, come into this state by mail and otherwise in large quantities, and yet cannot be interfered with by the state au-

thorities. That may be, but it does not follow that the state may not prevent such advertisements being printed in newspapers published in this state. If the state cannot wholly prevent the mischief of such advertisements by excluding from the state all newspapers containing them wherever published, it may yet prevent such increase and spread of the mischief as would result from such advertisements being printed in newspapers published within the state. It may to that extent control the conduct of printers and publishers within its own territory." However, some of the statutes have been construed to cover advertisements in newspapers printed without but brought within the state for distribution. This was the case in *State* v. *Delaye, supra,* and the same construction was placed on the Oklahoma Act in *State* v. *State Capital Co.,* 24 Okla. 252, 103 Pac. 1021, wherein, however, it was decided that the publication of an advertisement of the prohibited class by a newspaper could not be restrained by an injunction, and as to the latter point this decision was followed in *State* v. *Journal Co.,* 25 Okla. 180, 105 Pac. 655. The advertising of intoxicating liquors has in several instances become the subject of municipal regulation. In *Horton* v. *Old Colony Bill Posting Co.,* 36 R. I. 507, the court, in upholding the validity of a city ordinance prohibiting advertising of this character within a certain distance of schools or churches, said: "The state spends thousands of dollars upon schools and education, and encourages religious and moral development. To allow liquor advertisements to be placed in close proximity to schools and churches is inconsistent with the objects of secular and religious education. Such advertisements so located would be very offensive to a large part of the public, and would be not in proper place there. Education by pictorial advertisement in the brands of intoxicating liquors and suggestions to quench the thirst by intoxicating liquors are manifestly not proper for youth attending school or church, and the public in their relations to school and church have the right not to have such suggestions thrust upon their notice against their will by flaring liquor advertisements so located. The reasonableness of this provision is easily justifiable on educational, moral and welfare grounds; no court has held such a provision bad in any case brought to our attention." However, in *Haskel* v. *Howard,* 269 Ill. 550, 109 N. E. 992, there was questioned the validity of an ordinance in an anti-saloon territory forbidding the display of the sign or advertisement of any liquor dealer and the court held it invalid, saying: "The argument of appellees that the power to pass such an ordinance exists or is implied as incidental to the power to regulate or prohibit the sale of intoxicating liquors, or that it arises out of the statute which forbids taking orders for the sale and delivery of intoxicating liquors in anti-saloon territory, is untenable. The ordinance is not limited to advertisements for the sale of liquor in Villa Grove nor to advertisements for taking orders for the sale and delivery of intoxicating liquors in that city. The prohibition of such advertisements is unnecessary to and has no reasonable connection with the power to prohibit the sale of liquor in said city. If the power to prohibit such advertisements is to be implied, it must be because their display affects the public health, safety, morals, or welfare. By no stretch of the imagination could it be made to appear that such advertisements threaten or injuriously affect the public health or safety. If the ordinance can be sustained at all, it must be because they injuriously affect the morals or welfare of the public. It is a matter of common observation that a great many manufacturers extensively advertise their products by display signs in cities and along the lines of railroads and public highways. So far as we are aware, it has never been held that the advertisement of its beer by a brewery was so injurious to the public morals as to make it a nuisance *per se* and authorize it being prohibited. The use of intoxicating liquors is objectionable to a great many people; but so also is the use of tobacco, coca-cola, and chewing gum, but they are the products of lawful manufacture, and, so long as that is so, we do not see how their advertisement can be prohibited. It would seem inconsistent to say that a product may be lawfully manufactured for the consumption of all who desire it but the advertisement of it may be prohibited as an offense against public morals."

Possibly more important than any other legislation in its direct effect on the morality of the people is that of recent years designed to prevent the exploiting of "fake" cures for venereal diseases. There have long existed statutes prohibiting in general terms advertisements of obscene or filthy character, and the advertisements of methods of preventing conception and procuring abortion, have—perhaps regrettably—been forbidden, but it is only within the last few years that the legislatures have become alive to the danger of permitting the broadcast display of advertisements of methods and medicines which are ostensibly designed to convince the ignorant and credulous that their moral mistakes can be rectified and their attending evils cured. It is interesting to find, therefore, that in nearly a dozen states statutes have been passed forbidding a publication of advertisements of cures for certain particular diseases, or forbidding one to advertise himself as a specialist in the treatment of diseases of this character, and in some cases the owner or person in charge of a newspaper publishing such advertisements is declared to be guilty as well as the person causing its insertion. The Oregon statute on this question was upheld in *State* v. *Hollinshead* (Ore.) 151 Pac. 710, the court saying: "For many years it has been recognized by publicists and legislators that some drastic action is necessary to check certain social evils and to protect youthful and inexperienced humanity, not only from easy access to vicious and immoral practices, but also from the schemes of designing men, who, for the sake of financial profit, would prey upon the calamities of the unfortunate who have sowed the wind and reaped the whirlwind. Further than this, it has been thought that the act of spreading broadcast, by means of advertising, the idea that certain venereal diseases are easily and cheaply cured, is against public policy, in that it has a decided tendency to minimize unduly the disastrous consequences of indulging in dissolute action. These views were evidently the moving principle of our legislators in the passage of the act under discussion. The purpose of the act is clearly in the interest of the public morals. It is not class legislation, for it applies to all who may be engaged in a like business."

Lawyers are well acquainted with the class of statutes such as prevail in Illinois, New York and other states forbidding advertisements offering to procure divorces.

In the last analysis legislation of this nature shows an awakening of the lawmakers to a proper sense of their responsibilities as guardians of the financial and moral

interests of the people. True it may be questioned by the idealist whether commercial honesty can ever be inculcated by legislation, or whether morality can be reduced to a science of laws, but in any event, it is certainly worth the effort, if the mass of people can be protected from the designs of the few and from the results of their own ignorance, until they have lifted themselves to the plane which renders such protection unnecessary.

L. R. BUSKEY.

LIABILITY FOR DAMAGE TO PROPERTY FROM AIRCRAFT

IT seems probable that the legal question most prominently before the public mind at the present time is that of the liability which arises, as between landlords and tenants, for the destruction of, or damage to, demised property from the air raids, now resorted to with some frequency by the enemy, under the plea—unfortunately not cognizable by any human court—of military necessity or advantage.

The Government, as is well known, have put forward a scheme of insurance. But it is not, as perhaps it ought to be, and as it was in the case of the East Coast naval raids in the earlier stages of the war, one of a national character. Its benefits are confined to those who choose to take advantage of it by paying the necessary premiums, in consideration of which the policies are issued. The prudent owner or occupier of house property will no doubt endeavor to avail himself of those benefits; and, having regard to the uncertainty which must prevail, as the following observations will show, until actual decisions are pronounced, as to the real incidence of the liability in question, as well as to the uncertainty respecting the financial ability to bear the burden, of those on whom it falls, the best course would obviously be for the parties to arrange between themselves, if possible, to share the payment of the insurance in agreed proportions. There will, however, be a vast number of cases in which persons will prefer to run the risk in question (which appears to them perhaps to be only trifling) rather than add, even to a slight extent, to the heavy burdens which they have to bear at this difficult time; and it is to such cases in particular that the following remarks will apply. The leases and agreements referred to are, of course, those which were entered into before the beginning of the war.

It may perhaps be as well at the outset to repeat the caution which has already been given. It goes without saying that the question of liability depends in every case on the terms of the contract of demise. The chief difficulty arises from the circumstance that one is called upon to apply certain established rules of contract law to a case which, in one sense, was, beyond doubt, altogether outside the contemplation of the parties at the period when the contract was made. At the same time one must not lose sight of the fact that though air raids were not, in the great majority of cases, and perhaps could not have been, within such contemplation, they are in truth only a special instance of a class of acts—those of foreign enemies—which, although in that particular form they may not have been actually present to the minds of the parties, are frequently made the subject of general exception in legal documents of various kinds, and which cannot, therefore, as it is thought, be considered as altogether outside their legal contemplation.

That the mere fact of letting—apart from any express contractual obligations the instrument of letting may contain—can impose no liability on either party in the event of damage or destruction from air raids is probably clear. In no case—apart from statute—is such liability imposed on the lessor; and as regards the lessee, his immunity is equally plain. Where, however, a statute, like the Housing and Town Planning Act 1909 (9 Edw. 7, c. 44), imposes an obligation (sect. 15) that an undertaking shall be implied on the part of the lessor, in lettings within that section, to keep the house during the tenancy in all respects reasonably fit for human habitation, there can be little or no doubt that liability for such damage (subject to the right given to him by the section to apply for a closing order) could be enforced against him. No question as to how far the contemplation of the parties may be deemed to have extended can, as it is thought, influence the positive obligation laid down by the Act of Parliament.

But practically all leases, and the great majority of agreements, do contain contracts, in nearly every case on the part of the lessees, for the preservation of the demised property. And naturally the first question which arises is—Does a covenant or contract to repair, expressed in the ordinary terms, and without any exceptions, in itself throw the liability upon them? Even upon this point a certain amount of doubt may be said to prevail. It is believed that there is no case reported in the books in which liability to rebuild or restore a house destroyed by foreign enemies has been enforced against a lessee merely because he had entered into a covenant to repair and keep it in repair. In *Paradine* v. *Jane* (1647, Aleyn, 26), the authority usually referred to on the point, where a demised building had been destroyed by a foreign enemy, the claim was one for rent and not for repairs. The judgment of the court, however, certainly contains a direct dictum to the effect that liability to repair or restore the building would ensue; and the well-known distinction is drawn between obligations imposed merely by law (obligations the performance of which in a case like the one here spoken of is excused), and those imposed by the party's own act, where the contrary result prevails, because he might have provided against the event by his contract. The dictum just referred to was in no sense necessary to the actual decision of the case; but it has been so often spoken of with approval by text-writers, and its correctness appears to follow so closely as a corollary from the general principle laid down as the basis of the decision, that its authority is now no doubt very considerable.

In support of it, up to a certain point, may be brought forward those cases which may be said to have now completely established the principle that where a lessee has covenanted to keep premises in repair without more, and they are destroyed by accidental fire, he becomes bound to rebuild them in order to fulfil his express undertaking. The two principal are *Chesterfield (Lord)* v. *Bolton (Duke of)* (1738, 2 Com. 627) and *Bullock* v. *Dommitt* (1796, 6 T. R. 650); and both of them were treated as decisive of the law in this respect by the Lord Chancellor in *Clark* v. *Glasgow Assurance Company* (1854, 1 Macq. 668) in the House of Lords. Moreover, in *Digby* v. *Atkinson* (1815, 4 Camp. 275) Lord Ellenborough appears to have stretched the doctrine to the point of holding the assignees of a term responsible for destruction by fire, where the lease had contained an unqualified covenant to repair, and they had held over and paid rent (and this not the original rent stipulated for by the lease, but an increased rent by agreement) after the end of the term; although the yearly tenancy presumed in such cases only incorporates, as is well known, covenants applicable to a holding of this nature, and a distinction for such purposes has frequently been made between what are called "tenantable" and "substantial" repairs.

The above cases, however, appear to carry the matter only a

little further. Fire is a matter of everyday occurrence; and there is little or no difficulty in presuming that an event of that nature must have been, or must be taken to have been, within the contemplation of the parties when they entered into the contract.

A further modern illustration of the same principle (though perhaps better described as a kind of exception to it) is furnished by those cases in which, owing to the lapse of time and consequent structural decay, it becomes impossible to repair premises without renewing or rebuilding them. In *Lurcott* v. *Wakely* (104 L. T. Rep. 290; (1911) 1 K. B. 905) it was laid down by the Court of Appeal that though the lessee is not excused from renewing or rebuilding if the work which has to be done is only in subordinate parts of the demise, his covenant does not extend to make him liable to give something altogether different from what he received, and that he is so excused where the work cannot be properly or effectually done without rebuilding practically the whole of the demised structure. The ground of release in the latter event appears to be, as laid down in the judgment of the Master of the Rolls, that such a result could not be considered to have been within the contemplation of the parties; though perhaps it is not easy to see why, when an old building is demised, the end of its life, however sudden, due to decay from structural defects should be deemed to be less within such contemplation than its destruction by accidental fire.

In conflict, moreover—at least to some extent—with the general principle already adverted to may be cited another, which has been best expressed in a classical passage in the judgment of the Court of Queen's Bench in the case of *Baily* v. *De Crespigny* (19 L. T. Rep. 681; L. Rep. 4 Q. B. 180), delivered by Mr. Justice Hannen: "There can be no doubt," he says, "that a man may by an absolute contract bind himself to perform things which subsequently become impossible, or to pay damages for the non-performance; and this construction is to be put upon an unqualified undertaking where the event which causes the impossibility was or might have been anticipated or guarded against in the contract, or where the impossibility arises from the act or default of the promisor. But when the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens. It is on this principle that the act of God is in some cases said to excuse the breach of a contract. This is in fact an inaccurate expression, because where it is an answer to a complaint of an alleged breach of contract that the thing done or left undone was so by the act of God, what is meant is that it was not within the contract."

Applying this test, it seems capable of being urged with some force that as destruction of the premises by aircraft could scarcely, before the beginning of this war, be reasonably supposed to have been within contemplation, the general words of the covenant to repair, in the terms of the learned judge which have just been quoted, "were not used with reference to the possibility of the particular contingency which afterwards happens." And the argument, at least at first sight, appears a formidable one. The answer, however, seems to be supplied by a consideration which has already been referred to. It is no doubt true that if the "event" spoken of is the destruction of the property by bombs or missiles from aircraft, and that only, it is probably one altogether outside the contemplation of the parties. But the acts of foreign enemies taken as a whole class cannot be so spoken of; and the acts in question are, as already pointed out, only particular instances of that class. Many legal documents, as before mentioned, expressly except them; and the fact that these islands have enjoyed for a long course of time immunity from the acts of foreign enemies cannot, it is thought, of itself place those acts outside legal contemplation. If the Government had not intervened on behalf of the sufferers from the naval raids at Scarborough or Hartlepool, for instance, could it have been said that lessees of buildings there damaged or destroyed, if under covenants to repair, were exempted from liability to repair or rebuild them, merely because they had been injured by the acts of foreign enemies? There seems little or no real distinction between the two cases; and the better view seems to be that if acts of foreign enemies are not made the express subject of exception from the operation of a contract, all such acts are within that operation, irrespective of the particular mode in which those acts may be carried into effect, and irrespective of the consideration whether that mode may, or may not, be one altogether novel in the experience of mankind. But until the matter has been actually decided, this result cannot by any means be regarded as certain.

The same general principle will, it is thought, apply to the not infrequent case—nearly always found in the letting of flats—where external, or sometimes all structural, repairs are undertaken by the lessor, the lessee being made responsible for inside or decorative repairs only. This was the case, for instance, in *Manchester Bonded Warehouse Company* v. *Carr* (43 L. T. Rep. 476; 5 C. P. Div. 507), which will be referred to later on. In the event of the destruction of the premises by aircraft, it would appear that each party would remain bound to perform his part of the contract. Both of them have entered into covenants which are absolute so far as they go, and, if the preceding reflections are justified, could not evade liability, in the manner agreed, for the damage which the premises have sustained.

The covenant to repair, however, as is well known, frequently contains an exception. This is framed in a large variety of different ways; but the event which the lessee principally desires to guard himself against is undoubtedly that of fire. Where the bomb or missile thrown from the aircraft is (as often happens) of an incendiary nature, and generates a fire, which results in the destruction of a demised building, the first question which arises will no doubt be whether this is "damage by fire" within the exception of the covenant as it is ordinarily framed. The question whether any difference can be drawn between the case where the fire results directly from the explosion of the bomb and the case where it results indirectly by the process of "spreading" from another building will be discussed presently. The *primâ facie* rule, as we take it, to be applied is that "fire" means fire howsoever caused; that the leaning of the construction, as in many other cases, should be against the lessor; and that if he wishes to cut down the scope of the exception by excluding the acts of foreign enemies he is bound to say so. At the same time it would appear that the above is only a *primâ facie* rule, and may be displaced by considerations based on a regard to other parts of the lease.

Of these the most important is the covenant to insure. Suppose the lessor undertakes to insure "against fire," whilst at the same time the lessee has the benefit of the exception of fire in his covenant to repair. The intention of the lease would then appear to be to safeguard the demised property whilst the demise endures; and the reason why the lessee gets the benefit of the exception seems to be that the lessor has protected himself, or intends to protect himself, against the contingency of fire by the insurance. It would appear to follow that the meaning of the word "fire" in the repairing, ought to be the same as its meaning in the insuring clause.

Now here again it is presumed that a covenant to insure against "fire" without more means *primâ facie* against fire whatever may be its origin. But this presumption also may be displaced, and in the great majority of cases will, we think, be displaced, by the language used in the instrument of demise. As usually expressed, the party who agrees to insure agrees to insure in some specified or acceptable office; he agrees to pay the necessary premiums, and, on demand, to produce to the other party the receipts for them; and he further agrees, in the event of a fire taking place, to expend the policy moneys received from the office on the reinstatement of the premises. Is it not the proper inference that the real contract is only to insure in the mode usually adopted by insurance offices in this country in the issue of fire policies? It is a notorious fact that such policies invariably except the acts of foreign enemies; and it is further believed that risks of this kind were (before the war) declined by most, if not all, of such offices, even if accompanied by the offer of an increased premium. It seems, therefore, to follow that the lessor discharges his obligation by taking out an ordinary policy, from which damage from aircraft bombs is excluded; and consequently, if the foregoing observations are well founded, such damage is not within the exception of fire in the tenant's covenant to repair. This, however, does not probably apply to the case already adverted to, where the fire is not caused directly by the bombs themselves, but merely by the process of "spreading" from adjoining premises; and it is thought, though the point must be described as doubtful, that a fire of this kind, due only indirectly to the acts of foreign enemies, might well be within both the insurance clause and (consequently) the exception in the covenant to repair.

But to the exception of fire is often superadded an exception of "inevitable accident," and the question may then arise whether the damage which is the subject of the present inquiry is covered by those words. It is settled that when they follow, as they usually do, other words, such as fire, flood, or storm, the principle of *ejusdem generis* applies so far as to exclude damage which is due, not to any external agency, but to the acts of the parties themselves (*Saner* v. *Bilton,* 38 L. T. Rep. 281; 7 Ch. Div. 815; followed in *Manchester Bonded Warehouse Company* v. *Carr, sup.*). But this leaves the present case untouched. This point, also, can only be described as a difficult one. A little, though perhaps not much, assistance in approaching it can be derived from the many discussions which have taken place in the courts on the true meaning of the word "accident," as used in the Workmen's Compensation Act, and especially from the judgments of the House of Lords in the recent case of *Trim School Board* v. *Kelly* (111 L. T. Rep. 305; (1914) A. C. 667). In that case it was held (by a narrow majority of that House) that the death of a schoolmaster at the hands of his pupils had, *for the purposes of the Act,* resulted none the less "by accident" because the injuries which caused it had been designed by them. In one respect that case appears considerably stronger than the one here under discussion. The injuries sustained by the deceased man were not only designed, in the sense that they were intentional, but were designed *against him.* In the case of damage from air raids, it seems impossible to assume that the damage sustained by any particular property was designed against that property. In that sense, and in that sense only, is the damage "accidental." There is, however, an important difference between the two cases which should not be lost sight of. It is thoroughly established that the word "accident" in the Workmen's Compensation Act is used in its popular sense. Of the terms used in the exceptions to the repairing clauses of a lease this can hardly be said to hold good; and, having regard to the paramount consideration already referred to, that the real cause of the damage is the act of a foreign enemy, and that such act is constantly made the subject in itself of exception in the operation of legal documents, it hardly seems right to speak of damage from hostile aircraft as due to "accident," merely because it is to some extent a matter of chance whether a particular building sustains it. It seems quite possible, however, that a fire of the nature more than once mentioned, caused, not directly by bombs, but by spreading from other premises, depending, as it does, at least to some extent, on variable agencies, such as the direction of the wind, etc., might properly be described in this way.

A few words may be added in conclusion on the application of the ordinary clause providing for cesser of rent—sometimes only after the lapse of a specified period—to the case of damage to, or destruction of, a demised building from aircraft. That in the absence of such a clause a lessee is not excused from liability for rent, in the case of damage from the acts of foreign enemies, when he has entered into an express contract in general terms to bear that liability, was the exact subject of decision in the case of *Paradine* v. *Jane,* which has been previously referred to. Where, as generally happens, the clause applies only to fire, it is submitted that the *primâ facie* inference again is that it applies to all fire, whatever its cause, and that fire caused by an incendiary bomb dropped from aircraft is within it; but that that inference may be displaced, and will in general be displaced, by reference to other parts of the lease. If, for instance, as generally happens, the clause in question immediately follows one in which the lessor undertakes insurance against fire, with a covenant to apply the insurance moneys in reinstatement of the premises, it seems clear that the fire provided against in the cesser clause is fire only of the same kind as that spoken of in the covenant to insure. And if the views which have before been expressed are correct, that the latter covenant in general does not cover fire caused by the acts of a foreign enemy, it would seem to follow that the lessee in such case would not be relieved from payment of his rent. Other instances where the same result would seem to prevail from the construction of the whole demise might easily be given.

That the destruction of premises from accidental fire does not in itself afford an excuse for nonpayment of rent has been decided too many times to be now called in question. It is rather curious that the ground on which this is put by the earlier authorities is that the rent issues only out of the land, and that the tenant's enjoyment of the land (apart from the buildings on it) is not affected. But having regard to the fact that it was decided many years ago that the same principle applies when the subject of letting is a flat or floor in a building, it seems difficult to accept this as a satisfactory explanation; the real reason, as it is thought, being the one set out in *Paradine* v. *Jane* (*sup.*), that the agreement to pay rent is an obligation undertaken by a party himself, and that if he wishes to qualify it in any way it is his duty to provide the qualification in his contract.

It is of course impossible, within the limits of an article like the present, to do more than suggest a few of the principal points which appear likely to arise, in the near future, from the air raids. The ramifications of the subject are very extensive; and leases and agreements present, it is unnecessary to say, many and great differences of detail. Each case will have to be judged on its own merits; but enough has probably been said to show that it would scarcely be safe to dogmatise unduly on the question of what that judgment may be.—*Law Times.*

SCHEME TO CATCH LAWYERS.

A MAN, giving his name as W. of San Antonio, Texas, recently presented a card of introduction from a client of a Chicago law office to a member of the law firm. Mr. W. represented that he was in the oil business and was desirous of having drafted an assignment of an undivided half interest in certain oil leases covering property located in Louisiana. The assignment was to run to one of the oil scouts of the Standard Oil Company, who was supposed to be on his way from New York to Chicago to close the deal. Mr. W. was informed that the assignment would be ready at 4:30. At that hour he returned and exhibited a letter which he stated he had received in the noon mail from the oil scout. The scout therein advised that he would not reach Chicago until Thursday or Friday of that week. To show his anxiety to close the deal, the scout had enclosed a check for $250.00 to apply on earnest money. The assignment, as prepared, was handed to Mr. W., who examined it with apparent care. He stated that he had forgotten to mention one matter which he desired incorporated in the instrument; that the scout would doubtless have some points which he desired covered; and that as soon as Mr. W. and the scout could confer, they would reach a definite understanding covering all points and would call at the office with the revised deed to be re-written and executed.

After chatting about the oil industry in Mexico, Texas, Louisiana and elsewhere, and displaying considerable knowledge of the fields, the process of boring, etc., Mr. W. stated that the failure of the scout to reach Chicago that day had embarrassed him, as he found himself with but thirty cents in hand. With apparent reluctance he asked the lawyer whether he could identify him at a bank to enable him to cash the $250 check. The attorney suggested that he present his request to his friend who had referred Mr. W. to the law office. Mr. W. truthfully stated that his friend was in a sales conference and would not be released until late at night. Whereupon the lawyer advanced $2.00 and explained that that would enable him to have his hotel wire to New York to assure itself as to the check, and that doubtless the check would be cashed on receipt of a wire from the bank on which the check was drawn.

Mr. W. appeared somewhat disappointed by the smallness of the advance made, but stated that he would follow the suggestion and have the hotel wire immediately; that he would call on the following day, return the $2.00, and on Thursday or Friday close the deal. Any charges the attorney might have for conference and drafting the assignment would be covered when the instrument was executed. Mr. W. then left the law office, since which time neither he, nor the oil scout, nor anyone on his or their behalf, has called. The attorney is congratulating himself that he didn't cash the check.

The morning following the conference, the lawyer called up his client, who stated that Mr. W. had presented himself at his office on the morning of the day before, introduced himself as an old friend of a college classmate of his. He talked of his investments in oil, and requested a card of introduction to some lawyer whom the client could recommend. Mr. W. made no attempt to obtain money from the client or hint that he was hard up. The attorney fell into the very natural error of assuming from the card of introduction of his client that Mr. W. was vouched for as to his integrity, etc., whereas the client did not know him. There are rumors that similar schemes have been worked on other lawyers recently.

Cases of Interest.

