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THE INDETERMINATE PERMIT FOR PUBLIC UTILITIES IN TENNESSEE

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With the advent of changing methods of transportation, the consolidation of smaller public utility companies, and the general economic unrest of the last few years the problem of what kind of a franchise should be granted to public utilities becomes more acute. In the past, two kinds of public utility franchises have been in general use; the perpetual and the short term. The perpetual franchise is as the name signifies; a grant to a concern to furnish service to the public with no limitation on the time of the grant. The short term franchise is one granted for a term varying in different communities from ten and fifteen to twenty and twenty-five years.

The experience of communities with either the perpetual or the short term franchise has shown that each kind is lacking in several particulars. Neither has proved satisfactory as a solution of the differences obtaining between the municipality and public on the one hand and the utility and investor on the other. With the short term franchise the utility managers have had to participate in politics especially during the years at the end of the term; the service has been allowed to deteriorate if there was any doubt of securing a renewal; the investor's money was insecure under such a system; rates were adjusted to recompense this risk, and the public paid the bill. With the perpetual franchise the trouble has been of a different nature yet just as bad. The managers of the utility became heedless to the needs of the public, economic conditions changed so that a rate which was once just and reasonable was no more, yet the public was powerless to compel the rate to be lowered; the growth of the community perhaps made it

desirable to change the location or design of the physical properties of the utility, but it could not be done under a perpetual franchise and the public paid this bill. One might enumate many more harmful results from the use of these two forms of franchise but enough has been given to suggest the general harm resulting.

In recent years many states, along with Tennessee,[1] have provided public utility commissions whose duties vary in the several states but in general may be said to be bodies of regulatory control over public utilities carrying on intra-state business. These commissions have done much toward working out justice between the five interested parties in public utility regulation, viz., the public, the municipality, the state, the utility and the investor and given competent commissioners these bodies, it seems, will continue to do much toward the solution of the problem. The Tennessee Railroad and Public Utilities Commission is not a court but is an administrative body,[2] which indicates that it is the duty of the Tennessee Commission to use initiative in settling the difficulties arising among the five interested parties. All this is in line with the new form of franchise which may be termed the inderterminate permit. There are as many kinds of indeterminate permits, terminable franchises, franchises during good behavior, etc., as there have been states to pass laws providing for them but for sake of clearness the definition given by Professor E. Blythe Stason[3] is given. It is "a grant of perpetual duration of the privilege of furnishing a service to the public and of using in connection therewith a portion of the public streets, highways and public places for the construction and operation of the necessary equipment to supply such service, the permit to be subject, however,

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[1] Sections 3059a84—3059a114 of Shannon's Annotated Code Supplement of Tennessee, 1926.

[2] In re Cumberland Power Co. (1922) 147 Tenn. 504, 249 S. W. 818.

[3] "The Indeterminate Permit for Public Utilities" by E. Blythe Stason, Professor of Law, University of Michigan. Vol. 25 Mich. Law Rev. 355.

not only to the police power, the power of eminent domain, and the power of termination for mis-user or non-user, but also to amendment, revocation and termination by purchase upon payment of just and equitable compensation." The theory of the indeterminate permit is that it obviates the difficulties of both the perpetual and short term franchise in that it works out a compromise between the two by making the grant perpetual so long as the service to the public is satisfactory. It might be said that instead of a compromise it is a plan to give all the interested parties what they want; the investor, security and a fair return; the utility, an opportunity to make a fair profit without worrying over franchise years and politics; the state, a healthy non-meddling supervision over the utility and the public; the municipality, a chance to grow and have efficient utility service; and the public, reasonable rates and adequate service. How much of the wished for results are Utopian dreams it is hard to say but, to quite an extent the indeterminate permit is heralded as being better than either of the other two forms if it is properly drawn.[4]

The history of the use of the indeterminate permit shows that to some extent it has been used in Massachusetts in regard to street railways[5] but no provision exists for purchase by the municipality, while revocation may be had. However, the form of permit in use in Massachusetts seems to be working according to Dr. Milo R. Maltbie who said: "Probably nowhere in the world has there been a greater development of street railways, as it has been attended with fewer evils and with more satisfaction to the public generally than elsewhere. Capital has been attracted and yet overcapitalization has been avoided to an unusual degree. Service has generally been consid-