TRESPASSER AS INCLUDING PERSON ENTERING APARTMENT OF STRANGER BY MISTAKE.—A woman entering a duplex apartment house having a common vestibule, for the purpose of visiting a friend living in one of the flats, and by mistake opening a door leading into the flat of a stranger, is not a trespasser in the opinion of the majority of the Supreme Court of Wisconsin, as stated in Harris *v.* Hoyt, 154 N. W. 842, and if a dog springs at her from within, and she is bitten, the owner's liability is not measured by the duty which he owes a trespasser. The action was for damages for the injuries sustained by the bite of a dog, the circumstances being as stated above. A judgment of the court below awarding damages was affirmed for reasons, in part, as follows: "Plaintiff was not a trespasser at the time she was injured. She was rightfully in the vestibule when the dog bit her. The mistake of opening the wrong door as she did was one that might happen to any one, and did not spell negligence on her part. The construction of the entrances of the two flats was such that a jury might reasonably conclude the defendant ought to have anticipated that such a mistake as the plaintiff made might readily occur, and hence she should have kept the dog so secured that he could not injure an innocent intruder. It is shown, also, that she had knowledge of the fact that the dog had once before, under very similar circumstances, bitten the hand of a boy who was opening the door of a room where it was."

KEEPING POLLS OPEN AFTER TIME PRESCRIBED FOR CLOSING AS INVALIDATING ELECTION.—The keeping open of election polls after the time fixed by law for their closing will not, it is held by the Supreme Court of Ohio in the case of In re Contest of Special Election, 110 N. E. 491, invalidate the election in the absence of a showing of fraud, or that illegal votes were cast after the time for closing had expired. The court said: "The purpose of a popular election is to ascertain the will of the electors as to a given proposition submitted to them or as to who shall serve them as officers. Where there is a fair and honest expression of the will of the electors, and where there is no fraud, and where no substantial right is violated, an election will not be invalidated by reason of a failure to follow directory provisions of the law. In the instant case it is not claimed that any votes were cast after the legal time for closing the polls which were not entitled to be cast had they been cast within the hours fixed by statute. It is conceded that the polls were not kept open by the election officers after the time fixed by law for the purpose of altering, changing, or affecting in any way the result of the election, nor was there any fraud or collusion. It was simply an innocent noncompliance on their part with the directory provision of the statute relating to the closing of the polls, unaware, perhaps, of the fact that section 5056 had been amended. . . . Were the polls closed at a time earlier than that fixed by law, and qualified voters were thereby prevented from voting, and it could be shown that the result of the election would have been materially changed had the polls been kept open up to the time fixed by law, then it might be said that there was an interference with the free and full expression of the majority. But keeping open the polls after the time fixed by law and permitting no one to vote except qualified voters does not have that effect. The failure of the election officers to observe this directory provision of the statute did not render the votes of qualified electors cast after the time fixed by law illegal. Those cast after the time fixed by law were as expressive of the will of the electors as those cast before."

For a monographic note in point, see Ann. Cas. 1913B 166; and for a general discussion as to whether a statutory provision relating to the time for holding an election is directory or mandatory, see Ann. Cas. 1913E 371.

DEPORTATION OF ALIEN IMMIGRANT AS PUBLIC CHARGE BASED ON FACT OF OVERSTOCKED LABOR MARKET.—A statute of the United States authorizes the deportation of an alien immigrant if he is "likely to become a public charge." This statute was construed by the United States Supreme Court in Gegiow *v.* Uhl, 36 Sup. Ct. Rep. 2, not to permit the deportation of an alien immigrant on the ground that the labor market in the city of his immediate destination, to wit, Portland, Oregon, was overstocked. The court through Mr. Justice Holmes said: "The single question on this record is whether an alien can be declared likely to become a public charge on the ground that the labor market in the city of his immediate destination is overstocked. In the act of February 20, 1907, chap. 1134, § 2, 34 Stat. at L. 898, as amended by the act of March 26, 1910, chap. 128, § 1, 36 Stat. at L. 263, Comp. Stat. 1913, § 4244, determining who shall be excluded, 'Persons likely to become public charge' are mentioned between paupers and professional beggars, and along with idiots, persons dangerously diseased, persons certified by the examining surgeon to have a mental or physical defect of a nature to affect their ability to earn a living, convicted felons, prostitutes, and so forth. The persons enumerated, in short, are to be excluded on the ground of permanent personal objections accompanying them, irrespective of local conditions, unless the one phrase before us is directed to different considerations than any other of those with which it is associated. Presumably it is to be read as generically similar to the others mentioned before and after. The statute deals with admission to the United States, not to Portland, and in section 40 contemplates a distribution of immigrants after they arrive. It would be an amazing claim of power if commissioners decided not to admit aliens because the labor market of the United States was overstocked. Yet, as officers of the general government, they would seem to be more concerned with that than with the conditions of any particular city or state. Detriment to labor conditions is allowed to be considered in section 1, but it is confined to those in the continental territory of the United States, and the matter is to be determined by the president. We cannot suppose that so much greater a power was intrusted by implication in the same act to every commissioner of immigration, even though subject to appeal, or that the result was intended to be effected in the guise of a decision that the aliens were likely to become a public charge."

STATUTORY PROVISION THAT A WILL BE WITNESSED IN PRESENCE OF TESTATOR HOW SATISFIED IN CASE OF BLIND TESTATOR.—A blind person may of course execute a valid will, but the statutory provision that a will shall be witnessed in the presence of the testator is as applicable to his will as to that of any other person, and the result has been that in a few instances courts have had to deal with the problem of what evidence satisfied the statutory provision. For example, in the late case of In re Allred's Will, (N. C.) 86 S. E. 1047, which was a proceeding to caveat a will, the evidence was to the effect that the will was signed by the testator, a blind person, while it was resting in his lap, and was then taken and placed on a table about four feet from the testator, but in the same room, and there subscribed by the witnesses with their backs to the testator; and the question in dispute was whether this was a compliance with the North Carolina statute requiring the paper writing to be subscribed by the witnesses in the presence of the testator. It was held that it was. Allen, J., for the court said: "There was at one time a disposition to give a restricted meaning to the term 'in the presence of the testator,' and to hold that it meant 'in the sight of or within the scope of the vision,' but, as it was soon seen that this narrow construction would prevent a blind man from making a will, and that it excluded the operation of the other senses, except that of sight, a broader and more liberal construction has been generally adopted, and it is now well settled that a blind man may know of the presence of the witness without sight, and that he may make a will. Bynum *v.* Bynum, 33 N. C. 632; Underhill on Wills, vol. 1, p. 267; Ray *v.* Hill, 3 Strob. (S. C.) 302, 49 Am. Dec. 647; Reynolds *v.* Reynolds, 1 Speers (S. C.) 253, 40 Am. Dec. 599; Riggs *v.* Riggs, 135 Mass. 238, 46 Am. Rep. 464. 'In the case of a blind man the superintending control which in other cases is exercised by sight, must be transferred to the other senses.' Ray *v.* Hill, 3 Strob. (S. C.) 304, 49 Am. Dec. 647. 'He must first be made sensible, through his remaining senses, that the witnesses subscribed in his presence.' Reynolds *v.* Reynolds, 1 Speers (S. C.) 256, 40 Am. Dec. 599. 'It is true that it is stated in many cases that witnesses are not in the presence of the testator unless they are within his sight; but these statements are made with reference to testators who can see. As most men can see, vision is the usual and safest test of presence, but it is not the only test. A man may take note of the presence of another by the other senses, as hearing or touch. Certainly, if two blind men are in the same room, talking together, they are in each other's presence. . . . In cases where he has lost or cannot use his sense of sight, if his mind and hearing are not affected, if he is sensible of what is being done, if the witnesses subscribe in the same room, . . . and within his hearing, they subscribe in his presence.' Riggs *v.* Riggs, 135 Mass. 241, 46 Am. Rep. 464; 1 Underhill, p. 267. A notable instance of the execution of a will by a blind man is that of François Xavier Martin, who after he left this state was for thirty-one years a member of the Supreme Court of Louisiana, and during the last eight years of his service he was totally blind. His will was contested by the state upon the ground that a blind man could not make a will, and also because of an alleged illegal trust, but was sustained. State *v.* Martin, 2 La. Ann. 667."

For a general discussion of what constitutes a subscription by a witness to a will in "presence" of testator, see 6 Ann. Cas. 414.

MEANING OF "QUIET AND ORDERLY HOUSE" AS USED IN LIQUOR DEALER'S BOND.—An amusing case, for all but the victim, is that of Lynch *v.* Brennan, 154 N. W. 795, wherein the facts showed that a bartender in charge of a saloon poured alcohol upon the foot of a guest and then set fire to the alcohol, with the result that he was severely burned, and it was held that the act constituted a violation of a provision in the bond of the owner of the saloon that he would "keep a quiet and orderly house." The court said: "No argument should be required to sustain the proposition that when a bartender in charge of a saloon deliberately soaks a guest with an inflammable fluid and then deliberately sets fire to him, he is not keeping 'a quiet and orderly house,' as such language is ordinarily understood. It is contended, however, that the words 'quiet and orderly house' have acquired a technical meaning in the law, that they are the converse of the term 'disorderly house,' as that term is defined and understood in criminal law, and since the crime of keeping a 'disorderly house' is only committed by repeated and habitual acts of disorder (G. S. 1913, § 8712; State *v.* Reckards, 21 Minn. 47), it is argued that there is no violation of this bond unless the principal by repeated acts or omissions habitually keeps a 'disorderly house.' We think this contention cannot be sustained. The rules of criminal law are not applicable here. The penal law concerns itself only with public offenses, and under it a house becomes 'disorderly' only when it becomes

a common or public nuisance. Hunter *v.* Commonwealth, 2 Serg. & R. (Pa.) 298. There is reason for the rule that this should require more than a single act of disorder. The statute and bond we are now considering concern private, as well as public, wrongs. There is no reason why we should take the words of the statute or of the bond in other than their natural and ordinary meaning. We should not hold that a wrong arising from a plain act of disorder is not complete because there are not other acts of disorder either causing a repetition of the wrong, or else not concerning this plaintiff at all. We are impressed with the rule adopted and the reasons given in People ex rel. *v.* Eckman, 63 Hun, 209, 18 N. Y. S. 654. This was an action by the public authorities upon a saloon keeper's bond conditioned, among other things, that the principal should not 'suffer his place to be disorderly.' The language of Justice Morgan J. O'Brien is very pertinent here. He says: 'One of the conditions [of the bond] . . . is that the obligor will not suffer his place of business to become disorderly. In determining the construction or meaning to be given to the word "disorderly," it will not do to resort to the Penal Code as claimed by appellants, and take the definition therein given as to what would constitute a disorderly house. As defined by Webster it means, "not regulated by the restraints of morality; not complying with the restraints of order and law." This definition, coupled with the one given by Bishop on Criminal Law, in defining what is meant by disorderly inns, etc. (sections 1111, 1119), goes far to support the contention that the sale of intoxicating liquor to a minor under fourteen years of age is a disorderly act, and a breach of the condition of the bond. Moreover, as all the questions raised upon this appeal have been examined in the cases of People, etc., *v.* Burget, and Board of Excise *v.* Detterlein (not reported), and determined adversely to appellants further discussion is unnecessary. We think the conclusions reached in those cases were correct.' We find but few other authorities that are helpful. Iowa and Massachusetts cases hold that even in a criminal prosecution where statutes explicitly provide that certain acts of disorder are a common nuisance, a single instance of disorder is sufficient."

VALIDITY OF "HOURS OF LABOR" STATUTES.—Statutes limiting the hours of labor in various occupations have become rather common, and the law affecting their validity is already settled in its larger aspects, but legislatures have yet to learn that fact as is apparent from the latest grist of decisions, for in State *v.* Legendre, (La.) 70 So. 70; and again in Commonwealth *v.* Boston & Maine R. Co., 110 N. E. 264, a statute limiting the hours of labor of certain classes of employees was held invalid for reasons which should have suggested themselves to their framers. In the former case it was held that a statute providing that a full day's labor shall be eight hours and no more, and declaring it unlawful to employ a fireman to work longer than eight consecutive hours at a stationary boiler, using coal for fuel, in a city having a population of 50,000 or more, discriminated arbitrarily against the class of employers and employees embraced within its provisions because it invaded the fundamental right of freedom of contract, and having no real or reasonable relation to public morals, public health or public safety, was beyond the police power of the state. In the latter case the statute declared invalid read as follows: "Employees in and about steam railroad stations in this commonwealth designated as baggagemen, laborers, crossing-tenders and the like, shall not be employed for more than nine working hours in ten hours' time; the additional hour to be allowed as a lay-off." The Massachusetts court commenting on this statute said: "The main contention of the defendant is that the statute as thus constructed is unconstitutional. The agreed facts show that there is nothing inherently unhealthy about the work which the employee did. It was half performed in the open air. It was not arduous. Under these circumstances, the case at bar is indistinguishable from and is governed by Lochner *v.* N. Y., 198 U. S. 45, 25 Sup. Ct. 539, 49 L. Ed. 938, 3 Ann. Cas. 1133. It there was held that a statute which prohibited labor for more than ten hours per day in an ordinarily healthy occupation was 'an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they think best, or which they may agree upon with other parties to such contracts,' and that 'under such circumstances the freedom of master and employee to contract with each other in relation to their employment, . . . cannot be prohibited or interfered with, without violating the federal constitution.' That decision is binding upon the legislature and courts of this commonwealth. See, also, Opinion of Justices, 208 Mass. 619, 622, 94 N. E. 1044, 34 L. R. A. (N. S.) 771. The instant statute is indistinguishable in principle from the one there stricken down. That it relates in part to certain employees of railroads constitutes no ground for differentiation, for the class with which it deals, namely, 'baggagemen, laborers' and 'the like,' groups together those whose work does not have relation to the operation of trains and the safety of passengers. It refers to those employed in different capacities in and about railroad stations, whose work does not concern the safety of the traveling public. Whether other considerations might arise as to crossing-tenders, if they stood alone, need not be discussed, for the dominating classification of the statute is of employees whose work has no direct relation to the security of those who travel by railroad. The conclusion that such a statute as that here presented is an unwarranted interference with individual liberty and an interference with property rights, and therefore contrary to constitutions which secure these fundamental rights, is supported by numerous decisions in other jurisdictions, most of them antedating the Lochner case, which is decisive and to the same effect."

For monographic notes on the subject of the validity of hours of labor statutes, see Ann. Cas. 1914D 1263, Ann. Cas. 1912D 388.

LIABILITY OF SURVIVING TENANT BY THE ENTIRETY TO PAYMENT OF INHERITANCE TAX.—The question of whether a surviving tenant by the entirety is liable to the payment of an inheritance tax on the property held by the entirety has recently arisen in two important jurisdictions, namely Massachusetts and New York. In Palmer *v.* Mansfield, (Mass.) 110 N. E. 283, which was a petition for instructions brought in the probate court by executors to determine whether certain real estate held by the testator and his widow as tenants by the entirety was taxable under a statute relating to the taxation of legacies and succession, the attorney general contended that on the testator's death his one-half interest in the real estate passed to the widow by right of survivorship, and such interest was taxable under that clause of the statute which included real estate which passed "by the laws regulating interstate succession." This contention was overruled, it being held that the real estate by the entirety was not taxable. Crosby, J., said: "The peculiar nature of a tenancy by the entirety frequently has been considered by this court. It can arise only where the ownership is vested in husband and wife. As was said by Field, J., in Pray *v.* Stebbins, 141 Mass. 219, 221, 4 N. E. 824, 55 Am. Rep. 462: 'This tenancy by entirety is essentially a joint tenancy, modified by the common law doctrine that husband and wife are one person.' The difference between a joint tenancy and a tenancy by the entirety is that joint tenants take by moieties and are each seized of an undivided moiety of the whole *per my et per tout*, which draws after it the incident of survivorship unless either party in his lifetime

severs the jointure. On the other hand neither husband nor wife can sever a tenancy by the entirety. They do not take by moieties but by entireties. Neither can alienate a moiety so as to defeat the title to the survivor in the whole. Shaw *v.* Hearsey, 5 Mass. 521; Wales *v.* Coffin, 13 Allen 213; Pray *v.* Stebbins, 141 Mass. 219, 4 N. E. 824, 55 Am. Rep. 462; Hoag *v.* Hoag, 213 Mass. 50, 99 N. E. 521, Ann. Cas. 1913E 886. When a tenancy by the entirety is created, the husband and wife take the estate as one person, and they take but one estate. In view of the nature of such an estate, on the death of either husband or wife no beneficial interest accrues to the other by survivorship so as to create succession, and so no part of the estate was subject to the tax. Upon the death of the testator no estate in the property in question passed to his widow. It belonged to her from the time when the tenancy by the entirety was created. In the event that she survived her husband, upon his death she took no new title by survivorship, but held under the deed by virtue of which she was originally seized of the whole." In the case of In re Klatzl's Estate, N. Y. 110 N. E. 181, where the question of the liability of a surviving tenant by the entirely to the payment of a succession tax also arose, no decision was reached because the court was badly split on the preliminary question whether a tenancy by the entirety was shown. Four judges constituting a majority of the court held that certain real estate deeded by the testator to himself and wife was liable on his death to the payment of a succession tax on one-half of said real estate, but three of the judges reached this conclusion by holding that the testator and his wife took under the deed as tenants in common, and not by the entirety. The fourth judge, however, who was Chief Justice Bartlett, was of opinion that the testator and his wife took as tenant by the entireties, and that notwithstanding this fact one-half of the estate was subject to the tax. This conclusion it is clear is directly opposite to the conclusion reached by the Massachusetts Supreme Court. Three other judges dissented from the judgment of the majority, holding as did the Chief Justice, that a tenancy by the entirety was shown, but taking issue with his contention that such a tenancy subjected one-half of the property so held to a succession tax. Chief Justice Bartlett wrote an opinion which it is worth while quoting from in view of his lone stand that a tenancy by the entirety cannot escape a succession tax. He said: "The respective rights of husband and wife in land held by them as tenants by the entirety are settled by the decision of this court in Hiles v. Fisher, 144 N. Y. 306, 39 N. E. 337, 30 L. R. A. 305, 43 Am. St. Rep. 762. The only substantial difference between such a tenancy and a joint tenancy is that the tenancy cannot be severed except by their joint consent. The creation of such an estate is permitted by law, and I see no reason why the husband could not convey to his wife such an estate as she would get by a similar deed to them from a third person, and at the same time reserve for himself the same rights he would have under such a deed. Even if the deed created a mere joint tenancy, it would be good. The statutory provision that 'every estate granted or devised to two or more persons in their own right shall be a tenancy in common unless expressly declared to be in joint tenancy' does not require that the identical words, 'joint tenancy' shall be used in order to create such estate. It is sufficient if there is an apt description of the estate intended to be conveyed, and that such estate is in law a joint tenancy. But this does not dispose of the question before us. The estates and rights of the husband and wife were these. Each was entitled to the enjoyment, use, and profits of an undivided half during his or her life, with an absolute fee in the whole in case of surviving the other. The undivided half to the enjoyment, use and profits of which the husband was entitled during his life never passed into the possession of the wife until her husband's death, and, consequently, then became subject to that provision of the Tax Law which declares that a transfer tax shall be imposed when the transfer is of property made in consequence of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or after such death. Matter of Brandreth, 169 N. Y. 437, 62 N. E. 563, 58 L. R. A. 148."

VALIDITY OF STATE STATUTE PROHIBITING THE EMPLOYMENT OF ALIENS ON PUBLIC WORKS.—A New York statute which prohibited the employment of aliens on public works and which was upheld as constitutional in Heim *v.* McCall, 214 N. Y. 629, *reversing* 165 App. Div. 449, has recently been declared not in violation of any provision of the United States Constitution (see Heim *v.* McCall, 36 U. S. Sup. Ct. 78). The question arose in a taxpayer's suit begun by bill in equity to restrain the Public Service Commission for the First District of the State of New York from declaring certain contracts for the construction of portions of the rapid subway system of the city of New York void and forfeited for violation of certain provisions inserted in the contracts in pursuance of § 14 of the labor law (so-called) of the state providing as follows: "In the construction of public works by the state or a municipality, or by persons contracting with the state or such municipality, only citizens of the United States shall be employed; and in all cases where laborers are employed on any such public works, preference shall be given citizens of the state of New York. In each contract for the construction of public works a provision shall be inserted, to the effect that, if the provisions of this section are not complied with, the contract shall be void." Mr. Justice McKenna writing the opinion for the United States Supreme Court said: "The fundamental proposition of plaintiff in error Heim is that, assuming that § 14 applies to the subway construction contracts in question, it (the law) contravenes the provisions of the Constitution of the United States (*a*) in that it violates the corporate rights of the city and the rights of its residents and taxpayers, (*b*) the rights of the various subway contractors with the city, (*c*) the rights of aliens and citizens of other states resident in New York, and (*d*) it is in violation of treaty rights. . . . The contentions of plaintiffs in error under the Constitution of the United States and the arguments advanced to support them were at one time formidable in discussion and decision. We can now answer them by authority. They were considered in Atkin *v.* Kansas, 191 U. S. 207, 48 L. ed. 148, 24 Sup. Ct. Rep. 124. It was there declared, and it was the principle of decision, that 'it belongs to the state, as the guardian and trustee for its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities.' And it was said: 'No court has authority to review its action in that respect. Regulations on this subject suggest only considerations of public policy. And with such considerations the courts have no concern.' This was the principle declared and applied by the court of appeals in the decision of the present case. Does the instance of the case justify the application of the principle? In Atkin *v.* Kansas the law attacked and sustained prescribed the hours (8) which should constitute a day's work for those employed by or on behalf of the state, or by or on behalf of any of its subdivisions. The 14th Amendment was asserted against the law; indeed, there is not a contention made in this case that was not made in that. Immunity of municipal corporations from legislative interference in their property and private contracts was contended for there (as here); also that employees of contractors were not employees of cities. It was

contended there (as here) that the capacity in which the city acted, whether public or private, was a question of general law not dependent upon local considerations or statutes, and that this court was not bound by the decision of the state court. And there (as here) was asserted a right to contest the law, though the contracts were made subsequent to and apparently subject to it, upon the ground that they were entered into under the belief that the law was void. Finally the ultimate contention there was (as it is here) that the liberty of contract assured by the 14th Amendment was infringed by the law. In all particulars except one the case was the prototype of this. There the hours of labor were prescribed; here the kind of laborers to be employed. The one is as much of the essence of the right regulated as the other, that is, the same elements are in both cases—the right of the individual employer and employee to contract as they shall see fit; the relation of the state to the matter regulated; that is, the public character of the work. The power of regulation was decided to exist whether a state undertook a public work itself or whether it 'invested one of its governmental agencies with power to care' for the work, which, it was said, 'whether done by the state directly or by one of its instrumentalities,' was 'of a public, not private, character.' And, being of public character, it (the law—the Kansas statute) did not 'infringe the liberty of anyone.' The declaration was emphasized. 'It cannot be deemed,' it was said, 'a part of the liberty of any contractor that he be allowed to do public work in any mode he may choose to adopt, without regard to the wishes of the state.' And adversely it was said (as we have already quoted): 'On the contrary, it belongs to the state, as the guardian of its people, and having control of its affairs, to prescribe the conditions upon which it will permit public work to be done on its behalf, or on behalf of its municipalities.' See also Ellis v. United States, 206 U. S. 246, 51 L. ed. 1047, 27 Sup. Ct. Rep. 600, 11 Ann. Cas. 589. The contentions of plaintiffs in error, therefore, which are based on the 14th Amendment, cannot be sustained." The contention that the statute was in violation of treaty rights was likewise decided against the plaintiffs in error.

For a monographic note in point, see Ann. Cas. 1914B 1271.

New Books.

The Law of Suretyship. By Arthur Adelbert Stearns, LL.D., of the Cleveland Bar. Second edition by Clinton De Witt of the Cleveland Bar, Lecturer upon the Law of Suretyship and Mortgages, Western Reserve Law School. Cincinnati: The W. H. Anderson Company, Publishers. 1915.

This treatise came out originally in 1902. Thus it is seen that thirteen years separate the two editions. The present edition covers personal suretyship, commercial guaranties, suretyship as related to bonds to secure private obligations, official and judicial bonds and surety companies. A chapter in the original edition entitled "Suretyship as Related to Negotiable Instruments" has been eliminated because, as the editor says, the Negotiable Instrument code now in force in most of the states has largely supplanted the necessity of treating the subject in a text book. The editor states that eight thousand cases have been examined by him in the preparation of this edition, and those deemed sufficiently important have been used. The volume contains five hundred pages of text followed by a long table of cases and an index. The footnotes are full and show that many cases have been cited, though of course they are by no means exhaustive. It would take more than one volume to consider adequately every case relating to the subject. The material used, however, is sufficient for a general survey of the subject.

A Treatise on the Federal Employers' Liability and Safety Appliance Acts and on the Federal Statutes on Hours of Labor, Including Interstate Commission's Rules and Diagrams for Equipment of Cars. By W. W. Thornton of the Indianapolis Bar, author of Sherman Anti-Trust Law, Pure Food and Drugs, etc. Third edition. Cincinnati, Ohio: The W. H. Anderson Co. 1916.

The first edition of this work appeared in 1909, the second in 1912, and the third in 1915. Some over five hundred pages contain the main body of the treatise, and over four hundred pages are given up to appendices. Appendix A contains among other things the text of the Employers' Liability Acts of 1906 and of 1908, and Appendix B various reports of congressional committees pertaining to such legislation. Appendix C contains the English Employers' Liability Act, and Appendix D the Safety Appliance Acts and the rules of the Interstate Commerce Commission in the matter of designating the number, dimensions, location and manner of application of certain safety appliances. Appendix E sets out the Ash Pan Act of 1908, Appendix F the Hours of Labor Act of 1907, and Appendices G and H numerous decisions of the courts arising under the Safety Appliance Act and the Hours of Service Act. These decisions are set out in full and cover two hundred and fifty pages. The objection which might be raised to this third edition is one that is often patent in second and successive editions of other law books. The editor does not look upon his undertaking as one requiring serious and scholarly effort. He seeks to crowd in the cases decided since the publication of the original work, in the quickest possible time. The original text is left practically intact and bare citations are the rule in the notes. The old plates are fixed up and reused, with the result that on one page there may be scarcely any margin at the top and bottom while on the opposite page there may be an inch or more. Names of cases are frequently misspelled, and the fact that cases contained in the original edition have since been overruled or affirmed is overlooked. An examination of the edition before us shows margins that are far from uniform. For example, contrast those on page 397 with those on the opposite page. Numerous other instances could be given. Again, an examination of the edition discloses the inexcusable misspelling of names of important cases. For example, the very important case of Mondou *v.* New York, New Haven and Hartford R. Co., 223 U. S. 1, is given as "Mondon *v.* New York, N. H. & R. R. Co." (see page 22), and by the way the popular name of this case is "Second Employers' Liability Cases." An even more important case, Pedersen *v.* Delaware, L. & W. R. Co., 229 U. S. 146, is misspelled in one place, "Peterson" being given as the plaintiff's name. There is a lack of uniformity in the manner of abbreviating names. Thus, in the table of cases we find on page xxii in the same column "Atchison, etc., R. Co.," "Atchison, etc., Ry. Co.," "Atchison, T. & S. F. Ry. Co." and "Atchison T. & S. F. R. Co." Now these names refer to one and the same railroad company, and it is confusing to one using the table of cases to find such a lack of uniformity. The edition at hand fails in many instances to show the affirmance or reversal of a case cited. Thus on page 127 reference is made to the case of "Pedersen *v.* Delaware, L. & W. R. Co., 184 Fed. 737." As a matter of fact this case was affirmed in 197 Fed. 537, and the decision in 197 Fed. was reversed in 229 U. S. 146. Pages 125 and 126 contain a discussion of the case of Behrens *v.* Illinois Central

R. Co., as reported in 192 Fed. 581. The holding in the case is given, followed by a long quotation. But the holding in 192 Fed. 581 was reversed in 233 U. S. 473. Strange to say, however, the editor in the footnote merely says, "See Illinois Central R. Co. *v.* Behrens, 233 U. S. 473." The text was no doubt the law when written, but the case on which it rested was after the publication of the first edition reversed by the Supreme Court, and the editor in his haste failed to note the fact that it no longer expressed the law. On page 23 occurs the following citation "Missouri Pacific R. Co. *v.* Castle, 172 Fed. 841." This case was affirmed in 224 U. S. 541, and the fact should have been noted. Again on pages 22, 38, 217, 219, 250, and 597, occur the following citation: "Walsh *v.* New York, N. H. & H. R. Co., 173 Fed. 494." This case was affirmed in 223 U S. 1, but the editor failed to pick up the later citation.

Mr. Thornton's latest edition is probably quite as accurate as many revised law books. We therefore suggest that text writers take their revisions more seriously and give to them the same painstaking care that the original edition received.

News of the Profession.

THE ILLINOIS STATE'S ATTORNEYS' ASSOCIATION met in annual convention at Chicago on December 28 and 29.

MISSOURI JUDGE RESIGNS.—Judge Nat. M. Shelton of the Second Judicial Circuit of Missouri has resigned from the bench, to resume the practice of law.

NORTH CAROLINA BAR ASSOCIATION.—The 1916 session of the North Carolina Bar Association will be held at Old Point Comfort, Va., on June 27, 28 and 29.

DEATH OF KANSAS JUDGE.—Judge Alfred W. Benson, former United States senator and member of the Kansas Supreme Court, died at Topeka, Kan., on January 1, aged 72.

ALABAMA JUDGE DEAD.—J. M. Chilton, formerly a member of the Alabama Supreme Court and a prominent political leader, died at Montgomery, Ala., on December 29, aged 72.

DISTRICT OF COLUMBIA APPOINTMENT.—President Wilson has renominated Judge George C. Aukam of the Municipal Court of the District of Columbia for another term of four years.

CHICAGO JURIST DEAD.—Francis Adams, one of the oldest lawyers in Chicago and for many years a judge of the Circuit and Appellate Courts, died at Chicago on December 27, at the age of 86.

THE IOWA STATE BAR ASSOCIATION will hold its next annual convention at Dubuque, Iowa, on June 29 and 30. An effort is being made to secure former President Taft as the principal speaker.

KANSAS STATE BAR ASSOCIATION.—The annual dinner of the Kansas State Bar Association was held at Topeka, Kan., on January 28. Justice Henry F. Mason of the Kansas Supreme Court was toastmaster.

APPOINTED COUNTY JUDGE.—Governor Major of Missouri has appointed James A. Compton of Independence as judge of the Jackson County Court for the Eastern District, to succeed R. D. Mize, deceased.

THE ASSOCIATION OF AMERICAN LAW SCHOOLS held its fifteenth annual convention at Chicago on December 28 and 29. A dinner in honor of the deans and professors of law was given by the Illinois State Bar Association.

CHANGE IN OHIO JUDICIARY.—Timothy T. Ansberry of Defiance has resigned from the bench of the Ohio Court of Appeals, Third Appellate District. James E. Robinson of Marysville has been named to fill the vacancy.

VETERAN KANSAS JURIST DEAD.—Col. John Taylor Burris, 87 years old, veteran of the Mexican and Civil Wars, formerly United States district attorney for Kansas and a member of the Supreme Court of that state, died at Los Angeles, Cal., on December 4.

YOUTHFUL MUNICIPAL JUDGE.—Pierre A. White has been appointed judge of the Municipal Court of Cleveland by Governor Willis of Ohio. The appointee is but 26 years of age and is the youngest judge in Ohio. He succeeds Judge Fielder Sanders, resigned.

NEW CHIEF JUSTICES.—Justice W. D. Evans of the Iowa Supreme Court has been appointed by the court as its chief justice of 1916.—Justice John W. Stone of Houghton has succeeded Justice Flavins L. Brooke as chief justice of the Michigan Supreme Court.

GOES TO APPELLATE BENCH.—Judge C. N. Goodwin of the Superior Court of Chicago has been appointed judge of the Appellate Court of the third district of Illinois by the Supreme Court. Judge Goodwin succeeds Judge Kickham Scanian of Chicago, resigned.

DEATH OF NOTED WEST VIRGINIAN.—Col. Robert White, distinguished lawyer, publicist and orator, formerly attorney general of West Virginia, and Grand Master of the Grand Lodge of Free and Accepted Masons in that state, died at Wheeling, W. Va., on December 12, aged 82.

REAPPOINTED TO BENCH.—On January 1, Governor Ferris reappointed Justice Rollin H. Person of Lansing as a member of the Michigan Supreme Court. Justice Person was serving on the bench, by appointment, for the balance of the unexpired term of the late Justice Aaron V. McAlvay.

FEDERAL JUDGE RETIRES.—Judge Emil Henry Lacombe, senior judge of the United States Circuit Court, Second Circuit, resigned from the bench on January 29. Judge Lacombe had been on the federal bench for 29 years and on his retirement was entitled to a judicial pension.

MICHIGAN ASSOCIATIONS HOLD CONVENTIONS.—The Association of Michigan Circuit Judges met in annual convention at Lansing, Mich., on December 29. The State Association of Prosecuting Attorneys also met in Lansing on the same day. A joint banquet of the two associations was held in the evening.

CONVENTIONS OF KENTUCKY ASSOCIATIONS.—The Circuit Judges' Association and the Association of Commonwealth's Attorneys of Kentucky held their annual conventions at Louisville, Ky., on December 29. The two associations joined in tendering a reception and banquet to the judges of the State Court of Appeals.

NEW YORK JUDGE RESIGNS.—George L. Ingraham, presiding justice of the Appellate Division of the New York Supreme Court, First Judicial Department, since 1910, and a member of that court for the last twenty years, resigned from the bench on January 1. Justice Ingraham will resume private practice.

PENNSYLVANIA JUDICIAL APPOINTMENTS.—Governor Brumbaugh has appointed Judge Emery A. Walling of Erie County to succeed the late Justice John P. Elkin on the Supreme Court bench of Pennsylvania. Capt. Edward L. Whittelsey has been appointed to succeed Judge Walling on the Common Pleas bench of Erie county.

NEW OFFICIALS FOR FEDERAL TRADE COMMISSION.—Stephen S. Gregory of Chicago, former president of the American Bar Association, has been made special counsel for the federal trade commission in Washington. Leonidas L. Bracken, an attorney of Muncie, Ind., has been appointed secretary of the commission.

CHANGES AMONG FEDERAL ATTORNEYS.—Jeff Carn of Tennessee has resigned as United States Attorney for Hawaii.—Donald Bain, who for more than 18 years has been an assistant to the United States Attorney at Buffalo, has resigned.—Frank C. Dailey, United States Attorney at Indianapolis, has resigned, and L. Ert Slack has been appointed to fill the vacancy.

SENATOR COCKRELL DEAD.—Francis Marion Cockrell, former United States Senator from Missouri, died at Washington, D. C., on December 13, aged 81. On retiring from the Senate in 1905, Senator Cockrell was made a member of the Interstate Commerce Commission by President Roosevelt. In 1911 he was appointed United States Commissioner to adjust the boundary between the United States and Mexico.

TOLEDO BAR ASSOCIATION.—At the first meeting in the new year of the Toledo Bar Association, Mr. Albert S. Osborn of New York City, author of "Questioned Documents," gave an address on "Questioned Documents in Courts of Law," illustrated by lantern slide illustrations taken from actual cases. The address followed the usual monthly luncheon. The attendance was large, including nearly the complete judiciary of Toledo.

AMERICAN SOCIETY OF INTERNATIONAL LAW.—The ninth annual meeting of the American Society of International Law was held at Washington, D. C., on December 28, 29 and 30. Among the speakers were the following: Elihu Root, president of the society; Norman Dwight Harris, professor of European diplomatic history in Northwestern University; John Bassett Moore, formerly counselor for the Department of State; and George G. Wilson, professor of international law in Harvard University.

NEBRASKA STATE BAR ASSOCIATION.—The sixteenth annual meeting of the Nebraska State Bar Association was held at Omaha, Neb., on December 28 and 29. The president's address was delivered by C. J. Smyth. Other addresses were "The Policeman on the Beat," by John C. Hartigan of Fairbury; "The Lawyer's Duty to His State," by Merton L. Corey of Clay Center; "An Inquiry Concerning Justice," by Professor Floyd R. Mechem of the University of Chicago. Officers were elected as follows: President—John N. Dryden of Kearney; vice-presidents—Fred Wright of Scottsbluff; C. E. Sandall of York; C. E. Abbott of Fremont; secretary—A. G. Ellick of Omaha; treasurer—Charles G. McDonald of Omaha.

WEST VIRGINIA BAR ASSOCIATION.—At the recent annual meeting of the West Virginia Bar Association the following officers were elected: President—Former Governor G. W. Atkinson, now judge of the federal Court of Claims at Washington, D. C.; vice-presidents—S. B. Hall, New Martinsville; Tracy L. Jefferds, Harpers Ferry; U. G. Young, Buckhannon; John M. Baker, Spencer; A. W. McDonald, Charleston; Harold A. Ritz, Bluefield; secretary—Charles McCamic, Wheeling; treasurer—Charles A. Krebs, Parkersburg; executive council—W. P. Willey, Morgantown; Nelson C. Hubbard, Wheeling; B. M. Ambler, Parkersburg; Judge T. P. Jacobs, New Martinsville, and R. S. Spillman, Charleston.

JUSTICE LAMAR DIES.—Joseph Rucker Lamar, Associate Justice of the Supreme Court of the United States, died at Washington, D. C., on January 2, after an illness of several months. Justice Lamar was born in Georgia on October 14, 1857, and was educated at the University of Georgia, at Bethany College, West Virginia, and at Washington and Lee University. He was a member of the Georgia Legislature in 1886-1889, a commissioner to revise the code of that state in 1895 and an Associate Justice of the Supreme Court of Georgia in 1903-1905. Although a Democrat, Justice Lamar was appointed an Associate Justice of the Supreme Court of the United States on December 12, 1910, by President Taft, and took his seat and began his duties on January 3 following. In addition to his services on the bench, he was one of the commissioners who met at Niagara Falls in the spring of 1914 in an earnest, but futile, effort to restore peace and constitutional order to the Republic of Mexico.

OKLAHOMA STATE BAR ASSOCIATION.—The annual meeting of the Oklahoma State Bar Association was held at Oklahoma City on December 29 and 30. The President's address was delivered by George S. Ramsey, of Muskogee, and the annual address by United States Senator Joseph W. Bailey of Texas. Other addresses were as follows: "To What Effect Does the Carmack Amendment to the Hepburn Law Affect the Common Law Remedies and Proceedings in the State Court?" by Judge F. E. Riddle of Chickasha; "The Initiative and Referendum in Oklahoma," by W. A. Ledbetter of Oklahoma City; "Pleasures and Pain of Practicing Law in Oklahoma," by James B. Diggs of Tulsa. The following officers were elected: President—C. B. Ames, of Oklahoma City; secretary—W. A. Lybrand, of Oklahoma City; treasurer—C. K. Templeton, of Pawhuska; vice-presidents—Ad. V. Coppedge, Grove; W. J. Campbell, Nowata; J. B. Furry, Muskogee; Allen Wright, McAlester; William L. Crittenden, Stigler; C. C. Hatchett, Durant; B. H. Epperson, Ada; T. W. Champion, Ardmore; Frank L. Warren, Holdenville; D. G. Eggerman, Shawnee; John J. Hildreth, Guthrie; S. K. Sullivan, Newkirk; James S. Ross, Oklahoma City; C. G. Moore, Purcell; Alger Melton, Chickasha; J. A. Duff, Cordell; W. B. Merrill, Elk City; T. J. Womack, Alva; C. H. Parker, Enid; H. T. Aby, Tulsa; R. B. F. Hummer, Henryetta; W. B. Thompson, Vinita; A. T. Woodward, Pawhuska; T. M. Robinson, Altus; Robert M. Rainey, Atoka; R. K. Warren, Hugo. An invitation from the Texas Bar Association for a joint meeting by the Oklahoma and Texas associations was received and the matter was placed in the hands of the executive committee.

English Notes.

LAW BOOKS FOR PRISONERS.—There is something at once pathetic and inspiring in the appeal now being made for law books on behalf of the British civilian prisoners interned in the German concentration camp at Ruhleben. Unlike the case of the Israelites of old, who declared their inability to "sing the Lord's song in a strange land," these prisoners are mindful of their legal studies and are anxious to pursue them even amid the hardships of camp life in an alien and bitterly hostile country. The appeal now made for them touches the imagination, and is one which it may be hoped will find a ready response. It seems

that books on company law, contracts, and torts are in special request—works which probably have never been studied in more strange surroundings.

JUVENILE CRIME IN GERMANY.—One of the effects of the war noticeable in Germany has been a general increase of juvenile crime. The *Cologne Gazette,* which states that complaints of offenses on the part of children are constant, devotes a long article to the examination of the causes of this deplorable state of things and the means of remedy. One police-court we learn which convicted 58 minors in 1913, condemned 183 in 1914, and during the first ten months of the present year has had to punish 256 children. In the interests of the country generally, and in particular in regard to military training, the *Gazette* urges that it is necessary to deal effectively with this evil at any cost. The clergy, teachers, tutors (guardians) ought to act with greater decision. Recourse should be had to the courts in order that a tutor may be appointed during the absence of the father, when the conduct of a child renders such a course advisable. Children engaged in work should not be allowed the free disposition of their earnings, which in certain circumstances should be paid over to responsible relations. Moreover, steps should be taken to prevent young boys purchasing arms.

ART AND THE LAW.—The recent exhibition of a collection of etchings by Mr. Frank Newbolt, K. C., reminds us that art has always had her votaries among members of the Legal Profession, although not so numerous a body, it is true, as that which has felt the lure of literature. In the past there have been several prominent members of the Bar whose leisure from the arduous labors of the law has been devoted to the pursuit of art, notable among these being Sir Robert Collier, afterwards Lord Monkswell, who, even when he held the office of Solicitor-General, had some of his canvases on the walls of the Royal-Academy and other exhibitions. In a less exalted sphere of art one recalls the many sprightly efforts of the lamented Sir Frank Lockwood, which, with their characteristic playfulness, were a delight to all who saw them. A goodly number of his drawings found their way into the pages of *Punch,* one of these, an amusing sketch of a brother Q. C. in the uniform of the Inns of Court Volunteers, being a particularly happy effort of his pencil. Sir Frank is not without successors in his own special sphere. One member of the Bar who practices in the Probate Division has on many occasions shown himself the possessor of much of Lockwood's genius and humor, while on the Common Law side there is another member of the Bar equally felicitous with his pencil. So far as we are aware, however, Mr. Newbolt has had few colleagues at the Bar who have cultivated his special department of art.

DEATH OF LORD ALVERSTONE.—Viscount Alverstone died on December 15 at Winterfold, Cranleigh, his Surrey residence. Sir Richard Everard Webster, Viscount Alverstone, was the second son of Thomas Webster, Q. C., of Sandown, Isle of Wight, and of Elizabeth Anne, daughter of Richard Calthrop, of Swineshead Abbey, Lincolnshire. He was born on December 22, 1842, and was educated at King's College School, at Charterhouse, and Trinity College, Cambridge, with a foundation scholarship. Mr. Webster was called by Lincoln's-inn in 1868, and joined the South-Eastern Circuit. He took silk in 1878 and was elected Bencher of his inn in 1881. He held the obsolete post of tubman of the Court of Exchequer from 1872 to 1874, and later that of postman of the same court. In June, 1885, he was appointed Attorney-General in Lord Salisbury's first Government. In 1900 he went to the House of Lords as Baron Alverstone. He was also Attorney-General from 1886 to 1892, and from 1895 to 1900. Sir Richard Webster appeared as principal counsel for the *Times* before the Parnell Commission in 1889, a fact which led to many bitter and unfounded attacks upon him. In 1893 he was one of the British representatives in the Behring Sea Arbitration, receiving for his services the G. C. M. G. He was a member of the Royal Commission on Historical Manuscripts and a D. C. L. of Oxford. He became Master of the Rolls in 1900, and four months later he succeeded Lord Russell of Killowen as Lord Chief Justice of England. He resigned the office of Lord Chief Justice in October, 1913, when the dignity of a viscountcy of the United Kingdom was conferred on him.

THE SIMPLIFICATION AND CURTAILMENT OF FORMS OF INDICTMENT is a reform considerably overdue, but one which, it would seem, is somewhat nearer realization. If the bill now before Parliament having this as its object is carried, a welcome piece of improvement in a department of law in which clearness and concision are eminently desirable will have been effected. In Scotland, where the writ of summons in civil proceedings is still in the last degree cumbrous and redundant, the forms of indictment now in use are models of brevity and clearness. This was the result of the Criminal Procedure (Scotland) Act 1887. Prior to the passing of that statute, indictments were extraordinarily prolix, even more so than those in use in England, being framed in the form of a syllogism, the major proposition being a statement of the crime alleged to have been committed by the prisoner, the minor proposition averring the prisoner's guilt, accompanied by a detailed narrative of the circumstances under which it was committed, and then followed the conclusion that on conviction by the verdict of the jury the prisoner "ought to be punished with the pains of law to deter others from committing the like crimes in all time coming." According to Baron Hume, the great authority on Scottish criminal law, "any omission or inaccuracy which breaks the texture of the syllogism and hinders the connection of sense or even of language shall in strictness vitiate the libel (i. e., the indictment) no matter though it be evident what the words to be supplied are, and that they are words of form only and that the error has been owing to a hasty transcription of the libel." All this, as has been said, was swept away by the provisions of the Act of 1887—an excellent piece of legislative reform due to Sir John H. A. Macdonald, then Lord Advocate, who has recorded that the first year of its operation resulted in a saving of no less than £1500 in printing alone, for it should be stated that in criminal as in civil proceedings in Scotland almost all documents, including indictments, were, and presumably still are, printed.

FATHER AND SON ON THE BENCH.—The appointment of the Hon. Cecil Atkinson, K. C., of the Irish Bar, to a judgeship of the High Court of Orissa and Behar, will supply yet another instance of a father and son occupying judicial positions simultaneously—the new Indian High Court judge being the eldest son of Lord Atkinson, one of the Lords of Appeal in Ordinary. The most remarkable instance of a father and son occupying judgeships together is that of Sir Thomas More, who was Lord Chancellor, while his father was a puisne judge. Mr. Joseph Hewitt, a younger son of Viscount Lifford, who was Lord Chancellor of Ireland without a break of tenure from 1767 till 1789, was a judge of the Irish Court of King's Bench, while his father was holder of the Great Seal of Ireland. Sir Michael Smith, who in 1801 was promoted from the position of Baron of the Exchequer in Ireland to that of Master of the Rolls, was succeeded in the Exchequer by his eldest son, Sir William Cusac Smith, who occupied that position till his resignation in 1836. Within the last few years Sir Richard Harington, the eleventh

holder of the baronetcy, was judge of the County Courts in this country, while his eldest son was one of the judges of the High Court of Calcutta. Father and son for a few months exchanged places, Sir Richard Harington acting as judge in Calcutta, while his son, Mr. Justice Harington, discharged at home the duties of his father as County Court judge. Mr. Patrick Plunket was a judge of the Court of Bankruptcy in Ireland, while his father was Lord Chancellor of Ireland. Mr. David Pigot was an Irish County Court judge, while his father was Lord Chief Baron of the Irish Court of Exchequer; and Lord Justice Thesiger, a younger son of the first Lord Chelmsford, was appointed to the Bench not, indeed, while his father, whom he survived two years only, was in possession of the Great Seal, but while he sat as a Lord of Appeals in the House of Lords. The instances are, of course, very numerous in which sons of judges have themselves been elevated to the Bench, and the judiciaries of England, Ireland, and Scotland supply in the Coleridges, the Cusac Smiths, and the Moncrieffs respectively cases of fathers, sons, and grandsons being members of the High Court of these countries. The instances are, however, comparatively few of fathers and sons sitting contemporaneously on the Bench.

OFFENSE FOR WHICH EXTRADITED PERSON IS TRIABLE.—Sir John Simon was asked on December 9, in his capacity of Secretary of State for the Home Department, whether Lincoln, a former member for Darlington, when extradited from the United States, would be charged with espionage or only with the offense of forgery for which his extradition had been demanded. The answer was that Lincoln would not, and could not be, charged in England with any offense committed before his extradition other than those in respect of which extradition was granted, and that espionage forms no part of the charges on which his extradition was claimed. This reply is in complete accord with the British statutory regulations (6 & 7 Vict. c. 76, and 33 & 34 Vict. c. 52), through which alone British extradition treaties can be put in force. To the seven offenses for which surrender may be demanded, described in the extradition clauses of the treaty of 1842 between Great Britain and the United States, twenty more have now been added by the Convention of 1890. It is firmly settled, certainly so far as Great Britain and the United States are concerned, that the fugitive is not to be tried for an offense other than that for which he has been extradited until a reasonable time and opportunity have been given him after his release or trial to return to the country from which he has been taken. It has even been held that a person extradited on a particular charge cannot be convicted on a lesser charge included in it. In the case of Rauscher, an officer of an American vessel, who was extradited, under the treaty with Great Britain of 1842, on a charge of murder on the high seas of one of his ship's crew, the Supreme Court of the United States held that a man extradited under such circumstances could not be tried on an indictment for cruel or unusual punishment of the deceased, although such punishment resulted from the identical acts proved in the extradition proceedings. A serious controversy arose between the Governments of Great Britain and the United States in 1876, when the former refused to surrender the forger Winslow and other fugitives unless the United States would make an express stipulation that they should not be tried for any offense other than that for which their extradition was demanded. While no such condition or stipulation was contained in the treaty of 1842, such a provision has been inserted in the British Extradition Act of 1870, and that provision the British Government attempted to enforce just as if it had been written in the treaty itself. After the government of the United States refused to make stipulations, the government of Great Britain receded from its position, whereupon the government of the United States clearly indicated its unwillingness to try offenders for any crime except that for which they have been extradited, a rule embodied in a clear and formal form in the Convention entered into between the two countries in 1900.