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[4] Stason, "The Indeterminate Permit for Public Utilities" 25 Mich. Law Rev. 354; Wilcox, "The Indeterminate Permit as a Type of Utility Franchise", Journal of Land and Public Utility Economics, July 1926, p. 327; McCune, "The Indeterminate Permit," Vol. 49 Reports Amer. Bar Assn. 629; Fassett, "Regulation and the Franchise", Public Utility Regulations p. 45—edited by Morris Llewellyn Cooke.

[5] Gen. Laws of Mass., 1921, Vol. 2, Chap. 161, Sec. 7-77. Gen. Laws of Mass., 1921, Vol. 2, Chap. 166, Sec. 21 et seq.

ered good and rates ordinarily reasonable."[6]

The federal government has adopted the indeterminate permit for public utilities in the District of Columbia,[7] Porto Rico[8] and the Philippine Islands.[9] There is no provision made for purchase of the property in the event of revocation and in this respect the federal government's indeterminate franchise differs from Professor Stason's definition. However, more recent legislation by Congress has provided for a purchase by the government at the end of a fifty year term grant.[10] This last legislation also varies from Professor Stason's definition in that the term is fifty years and not indeterminate but the purchase plan is similar.

The indeterminate theory with some differences in detail has been adopted in nine states besides Massachusetts, viz., Arkansas,[11] California,[12] Colorado,[13] Indiana,[14] Louisiana,[15] Minnesota,[16] Ohio,[17] Oklahoma[18] and Wisconsin.[19] No one of

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[6] Annual report to the New York Public Service Commission, 1908.

[7] 25 Stat. L. 199.

[8] Laws of Porto Rico, 1923; Act of Congress, March 2, 1917—39 Stat. at Large 964.

[9] U. S. Stats. 895-910.

[10] Act of June 10, 1920, Chap. 285. 41 Stat. L. 1063-67.

[11] General Acts of Arkansas, 1919, No. 571, Sec. 14-15; General Acts of Arkansas, 1921, No. 124, Sec. 15.

[12] Statutes and Amendments to Code of California, 1917, Chap. 578, pp. 820-24.

[13] Colorado Sessions Laws, 1917, Chap. 110.

[14] Burns Anno. Indiana Statutes, 1926, Sec. 12773-83.

[15] Louisiana Session Laws, 1921, Act 94.

[16] Minnesota, Laws of 1915, Chap. 152 and Laws of 1921, Chap. 278.

[17] Page's New Anno. Code, 1926, Vol. 1, Sec. 4000-1 to 15.

[18] Oklahoma Session Laws, 1925, Chap. 102.

[19] Statutes 1919, Sec. 1797t-1-13, and Sec. 1797m-74-87.

the states has adopted it fully equipped with all the generally recommended provisions. In Illinois the Barr Bill, a so-called indeterminate permit measure, was introduced in the legislature in 1925 but it contained several features which at that time raised protests through the press.[20]

So much for the history of the indeterminate permit. In most of the states it has not been used to any great extent, but to Wisconsin where the law was passed in 1907 we may look to ascertain with some certainty how it has worked. The Wisconsin law compels a utility to obtain from the Railroad Commission a certificate of convenience and necessity[21] before carrying on its business and in exchange for this requirement the Supreme Court of Wisconsin in *State ex rel. Kenosha G. & E. Co. v. Kenosha E. R. Co.*[22] said: "The intent was to give the holder of an indeterminate permit within the scope thereof, a monopoly, so long as the convenience and necessities of the public should be reasonably satisfied, yet to secure to the public the benefit of the monopoly in excess of a fair return upon the investment, under proper administration, by insuring to the consumers the best practicable service at the lowest practicable cost - - -."