COMPENSATION TO WORKMAN SUFFERING FROM DISEASE.—It was Lord Halsbury, L. C., when delivering his considered opinion in what is popularly styled the "Anthrax case"—that is to say, the well-known workmen's compensation case of Brinton's, Limited *v.* Turvey (92 L. T. Rep. 578; (1905) A. C. 230, at pp. 233-4)—who first set forth, in relation to the above, a principle that now meets with general acceptance. There his Lordship said: "It does not appear to me that by calling the consequences of an accidental injury a disease one alters the nature or the consequential results of the injury that has been inflicted." That case was, of course, decided, as will be seen from the date of the report, before the passing of the Workmen's Compensation Act 1906 (6 Edw. VII, c. 58). It was decided under the old act of 1897. And on that Act coming into operation, the common supposition was that what was contemplated by the legislature, by the use of the expression "personal injury by accident," was something in the nature of an abrasion, cut, or rupture, a physical breaking or tearing—in short, a bodily wound of some kind. It came distinctly as a revelation, therefore, when the House of Lords laid down that even the contracting of a disease by a workman, as in the case of Brinton's, Limited, *v.* Turvey (*ubi sup.*), without any other form of personal injury, would warrant a claim for compensation. Conducing, as that decision did, to the insertion in the Act of 1906 of provisions whereby the benefits conferred by the Act are specifically rendered applicable to certain diseases termed "industrial diseases," workmen are now placed in a position of even greater security than previously. It might not unreasonably be presumed, however, that the suffering of any disease not expressly included among "industrial diseases" could not possibly entitle a workman to compensation. But that appears to be an altogether misconceived assumption, as numerous decisions of the Court of Appeal and House of Lords have abundantly served to demonstrate. Provided that the particular time, circumstances, and place in which an "accident"—as that word was defined by the House of Lords in Fenton *v.* Thorley and Co., Limited (89 L. T. Rep. 314; (1903) A. C. 443)—has occurred are indicated by means of some definite event, all that is needful is satisfied. In other words, it must be established that the disease was occasioned by a circumstance, or combination of circumstances, describable as "by accident." Otherwise, a mere disease, which is not one of the specified "industrial" type, gives no claim against an employer (see Eke *v.* Hart-Dyke, 103 L. T. Rep. 174; (1910) 2 K. B. 677). Was the essential element of "accident," to which the contracting by the workman of pneumonia could be ascribed, present in the latest of the cases that has arisen in connection with the subject of the foregoing disquisition? We refer to the recent case of Brown *v.* J. Watson, Limited. That was the question which had to be determined by the House of Lords, and the answer was in the affirmative. An accident occurred that interfered with the regular working of a mine. A workman was consequently exposed to rigorous climatic conditions for a prolonged period, and thereby contracted the disease from which he died. *Nova causa interveniens* was not a factor to be taken into consideration, for there was, as Lord Dunedin remarked, no intervening circumstance depending on some cause other than the accident which occurred to break the chain of causation. The decision in Alloa Coal Company, Limited *v.* Drylie (50 Sc. L.

Rep. 350; 1913 S. C. 977) was considered by the House of Lords to be correct and as governing the present case; while that in McLuckie *v.* Watson (50 Sc. L. Rep. 770) was treated as distinguishable. At first sight, the conclusion arrived at by the House of Lords may seem to be somewhat an advance upon anterior decisions. Yet Lord Halsbury's statement, made as far back as the year 1905, foreshadowed what was bound to become the view in respect of diseases precisely resulting from accidents, although not classed among the "industrial" and scheduled in the Act as such

Obiter Dicta.

BY GOSH!—Farmer *v.* Greene, 160 Ky. 680.

A SERIOUS GAME.—Parchen *v.* Chessman, 49 Mont. 326.

WIL-SONS IN LAW FIGHT?—McAdoo *v.* Sayre, 145 Cal. 344.

TWO VERSIONS OF THE OLD PARABLE.—Freeman *v.* Lazarus, 61 Ark. 247; Humble *v.* Gay, 168 Cal. 516.

AN APT TITLE.—In re Cash, 30 New Zealand L. R. 577, was a dispute among heirs as to the distribution of an intestate estate.

HE OUGHT TO WALK ALONG BROADWAY.—"The battle of life is no silk-stocking, kid-glove affair."—Per Furman, J., in Hunter *v.* State, 10 Okla. Crim. 130.

NEEDED NO SIGN.—From the statement of facts in American Express Co. *v.* Beer, (Miss.) 65 So. 575, it appears that the appellee, M. D. Beer, was engaged in the liquor business.

EASILY BROKEN.—In Glassman *v.* Harry, (Mo.) 170 S. W. 403, it appeared that the plaintiff's husband had a collision with an automobile. The result was what might have been expected.

AND HE GENERALLY GETS IT!—"When a man deliberately 'buys a lawsuit,' he is evidently intending, or looking for, trouble."—Per Root, J., in Pitcher *v.* Lone Pine-Surprise Consol. Min. Co., 39 Wash. 608.

WHAT HAPPENED TO HIM.—Slick Green *v.* State, 10 Okla. Crim. 652, was a prosecution for selling liquor contrary to law. The report of the case fails to show whether it was good or bad liquor, but at any rate, the name of the purchaser was Burst.

JUST A JOKE.—"The relations of the parties as husband and wife were never pleasant, and after the fraud on his part they became much worse. He was in the habit of telling her how homely she was, and of saying that she had a sweet-potato nose and pop-eyes, which he said, at the hearing, was a method of joking that he had."—See Brown *v.* Brown, 265 Ill. 548.

WHAT DOES IT MEAN?—"In the case at bar, the expression 'shoot your dog water,' used by the servant to his master, is 'not susceptible of any precise legal definition,' and this court is unable to say what it does mean. We have searched 'Words and Phrases,' the dictionaries, and the encyclopædias, but with no success."—See Wade *v.* Hefner, (Ga.) 84 S. E. 598.

AND THERE ARE OTHERS.—A recent issue of a Sunbury (Pa.) newspaper contained the following advertisement: "My wife Helen having left my bed and board without just cause, I hereby give notice that I will not pay any bills contracted by her." In the next issue of the paper and in the same position of the husband's advertisement appeared the wife's rejoinder: "I, Helen Bowman, did not leave the bed of my husband, Charles F. Bowman. We had only one bed and that belonged to me."

A NATURAL INQUIRY.—Hunner *v.* Stevenson, 122 Md. 40, was an action for damages for malpractice. It appears that Dr. Hunner had performed an operation on Mrs. Stevenson and that about five weeks thereafter a piece of gauze which had been left in the wound through the carelessness of someone was removed from her side. A week after that some rubberized silk was also removed from the wound. Thereupon Mrs. Stevenson wrote to Dr. Hunner as follows: "Last Saturday evening a week ago, the 8th, Mr. Stevenson took a substance about three inches or more in length from the incision in my side. Dr. Madara says it was a silk rubber sack that was around the drain. You of course will know what it was. Do you think there are any hatchets, saws, or the like in me yet?"

WESTWARD THE COURSE OF POETRY TAKES ITS WAY.—The practice of quoting poetry in court opinions seems finally to have spread even to the Pacific Coast. We would have experienced no surprise at finding Shakespeare quoted in a Missouri case (opinion per Lamm, J.), but to think of the California court getting off the following: "The agents of corporations are the means whereby the corporations live and in opposition to a tax upon their agents the corporations may well be heard to voice Shylock's expostulation:

> 'You take my house when you do take the prop
> That doth sustain my house; you take my life
> When you do take the means whereby I live.'

But in exposition of the fact that this principle does not rest upon the authority of Shakespeare alone a reference may be made to [citing cases]."—Per Henshaw, J., in Hughes *v.* Los Angeles, 168 Cal. 764.

REACTIONARY.—"Change does not always denote progress, and modern departures from ancient rules of law in response to the exigencies of particular cases frequently obliterate the wisest and safest rules designed for the protection of society. Modern practices and advanced ideas look with complaisance upon the spectacle of husband and wife worshiping different gods and voting in the same booth for different candidates and different governmental policies. We confess to a preference for the old-fashioned ideal of the oneness of man and wife, and at the risk of being classed as 'standpatters' we adopt as a sound policy, applicable to the wife as to the husband, the sentiment expressed in these words: 'Therefore shall a man leave his father and his mother, and shall cleave unto his wife; and they shall be one flesh.' True, this admonition is hoary with age; but we doubt that the cocksuredness of modern iconoclasm has succeeded in demonstrating the unwisdom of the common paternal ancestor of all mankind. The majority still believe in the doctrine, even though few obey it."—Per Cook, J., in Whitehead *v.* Kirk, 104 Miss. 814.

PROGRESSIVE.—"Bench and bar almost universally concede that there is no branch of our jurisprudence in which there exist more glaring defects and discrepancies, and in which there is a more crying need of reform, than exist in our present strict and antiquated rules of evidence. All concede, bench, bar and laymen, that the attempted application of our strict, crabbed, century-old rules of evidence, in many cases to our present-day conditions of advanced thought, science and invention, is a laughable anachronism, on a parity with the 18th century blood-letting of an anæmic and denial of water to the fevered. All concede that it is high time to lop off some of the branches, which died of old age a century ago, and to let in the light by which justice may be seen and done. All concede that the application of these outgrown rules causes daily miscarriages of justice, yet withal, we hitch ourselves fast to Stare Decisis, and no one moves toward betterment. The way to reform these in many cases concededly bad rules, is to reform them, and the way to move toward better, wiser, more just and more logical conditions is to strike heavy-handed such antiquated rules of evidence as allow outrageous injustice to be perpetrated, in the open light of plain reason and common sense, in the name only of Stare Decisis!"—Per Faris, J., in Epstein v. Pennsylvania R. Co., 250 Mo. 37.

RECOMMENDED AS A PRECEDENT.—We have always thought that the practice obtaining in some jurisdictions of filing what is called a "suggestion of error" after a decision by an appellate court must be one attended by considerable hazard. Of course courts fall into error, but they don't like to be told of it, and the operation of suggesting an error to any court must be an extremely delicate one, to say the least. We have at last, however, happened upon a formula which we can unhesitatingly recommend as a precedent to be followed in every such case. It was used recently before the Mississippi Supreme Court and was sent to us by counsel for the opposing party. The only point as to which we are in darkness is how it was received by the court. But any court that would take umbrage at the following "opener" in a brief ought to be recalled:

"With proper humility and full appreciation of the excellent judgment and profound learning of the most exalted court in our state, which must be infallible, as nearly as human institutions can be infallible, but because error unnoticed will find its way into the consultations of the most profoundly learned, sometimes about matters that, by some inconceivable direction of chance or Divine Providence, are clear to the simple minded, I am emboldened and that earnestly and with unprejudiced desire for right and justice to suggest that the court, reviewing it, even without any advancement of legal authorities or argument of counsel, must find that it inadvertently has fallen into error in its written opinion handed down in the above case in the decision on the motion of the appellee to dismiss."

"The Doctrine of Legislative absolutism is foreign to free government as it exists in this country. The corner stone of our republican institutions is the principle that the powers of government shall, in all vital particulars, be distributed among three separate co-ordinate departments, legislative, executive and judicial. And liberty regulated by law cannot be permanently secured against the assaults of power or the tyranny of a majority, if the judiciary must be silent when rights existing independently of human sanction, or acquired under the law, are at the mercy of legislative action taken in violation of due process of law." Harlan, J., dissenting. Taylor v. Beckham, 178 U. S. 609.

Correspondence.

NEGOTIABLE INSTRUMENTS ACT AND THE REDUCTION OF LITIGATION.

To the Editor of LAW NOTES.

SIR: In the December number of LAW NOTES, attention is called to the fact that for six months from April 1, to September 30, 1901, the *American Digest* shows under the topic "Bills and Notes" 248 paragraphs; to the corresponding period in 1907, 274; and from June 1 to November 30, 1914, 325 paragraphs. Comparison is made with the topic "Negotiable Instruments" in Mews' Case Law Digest, in England, for the sixteen years from 1898 to 1914 inclusive, which shows a total of five paragraphs.

You leave to inference whether the passage of the Negotiable Instruments Act has reduced or abated litigation. Certainly the figures you submit are very interesting. That there should have been so much less litigation under the English Bills of Exchange Act, upon which the draftsman of the Uniform Negotiable Instruments Act based the same, would seem to be explicable on the ground that in England there is but one jurisdiction and in the United States about fifty. A former president of the Conference of Commissioners on Uniform State Laws, the late Amasa M. Eaton, Esq., was at pains to collect and digest all of the decisions on cases arising under the Negotiable Instruments Law, in a series of articles in the *Central Law Journal* of a year or two ago. It is undoubtedly true that there has been some divergence in the decisions of the different States, but the tendency toward uniformity of decision of cases arising under the Act will become more uniform as the judges of the courts learn to appreciate the meaning of that section, which is embodied in all of the Uniform Commercial Acts excepting the one under consideration, viz.: "This Act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those States which enact it." Various courts have interpreted the Negotiable Instruments Act in harmony with the principles of this section. Rockfield v. First Nat'l Bank of Springfield, 77 Ohio St. 311; Downey v. O'Keefe, 26 R. I. 571; Thorpe v. White, 188 Mass. 333, and other cases. (See note American Uniform Commercial Acts, p. 182.) The volume of business may afford further explanation for the number of cases that have arisen under the Act. It may be confidently asserted that in no jurisdiction where any of the Commercial Acts have been passed, especially the Negotiable Instruments Act, would the profession or the community willingly see them repealed.

WALTER GEORGE SMITH,
Chairman Committee on Commercial Law, Nat'l Conference of Commissioners on Uniform State Laws, Philadelphia, Pa.

Law Notes

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NEWS Item: "A four-line item announces that the House Committee on Judiciary has made a favorable report upon a bill which will prevent the appeal of lawsuits upon grounds which do not affect the substantial merits of the case. While this measure has attracted no general attention, we doubt if there is very much in the way of new legislation now under discussion in Washington that will affect the everyday affairs of the people more wholesomely. In itself, as a measure to reform practice on the law side of the Federal courts, it will prove important to the business men of the country when it passes, and as an example to the States, which for the most part still linger in outer darkness, its influence will continue until the whole country is brought into line on the subject of judicial reform."

But who is to decide whether the appeal involves the merits or not? Surely not the trial judge. If so, then abolish appeals. If not, it will take an appeal to determine whether there shall be an appeal or not. Moreover, already the appellate courts summarily dismiss frivolous appeals and refuse to reverse for harmless error. Verily, the time has come to suggest that the press of the country needs law editors, unless, as it loudly desires, the law truly may be expressed in newspaper diction.

Self-Protection.

WE read that Captain W. M. Myers, of Richmond, Va., has introduced a bill in the legislature of that state limiting the "up" of woman's apparel to four inches from the ground, and the "down" of the same to three inches from her neck, with the additional safeguard that her waists and skirts shall not be transparent. This would be amusing if it were not pathetic—poor, helpless, polygamous man, trying to protect himself from the wiles of the fair, virtuous, monogamous woman! It is a sort of legislative "Lead me not into temptation." And all the while the emancipated woman insists on teasing and tempting him, and then jailing him. Strange, there are no societies for the protection of men, and the English language yet lacks the term "man-suffrage."

Schools of Citizenship.

IT has been suggested that schools be established for the instruction of our foreign born citizens in the mystery of citizenship. It is a good suggestion, but such a need is a commentary on our methods with regard to the native born for many generations. The alien is poetically pictured as pausing on our shores to get a full breath of freedom wafted to him from our land of liberty. He is even painted as sniffing it from afar as his ship approaches the land of the free and the brave. Why, then, is it necessary to shut him up in a schoolroom to teach him what means that sweet perfume? The answer, it seems, is that our native sons know little of what our freedom means. The average American knows nothing of true freedom except what he hears on the Fourth of July, and what he learns in the rough and tumble struggle for existence during the rest of the year. This latter is, that in this great land everyone is free to get what he can any way he can, provided he can keep out of jail while doing it, and as he is blissfully ignorant of most of the laws and still more blissfully careless of whether there are any or not, he generally gets along pretty well until some other fellow gets from him what he got from still another fellow, when he hunts up a lawyer who in turn hunts up a law to fit the case. Indeed, the average foreigner has more respect for the law than the average native son. The American is taught from childhood that he makes his own laws, but as he is not taught why he should not break them, he feels that he can break them because he himself makes them. So perhaps what we need is a course in the public schools on the reason and necessity of law, whereby the native sons will be taught the sacredness of law. He need not be taught a single law. Teach him that freedom is not license; that law is a sacred thing; that to break the law is a sin against himself and every man, woman, and child in the country. These things are not taught by the parents. Indeed, few parents know them. The child is taught just the opposite by the example, if not indeed the precept, of his parents. So the schools must teach them. If this were done, it would need no prophet to declare that in a generation or two the alien would need no school to teach him American citizenship. In truth, then, he would breathe it with the air. By all means teach the alien, but don't neglect the native sons any longer. We all admit that we need obedience to existing laws more than more laws which will not be obeyed. But how can we expect obedience when none are taught it, either through fear or, as should be, through regard for right? We realize that we have distorted the suggestion of schools for aliens. It was aimed at the hyphenates. But there are worse things in America than

hyphens. We are too much disposed to treat the symptoms regardless of the disease.

The Appam Case.

CONSIDERABLE speculation has been aroused over the status of the British steamer Appam brought as a German prize into Norfolk. It is undoubted that capture does not of itself establish title, but there must be a condemnation by a prize court at a port of the captor or its ally. Modern international law is equally clear as to the right of a belligerent to bring a prize into a neutral port. The modern rule, as declared at The Hague in 1907, permits the bringing of a prize into a neutral port only for unseaworthiness, stress of weather or want of fuel or provisions, and requires a departure as soon as the circumstances which warranted the entry are at an end. Prior to the declaration of The Hague the practice of most civilized nations was along the line indicated. Such, for example, has been the rule in France for over a century. See Wharton on Maritime Capture, p. 263. The action of the British government in refusing admission into its ports to the prizes of Confederate privateers may be recalled as another recent illustration. It appears, however, that as between the United States and Germany the subject is controlled by an old treaty perpetuating a rule now archaic. A treaty of 1799, revived in 1828, provides as follows:

"The vessels of war, public and private, of both parties, shall carry freely, wheresoever they please, the vessels and effects taken from their enemies, without being obliged to pay any duties, charges, or fees to officers of admiralty, of the customs, or any others; nor shall such prizes be arrested, searched, or put under legal protest, when they come to and enter the ports of the other party, but may be freely carried out again at any time by their captors to the places expressed in their commissions, which the commanding officer of such vessel shall be obliged to show."

It appears to be debatable whether the provision quoted is not now obsolete, every other clause of that treaty having been superseded by subsequent agreements. It is, however, reported that the State Department has ruled that the provision in question is in full force, and in such a case it is of course controlling.

Practice of Law by Corporations.

IN our last issue we called attention to a recent dictum of a Missouri court as to the ethical aspect of the acceptance by attorneys of employment with collection agencies and the like whose activities trench on the practice of the legal profession. Some point is given to those observations by a recent decision of the Appellate Division of the New York Supreme Court. *In re Pace,* 156 N. Y. Supp. 641. In that case two New York city lawyers were charged by the Bar Association with professional misconduct in accepting a retainer to represent in that city a Delaware corporation engaged inter alia in the business of incorporating companies. The court held that the acts of the company in question amounted to illegal practice of law, acts not only violative of a statute but contrary to public policy and malum in se. "It is clear," continued the court, "that the respondents assisted in and furthered them and therefore shared in the doing of the unlawful acts. For this they cannot escape responsibility, even although they erroneously believed that they were doing no wrong." In view of their prompt disavowal and quitting of the objectionable employment the respondents were released with a judicial censure, the court saying, however, that their acts "clearly amounted to professional misconduct."

The matter of the practice of law by notaries, corporations and collection agencies was reviewed at some length in a report of a special committee of the New York County Lawyers' Association some time ago, wherein systematic and drastic action was recommended. The prosecution referred to was undoubtedly an outgrowth of that report.

The Federal Income Tax.

THE Federal Income Tax Law is valid. Behind that announcement lie twenty-two years of history, beginning with the enactment of 1894, followed by its nullification in *Pollock* v. *Farmers L. & T. Co.,* 158 U. S. 601, the submission and ratification of the Sixteenth Amendment of the Constitution, and the enactment pursuant thereto of the Act of Oct. 3, 1913 (Fed. St. Ann. 1914 Supp. 185). This act the federal Supreme Court has sustained as against contentions based on the fact that it taxes incomes accruing prior to the time when it went into effect, that it collects taxes at the source on income derived from certain securities and that it exempts labor, agricultural and horticultural organizations. The decision not only sustains the present act, but leaves a clear field for such amendments as may be desirable, the court holding that the Sixteenth Amendment did not confer a new taxing power but merely relieved from the requirement of apportionment by population a well-established congressional power. Satisfaction with the ultimate result must inevitably be tempered by some measure of regret over the long and expensive process by which it was secured. Personifying the Income Tax, it may well be thought of as remarking that it has been a long way to Tipperary.

Price Control Again.

IN the recent case of *Victor Talking Machine Co.* v. *Macy,* the United States Circuit Court of Appeals is reported to have sustained a contention that the agreement under which the complainant furnished talking machine records to a dealer was merely a license, giving a right to control the dealer's selling price. The question turns squarely on the nature of the transaction; if a sale the price restriction was clearly void, and if a license it was indubitably valid. Just as a matter of common sense, the idea that when a manufacturer receives from a dealer the full price of an article, with the intent that the dealer shall dispose of it to an ultimate consumer for a use which will speedily destroy its value, dealer and consumer are not purchasers but merely licensees, seems distinctly far fetched. It was said by Mr. Justice Day in *Bauer* v. *O'Donnell,* 229 U. S. 1, Ann. Cas. 1915A 150, to be "a mere play upon words." The case cited would be conclusive on the question were it not for a doubt as to the scope of the earlier decision of *Henry* v. *A. B. Dick Co.,* 224 U. S. 1, Ann. Cas. 1913D 880. Each of these cases was decided by a bare majority of the court, the case last mentioned by the concurrence of four judges, two members of the court being absent. The Dick case, how-

ever, seems to occupy a very narrow field, the dominating consideration therein apparently being the fact that the manufacturer parted with the article at cost, deriving his entire profit from the license restriction attached, which was that accessories of his manufacture only were to be used. A very clarifying discussion of the entire question may be found in *Ford Motor Co.* v. *Union Motor Sales Co.*, 225 Fed. 373, and it is probable that the ultimate decision of the federal Supreme Court will be along similar lines.

The Lamar Case.

THE federal Supreme Court has recently affirmed the conviction of David Lamar under a statute making it a felony to impersonate an "officer of the United States," it appearing that the defendant, with a view to influencing legislation, impersonated Representative Palmer in telephone conversations with prominent financiers. The legal question involved, whether a Congressman is an officer of the United States, is one of some technical nicety. In view of the language of Const. art. 2, § 2, it seems that in a narrow sense "officers" of the United States are confined to appointive officers. *U. S.* v. *Germaine,* 99 U. S. 508. "Unless a person in the service of the Government . . . holds his place by virtue of an appointment by the President, or of one of the courts of justice or heads of Departments authorized by law to make such an appointment, he is not, strictly speaking, an officer of the United States." *U. S.* v. *Mouat,* 124 U. S. 303. Thus a senator has been held not to fall within a statute disqualifying for conviction of crime a person holding an office "under the government of the United States." *Burton* v. *U. S.,* 202 U. S. 344. But as was remarked in *Hendee* v. *U. S.,* 22 Ct. Cl. 140, the word is frequently used in statutes and regulations in a broader sense. That it was not the legislative intent in the false personation statute to use the term in a narrow sense, which would exclude the President while including a deputy marshal, is clear, and in construing it in accordance with its manifest intent the court has but followed the most fundamental rule of statutory interpretation. Decisions of this kind have a most wholesome effect on a criminal jurisprudence now overburdened with technicalities.

Democracy.

MR. ROOT'S invocation of the spirit of democracy, in his speech at the New York State Bar Association dinner, was brilliantly characteristic. "Liberty," he said, "has always been born of struggle. It has not come save through sacrifice and the blood of martyrs and the devotion of mankind. And it is not to be preserved except by jealous watchfulness and stern determination always to be free." This, we may say, was the "text" of his sermon, which, as a whole, has been and will be taken as "a warning of the dangers which threaten our country, an appeal to all thinking persons to forget their selfish interests in an effort to re-establish the ideals upon which the nation was founded." But there are those who interpret it as an insidious appeal in the interest of that extreme individualism which has come to be a badge of strong but selfish men, if not, indeed, of extreme reactionism. And there was much in the speech to give color at least to the suggestion that Mr. Root does not look with favor upon many of the reforms to which serious thought is being given in some quarters.

"In our colleges," he said, "and law schools there are many professors who think they know better what law ought to be and what the principle of jurisprudence ought to be and what the political institutions of the country ought to be than the people of England and America, working out their laws through centuries of life. And these men who think they know it all—these half-baked and conceited theorists—are teaching the boys in our law schools and colleges to despise American institutions. The whole business of government in which we are all concerned is becoming serious, grave and threatening. No man in America has any right to rest contented and easy and indifferent, for never before, not even in the time of the civil war, have all the energies and all the devotions of the American democracy been demanded for the perpetuity of American institutions, for the continuance of the American republic against foes without and more insidious foes within, than in the year of grace 1916."

One would wish that Mr. Root had been a little more specific—had named the villains and specified the particular institutions which they threaten to overthrow. Had he done so his utterances concerning our immigrant population—that "they will change us unless we change them" —might not have provoked the covert suggestion that he was striking at the principles of the Progressive Party, which, we are informed by a metropolitan journal, in 1912, constituted an "elaborate scheme to Prussianize the United States." This latter information is an interesting revelation to us, and doubtless will be to many others, Progressives, Stand-patters, and Democrats. Nor, in view of Mr. Root's warning against being beguiled by the "efficiency" of the doctrines and social formulas which our human imports bring with them, is it altogether inapt in the premises. However, we accept Mr. Root's speech at its face value, and agree that we must be vigilant if we are to remain free and are to preserve our free institutions "against foes without and more insidious foes within."

Educational Standard for Lawyers.

APROPOS of the undertaking of the New York State Bar Association to organize and press a movement for the improvement of the bar by raising the requirements for admission to practice, it may be, as suggested by a journalistic protest, that no discrimination should be made against graduates of night schools. Certainly a man's education, whether in the law or the academics, can seldom be measured by his diplomas. It may also be true, as suggested by the same journal, that "it is altogether likely that more bad lawyers are turned out from diploma factories than are passed by conscientious examination boards sitting on the qualifications of men who possess the ambition to educate themselves by hard work and severe sacrifices." Nevertheless, we consider the effort to encourage the general, as well as the legal, education of the lawyer to be very timely. The tendency to place the profession upon a purely business basis has not only lessened the professional efficiency of the modern lawyer but has lowered his ethical standards as well. Mr. Charles E. Shepard, chairman of the section of legal education of the American Bar Association, has expressed the need in language well worth reiteration and wide circulation.

"The education of the lawyer—how important it is for himself and for his fellow citizens!" says Mr. Shepard, in his pamphlet on the subject:

"His standards of conduct cannot be too high, his field of learning too broad for the work he has to do. He cannot, no one in this age can, say with Bacon, in Bacon's sense, that he takes all knowledge to be his province. But he can say that there is no province of knowledge into which he may not need to make excursions. To the ideal lawyer, we may apply Terence's words that nothing in human nature and human affairs but is akin to him. For he embodies to us the idea of law, which is the universal order of civil society, and touches all interests. Alike in private affairs and in public life he seeks to restore that order when violated, to strengthen it when enfeebled, to adjust and rectify it amid novelties. He is a great conservative force of society, distant alike from the iconoclast and the reactionary. He is a great constructive force of society, for he builds where others destroy, and brings order where they had left confusion. His education should fit him for all the varied functions of his career, and make him not only an advocate and a counselor, but a wise and instructed citizen well equipped for his duties to the commonwealth alike in private and in public life."

Boston Bar Surrenders.

UNDER this fearsome headline we looked to see what foreign foe had taken advantage of Boston's unpreparedness, but were relieved to find that the worst that has befallen the bar of Boston is its capture by the ladies. Ever since they were admitted to the practice of law they have demanded full and equal rights in the profession, and membership in the bar associations has been one of their most cherished objects, carrying with it, as it does, full recognition of equality. Time and again have they made application for membership in the associations of the various cities and states and in the national organization, but to meet with stern refusal, and it was only after repeated efforts that the Boston association succumbed to the inevitable and by a vote of 34 to 16 the membership committee amended the regulations so as to admit women lawyers to membership. It is difficult to see by what right they are refused this privilege solely on the ground of their sex, as it would certainly seem that a woman, duly and lawfully admitted to practice and possessing the requisite personal qualifications, is as much entitled to membership in her professional associations as the man. However, the woman lawyers of the country can take courage from the action of the Boston bar, for Boston is a most conservative city and its bar is in no whit behind the city in its worship of precedent. The recent refusal of the St. Louis association becomes insignificant in view of Boston's action, and it is safe to predict that the other associations of the country will sooner or later follow Boston's example and the woman lawyer will be admitted to full fellowship with her brothers at the bar. As was said by one evidently wise in woman's ways, it is better to submit to the inevitable without a contest, for there will be no peace for the lawyers until they do, and probably less after.

The Courts and the Boy Problem.

THE efforts now being made in various parts of the country to humanize the courts, so to speak, particularly with reference to their methods of handling boy offenders, should meet with universal approval. The theory that a boy accused or convicted of a minor offense and placed in a cell with a hardened criminal is started on the road to confirmed criminality by such associations is maintained by the leading students of criminology, and the need of a better method of dealing with these cases whereby the prevention of crime and the development of criminal habits among boys will receive as much attention as the punishment of crime cannot be denied. At the present time Chicago is particularly active in its efforts to solve this problem, and the views of Judge Fisher of the Boys' Court are of unusual interest in this connection. He divides boys into four groups, those who are absolutely honest; those who are honest by preference but can be influenced toward wrong by association, want or temptation; those who are criminally inclined but can be made honest; and those who are natural criminals. The last class he considers to be mentally deficient, and the first will normally look after itself. It is in dealing with the second and third classes that he thinks the greatest good can be accomplished. The police system under which the youthful offender is arrested like an ordinary criminal, and often imprisoned for days awaiting a trial is severely criticised, as well as the lack of suitable institutions where wayward, criminal and backward or mentally defective boys can be placed. He advocates the abolishment of evils that school boys in crime, and the creation of ways and means to occupy their idle time. To the end that some means may be adopted looking to saving boys from crime, he has appointed a committee of fifteen men and women, prominent in sociological work in Chicago, to study the boy problem and suggest practical means for its solution. The result of their deliberations should be of interest to all, though it is too much to hope that they will completely solve the problem.

A Caseless Court.

WE have often heard of the briefless lawyer and have sympathized with him in his enforced idleness, but a caseless court is indeed a novelty. Through the loyal and ever watchful endeavor of their representative at Washington, Rolla, Missouri, was designated as one of the places where the federal court for that section of the state must hold stated terms. This evidence of activity on their behalf was doubtless received with great satisfaction by the citizens of Rolla, and the court became a source of civic pride, but here the reason of its creation ceased, for be it known that as yet there has never been a case filed in this court. No jury has ever sat in it to decide the fate or fortune of the people, nor has a judge ever dignified its halls by his presence. A deputy United States marshal, at regular intervals, makes a trip to Rolla and goes through the form of opening and adjourning an imaginary term of the court. This court has been termed by a free-spoken press a pork-court whose only business is to cost. That, it says, is all the court ever does, just costs. It is certainly a unique case and we do not recall another like it, though there are many places designated for holding federal courts at which little business is done. The theory on which the numerous places for holding court were designated was, that it was cheaper and more convenient to carry the courts to the people than to compel the people to go to the courts. This theory might have been justified if each designated place were supplied with

a full complement of court officers, on duty for the most of the year, but in actual practice it has been found that the lawyers and litigants prefer to take their business to the principal and relatively permanent place of holding the court, where the bulk of the records is kept and the judge can be found during most of the year. It would doubtless prove interesting to ascertain just how many places there are for holding federal courts at which little or no business is enacted and what it costs to maintain them. At any rate, this much can be said in favor of the Rolla court, it has kept up with its docket.

THE CASE LAW PROBLEM.

"OF making many books there is no end." To no class of persons is the weight of this aphorism brought home more impressively than to the practicing lawyer, who purchases an ever increasing number of law books to meet the necessities of his practice. The much discussed question of reducing the volume of the case law has been taken up seriously by the Kentucky Court of Appeals. Having invited suggestions from the bar and given the matter thorough consideration, the court has formulated a plan which was expounded by Justice Carroll at a recent meeting of the Louisville Bar Association, and for which legislative sanction will be asked. In brief, the court proposes that, while opinions shall be written in every case, such opinions only as decide some new or unsettled question of law, or some novel question of fact, or which for some other reason the court deems of sufficient importance to be published, shall be published in the official reports or by private persons and that all other opinions shall not be published anywhere. It will be remembered that for a considerable time the plan of marking certain opinions not to be reported was tried in Kentucky and was abandoned. The moving cause of its abandonment was that the opinions in question were reported in the Kentucky Law Reporter and other unofficial reports so that the result of the withholding of some opinions from official reporting was merely to necessitate the purchase of these unofficial volumes. Referring to the previous practice Judge Carroll said: "Now the radical difference between the proposed plan and the practice in force when the opinions now published in the Kentucky Opinions and that appear in the Kentucky Law Reporter were handed down, is that the new plan contemplates that both by legislation and by rule of court these unreported cases shall not be used or cited as authority or precedent or referred to by the court, and that the judge will know when the case is disposed of in consultation whether it will be published or not, and can write the opinion accordingly." Some stress was laid by the learned judge on the point that the Justice writing an opinion should know, that it was not to be reported. Of the saving of judicial time to be thus effected he said: "I am also sure that it would not take one-fourth of the time to write an opinion not for publication that it does to write one intended to be published. There are, I have no doubt, some men whose minds are so accurate and so full and who have such ease and felicity of expression that they can sit down and write at first impression as well as they could write with much time and care. But I also venture the assertion that not many men of that kind are to be found among the judges of the country, or at any rate, there are not many judges who would be willing to have published in permanent form opinions that they write off-hand or under first impression. For example, it is easy enough for a lawyer to write a letter to his client advising him fully as to the law and the facts of his case, and he may do this with great freedom and ease; but if his client should say to him, 'I want you to write me a letter that will be printed and published in a book that will go into the hands of every lawyer in this state and all the public libraries in this country and remain there forever as your opinion on this subject,' I feel sure that he would at once decide to take great pains and time with the letter, and would carefully look out for the meaning of words and construction of sentences, and see that everything was stated as nearly accurately, both grammatically and legally, as it could be."

The earnest desire of the court that the reduction in the volume of the reports shall not be at the expense of a thorough consideration of the merits of every case is evidenced by its rejection of a suggestion that no opinions should be written in cases of trivial importance. The writing of an opinion in every case was deemed of the greatest importance in insuring a full and clear understanding of its merits. "Then too," said Judge Carroll, "there is a widespread feeling that written opinions are the only sure check on courts of last resort to keep them from becoming careless or indifferent. Now I don't agree that this is a sound reason, but I submit that it is not well for courts to ignore a well-fixed and settled public opinion like this. No good can come to the administration of the law from a disposition of the courts to disregard or ride over a reasonable and well-established public opinion touching a detail such as the writing or not writing of opinions. But, on the other hand, much harm might result by the creation of a feeling of distrust or suspicion of a body that should always have a secure place in the confidence of the people." On the same principle the judges declined to recommend a limitation of the right of appeal, being desirous to preserve to every litigant the fullest right to a review. A suggestion that the judges might write shorter opinions was likewise dismissed from consideration for the reason that if an opinion is deemed worthy of publication and use it should be expressed with such fullness as to give it real value as a precedent.

The views of the Kentucky judges here briefly summarized are deserving of serious consideration in every jurisdiction wherein the burden of the case law problem is felt. Their conclusion that a large proportion of the decisions annually handed down are of no value whatever to the profession is in line with that of most unbiased students of the subject. To the same effect Lord Reading, Lord Chief Justice of England, in an address lately made to the lawyers of New York, said, among other things, "Speaking for myself, I am strongly impressed day by day with the undesirability of the constant reporting of decisions which lay down no new principle, but only report the application of old principles to new facts. I think that I recognize a feeling of satisfaction which the members of the bar would have in getting rid of their thousands of volumes of decisions, so that they might base themselves on the solid principles of the law." The

fact that the American bar is becoming convinced of the merit of this view is evidenced by the growing popularity of the various sets of selected cases; a popularity, be it noted, which has survived the conditions which made the Kentucky court abandon its former plan of selection. So great a proportion of the current case law is of a cumulative character only, that a legal author of national repute once told the writer that he could write a text book on any subject of general law from one of the sets of selected cases and that his subsequent work would amount to no more than the filling in of some cumulative citations. The average lawyer would protest stoutly enough if his grocer included in a sack of flour the middlings, bran and chaff, yet he pays ("cheerfully" deleted by a censor in the accounting department) for multiplied reiterations of the holding that a verdict on conflicting evidence will not be disturbed on appeal.

The execution of such a plan as that proposed by the Kentucky judges should work to advantage in more ways than the mere saving of money. Legal treatises and legal arguments would inevitably tend to a greater reliance on principle, and from that emphasis of fundamentals more of consistency and uniformity in the law would certainly emerge. It has been argued that the greater the supply of materials in the form of adjudicated cases the more readily can a juristic exposition of the law be made. The proposition will be seen to be false in its major premises when it is remembered that a large part of the "materials" is pronounced by the most competent judges to be useless rubbish.

It is in a way amusing that courts and lawyers should look for rules and statutes to help them out of difficulties which are largely of their own making. Behind most decisions which are not worth a place in the reports lies a contention of counsel with which the time of a tribunal should not have been occupied. And behind most over-technical arguments of counsel lies some prior decision which fosters a hope that a technical plea or a trivial error may bring victory. It is within the power of every appellate court to apply rigidly a harmless error rule; to strike from its files every brief which urges a question deemed wholly without substance, to stop summarily any counsel who seeks to argue a trifling objection or a question which has been settled by previous decisions. Persistence in this course would speedily reduce the volume of the case law. A vision yet more idealistic glimpses a bar whose every member feels himself so fully an officer of justice that he will present to an appellate tribunal no proposition on whose merits he is not prepared to stake his repute as a counsellor. But until that utopian day arrives any proposition looking to relief from the burden of reports of inutile cases is worthy of careful consideration.

W. A. S.

"The citizen here knows no person, however near to those in power, or however powerful himself, to whom he need yield the rights which the law secures to him when it is well administered. When he, in one of the courts of competent jurisdiction, has established his right to property, there is no reason why deference to any person, natural or artificial, not even the United States, should prevent him from using the means which the law gives him for the protection and enforcement of that right." Miller, J., in U. S. *v.* Lee, 106 U. S. 208.

THE PIT AND THE PENDULUM

"Down—certainly, relentlessly down. . . . Down—still unceasingly—still inevitably down."

THUS did the razor-edged pendulum descend upon him condemned by the Inquisition, as he lay bound and helpless on the edge of the Pit, "typical of Hell." By accident—by a stumble over a rag as he groped across his dungeon floor—he had escaped the Pit. By strategy—and through the instrumentality of vile vermin that gnawed his bonds for the sake of the grease he had smeared upon them—he avoided the pendulum. And yet, but for the timely arrival of a new régime in the person of General Lasalle he would still have perished between the inclosing red-hot iron walls of his dungeon. And so, according to inspired tradition, was mankind cast by the first inquisition into a world-dungeon, with the pit of hell below him and the pendulum of universal forces swinging above him, there to squirm and wriggle in vain effort to save himself from both, until Divinity, through Christ, reached down and lifted him out. "Out," did I say? I should have said "up." Through Adam man was condemned to the Pit. Throught Christ the judgment was suspended, but not set aside. Nor was the culprit set free. He was unbound and placed upon his feet, but the pit is still below and the pendulum above him. Not the pit of the Spanish Inquisition, nor, perhaps, the pit of Hell Fire, but the pit of barbarism and savagery. Not the pendulum of Poe's harrowing narrative, nor, perhaps, the pendulum of God's wrath, but the pendulum of natural forces which in its epochal swings carries man with it from one extreme to another, and reduces the sum total of his progress away from the pit to a negligible residuum measurable only in the summing up of the ages.

It would seem that Adam, on being cast out of Eden, should have sat down on the nearest boulder and taken sober thought upon how to get back. But, instead, he rioted in freedom, he and his race, until through pure reaction new gods—not one but many—were created to rule the soul, and rulers chosen to govern the actions of the body. Thus man-made law began, and ever since then man has been busy smashing his self-made idols and creating new ones, setting up rulers and knocking them down, making new laws and abrogating them. The pendulum swung, and freedom, for which Eden was sold, was cast into the arms of Moloch and crushed under the heel of Nero. The pendulum swung again, and republics were born. At the next swing they died, and man was once more on the edge of the pit. Next he was rushed into the golden age of Kings. Then America! and "All men are free and equal!" But the pendulum is still swinging! Who knows why Europe is fighting? And who knows whither the commission form of government will lead? Business already has its princes and tyrants who daily pull off exhibitions that reduce those of Claudius Cæsar Drusus Germanicus Nero to the classic denomination of thirty cents. Strangely enough, the most democratic country in the world to-day, when measured by average equality and public administration, is an empire, while the greatest individual freedom is probably enjoyed in the land of the Czar. Such being the sum total of social progress, how about man's laws? Man enjoys the distinction of being the only creature that makes laws—

and breaks them. Still more queerly, by this double attribute is his kinship to God proclaimed. But that aside, man's laws are as evanescent before the breath of the ages as the night mists before the morning breeze. True, all life exists in change, by change, and for change, but life's changes are gradual and ever progressive, while man's laws are born of revolution and most often seem to "progress backward" towards the point whence they started. Like Omar, they come,

> "Into this universe, and why not knowing,
> Nor whence, like water willy-nilly flowing;
> And out of it, as wind along the waste,
> I know not whither, willy-nilly blowing."

For example: Originally land was owned by no one, or, what is the same thing, by all in common. Next it was reduced to possession by man-made rulers, who parcelled it out on tenure to the men who made them. From this it passed by revolution into private hands. Finally it has become the free subject of barter and trade, with the result that its ownership is rapidly becoming centralized in our self-made rulers, and the other few who still can claim twenty feet to live on or six feet to be buried in are very uncertain as to how long their claims will last. The concrete result is that the earth has been robbed of the wealth which in the ages past she stored up for the ages to come, and the only consolation held forth to the race of man may be that in the not distant future the shell of its common inheritance may be returned through the instrumentality of some device of common ownership.

Again, take the contract, status, institution, or sacrament of marriage. No one seems to know exactly what it is, so we will just call it marriage. Originally the human mating must have been free, the male choosing as often and variously as he pleased, the female bestowing her strength and solicitude upon her offspring, with little thought of the past loves which bade her hearken to nature's maternal behest. Then, presto! *Vinculum matrimonii* was forged! A bond, a chain, poetically gilded, ceremoniously garlanded, but nevertheless a chain strong enough to hold woman in double bondage for many centuries, to curb in fair degree the polygamous nature of man, and cruel enough, withal, to brand the innocent offspring of the unbound with the ugliest epithet of the human tongue. And what is the concrete result? Space forbids elaboration, respect for an honorable status closes the volume of details. But a few press head-lines will illustrate, such as: "Affinity Boldly Vindicated;" "Feminist Movement Gains;" "Suffrage Carries in Two States;" "Divorce for Incompatibility;" "Married at Muzzle of Shot-gun;" "Judge Refuses to Countenance Patch Wedding;" "New Eugenics Law;" "Pennsylvania Divorce Law;" "$50,000 Breach of Promise Suit;" "The Passing of Illegitimacy;" "Europe Seeks to Encourage Birth Rate." And, shades of Napoleon, Pope, and the Little Lame Prince, forbid! There are those who seek to quiet this maëlstrom by collecting and destroying the débris on its surface, to save the race of man by destroying the defectives, by applying to *Homo Divinus* the standard of perfection of a rooster. But however that may be, certain it is that man—*homo*, not *vir*—is tugging at the *vinculum*. By his laws he is slowly filing the links. He does not know it. He is even soldering where he has filed. But the pendulum is swinging, and if the *vinculum* is in its path it will be severed. Even the family may be destroyed—the family, long considered the basis of social government, but now in antipathy to every modern tendency. Who shall mother the race when the curse of maternity is lifted from the woman? We all know we are progressing, but whither? who knows?

But enough of individual examples! They are too personal. Let us consider rather the sum total. Then, perchance, we may sing with Tennyson of the purpose of the ages. Yet at the close of the song we pause and ask ourselves again, what? What purpose? We have progressed. But whither? Economic progress? Size! Size! By the metropolitan press we are informed that the country is on the crest of a great wave of prosperity. Comforting information, when the local paper advertises foreclosure on the home property! With one hand we build great factories; with the other we seek to save humanity from their engulfing jaws. We build great cities and point to them with pride; and all the while our souls are protesting against the pit we are thus creating for humanity. And now that we have builded we cry "Back to the soil!" But when we are asked, "Where, where is the soil?" we hang our heads in shame. Economic progress! It has swept away the rules against champerty and maintenance, and filled the courts with litigants. No man knows his creditors. No man is sure of his title. Love and blood are bought and sold. Imprisonment for debt is practically restored. No man knows what he eats, drinks, or wears. Huge soulless creatures stalk through the land, trampling and devouring—great octopi whose all-embracing tentacles reach into every home. And when the people, the sovereign people, cry out in agony, their voices are stilled by the mere suggestion that the octopi may be frightened and cease to feed. The people feebly protest with more feeble statutory regulation. Alas! Too often they find they have bound themselves with the bonds of their own constitutions! They have said to themselves in solemn writing that they "shall not." They finally threaten to go to war because a belligerent nation has seized the very meat which they should have kept for home consumption. Three years ago we were told that there was a meat shortage. Most of us had been short on meat for a long time, but we agreed that the price would have to be raised. And yet we can send enough meat to Europe to suggest a war!

On the whole, is it any wonder that man has cast himself into a world's war? The life of his soul depends on devotion and sacrifice. Can he find them in the modern system? Perhaps, but he has not, and once more has responded to the call of primal heroism.

> "This did not end by Nelson's urn
> Where an immortal England sits—
> Nor where your tall young men in turn
> Drank death like wine at Austerlitz.
> And when the pedants bade us mark
> What cold mechanic happenings
> Must come, our souls said in the dark:
> 'Belike, but there are likelier things.'
>
> "Likelier across these flats afar.
> These sulky levels, smooth and free
> The drums shall crash a waltz of war
> And Death shall dance with Liberty;
> Likelier the barricades shall blare
> Slaughter below and smoke above,
> And death and hate and hell declare
> That men have found a thing to love."

But wait! lest in protesting against hysteria we ourselves get hysterical. Tennyson is right, and Omar wrong. A grain of Tennyson's faith will fill old Omar's empty cup to overflowing with a divine vintage. One line of his sweet song will drown the blare and roll of Chesterton's trumpets and drums. Man has, withal, traveled far from the pit, if only in the curbing of the unbridled license of savagery's individualism. The evils of private ownership of land are due to the primitive selfishness of individuals rather than to the system. If man would only submit to the *vinculum* with which he has bound his primal instincts it would truly become golden. Garb economic progress in the vestments of humanity, and civilization will be vindicated and likewise perpetuated. Man's greatest menace now is the pendulum. Let him discover the secrets of its springs, and it will swing in accord with his will. And America! Let her prepare against the excesses of her young blood, and likewise against the menace of the war-mad world. But let her do it soberly and sanely. Let her not be caught in the vortex of the pendulum that even now is swinging towards her beloved shores. Verily, eternal vigilance is the price of peace, and judgment is the divine attribute of man. Upon these depends the escape of man from the pit and likewise from the pendulum.

HERBERT B. HAWES.

FEDERAL AND STATE POWER.

From the Address of Mr. Justice Hughes before the New York State Bar Association.

THE content of the Federal authority over commerce has not been enlarged since the beginning, and to understand its scope we recur to the classic definition of Marshall; but there has been a profound change in the disposition to use that authority. From the outset Congress exercised its power somewhat broadly with respect to foreign commerce, but it did little in the interstate field until a short time ago. In that field the requirement of uniformity, until quite recently, was taken to assure freedom rather than restriction. Within a few years plans of regulations involving new exertions of federal power have followed each other in swift succession, reflecting convictions of recent origin with respect to national needs. The Interstate Commerce Act, the Anti Trust Act, the Safety Appliance Act, the Hepburn Amendment, and the Carmack Amendment to the Interstate Commerce Act, the Food and Drugs Act, the Meat Inspection Act, the Hours of Service Act, the Employers' Liability Act, the Clayton Act and the Trade Commission Act have, to a considerable extent, recast our law. And it is of the deepest significance that these changes have not led to partisan controversy, and that in the most recent legislation there has been no indication of any desire to withhold the exercise of Federal power. It is also noteworthy that Congress has seen fit, in increasing measure, in its government of interstate commerce to adopt means having the quality of police regulations. The authority recognized in the Lottery case has been extended to persons in the White Slave Act, and a still more recent illustration of its exercise is found in the Sherley Amendment to the Food and Drugs Act, making "articles of drugs," accompanied by false and fraudulent statements as to curative effects, contraband of interstate commerce. What this means is apparent. Abounding activities and facility of intercourse have been producing the natural legislative reactions; and when the people have determined to exercise governmental control, they are disposed to utilize freely whatever powers they find at their immediate command, caring little for former divergencies of political theory.

With this noteworthy change in point of view, there have been constant manifestations of a deepening conviction of the impotency of legislatures with respect to some of the most important departments of lawmaking. Complaints must be heard, expert investigations conducted, complex situations deliberately and impartially analyzed, and legislative rules intelligently adapted to a myriad of instances falling within a general class. It was not difficult to frame legislation establishing a general standard, but to translate an accepted principle into regulations wisely adapted to particular cases required an experienced body sitting continuously and removed so far as possible from the blandishments and intrigues of politics. This administrative type is not essentially new in itself, but the extension of its use in state and nation constitutes a new departure. The doctrine that the legislature cannot delegate its power has not been pushed so far as to make needed adaptation of legislation impossible, and reconciliation has been found in the establishment by the legislature itself of appropriate standards governing the action of its agency. The ideal which has been presented in justification of these new agencies, and that which alone holds promise of benefit rather than of hurt to the community, is the ideal of special knowledge, flexibility, disinterestedness and sound judgment applying broad legislative principles that are essential to the protection of the community, and of every useful activity affected, to the intricate situations created by expanding enterprise. But mere bureaucracy—narrow, partisan or inexpert—is grossly injurious; it not only fails of the immediate purpose of the law and is opposed to traditions which, happily, are still honored, but its failure creates a feeling of discouragement bordering on pessimism which forms the most serious obstacle to real improvements in the adjustment of governmental methods to new exigencies.