However, the same court in *Calumet Service Co. v. Chilton,*[23] said: "We should say, in passing that the term 'monopoly' as thus used is to be taken in the sense of a mere exclusive privilege granted for a consideration equivalent; monopoly only in the sense that the field of activity is reserved to the grantee,—the mere element of exclusiveness. A privilege of that sort, where there is a consideration equivalent to the public, though often spoken of as a 'monopoly' is essentially different from one of the character regarded as odious at common law and prohibited in many state constitutions; a privilege from the sovereign to the individuals a mere favor to the

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[20] Editorial in Chicago Daily News, May 23, 1925.

[21] Chap. 87s, Sec. 1797m-74n, Wisconsin Statutes 1913.

[22] 145 Wis. 337.

[23] 148 Wis. 334.

latter for his aggrandizement, or as such and the personal advantage of the individual sovereign grantor, the thing granted being by way of limitation, of what would otherwise be of common right, to the particular grantee. The term 'monopoly' as it has been used to characterize the privilege in question, has been sanctioned in many jurisdictions, they sometimes differentiating it from 'monopoly' in the offensive sense, and sometimes not, it being assumed, from the very nature of the case, that the word would be taken in its popular and common rather than in its technical sense----So while, in common parlance, it is proper to characterize the exclusive privilege in question, a monopoly, it is one purchased by giving an equivalent to the public, as in case of a patent allowed by the federal government. It is a grant for a public, not for a private purpose, and not a grant of that which without it would be of common right. It has none of the essentials of the monopoly so offensive, anciently, in the eyes of the law."

It therefore seems that in Wisconsin the indeterminate permit is looked upon as a so-called "monopoly," to be enjoyed by the utiltiy so long as the utility gives the proper service, and when proper service is not forthcoming then the "monopoly" goes to the municipality upon payment of proper consideration except a taking by police power.

The laws of Tennessee present no severe difficulties to the adopiton of an indeterminate plan in Tennessee. The state is already provided with a Railroad and Public Utility Commission which is the first step towards the operation of the indeterminate permit.

Public Utilities in Tennesse are defined as follows: "The term 'public utility' is hereby defined to include every individual, copartnership, association, corporation or joint stock company, their lessees, trustees or receivers, appointed by any court whatsoever, that now or may hereafter own, operate, manage, or control, within the State of Tennessee, any street railway, interurban electric railway, traction company, all other com-

mon carriers, express, gas, electric light, heat, power, water, telephone, telegraph or any other like system, plant or equipment, effected by and dedicated to the public use, under privileges, franchises, licenses, or agreements heretofore granted, or hereafter to be granted, by the State of Tennessee, or by any political subdivision thereof." (Railroads are expressly excluded).[24]

After defining a public utility the legislature further provided: "No privilege or franchise hereafter granted to any public utility as herein defined by the State of Tennessee or by any political subdivision thereof shall be valid until approved by said commission, such approval to be given when, after hearing, said commission determines that such privilege or franchise is necessary and proper for the public conveneience and properly conserves the public interest, and the commission shall have power, if it so approves, to impose such conditions as to construction, equipment, maintenance, service or operation as the public convenience and interest may reasonably require----."[25] It seems there is nothing in the Tennessee statutes preventing indeterminate permits and it is possible they may now be used.

One of the essentials to the indeterminate permit is furnishing the grantor of the permit with financial power to purchase the utility property. Without this power an indeterminate permit law is an empty gesture, letting the public think it is getting something of protection and value when in fact it is getting a mere name. Provision must be made by the legislature to permit towns and cities to exceed debt limits for the buying of utility property if the indeterminate permit is to be anything but a permit of perpetual duration. The only difficulty in this particular would be framing an indeterminate permit so as not to conflict with the provisions of Art. 2, Sec. 29 of the Constitution of 1870 requiring a three-fourths vote to pledge the credit of municipalities.

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[24] Shannon's Anno. Code of Tennessee, 1926 Supp. Sec. 3059 a 86.

[25] Shannon's Anno. Code of Tennessee, 1926, Supp. Sec. 3059 a 90.