With Congress using widely its authority over interstate commercial intercourse and the states creating new obligations and remedies, the difficulty and importance of the work of the courts as the interpreters of constitutions and laws has enormously increased. There has never been a time when that work, in view of the intimate relation of legislation to commerce and industry, has been of more vital concern to the country than it is to-day. It is plain that our dual system of government is being subjected to a new and severe strain. Congress is constantly defining the scope of its legislation by reference to the commerce clause, while on the other hand the states, with respect to almost every important activity, press their action to the constitutional limit of state power. Thus the Interstate Commerce Act fastens upon interstate transportation, while statutes with similar purpose and thoroughness deal with the transportation that is intrastate, conducted by the same carriers. The Federal Employers' Liability Act applies to persons suffering injury while employed by railroads in interstate commerce, and other acts define what it shall be unlawful for any person to do "in the course of such commerce," either "directly or indirectly." Now, as has been aptly said, interstate commerce is a "practical conception"; it is not determined by mere forms of contracts, or by bills of lading, or by mere technicalities of any sort, that is, by anything short of the substance of the transaction. But, while this is true, interstate commerce is a department of practical affairs which as a rule is segregated only in legal theory. It has not separate

existence in economics and is not separately maintained by transportation companies or by those engaged in trade. When is an employee of a railroad company engaged in interstate commerce? There may be no distinction in the mere physical conditions of his work or in his wages. Train crews handle interstate and intrastate traffic indiscriminately; and the practical service of the carrier is determined by the nature of the haul, not by the presence or absence of a state boundary. If, while in the usual work as a train hand, there is an interstate passenger on the train, or goods in a freight car are in the actual course of an interstate journey, his rights and the correlative liability of his employer in case of injury through the latter's neglect is governed by federal law; but if the passengers or goods are being moved solely in intrastate traffic, the state law alone determines right and remedy. Again, the same right of way, terminals, tunnels and bridges are used for both classes of traffic. The railroad has economically but one value; but this value must in some way be separated to determine whether laws of different jurisdictions permit a fair return upon that value, which, for legal purposes, must be assigned to each. Rate structures which from the standpoint of economic principle and practical judgment are single, are split up into legal divisions for the purpose not of academic discussion, but of vital control. Our recent reports abundantly show that questions of utmost nicety are constantly being presented in the application of new statutes and evidence the extreme difficulty of the work of carrying out the will of Congress over the activities within its control, while at the same time avoiding encroachment upon the state field. This difficulty is sure to be very keenly appreciated in whatever fields of activity the regulating power of government takes hold. It is the problem of many governments within one nation dealing with portions of an activity which has economic unity. The import of this should be clear to every disinterested observer; a practical people with boundless opportunities and with aspirations unconfined will not be disposed to permit legitimate progress to be needlessly restrained or governed to defeat itself by its own complexity.

But in the face of the difficulties already upon us, and destined to increase in number and gravity, we remain convinced of the necessity of autonomous local governments. An over centralized government would break down of its own weight. It is almost impossible even now for Congress in well-nigh continuous session to keep up with its duties, and we can readily imagine what the future may have in store in legislative concerns. If there were centered in Washington a single source of authority from which proceeded all the governmental forces of the country—created and subject to change at its will—upon whose permission all legislative and administrative action depended throughout the length and breadth of the land, I think we should swiftly demand and set up a different system. If we did not have states we should speedily have to create them. We now have them, with the advantages of historic background, and in meeting the serious questions of local administration we at least have the advantage of ineradicable sentiment and cherished traditions. And we may well congratulate ourselves that the circumstances of the formation of a more perfect Union has given us neither a confederation of states nor a single centralized government, but a nation, and yet a union of states, each autonomous in its local concerns. To preserve the essential elements of this system, without permitting necessary local autonomy to be destroyed by the unwarranted assertion of Federal power, and without allowing state action to throw out of gear the requisite machinery for unity of control in national concerns, demands the most intelligent appreciation of all the facts of our inter-related affairs and far more careful efforts in co-operation than we have hitherto put forth.

Cases of Interest.

VALIDITY OF ORDINANCE MAKING EMISSION OF DENSE SMOKE IN MUNICIPALITY A PUBLIC NUISANCE.—The enactment of an ordinance by the city of Des Moines, Iowa, providing that the emission of dense smoke in portions of that city should constitute a public nuisance caused a Laundry Company to file a bill in the United States District Court, the purpose of which was to enjoin the enforcement of the ordinance as in violation of the due process and equal protection provisions of the Fourteenth Amendment. The case reached the Supreme Court of the United States and is reported as Northwestern Laundry *v.* City of Des Moines, 239 U. S. 486, it being held that the District Court which dismissed the bill did right. The court through Mr. Justice Day said: "So far as the Federal Constitution is concerned, we have no doubt the State may by itself or through authorized municipalities declare the emission of dense smoke in cities or populous neighborhoods a nuisance and subject to restraint as such; and that the harshness of such legislation, or its effect upon business interests, short of a merely arbitrary enactment, are not valid constitutional objections. Nor is there any valid Federal constitutional objection in the fact that the regulation may require the discontinuance of the use of property or subject the occupant to large expense in complying with the terms of the law or ordinance."

For a monographic note on smoke as constituting a nuisance, see 12 Ann. Cas. 846; Ann. Cas. 1912B 1036.

VALIDITY OF STATUTE MAKING IT A MISBRANDING OF DRUGS FOR A PACKAGE TO CONTAIN FALSE AND FRAUDULENT REPRESENTATIONS REGARDING THEIR CURATIVE OR THERAPEUTIC EFFECT.—Section eight of the Food & Drugs Act enacted by the Congress of the United States, was amended in 1912 to provide that with respect to drugs an article shall be deemed to be misbranded "if its package or label shall bear or contain any statement, design, or device regarding the curative or therapeutic effect of such article or any of the ingredients or substances contained therein, which is false and fraudulent." In Seven Cases *v.* U. S., 239 U. S. 510, the question arose whether this amendment was valid. It was held that it was. The principal contention, that it was invalid because it was an encroachment upon the reserved powers of the states, was answered by the court as follows: "The objection is not to be distinguished in substance from that which was overruled in sustaining the White Slave Act, c. 395, June 25, 1910, 36 Stat. 825. Hoke *v.* United States 227 U. S. 308. There, after stating that 'if the facility of interstate transportation' can be denied in the case of lotteries, obscene literature, diseased cattle and persons, and impure food and drugs, the like facility could be taken away from 'the systematic enticement of and the enslavement in prostitution and debauchery of women,' the court concluded with the reassertion of the simple principle that Congress is not to be denied the exercise of its constitutional authority over interstate commerce, and its power to adopt not only means necessary but convenient to its exercise, because these means may have the quality of police regulations."

For a monographic note on the subject of the construction and validity of the Federal Pure Food and Drugs Act, see Ann. Cas. 1915A 45.

VALIDITY OF STATUTE REQUIRING ALIENS AND NONRESIDENTS TAKING FISH AND OYSTERS FROM SALT WATERS OF STATE TO PAY LICENSE TAX.—The Florida legislature having in mind no doubt the large nonresident population of their state, during the

winter months, has enacted a statute providing that: "Whoever being an alien or nonresident of this state, and who shall engage in taking fish or oysters from the salt waters of this state for any purpose other than his own individual use, shall be required to pay a license tax of ten dollars per annum." This statute was declared constitutional in the case of Ex. p. Gilletti, 70 So. 446, which was a habeas corpus proceeding by persons falling within the provisions of the statute who were arrested for removing certain oysters from a public oyster bar without first having paid a license. The court construing the statute said: "The provision of the statute requiring an alien or nonresident to pay a license tax of ten dollars per annum before he can 'engage in taking fish or oysters from the salt waters of this state for any purpose other than his own individual use' applies to aliens and nonresidents of the state who 'engage in taking fish or oysters' on their own account, not to laborers who are employed to take fish or oysters for their employers. As so construed and applied, the statutory provision does not violate organic or treaty rights. The state may, without denying 'to any person within its jurisdiction the equal protection of the laws,' justly discriminate in favor of its citizens in regulating the taking for private use of the common property in fish and oysters found in the public waters of the state, where such regulations have a fair relation to and are suited to conserve the common rights which the citizens of the state have in such fish and oysters as against aliens and nonresidents of the state. The equal right of all persons who reside in a state whether citizens or aliens to labor therein does not include an equal right of an alien to participate in the common property and privileges that are peculiar to citizens. The statute does not purport to discriminate against aliens and nonresidents with reference to private property rights or the right to labor or to deal in fish and oysters after they lawfully become private property."

For a monographic note relating to the constitutionality of game laws discriminating between persons or classes as to the right to hunt game, see 19 Ann. Cas. 239.

EFFECT OF EUROPEAN WAR AS MAKING MOOT QUESTION OF VALIDITY UNDER ANTI-TRUST LAWS OF AGREEMENT OF OCEAN STEAMSHIP COMPANIES.—The fact that there is a European war has reached the ears of the United States Supreme Court as is evidenced by the case of United States *v.* Hamburg-American Co., 239 U. S. 466, which was an appeal from a decision of the District Court for the southern district of New York holding that a certain agreement entered into between various ocean steamship companies, British and German, was in violation of the Sherman anti-trust law. The Supreme Court refused to pass on the merits of the case on the ground that the European war which it would take judicial notice of made the question a moot one. Chief Justice White after stating the facts of the case said: "While this mere outline shows the questions which are at issue and which would require to be considered if we had the right to decide the controversy, it at once further demonstrates that we may not, without disregarding our duty, pass upon them because of their absolute want of present actuality, that is, because of their now moot character as an inevitable legal consequence springing from the European war which is now flagrant—a matter of which we take judicial notice. Montgomery *v.* United States, 15 Wall. 395; United States *v.* Lapene, 17 Wall. 601; 7 Moore's International Law Digest, 244, 250. The legal proposition is not in substance controverted, but it is urged in view of the character of the questions and the possibility or probability that on the cessation of war the parties will resume or recreate their asserted illegal combination, we should now decide the controversies in order that by operation of the rule to be established any attempt at renewal of or creation of the combination in the future will be rendered impossible. But this merely upon a prophecy as to future conditions invokes the exercise of judicial power not to decide an existing controversy, but to establish a rule for controlling predicted future conduct, contrary to the elementary principle which was thus stated in California *v.* San Pablo & Tulare R. R., 149 U. S. 308, 314: 'The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. When, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it. No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard.'"

"PASSENGER" AS INCLUDING PERSON SIGNALING TRAIN AT FLAG STATION.—Who is a "passenger" is a question that is frequently put to courts, but no rule that has been laid down has been comprehensive enough to settle it. In Georgia, etc., R. Co. *v.* Tapley, 87 S. E. 473, the plaintiff suing for damages for a personal injury claimed to have resulted while he was a passenger, contended that he went to a flag station on the line of the defendant railway company and gave a signal for a passenger train to stop, for that purpose stepping upon the track and using a lighted paper, it being dark; that the whistle was blown but the train did not stop, and while he was endeavoring to leave the track his foot was caught under the rail, and he was caused to fall in a position from which he could not entirely extricate himself before the train passed, and injured him. On these facts it was held that the plaintiff was not a passenger and therefore that the measure of care due him was ordinary care. The court said: "Efforts to lay down a comprehensive definition of the word 'passenger,' or, in a single statement, to exhaust all possible circumstances under which the relation of carrier and passenger may exist, have not proved very successful. The varying facts under which that relation may begin, continue, and terminate, render such a complete definition, applicable to all cases, difficult, if not impossible. It is easy to declare that where one has purchased a railroad ticket entitling him to transportation upon a train, and has at the proper time taken his seat in the proper car for that purpose, he is a passenger; but he may have entered the train without a ticket, yet with the means and intention to pay for transportation, or he may be in the act of boarding the train at a proper place for that purpose, and with a ticket or the necessary means of transportation, when injured; or he may have procured a ticket and be waiting in a waiting room set apart by the company for that purpose, while the train is being made ready for departure. These or other variations in circumstances may enter into the question of whether or not the relation has begun at a given time. One definition sometimes given is that a passenger is one who travels in some public conveyance by virtue of a contract, express or implied, with the carrier, as to the payment of fare or which is accepted as equivalent therefor. As just indicated, however, this definition, like some others which have been made, does not comprehend all possible situations. Indeed, as a general rule, every person not an employee, being carried by the express or implied consent of the carrier upon a conveyance usually employed in the carriage of passengers, is presumed to

be lawfully upon it as a passenger. . . . In Western & Atlantic R. Co. *v.* Voils, 98 Ga. 446, 26 S. E. 483, 35 L. R. A. 655, it was held that when a person goes to a railway station where there is no ticket office, but where it is customary for trains to stop when signaled in order to take on persons desiring to take passage, and by giving proper signals signifies his intention to become a passenger and the train is stopped for the purpose of taking him on, he is, when attempting to take the train, a passenger, and is entitled to all the rights of a passenger, although he has not purchased a ticket. A mere intention on the part of a person to become a passenger, without regard to any act on the part of the company, does not, ipso facto, constitute him such a passenger. Neither does the mere giving of a signal at a flag station make a person giving the signal a passenger on an approaching train."

For a monographic note on the subject of when an intending passenger actually becomes such, see 1 Ann. Cas. 605; 9 Ann. Cas. 1104.

RIGHT OF NATIONAL BANK TO ACT AS ADMINISTRATOR.—An interesting question as to the right of a national bank to act as an administrator arose in the case of the Appeal of Woodbury, N. H. 96 Atl. 299. The proceeding was begun in the probate court to secure the appointment of a national bank as administrator of an estate. The petition for the appointment was denied on the ground of lack of power, and the decree denying the petition was affirmed, first by the Superior Court, and then by the Supreme Court. The petitioners relied on a provision of the Federal Reserve Act which authorized the reserve board "to grant by special permit to national banks applying therefor, when not in contravention of state or local law, the right to act as trustee, executor, administrator, or registrar of stocks and bonds under such rules and regulations as the said board may prescribe," and the petitioners showed that the national bank in question had received the special permit. They were met however by a New Hampshire statute passed in 1915 which provided as follows: "No trust company, loan and trust company, loan and banking company, bank or banking company, or similar corporation, shall hereafter be appointed administrator of an estate, executor under a will, or guardian or conservator of the person or property of another." The Supreme Court held that the state statute applied to national banks, and that the special permit was unavailing in view of the provision in the Federal Reserve Act that the grant of the special permit to national banks must not be "in contravention of state or local law." Another contention of the petitioners was stated and answered by the court as follows: "As the Federal Reserve Act was approved on December 23, 1913, authorizing national banks to act as administrators when the state law permitted it, it is claimed that the New Hampshire statute of 1915 could not deprive them of that privilege; in other words, that subsequent state legislation would be ineffective to deprive them of the power of administration if they already possessed it in this state. Assuming, but not deciding, they have had that authority, it is clear that the language of the Reserve Act does not lead to the conclusion that the legislature of this state could not subsequently provide that national banks should not act as administrators, or that the probate courts should not subsequently appoint them to such positions. The power of the state over the probate courts is exclusive, and they have such powers and only such as the legislature gives them. The act of Congress was not an attempt to invest probate courts with a power of appointment they did not possess before, but it was an authorization to national banks to accept appointments when the probate courts were authorized to make them. As those courts cannot now make such appointments, it necessarily follows that national banks cannot be appointed. They have no vested right to exercise that trust, and can only enjoy the privilege when the appointing power is authorized to appoint them."

INSPECTION OF MEAT BY UNITED STATES INSPECTORS AS AFFECTING PACKER'S LIABILITY IN CASE IT PROVES UNWHOLESOME.—The effect of an inspection of meat by United States Inspectors on the liability of the packer in case it proves unwholesome and causes injury to a consumer is a question raised and decided in Catani *v.* Swift, (Pa.) 95 Atl. 931. The action was one of trespass by plaintiff to recover damages for the death of her husband which resulted from eating unwholesome and diseased pork slaughtered by defendant in the state of Missouri and shipped to its distributing house at the borough of Nanticoke, in this state, and there sold to a dealer and delivered to plaintiff in its original package, which bore the government stamp showing an inspection by United States inspectors. Plaintiff produced evidence that her husband and other members of the family had eaten the pork and all subsequently became ill, her husband dying a short time later from what the evidence tended to show was trichinosis, a disease resulting from eating meat containing trichinæ, a small parasite or germ which multiplies rapidly and bores through the walls of the intestines, stomach, and muscles of the human body and poisons the system. The trial judge submitted to the jury the questions whether plaintiff's husband died of trichinosis, and, if so, if he contracted the disease from pork sold by defendant and eaten by him. The jury returned a verdict for plaintiff, thus deciding both questions in the affirmative. Judgment *non obstante veredicto* was, however, subsequently entered for defendant on the ground that the federal laws having been complied with and the meat inspected by the United States inspectors, and certified to be sound, defendant was not liable, in the absence of negligence in the transportation or handling of the meat subsequent to the inspection, even though it made no further inspection. From the judgment entered plaintiff appealed assigning as error this action of the court. And on a consideration of the appeal the Supreme Court were of opinion that there was error and consequently reversed the judgment below. Frazer, J., for the court, said: "We . . . hold that the federal statutes providing for meat inspection by government officers do not relieve the packer from liability for damages where he has made no inspection nor taken any steps to ascertain for himself whether the meat sold by him is fit for food. The common-law duty to sell only wholesome food still remains, and the burden of discharging this duty has not been shifted to government inspectors. The jury having found that the death of plaintiff's husband was the result of eating meat packed by defendant which was affected by a disease which the evidence showed was discoverable by proper inspection, the burden was on defendant to show fulfillment of its duty, which burden was not met by merely proving inspection by the United States government inspectors. Under the foregoing principles, governing the sale of articles of food, a *prima facie* case is made out by proof that the meat sold by defendant was diseased and caused the death of plaintiff's husband. It was not necessary to go farther and prove defendant knew the food was unwholesome. Defendant's duty was absolute. It was bound to know that the meat was unwholesome and unfit for food, and this duty was not performed by merely showing an inspection and approval by United States government inspectors."

For a general discussion of the right to recover consequential damages for breach of implied warranty on sale of food, see 16 Ann. Cas. 497; Ann. Cas. 1913B, 1114.

Validity of Statute Prohibiting Use of Second Hand Materials in Bedding.—Whether a state legislature may in the exercise of its police power prohibit the use of second hand materials in the making of bedding is answered in the recent case of People *v.* Weiner, (Ill.) 110 N. E. 870, wherein a statute was held valid which provided in part as follows: "No person shall use, either in whole or in part, in the making of any mattrass (mattress), quilt, or bed comforter any second-hand cotton, cotton-felt, hair, wool, shoddy, excelsior or kapoc(k), or any other soft material which has been made secondhand by use about the person, nor shall any person sell, or offer to expose for sale, or be in the possession or with intent to sell, or deliver any mattrass (mattress), quilt, or bed comforter, in which has been used, in the making, either in whole or in part, any secondhand cotton, cotton-felt, hair, wool, shoddy, excelsior or kapoc(k) or any other soft material which has been made secondhand by previous use in or about the person." Replying to the contention of the state that the statute was valid as within the police power of the legislature, Carter, J., for the Illinois Supreme Court said: "The court must be able to see, in order to hold that a statute or ordinance comes within the police power, that it tends in some degree toward the prevention of offenses or the preservation of the public health, morals, safety, or welfare. It must be apparent that some such end is the one actually intended, and that there is some connection between the provisions of the law and such purpose. If it is manifest that the statute or ordinance has no such object but, under the guise of a police regulation, is an invasion of the property rights of the individual, it is the duty of the court to declare it void. City of Chicago *v.* Netcher, supra. The evidence shows conclusively that the business of making mattresses out of secondhand material and remaking old mattresses and bedclothes is not injurious per se to the public health. Indeed, the legislature recognizes this in the act itself, for it permits the remaking or renovating of any mattress, quilt, or bed comforter for one's own use, provided the materials used shall have been first sterilized. This right, however, is denied to the manufacturer and dealer when the article of bedding is for sale. Obviously, if by any process a renovated mattress can be rendered safe for the use of the person remaking it, it can also be made safe for sale. Under the federal and state Constitutions the individual may pursue, without let or hindrance, all such callings or pursuits as are innocent in themselves and not injurious to the public. These are fundamental rights of every person living under this government and the legislature by its enactments cannot interfere with such rights. Frorer *v.* People, 141 Ill. 171, 31 N. E. 395, 16 L. R. A. 492; Ramsey *v.* People, 142 Ill. 380, 32 N. E. 364, 17 L. R. A. 853; City of Chicago *v.* Netcher, supra. The evidence shows that secondhand bedding does not necessarily convey infectious or contagious diseases, and that a lawful business of selling or dealing in such may be carried on without danger to the public health. The test of reasonableness required in a statute based on the police power as to whether it is in violation of the Constitution is whether in its attempted regulation it makes efficient constitutional guaranties and conserves rights or is destructive of inherent rights. Mehlos *v.* Milwaukee, 156 Wis. 591, 146 N. W. 882, 51 L. R. A. (N. S.) 1009, Ann. Cas. 1915C, 1102. It is the nature of the previous use, condition, or exposure in respect to contagious or infectious diseases which makes the use of secondhand material dangerous in the manufacture of mattresses, comforters, and quilts, and not the mere fact of the previous use of such material by other persons. Town of Greensboro v. Ehrenreich, 80 Ala. 579, 2 South. 725, 60 Am. St. Rep. 130. It is eminently proper to require that material be free from germs of contagion and infection before being used in mattresses, comforters, or quilts, whether the material be secondhand or new, but the possible danger to health or safety does not justify the absolute prohibition of a useful industry or practice where the danger can be dealt with with by regulation."

Meaning of "Wrong" in Statute Excusing from Criminal Liability One Who Did Not Know that His Act Was "Wrong."—A New York statute provides as follows: "A person is not excused from criminal liability as an idiot, imbecile, lunatic or insane person, except upon proof that, at the time of committing the alleged criminal act, he was laboring under such a defect of reason as: (1) Not to know the nature and quality of the act he was doing; or (2) not to know that the act was wrong." Penal Law, § 1120. In People *v.* Schmidt, N. Y. 110 N. E. 945, which was an appeal from a judgment convicting the defendant of murder, one of the alleged errors was that the trial judge instructed the jury that "wrong" as used in the statute meant "contrary to the law of the state." Judge Cardoza for the Court of Appeals in a very learned opinion considered at great length the alleged error, and reached the conclusion that the trial judge committed error and that "wrong" had reference to moral wrong. He said: "We are unable to accept the view that the word 'wrong' in the statutory definition is to receive so narrow a construction. We must interpret the rule in the light of its history. That history has been often sketched. In the beginning of our law the madman charged with murder was not acquitted. A special verdict was given that he was mad, and then the king pardoned him. Stephen, History Criminal Law, vol. 2, p. 151; Pollock & Maitland's History of Law, vol. 2, p. 478; 3 Holdsworth, History English Law, 395, 396. There was the same need of the royal pardon for homicide by misadventure or in self-defense Stephen, supra. 'The man who commits homicide by misadventure or self-defense deserves but needs a pardon.' Pollock & Maitland's History of Law, vol. 2, p. 477. 'If the justices have before them a man who, as a verdict declares, has done a deed of this kind, they do not acquit him, nor can they pardon him, they bid him hope for the king's mercy.' Ibid. p. 477. Then came the age of what has become known as the 'wild beast test.' The law of that age and of later days has been adequately stated by Judge Doe in State *v.* Pike, 49 N. H. 399, 6 Am. Rep. 533, and by Judge Ladd, writing for the same court, in State *v.* Jones, 50 N. H. 369, 9 Am. Rep. 242. 'The defendant was not excused unless he was totally deprived of his reason, understanding and memory, and did not know what he was doing any more than a wild beast.' Arnold's Case, 16 Howell's State Trials, 764. As late as 1800, in Hadfield's Case, 27 St. Tr. 1288, that test was announced as law. The first departure from the ancient rule came in 1812. Parke's Case, Collinson on Lunacy, p. 477; Broler's Case, Id. p. 673; Bellingham's Case, Id. p. 636. The capacity to distinguish right from wrong was then put forward as another test. As propounded in these cases, it meant a capacity to distinguish right from wrong, not with reference to the particular act, but generally or in the abstract. Sometimes it was spoken of as a capacity to distinguish between 'good and evil.' Bellingham's Case, supra. See, also, Commonwealth *v.* Winnemore, 1 Brewster (Pa.) 356; Matter of Ball, 2 City H. Rec. 85. Wrong was conceived of as synonymous, not with legal, but rather with moral, wrong. Lord Mansfield told the jury in Bellingham's Case: 'It must be proved beyond all doubt that at the time he committed the atrocious act, he did not consider that murder was a crime against the laws of God and nature.' That became for many years the classic definition. It was followed by Lord

Lyndhurst in Reg. v. Oxford, 9 C. & P. 533. Its phraseology, as we shall see, has survived with little variation in charges and opinions of our own day." After a consideration of further precedents Judge Cardoza continued: "In the light of all these precedents, it is impossible, we think, to say that there is any decisive adjudication which limits the word 'wrong' in the statutory definition to legal as opposed to moral wrong. The trend of the decisions is indeed the other way. The utmost that can be said is that the question is still an open one. We must, therefore, give that construction to the statute which seems to us most consonant with reason and justice. The definition of insanity established by the statute as sufficient to relieve from criminal liability, has been often and harshly criticised. See, e. g., State v. Pike, supra; State v. Jones, supra; Parsons v. State, 81 Ala. 577, 2 South. 854, 60 Am. Rep. 192. Some states reject it altogether. Parsons v. State, supra, and cases there cited. A recent case in Massachusetts (Commonwealth v. Cooper, 219 Mass. 1, 5, 106 N. E. 545), says that an offender is not responsible if he was 'so mentally diseased that he felt impelled to act by a power which overcome his reason and judgment, and which to him was irresistible.' That is not the test with us. Flanagan v. People, 52 N. Y. 467, 11 Am. Rep. 731; People v. Taylor, 138 N. Y. 398, 34 N. E. 275; Penal Law, § 34. Whatever the views of alienists and jurists may be, the test in this state is prescribed by statute, and there can be no other. People v. Silverman, 181 N. Y. 235, 240, 73 N. E. 980. We must not, however, exaggerate the rigor of the rule by giving the word 'wrong' a strained interpretation, at war with its broad and primary meaning, and least of all, if in so doing, we rob the rule of all relation to the mental health and true capacity of the criminal. The interpretation placed upon the statute by the trial judge may be tested by its consequences. A mother kills her infant child to whom she has been devotedly attached. She knows the nature and quality of the act; she knows that the law condemns it; but she is inspired by an insane delusion that God has appeared to her and ordained the sacrifice. It seems a mockery to say that, within the meaning of the statute, she knows that the act is wrong. If the definition propounded by the trial judge is right, it would be the duty of a jury to hold her responsible for the crime. We find nothing either in the history of the rule, or in its reason and purpose, or in judicial exposition of its meaning, to justify a conclusion so abhorrent. No jury would be likely to find a defendant responsible in such a case, whatever a judge might tell them. But we cannot bring ourselves to believe that in declining to yield to such a construction of the statute, they would violate the law. We hold therefore that there are times and circumstances in which the word 'wrong,' as used in the statutory test of responsibility, ought not to be limited to legal wrong. A great master of the theory and practice of the criminal law, Sir James Fitz-James Stephen, in his General View of the Criminal Law of England (pages 79, 80), casts the weight of his learning and experience in favor of that view. See, also, 2 Stephen, History Criminal Law, p. 168. Knowledge that an act is forbidden by law will in most cases permit the inference of knowledge that according to the accepted standards of mankind, it is also condemned as an offense against good morals. Obedience to the law is itself a moral duty. If, however, there is an insane delusion that God has appeared to the defendant and ordained the commission of a crime, we think it cannot be said of the offender that he knows the act to be wrong." Notwithstanding the error of the trial judge in his definition of the word wrong it was held that the error was harmless because of a concession made by the defendant in his motion for a new trial that he was sane.

DANCING HALL AS "PLACE OF PUBLIC ACCOMMODATION, RESORT OR AMUSEMENT."—The Appellate Division of the New York Supreme Court, Fourth Department, has just handed down a decision of unusual interest affecting civil rights based upon what seems to be the soundest reasoning. The decision was rendered in the case of Johnson v. Auburn and Syracuse Railroad Company, 169 App. Div. 864, which was an appeal by a street railway company from a judgment rendered against it for an infraction of a penal statute in refusing to permit the plaintiff, a colored man, to enter and dance in a room used for dancing, at a resort owned and maintained by the defendant. The facts in the case were as follows: At the foot of Owasco Lake near Auburn defendant owns a piece of land known as Lakeside Park. It is maintained as a place of recreation and amusement and for picnics during the summer season, presumably to increase the business of the electric railroad which it operates from Syracuse and Auburn to that point. In this park were flower beds, swing chairs and benches, and near the center of the park was a building or pavilion, a separate and inclosed part of which was used for dancing and another separate part as a restaurant, and through the center was an open passage or corridor in which was a fountain. The pavilion occupied only a small part of the park. For the dancing room defendant furnished an orchestra during the afternoon and evening and a lady superintendent. An attendant stood at the entrance door of the dancing room and admission was gained by purchasing from him buttons which were sold to the men and boys for ten cents each and to ladies and girls for five cents each, and these buttons were worn or displayed as evidence of payment of the admission fee. There was an outside veranda adjoining the dancing room, supplied with chairs and seats for the use of the dancers between dances. Girls came to these dances in the afternoon unattended. The place was carefully policed and great care was exercised by defendant's servants as to who should dance upon the floor and how they should dance, and at times people were ejected from the floor for improper conduct or improper dancing. On the afternoon of June 12, 1914, plaintiff, who was a colored man, visited the park with several other colored men and women. After amusing themselves about the park for an hour or two, plaintiff and two or three of the women entered the open part of the pavilion and watched the dancing through the windows. Finally they decided to enter the dancing room, and some of them to join in the dancing. Thereupon plaintiff left the party and went to the attendant at the entrance door and asked to purchase some dancing buttons. The attendant refused to sell him any buttons and when asked, "What is your reason?" he replied, "Those are my orders . . . from the railroad company." Plaintiff then said, "Very well, I will trouble you no further," and made no further effort to gain admission. Plaintiff had sufficient money in his pocket to pay for the buttons he wished to buy, but did not exhibit it or make any tender to the attendant. At the close of plaintiff's case defendant moved for a dismissal of the complaint upon the ground, among others, that the dancing pavilion was not such a place of public accommodation, resort or amusement as was contemplated by the statute under which the action was brought; and that a tender of the money for the admission fee was necessary before the defendant could be subjected to the penalty of the statute. The motion was denied, and the jury were instructed, in substance, that the dancing pavilion was a place of public accommodation, resort or amusement within section 40 of the statute, and if plaintiff was refused the privilege of dancing there, and consequently was not afforded the full and equal facilities and privileges of that place on account of his color, then plaintiff was entitled to

recover the penalty prescribed by section 41. An appeal was taken by the defendant to the Appellate Division of the Supreme Court which reversed the judgment below and dismissed the complaint saying: "We think the above stated grounds for defendant's motion for a dismissal of the complaint were good, and that defendant was entitled to have the motion granted upon either or both of these grounds. A room or place for promiscuous dancing is not one of the places of public accommodation, resort or amusement specified by name in the statute. . . . If at the time plaintiff applied for admission there had been in progress or about to be given a public exhibition of dancing furnished by defendant for the entertainment of those admitted to witness it, then I think the statute entitled plaintiff to be admitted as one of the audience. It was so held in reference to a skating rink in People *v.* King (110 N. Y. 418), where a colored man sought admission to witness a public exhibition of skating. Plaintiff, however, did not seek admission in order to witness any public exhibition of dancing, but for the purpose of himself participating in the dancing. Was it the intent of the Legislature by this statute to require the proprietor of every place where a public dance is being given to admit all persons who apply and are willing to pay the admission fee? A so-called public dance is usually a private enterprise conducted for the profit of its proprietor. It is a social meeting of the sexes for the pleasure derived from the society of those they know or whose acquaintance they there form as well as from the dancing. Its success depends largely upon bringing together, people who are mutually congenial and who are willing to associate together for the time being for the pleasure they derive from each other's society and acquaintance as well as from dancing together, or upon the same floor. If a proprietor of such a place may not exercise his judgment as to who to admit and to exclude in order to secure the patronage necessary to success in such an enterprise, then it is manifest he cannot control the character of his place or its patronage. It would not be possible to regulate admission by rules applicable to all, which would exclude persons of a certain degree of intoxication, or condition of dress or cleanliness, or standard of character or reputation in the community. It would seem, therefore, that such a business could not be carried on successfully unless the proprietor is able to discriminate according to his judgment as to persons, male and female, he is to admit to such an intimate association with each other. In none of the places of public accommodation, resort or amusement mentioned in the statute by name is there any such intimate association among the persons admitted as patrons or guests, and I think the specification of these places by name enables us to say with reasonable certainty that a dancing hall or room, which is not named, was not intended to be included under the more general words. It is not necessary to say that a place to come under the general words must in all cases be ejusdem generis of those afterward specially named, but I do say that to be covered by the general words, a place not included in those afterward specially named should be one within the mischief to be remedied. In my opinion a dancing hall is not such a place; at least, it is not clear that it was so intended, and defendant should not be subjected to a penalty unless the right is clear. Moreover, if the statute can be so construed as to apply and cover this dancing pavilion, still I think plaintiff was not entitled to enforce the penalty because he did not tender the admission fee. This is a penal statute, and must be strictly construed in favor of defendant."

For a monographic note relating to statutes securing equal rights in places of public accommodation, see 9 Ann. Cas. 69; Ann. Cas. 1912B 860.

New Books.

A Treatise on the Modern Law of Evidence. By Charles Frederic Chamberlayne of the Boston and New York Bars. Volume V. Media of Proof. Howard C. Joyce, Editor. Albany, New York: Matthew Bender & Company. 1916.

With the publication of Volume V, edited by Howard C. Joyce, Mr. Chamberlayne's Treatise on the Modern Law of Evidence is brought to a close. The previous volumes have been published a sufficiently long time to enable those using them to judge of their worth, and the verdict is extremely favorable. They have been widely used by bench and bar to the great satisfaction of both. The volume at hand is a royal octavo of 1232 pages, and besides containing a table of cases of about one hundred thousand citations, treats of such important subjects as public documents, judicial records, copies and transcripts, private documents and writings, ancient documents, the parol evidence rule, the best evidence rule, evidence by perception, and witnesses, their attendance, competency, examination, impeachment and privileges.

Commentaries on the Laws of England. By Sir William Blackstone, Kt. Edited by William Carey Jones, Director of the School of Jurisprudence, University of California. Two volumes. San Francisco: Bancroft-Whitney Company. 1915.

In 1890 the publishers of this edition of Blackstone's Commentaries brought out an edition prepared by William G. Hammond, then Dean of the St. Louis Law School. This work is now out of print, the plates having been destroyed in the San Francisco fire of 1906. After a period of twenty-five years the Bancroft-Whitney Company has seen fit to publish another edition following to a considerable extent the Hammond edition. The new editor has accepted the text as prepared by Professor Hammond from the eighth edition of the Commentaries which was published by the Clarendon Press, Oxford, in 1788, and was the last issued during the author's lifetime. He has also availed himself of a considerable number of the notes collected by Professor Hammond and incorporated in the edition prepared by him. He has not, however, stopped here, but has included in the volumes, first, notes prepared by himself or by other persons for him, intended to show important modern modifications of or innovations on the common law, and, secondly, notes in the form of extracts from the writings of acknowledged authorities on the history and theory, as well as the practice, of the law. The second class of notes the editor considers constitutes a feature of the edition. And indeed they do, for legal scholarship did not end with Blackstone, as is evidenced by the valuable researches of Professor Maitland and others. The judicious use of the writings of such scholars has made the present day Blackstone an even better one than previous generations of lawyers knew. We suggest to law students especially that they do not forget the great legal classic of the common law, and of the various editions we know of none better than the one before us.

"The title by conquest is acquired and maintained by force. The conqueror prescribes its limits. Humanity, however, acting on public opinion, has established, as a general rule, that the conquered shall not be wantonly oppressed, and that their condition shall remain as eligible as is compatible with the objects of the conquest." Marshall, C. J., in Johnson *v.* McIntosh, 8 Wheat. 589.

News of the Profession.

THE FLORIDA BAR ASSOCIATION will meet at Atlantic Beach on June 16 and 17.

THE ASSOCIATION OF PROBATE JUDGES OF OHIO met in annual convention at Columbus, Ohio, on January 11.

THE LOUISIANA BAR ASSOCIATION will hold its next annual convention at Opelousas, La., on May 5 and 6.

NAMED COUNTY JUDGE.—Governor Whitman of New York has named Frank L. Young as County Judge of Westchester county.

KANSAS DISTRICT JUDGES.—The ninth annual meeting of the district judges of Kansas was held at Topeka, Kan., on January 26.

FORMER NEW YORK JUDGE DEAD.—George B. Bradley, formerly a justice of the New York Court of Appeals, died at Corning, N. Y., on January 9.

OHIO STATE BAR ASSOCIATION.—A district meeting of the members of the Ohio State Bar Association was held at Sandusky, Ohio, on February 12.

DEATH OF LAW SCHOOL DEAN.—Clarence Degrand Ashley, dean of the New York University Law School, author and lecturer, died at New York city on January 26, aged 64.

APPOINTED TO BENCH IN OHIO.—Orville Smith of Napoleon has been appointed by Governor Willis of Ohio to the Henry county Common Pleas bench to succeed P. C. Prentiss.

NEW YORK JUDGE DEAD.—Justice James A. Robson of the Appellate Division of the New York Supreme Court, Fourth Department, died at Canandaigua, N. Y., on February 1, aged 65.

MADE ASSISTANT UNITED STATES ATTORNEY.—John H. O'Day has been appointed assistant United States attorney at Buffalo to succeed Donald Bain, who resigned after 18 years of service.

APPOINTED DEAN OF YALE LAW SCHOOL.—Announcement has been made of the appointment of Thomas Walter Swan of Chicago as dean of the Yale Law School, to succeed Dr. Henry Wade Rogers, resigned.

NOTED DETROIT LAWYER DIES.—Julian George Dickinson, a noted District Attorney, and famed in Civil War days as the captor of "Jeff" Davis, died at Detroit on January 11, at the age of 72.

AMERICAN BAR ASSOCIATION.—The executive committee of the American Bar Association has decided to hold the next annual meeting of the association at Chicago on August 30, 31 and September 1.

MARYLAND JUDICIAL APPOINTMENT.—Robert F. Stanton has been appointed by Governor Goldsborough of Maryland as a member of the Supreme Bench of Baltimore city to succeed the late Judge Thomas Ireland Elliott.

NAMED CIRCUIT JUDGE.—Thomas B. Buckner of Kansas City has been appointed by Governor Major of Missouri to fill the vacancy on the Jackson county Circuit Court bench caused by the resignation of Joseph A. Guthrie.

BAR ASSOCIATION ADMITS WOMAN.—By a vote of 34 to 16, the Boston Bar Association on January 7 voted to admit women to membership. Previous applications for admission by the gentler sex had been consistently denied.

NEW FEDERAL JUDGE.—Dr. Henry Wade Rogers, formerly president of Northwestern University and for the last thirteen years dean of the Yale Law School, has been appointed a United States circuit judge by President Wilson.

MADE MUNICIPAL JUDGE.—Arthur Langguth, a member of the Oregon state senate and a practicing lawyer in Portland, has been appointed to the bench of the Municipal Court of Portland, succeeding Judge John H. Stevenson, resigned.

YOUTHFUL APPOINTEE TO BENCH.—Governor Ferguson has appointed William N. Bonner of Wichita Falls as judge of the 30th Judicial District of Texas. Mr. Bonner is but 27 years old and is the youngest man ever to hold the position of district judge in Texas.

VENERABLE JURIST DIES.—William T. Mitchell, formerly judge of the Michigan Circuit Court, United States consul at Quebec, and grand master of the Masonic Grand Lodge of Michigan, died at Port Huron on February 6 at the advanced age of 98 years.

THE YOUNGEST GOVERNOR.—J. A. A. Burnquist, lieutenant-governor of Minnesota, who succeeded Governor Hammond as chief executive of that state on the latter's death recently, is but thirty-six years old. He is the youngest living governor. He graduated from the Minnesota University law school ten years ago and has since been a practicing attorney in St. Paul.

NOTED LAWYER AND WRITER DEAD.—Charles Edward Grinnell, lawyer and writer on legal subjects, died at Boston, Mass., on February 1. Mr. Grinnell was 75 years of age. From 1881 to 1882 and from 1907 to 1909 he was editor of the *American Law Review*.

THE DISTRICT OF COLUMBIA BAR ASSOCIATION has elected the following officers for the ensuing year: President—Adolph A. Hoehling, Jr.; first vice-president—Joseph A. Burpart; second vice-president—William C. Sullivan; secretary—Edwin L. Wilson; treasurer—W. W. Millan.

THE CHICAGO LAW INSTITUTE has elected officers for 1916 as follows: President—Charles T. B. Goodspeed; first vice-president—William S. Johnston; second vice-president—Charles J. O'Connor; secretary—Alfred E. Barr; treasurer—Frederic S. Hebard; librarian—William H. Holden.

NEW JERSEY JURIST HONORED WITH FOURTH TERM.—Governor Fielder has named Justice Charles G. Garrison, of Camden county, for a fourth term as justice of the Supreme Court of New Jersey. Justice Garrison is a brother of former Secretary of War Lindley M. Garrison. If he finishes out his fourth term he will have served a total of 28 years on the bench.

DEATH OF FEDERAL JUDGE.—Oliver P. Shiras, aged 83, for twenty-one years judge of the United States Court for the Northern District of Iowa and author of a number of books on practice in the Federal courts, died at Daytona, Fla., on January 7. He was appointed to the bench by President Garfield and was a brother of former United States Supreme Court Justice George Shiras, now retired.

DEATH OF PHILADELPHIA JUDGE.—Judge Robert Ralston of the Philadelphia Court of Common Pleas, formerly an assistant United States District Attorney, an auxiliary member of the faculty of the University of Pennsylvania Law School and the author and editor of many essays and textbooks on legal subjects, died at Philadelphia on January 22, aged 53.

Woman Translates Old Law Volume.—A remarkable translation of Nicholas Statham's "Abridgement of the Law," an old English book, has been completed by Mrs. Margaret C. Klingelsmith, member of the Pennsylvania bar and librarian of the Biddle Law Library, University of Pennsylvania. Because of its curious mixture of Norman-French text Statham's book, regarded as one of the most important histories of the source of English law, has baffled translators for many years. The original was printed in 1470, and in recent years the attempts of eminent scholars to translate it have failed. For fifteen years Mrs. Klingelsmith has been working on the book, and the announcement of its translation and publication has aroused much interest.

Brandeis Named for Supreme Bench.—President Wilson has nominated Louis D. Brandeis of Boston as associate justice of the United States Supreme Court to succeed the late Justice Lamar. Mr. Brandeis has had no judicial experience, but has practiced law since 1879. He was counsel for Glavis in Ballinger-Pinchot investigation in 1910, and counsel for shippers in the freight rate advance hearings before the interstate commerce commission in 1911. He was counsel for the people in proceedings to test the constitutionality of the Illinois and Oregon women's ten hour laws and the Ohio nine hour law. In many of his most important cases, Mr. Brandeis has given his services free of charge.

Kansas State Bar Association.—The thirty-third annual meeting of the Kansas State Bar Association was held at Topeka, Kan., on January 27 and 28. The subject of the president's address, delivered by C. L. Kagey, of Beloit, was "The High Cost of Justice." Other addresses on the program were as follows: "State and Federal Control of Carriers," by Edward J. White of St. Louis, general solicitor for the Missouri Pacific Railway; "The Lawyer, Outside of Court," by T. A. Moxcey of Atchison; "Free Justice," by Charles D. Shukers of Independence; "The Bulk Sales Law," by C. L. Hunt of Concordia; "A Corporation's Contracts and the Courts," by George T. McDermott of Topeka; "Trust Estates in Emporia," by Gilbert H. Frith of Emporia.

New York State Bar Association.—The thirty-ninth annual meeting of the New York State Bar Association was held at New York city on January 14 and 15. The President's address was delivered by Alphonso T. Clearwater of Kingston. Justice Charles E. Hughes of the United States Supreme Court delivered the annual address, his subject being "Some Aspects of the Development of American Law." The closing feature of the convention was a dinner in honor of Elihu Root, president of the American Bar Association, at which the speakers included Jacob M. Dickinson of Chicago, Secretary of War under President Taft; Robert C. Smith, K. C., of Montreal, representing the Canadian Bar Association; Henry L. Stimson of Brooklyn, former Secretary of War; and Almet F. Jenks of Brooklyn, Chief Justice of the Appellate Division of the Supreme Court, Second Department. The following officers were elected: President, Morgan J. O'Brien; vice-presidents—James Byrne, Edgar M. Cullen, Danforth E. Ainsworth, Thomas Spratt, William A. Mackenzie, Abraham L. Kellogg, Thomas Raines, Porter Norton and Charles Philip Easton; secretary—Frederick E. Wadhams, and treasurer—Albert Hessberg.

"All illegitimate children are the fruits of crime; differing, indeed, greatly, in its degree of enormity." Taney, C. J., in Brewer *v.* Blougher, 14 Pet. 198.

English Notes.

Liability to Employees of Railroad in Possession of Military Authorities—An interesting point has recently been decided by the Seventh Chamber of the Tribunal of the Seine. The question was whether a railway company, the military authorities having taken possession of the services, is responsible for accidents which might happen to their servants while at work. On August 3, 1914, an employee of the Compagnie du Nord was crushed during shunting operations. He claimed compensation for his injuries from the company. The company disputed liability on the ground that the mobilization had militarized all its services. M. Lantz, the president of the tribunal, has decided against the company, holding that "mobilization did not completely suspend the ordinary operations of the company, and did not modify the commercial character of the enterprise; for this reason the personnel of railway companies could not be deprived of the indemnities provided for by the law of the 9th April, 1898, as far as accidents are concerned and to which employees are victims in the ordinary course of their work."

Guide to Spanish Law.—Under the direction of the Librarian of Congress there is being published an admirable series of guides to the law and legal literature of foreign countries, says the *Law Times*. The latest addition to the series relates to Spain. It has been prepared by Mr. T. W. Palmer, who was awarded a scholarship by the Harvard University Law School, enabling him to devote a considerable time to the work and to pay a visit to Spain for the purpose. Few English lawyers know anything about Spanish law, although it is one of the oldest developed systems of law. There are still some remnants of it within the British Empire, as was shown a short time ago in the Journal of Comparative Legislation. Spanish Law is a composite of Roman, Germanic, and Arabic elements, with a strong infusion of canon law. It is being adapted to modern requirements by attention to the industrial and commercial sections, and by the adoption of measures of social and economic reform. Mr. Palmer has dealt with the subject in all its aspects. He traces the history of the system of law, deals with its philosophy, notes its treatment of the problems of the day, and shows what are the authorities upon any branch of Spanish law. The result is a valuable work of reference.

Insurance of Ship against War Risk.—War risk is, of course, one of the marine insurances that is now in universal operation. The decision of the Court of Appeal, consisting of Lords Justices Swinfen Eady, Bankes and Warrington, in the recent case of Holland Gulf Stoomvaart Maatschappj *v.* Watson, Munro, and Co., Limited, may, therefore, be expected to require to be referred to whenever a charter-party contains words similar to those in question in that case. The case came first before Mr. Justice Bailhache, and the decision pronounced by his Lordship on the meaning of the extremely elliptical expression "war risk, if any required, for charterers' account" was that the charterers of the steamship were bound to provide and pay for a war risk policy, which obligation they had neglected to perform. That, in the opinion of the learned judge, was the business meaning of "for charterers' account." It was the German cruiser *Karlsruhe* which was responsible for the sinking of the steamship. And the charterers' failure to insure against war risk was, in the words of Mr. Justice Bailhache, because "they did not anticipate that the Germans would so violate international law as to sink a neutral vessel with an English cargo not contraband, and they preferred not to insure." That was the

charterers' interpretation, apparently, of the phrase "if any required." They considered the risk so small as to be negligible, an estimate which events unfortunately contradicted. In the Court of Appeal, however, a different conclusion was arrived at with regard to the true construction to be placed upon the ambiguous provision in the charter-party that came up for consideration. Taking the charter-party as a whole—the material clauses of which are stated in the judgment of the learned judge in the court of first instance (see 113 L. T. Rep. 178)—the Court of Appeal adopted the view that the charterers had to bear the cost of the insurance against war risk—a liability which was admitted by them—but that the insurance itself had to be effected by the owners and not by the charterers. This view was supported, in the opinion of the learned Lords Justices, by the direction contained in clause 2 of the charter-party that the owners should provide and pay for insurance on the vessel. Further, clause 23 had to be regarded, the terms of which were to the effect that nothing in the charter-party was to be construed as a demise of the ship to the charterers; but that the owners were to remain responsible for the navigation, insurance, crew, and all other matters "same as when trading for their own account." What was, therefore, the meaning of "for charterers' account" in the opinion entertained by Mr. Justice Bailhache was given the go-by by the learned judges of the Court of Appeal. That phrase did not override the earlier provision of the charter-party. All that it did was to throw the cost of insurance against war risk, when duly effected—which cost would otherwise have had to be borne by the owners—upon the charterers. That specific insurance having thus to be effected by the owners at the charterers' charge, the latter were not in default in not effecting the same, contrary to the opinion that was expressed by Mr. Justice Bailhache.

SENSATIONAL MURDER TRIAL RECALLED.—The death in America of Edward O'Meara Condon will recall one of the most sensational criminal trials in England of the last century. On September 18, 1867, a prison van, while being driven to the county gaol at Salford from Manchester, was attacked with a view to the rescue of two prisoners, Kelly and Deasy, who were leaders of the Fenian insurrectionary movement. A party of thirty men rushed forward with revolvers, shot one of the horses, and the police, being unarmed, fled. An attempt was made to open the door of the van, but this failed, and meanwhile the police came back accompanied by a large crowd. Sergeant Brett, the policeman inside the van, refused to give up the keys; a pistol was placed to the keyhole for the purpose of blowing open the lock, the bullet passed through Brett's body, and he fell mortally wounded. Kelly and Deasy were released and never recaptured. Several of the rescuing party were seized and almost stoned to death. The prisoners when brought before the magistrates for committal were placed at the Bar in irons. Their counsel protested against this treatment. The Bench decided that the handcuffs should be retained, and the audience burst into applause. On October 28, 1867, five men, of whom Condon was one, were arraigned for the wilful murder of Sergeant Brett. That the men who really belonged to the rescuing party were legally guilty of murder was indisputable. But the moral guilt, heavy enough in any case, would be very different, if instead of mischance, cold-blooded design had led to Brett's murder. The Crown alleged that he was deliberately shot at. The solemn assertion of the men who were present is that Brett was shot by the bullet which entered the keyhole. All the five prisoners were arraigned and tried together on the one indictment, and were convicted on the one trial in the one verdict. The evidence was tainted, and the trial took place amid a hurricane of public passion and panic. Before sentence, the prisoners each addressed the court. Maguire denounced the reckless swearing of the witnesses, said he had served his Queen faithfully as a marine, was loyal to her still, and bore a high character from his commanding officer. Condon was the last to speak, and used a phrase that has become historic. "I have nothing," he said, in conclusion, "to regret or to take back. I can only say 'God save Ireland.'" His companions advanced to the front of the dock, and, raising their hands, repeated the cry, "God save Ireland." Maguire was released and Condon reprieved. But the authorities decided that the three other men, tried on the same evidence and identified by the same witnesses as Maguire, should be hanged. The commutation of the sentence on Condon and his subsequent release, though in themselves highly commendable, added to the bad effects produced in Ireland by the execution of the other men, for they gave rise to the belief that he had been spared only because the aid of the American government—he was a United States citizen—might have been invoked on his behalf.

PARDON AND THE DISPENSING POWER.—A lay contemporary, in an article entitled "The Dispensing Power in India," severely criticises the action of the Viceroy of India, to whom every capital sentence comes before execution, in interposing in no fewer than sixteen cases out of twenty-three in which sentence of death had been passed after trial and conviction by a special commission of three judges to try the Lahore conspirators, constituted under the Defense of India Act, and in commuting the death sentences into sentences of transportation for life. The article supplies yet another instance of the ignorance so general, even in well-informed, cultivated circles, of the leading facts of English constitutional history by characterizing the conduct of the Viceroys as "a random use of the prerogative of mercy, which, exercised on such a sweeping scale, begins to approach the dispensing power and pardons of the later Stuarts, to which our forefathers so vigorously objected." The writer fails to distinguish the difference between such a pardon and a dispensation. The prerogative of pardon, which is left untouched by the Bill of Rights and in the Act of Settlement only affected by the provision which forbids a pardon to be pleaded to an impeachment, is a discretionary power to remit or modify punishment for a public offense actually committed—a power which must not be exercised so as to infringe personal rights or secure the offender in the proceeds of his wrongdoing. The dispensing power, declared by the Bill of Rights to be illegal "as it hath been assumed and exercised of late," is the pretended power of dispensing with laws or the execution of laws by Royal authority, a prerogative by which the King might dispense with an individual breach of a penal statute by which no man was injured, or with the continuous use of a penal statute enacted for the Crown's exclusive benefit. Chief Justice Vaughan in the case of Thomas *v.* Sorrell distinguishes a dispensation or license (two terms which he seems to regard as convertible) as meaning the permission to do or to abstain from doing that which legalizes what it would otherwise be unlawful to do or leave undone from a pardon which frees after conviction from the penalties of wrongdoing. The essential characteristic of a pardon is that it must not be anticipatory. The Middle Ages furnish us with instances of charters of pardon for offenses not yet committed which were in fact licenses to commit crime, and the Act of Settlement points to the same danger when it enacts that a pardon may not be pleaded in lieu of an impeachment. No distinction can be more marked than that between the prerogative of pardon which is still intact. "The Queen," writes Mr. Bagehot in 1872, "could pardon all offenders," and the dispensing power "of which we may say, with Sir William Anson, any exercise subsequent to the

Bill of Rights must take place by authority of Parliament, not by the prerogative of the Crown, and that we must go back to some considerable time before 1688 to find cases of dispensations which would be lawful."

Neutral Ships and Belligerent Envoys.—Sir Edward Grey, in reply to a question addressed to him in the House of Commons, said that the removal of Colonel Napier and Captain Wilson from a Greek ship by an enemy submarine was not contrary to the generally accepted rules of international law. The rule that permits a neutral vessel to be the bearer of diplomatic dispatches between a belligerent government and its diplomatic agents in a neutral country also permits such a vessel to transport diplomatic agents themselves. The taking of Messrs. Slidell and Mason, the diplomatic agents of the Confederate States in the American Civil War, at London and Paris in 1866 from the British mail steamer *Trent,* was the subject of an attempted justification by the Federal Government, which was traversed by Lord John Russell on the ground that as accredited diplomatic agents of a Government which had only reached the stage of belligerent recognition, they were not entitled to that free transport admitted to belong to the representatives of regularly organized sovereignties. If that contention were unsound, the fact remains that Messrs. Slidell and Mason were private persons, and as such entitled to transport as ordinary passengers in a mail packet of a neutral. This seizure in that capacity was certainly illegal, and its illegality was demonstrated by the late Sir William Harcourt, writing as "Historicus" in the *Times,* when he said: "It would seem to justify or may be taken to encourage the captain of a Federal warship to seize the Dover packet and carry her into New York for adjudication in case Messrs. Slidell and Mason should take a through ticket for Paris." The carrying, however, of dispatches (excepting such as are diplomatic and consular) for the enemy is illegal, dispatches being defined by Lord Stowell as the official communications of official persons in the public offices of the Government: (The *Caroline,* 6 Rob. Adm. 464-470). Prohibited dispatches may be defined to be such as are military and naval, or such as pass between the belligerent Government and the official of its colonies and dependencies. The same principle which denies to a neutral the right to bear noxious dispatches for a belligerent prohibits the transport of certain classes of persons in his service, and justifies the seizure of their persons, more especially if they be bearers of such dispatches, and, in some cases, the seizure and confiscation of the ship: (The *Atlanta,* 6 Rob. Adm. 440). While no penalty attaches to a neutral who receives on a regular packet boat individuals who come on board as ordinary passengers or pay for their berths as such, even if it should transpire that they are officers (as in the cases of Colonel Napier and Captain Wilson) of either the one or other of the combatants, military or naval persons, coming on board as such and travelling at the expense of a belligerent Power, may not only be seized, but must be carried by a neutral at the peril of seizure and confiscation. The permission of the Greek mail boat to continue her voyage unmolested was evidently due, not to considerations of international morality, but of diplomacy.

Centenary of Jury Trial in Scotland.—In the lay press notice has been taken of several interesting centenaries which, despite the distractions of the war, are likely to receive attention during the present year. Those that have thus been referred to are for the most part literary centenaries, but in the domain of law one interesting event which took place in Scotland one hundred years ago is also worthy of being borne in mind. This was the first trial in the Jury Court, a tribunal which had been established by a statute of 1815. Scotland had, of course, long been familiar with jury trials in criminal cases, and, since the Union of 1707, with juries in comparatively rare Exchequer causes, but juries in civil actions were unknown, although, as Cockburn says, in his Memorials, their introduction had for some time been much discussed. The court, which lasted as a separate tribunal till 1830, when it became merged in the Court of Session, was modelled on English procedure, and was presided over by a Scotsman, William Adam, who was a member of the English Bar, and had been standing counsel for such clients as the East India Company and the Bank of England, and had also been in good general practice. Associated with him were two of the judges of the Court of Session, who were supposed to keep Adam right on questions of Scots law, while he, with his familiarity with jury practice in England, was to guide the new tribunal in its general proceedings. At the opening of the court on January 22, 1816, Adam delivered an interesting allocution explanatory of its functions, and taking care to make quite clear that the first duty of its judges was so to act as not to disturb in any respect "the ancient and admirable system of the municipal law of Scotland handed down to us by our ancestors and secured to us by the Act of Union, constituting, as it were, a charter for the preservation of the jurisprudential system of Scotland." The first case actually tried resulted in a verdict that a "steam engine of an improved construction in the vicinity of the New Town of Edinburgh was not injurious to property." Jeffrey and Cockburn were the most successful advocates who appeared in the Jury Court, and their forensic combats attracted many spectators. Being, as has been said, framed on the English model, the jury consisted, and still consists in civil cases, of twelve men, whereas in criminal trials the number of the jury has always been fifteen. The introduction of jury trial in civil causes was not universally welcomed. Sir Walter Scott, who always disliked interference with the old Scots law or its system of administration, entertained grave doubts as to the expediency of the innovation, and, indeed, he never could understand how twelve laymen were any better qualified for getting at the truth than a trained lawyer accustomed to the investigation of facts and the careful sifting of evidence. Curiously enough, however, what excited in some minds the greatest outcry against the new procedure was that which required the verdict to be the unanimous finding of the twelve men. On a variety of grounds this was keenly opposed, but that which carried most weight with the average Scotsman was the religious objection, for it was said that where there was a division of opinion among the members of the jury, the minority must necessarily perjure themselves by sacrificing their conscience to that of the majority! Unanimity was, however, insisted on for many years, but eventually the objectors had their way, and now by section 48 of the Court of Session Act, 1868, "a jury may at any time, being not less than three hours after it has been inclosed, return a verdict by a majority of its members."

Action against Executor for Breach of Promise of Marriage.—In the recent case of Quirk *v.* Thomas some interesting points of law arose. The plaintiff issued a writ against the original defendant, claiming damages for breach of promise of marriage, and, the defendant having died, continued the action against the executor. An action for breach of promise of marriage, where no special damage is alleged, does not survive against the personal representatives of the promisor: (Finlay *v.* Churney, 58 L. T. Rep. 664; 20 Q. B. Div. 494). The plaintiff, however, claimed that, in giving up a valuable business in order to marry the defendant, she had suffered such special damage as gave rise to a cause of action. The Court of Appeal held that there was no corroboration of the particular promise in consequence of

which the plaintiff had given up her business, and that in itself was enough to dispose of the case, but the court went on to consider the questions of law raised—namely, (1) whether an action for breach of promise whereby special damage has arisen can be maintained against the executor of the person who has broken the contract; (2) whether the loss sustained by the plaintiff through giving up her business could properly be treated as special damage, and whether it was damage arising from the breach. As regards (1) reliance was placed by the plaintiff's counsel on certain passages in Chamberlain *v.* Williamson (2 M. & S. 408) and Finlay *v.* Churney (sup.). Lord Justice Swinfen Eady, however, treated those passages as dicta only, and came to the conclusion that the action will not lie against the executor even if special damage is proved. The action of breach of promise was an anomalous one, said his Lordship, and, as damages had never yet been recovered after the death of the promisor, the court would probably take the view that the action ought not to be further extended by judicial decision. Lord Justice Phillimore, for the purposes of the case and without desiring to express any opinion of his own, was content to take it to be the law that in this case an action would lie for special damages, and Lord Justice Pickford assumed that there may be special damage affecting the plaintiff's property of such a nature as to support an action against the promisor's executor. On the other point, Lord Justice Phillimore (with whom Lord Justice Pickford concurred) said that the "loss did not arise from the breach of promise. It was not something which she gave up because the man refused to marry her; it was something which she agreed to give up in order to induce him to promise—something by which she bought the promise"; and the only way in which that could benefit the plaintiff was as a measure of damages, for, "if it was worth her while to give up the business in order to get the man to marry her, it might be suggested that her loss by reason of his refusal was at least as grave." The main difficulty in the case arose from certain passages in the judgments in Finlay *v.* Churney (sup.). At p. 501 Lord Esher, M. R., said: "Then it is also said by the plaintiff that she had given up a better place, and if at the time of the contract to marry the plaintiff had agreed to give it up at once or before the wedding day, it might be special damage;" but this must be read in conjunction with another passage of Lord Esher at p. 499: "I have grave doubts whether it would not be the wisest course to say that even with special damage the action will not lie, but I am not prepared upon the authorities to go that length. I can hardly conceive of a case where such special damage could arise as would support the action." Again, at p. 507, Lord Justice Bowen, delivering the opinion of himself and Lord Justice Fry, said: "It would seem to follow that with the death of the promisor all claim to damages of an exemplary or sentimental kind ought to cease, and that such damages only ought to be left as represent compensation for a temporal and measurable loss." Assuming that these passages gave the plaintiff here a right of action in respect of special damages, Lord Justices Phillimore and Pickford agreed that the loss did not flow directly from the breach, within the words of Lords Justices Bowen and Fry in the same case. As Lord Justice Swinfen Eady expressed the opinion that the action on special damage would not lie, and the other members of the court came to no conclusion on that point, the practical result of the case would appear to be that an action of breach of promise founded on special damage will not lie against the executor of the promisor, but the case can scarcely be treated as a conclusive ruling to that effect.

Obiter Dicta.

OUT OF TUNE.—Musick *v.* Musick, 88 Va. 12.

AN EXCHANGE OF NOTES.—German *v.* United States, 137 Fed. 817.

SELLING INDEPENDENT PRODUCTS ON THE QUIET.—Standard Oil Co. *v.* Slye, 164 Cal. 435.

EXECUTIONS AGAINST THE HIGH AND THE LOW.—Levy *v.* Rich, 106 La. 243; Levy *v.* Ford, 41 La. Ann. 873.

FIGS FROM THISTLES.—In Georgia Fruit Exchange *v.* Turnipseed, 62 So. 542, it appeared that the defendant was a fruit grower.

HOW OFTEN?—"The Reno County bar does not have an annual banquet every year."—From the Hutchinson (Kan.) *News* of Jan. 17, 1916.

LYING IN WAIT FOR MEXICO.—"To constitute lying in wait three things must concur, to wit, waiting, watching and secrecy." See Riley *v.* State, 9 Humph. (Tenn.) 646.

BETTER AN OYSTER THAN THE REVERSE.—"Neither do I believe that a trial court should imitate an oyster."—Per Burke, J., in Booren *v.* McWilliams, 26 N. Dak. 586.

NOT ALWAYS.—In Birmingham R., etc., Co., *v.* Girod, 164 Ala. 10, it is declared that the loss of a wife's voice through personal injuries is an element of damages suffered by her husband in consequence thereof. Could not the fact be better pleaded in mitigation of damages?

PRINTING ON LAND.—The Canadian Annual Digest for 1909 contains on page 186 this startling statement: "The defendant paid for a permit to cut in 1908, on a parcel of land across which was printed the following: 'This permit becomes cancelled by the sale or lease of the land.'"

ALSO IN ACCORD WITH THE WEIGHT OF EXPERIENCE.—"It is urged by the complainant in extenuation of this conduct that the games played in the hotel were with gentlemen, and that there was only a penny 'ante,' with a chance to lose only a small amount of money. However, the weight of the proof shows that it was possible to lose a good deal of money—several dollars—at each sitting, and that such was in fact the result."—See Wyatt *v.* Brown (Tenn.) 42 S. W. 478.

OUT OF THE MOUTHS OF BABES AND SUCKLINGS?—Judge D. P. Dyer, of Sedalia, Mo., is credited with the following yarn:

At a recent examination of 151 men who wished to become citizens of the United States he had asked one applicant the usual questions and had received satisfactory replies, although it was evident that the man had a hard time fathoming some of the questions. At last he asked:

"And now, do you belong to any society or organization inimical to the government of the United States?"

This was too much for the man and he was silent. Judge

Dyer explained the meaning and again asked the question. A gleam of understanding overspread the face of the man and he replied:

"Yes, judge, I'm a Democrat."

IN LAW SHEEP'S CLOTHING.—"Is not a general demurrer too diabolical to have any claim upon modern emotion? Stated in the most partial terms, its merit would seem to stand thus: 'Demurrer is the only legal devil always present and always ready; every logical universe requires one such character; some destructive work has to be done; and how can it be done if there is only resistance, no co-operation, not even sympathy?' But the spirit of modern procedure is altogether constructive and conservative, and though it gives the devil his due it takes care to restrict his dues as much as possible."—Per Bleckley, C. J., in Ellison *v.* Georgia R. Co., 87 Ga. 704.

GERMANE TO THE SUBJECT-MATTER?—State *v.* Baughn, 162 Iowa, 308, was an action to procure the removal of the defendant from the office of mayor of the city of Harlan, Iowa. One of the specifications of alleged misconduct on the part of the defendant was adverted to by the court as follows: "It was for the electors of Harlan to say whether they wanted 'Bill' Baughn for mayor, and if a majority so decided, it is not for the courts to determine whether in electing him they exercised good judgment. Of course, there are some things he might well have omitted; for instance, this piece of alleged wit, included in a notice requiring dogs to be registered and wear collars: 'Also you two-legged dogs that are visiting your neighbors' wives when their husbands are away, look out or the marshal will catch you with your shoes off.'" The following query naturally arises: If any one of the "two-legged dogs" referred to had been caught by the marshal, could he have claimed want of notice?

FROM A MISSISSIPPI BRIEF.—We have often wondered why in some of the state reports, the briefs of counsel are printed in full. Certainly, as a rule, they are none too interesting reading, even assuming that they are masterpieces of erudition. If, however, something like the following was more often found to dissipate the gloom of dry legal argument, it might well be said that the printing of briefs was justified. In Whitehead *v.* Kirk, 104 Miss. 804, counsel for the appellee points his argument in this fashion:

"Distinguished counsel surely is not attempting to sidetrack the court, or to play the role of 'Old Sarcasm,' in that distinguished book 'Flushtimes of Mississippi and Alabama,' written by Judge Baldwin, when Old Sarcasm had a young lawyer fined before a justice of the peace for reading from Story on Contracts, because it was Yankee law, and stated that it was an insult to the Mississippi justice, trying a Mississippi case, to read to him a Massachusetts law, referring to the title page of the book to show that the book was published in Boston, Mass. The justice very promptly fined the young man twenty-five dollars for contempt of court. Is distinguished counsel attempting to play this role when he says that he has no time to refer to the decisions of other courts because we are trying a Mississippi case before a Mississippi judge, and have plenty of Mississippi law?"

HE PAID THE FREIGHT.—Far be it from us to doubt the veracity of the former justice of the Oklahoma Supreme Court to whom we are indebted for the following personal recollection: "A. C. Towne and the writer drifted into the court of J. J. Hughes, who was Judge of the county court in Alva, Oklahoma, one afternoon in 1899 to argue a demurrer. On coming in we found that Chris Montel, who was then county attorney, was prosecuting a young fellow by the name of John Dustin, who was charged with having stolen three hogs at Isabella in Woods County, and having loaded them into a wagon and taken them to Waukomis to the railroad, where he sold them for $21.50. The defendant, a young fellow about 21 years of age, had no counsel and had virtually entered a plea of guilty. Under the statute the value of the property being in excess of $20 he was guilty of a felony and was headed direct to the penitentiary. Towne and myself, grasping the situation and seeing that the young fellow was without counsel, and being acquainted with his people, asked the court for permission to talk to the boy and see if a defense could not be found for him. This was granted. The trial was proceeded with and we established by witnesses that it was worth $3.00 to haul the hogs from Isabella to the railroad, secured credit therefor upon the price received, reduced the offense thereby to a misdemeanor, and justice in Oklahoma once more triumphed."

OBITER.—Had Judge Lamm of the Missouri Supreme Court practised what he preached in Nalley *v.* Home Ins. Co., 250 Mo. 475, the "Obiter Dicta" column of this magazine would have been the poorer by many gems. Said he in that case: "A court has nothing to do with what is not before it; a court should not judicially decide what is not judicially presented. To hold one way or the other on the constitutionality of a fire insurance law in a case where fire insurance and a fire insurance policy are not the subject-matter of litigation, is to inadvertently step aside into obiter. The decision, therefore, decides nothing. It may illuminate or persuade (as it does) but it cannot control when the question comes up in some case riding off on the point. Its only office is to mark time, it leads nowhere, it goes nowhere. If by ruling the statute constitutional in part and not constitutional in part the decision would come under the doctrine of stare decisis or res adjudicata and thus be a precedent to be followed below or above, I would be inclined to agree to it, as now advised, but as it can have no such effect, I mark myself as saying nothing on the question of constitutionality. If the thing 'were done when 'tis done then 'twere well it were done quickly' (by a side stroke, as my brother does it). But as 'tis not done when 'tis done, then were it not well it were not done at all till the time is ripe to so do it that it will be done once for all? 'Reserve your fire,' said the Bunker Hill officer, 'till you see the white of their eyes'—that is, till you have a mark to shoot at in close range. May not judicial 'fire' profit by that advice?"

Correspondence.

UNIFORM CONDITIONAL SALES LAW.

To the Editor of LAW NOTES.

SIR: I notice in the February number a reference to a Uniform Conditional Sales Law. This matter was mentioned before the Committee on Commercial Law of the Conference of Commissioners on Uniform State Laws at its last session at Salt Lake City, and probably will be considered at its next meeting preliminary to the next Conference to be held in Chicago in August, which meeting will probably take place in New York in April or May.

New Orleans. W. O. HART.

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Parts of two pages from a note in Ann. Cas. 1915B entitled

SIMILARITY OF NAME

AS CONSTITUTING INFRINGEMENT OF TRADEMARK OR TRADE NAME

...one slight care which is required would be likely to select one article for the other."

FOOD PRODUCTS AND CONFECTIONERY.

Names Held to Infringe.

In each of the following cases, involving the name applied to a food product or confection, the name first given was held to be infringed by the name which follows:

"Allegretti"—"Allegretti,"

Rubel Allegretti v. Allegretti Chocolate Cream Co. 117 Ill. 129, 52 N. E. 487 (use of name on candy);

"Boston Wafers"—"Boston Wafers,"

C. A. Briggs Co. v. National Wafer Co. 215 Mass. 100, Ann. Cas. 1914C 926, 102 N. E. 87 (name had acquired secondary meaning in certain localities; injunction against use by defendant in those localities);

"Ceresota"—"Cressota,"

Northwestern Consol. Milling Co. v. Mauser, 162 Fed. 1004 (flour);

"Ceresota"—"Certosa,"

359 (canned goods);

"Junket Tablets"—"Junket Capsules,"

Hansen v. Siegel Cooper Co. 106 Fed. 691 (preparation used for making desserts; no similarity of dress);

"Kramer's High Patent"—"Kramer's Chancellor, Highest Patent;" "Genuine Kramer's Flour,"

Ætna Mill, etc. Co. v. Kramer Milling Co. 82 Kan. 679, 109 Pac. 692, 28 L.R.A.(N.S.) 934 (flour);

"Liebig"—"Liebig,"

Liebig's Extract, etc. Co. v. Liebig Extract Co. 180 Fed. 688, 103 C. C. A. 654 (use of Baron Liebig's name on meat extract held exclusive in complainant);

"Marshmallow Dainties"—"Marshmallow Dainties,"

National Biscuit Co. v. Pacific Coast Biscuit Co. (N. J.) 91 Atl. 126 (biscuit);

"Maizena"—"Maizharina,"

Glen Cove Mfg. Co. v. Ludeling, 22 Fed. 823 (corn flour; similar...

...how to do it. It follows that the defendant must be held to have gone beyond the line of fair competition."

Names Held Not to Infringe.

In each of the following cases, involving the name applied to a food product or confection, the name first given was held not to be infringed by the name which follows:

"Burgess's Essence of Anchovies"—"Burgess's Essence of Anchovies,"

Burgess v. Burgess, 3 De G. M. & G. (Eng.) 896 (right to use own name carried to ... limit);

Co. v. Walker, 115 Fed. 822.

"Oakes What Is It"—"Hawthorne's What Is It,"

Oakes v. St. Louis Candy Co. 146 Mo. 391, 48 S. W. 467 (candy; no deception);

"Pettijohn's California Breakfast Food"—"Eli Pettijohn's Best,"

American Cereal Co. v. Eli Pettijohn Cereal Co. 72 Fed. 903, *affirming* 76 Fed. 372, 46 U. S. App. 188, 22 C. C. A. 236 (common right to use name; no deception);

"Rose Vanilla Puddine"—"Rose Vanilla Pud...

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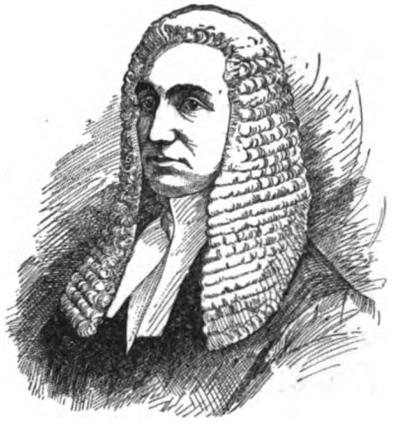
Baron Reading

Lord Chief Justice of England and Head of the Anglo-French Loan Commission



LORD READING, at a reception tendered by the Association of the Bar of New York city, October 14th, delivered a remarkable address. The comment of this foremost English lawyer on a situation which more and more perplexes his American brethren will be read with wide interest.

"Blackstone said that the common law can only be understood if its history is studied," said Lord Reading, as quoted in the New York *Times*. "I am sure that no one has given time to the study of our English history without understanding how essential it is to know what led to the great pronouncements of the common law. But the common law is a great labyrinth without such a study. If you understand its history, the common law appears symmetrical with alterations marking the stages of its development, but the whole is harmony, and once you get the key to the solid principles which stand for justice and liberty the rest is easy to understand.

"We, in our country, have striven for thirty or forty years to administer the law in the full understanding that it is really secondary to justice. We started with the idea that a court of justice is intended to administer justice. The law is there for those to study who wish to give advice and who wish to follow the safe course, and for Judges to understand in order to have the principles in passing on facts.

"Speaking for myself, I am strongly impressed day by day with the undesirability of the constant reporting of decisions which lay down no new principle, but only report the application of old principles to new facts. I think that I recognize a feeling of satisfaction which the members of the Bar would have in getting rid of their thousands of volumes of decisions so that they might base themselves on the solid principles of the law.

"This system of citing corroborating cases has been changed with us. We now strive to get at the merits; to allow no technicalities to prevent the court from perceiving the true facts and arriving at a just decision, notwithstanding all the learned counsel who appear before the Judge. We believe that is the true principle that should animate the courts of justice."

The spirit that animates Lord Reading's speech will be found to pervade every page of RULING CASE LAW. The "system of citing corroborating cases" has been changed here also. RULING CASE LAW cites the great English and American cases which have been annotated with references to all the lesser authorities. It reaches *the substance* of the thing and is based on what Lord Reading calls "the solid principles of the law." Reason, right and justice are not sacrificed to a labyrinth of local decisions.

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