The Railroad and Public Utility Commission has plenary power in granting certificates of convenience and necessity. It is suggested that an indeterminate bill would be more wisely framed if it left to localities the settlement of local questions and gave to the state commission the task of settling inter-community and state wide questions. No state body can be so fully acquainted with local conditions as the persons in that community, and the settlement of strictly local problems should still be left a matter of contract as between the locality and the utility, of course, with the approval of the commission. This may seem to be giving back with one hand what is being taken away with the other but the plan is to permit the locality to have the final say in regard to whether it shall adopt certain measures which measures are strictly local in scope. The Committee of the National Municipal League, drafting a model charter for cities in 1916 recommended: "The public utility and franchise policy embodied in a model city charter should be so formulated as to conserve and further the following purposes:

"1. To secure to the people of the city the best public utility srevice that is practicable.

"2. To secure and preserve to the city as a municipal corporation the fullest possible control of the streets and of their official uses.

"3. To remove as far as practicable the obstacles in the way in the extension of municipal ownership and operation of public utilities, and to render practicable the success of such ownership when undertaken.

"4. To secure for the people of the city public utility rates as low as practicable consistent with the realization of the three purposes above set forth."[26]

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[26] Morris Llewellyn Cooke, "Public Utility Regulation" p. 43.

Whether or not municipal ownership of public utilities is well for all concerned the writer hesitates to venture a guess much less an opinion. However, it is submitted that an indeterminate permit when properly drawn will come close to the realization of the recommendation of the Committee of the National Municipal League and it is believed it may be done without the possible consequent difficulties of municipal ownership.

THE PLACE OF THE PRESIDENT'S CABINET IN LEGISLATION AND ADMINISTRATION

WALLACE MCCLURE

Colonel House records in his dairy that soon after the election of 1912, he told Walter Page of his fear lest President-elect Wilson should appoint to his Cabinet "too many independents" and not enough "rock-ribbed Democrats." This fear was not the fear of the spoilsman. "I thought", the Colonel wrote, "that in twenty years from now no one would know how the different departments of the government had been run and that the President's fame would rest entirely upon the big constructive measures he was able to get through Congress; and in order to get them through he had to be on more or less good terms with that body. This, I thought, was one of the most important things he had to consider, for his future reputation would rest almost wholly upon it."[1]

The Colonel commented, a little later, upon the "casual way"[2] in which the President-elect was making up his Cabinet, which, as finally selected, has been pronounced by the editor of the Colonel's papers "a *melange* of administrators selected because of personal ability and of political leaders whose influence demanded recognition."[3]

These passages are fertile of searching questions concerning the operation of our national government. What is the function of the Cabinet? Are the individuals who compose it to be charged with two sets of duties, one of which calls for

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[1] Seymour, Charles, *The Intimate Papers of Colonel House*. Vol. 1, p. 103.

[2] Ib., p. 111.

[3] Ib. In connection with these passages it is interesting to note the following from Colonel House's fictitious work entitled *Phillip Dru, Administrator*, first published in 1912: "The Executive shall have authority to select his Cabinet Officers from members of the House or elsewhere, other than from the Courts or Senates, and such Cabinet Officers shall by reason, thereof, be ex-officio members of the House." (Chapter XLI, as published in 1920, p. 240).

men of a type which is unfitted for the performance of the other? If so, shall we sacrifice administrative efficiency in some or all of the great executive departments in order that Presidential leadership in the consummation of a legislative program may be safeguarded?

Even the man who sees no practicable method of improvement cannot gainsay the widespread belief that the relation of Congress and the President, as conceived by the framers of the Constitution, is in need of readjustment in the direction of closer cooperation. Generally in democratic representative government the executive cabinet is regarded as an agency of liaison; it is natural, therefore, that reformers have commonly pointed to the President's group of personal advisers as the means of bridging the gap between the Capitol and the White House, either by assigning to the Cabinet as at present formed seats in Congress, or by forming the Cabinet of members of the House and Senate rather than of the heads of the executive departments.

The latter alternative, though much the less discussed, is not without its advocates. Another eminent diarist, Mr. David F. Houston, has recently published his impressions regarding President Wilson's appearance in person to address the two houses of Congress.

"It would be interesting if this step," he continues . . . . "should lead to another—the appearance in both houses of members of the Cabinet to participate in discussion. I hope that it will not. I much prefer the present practice of having them appear before committees . . . . unless we are willing to go the whole distance and adopt . . . . the parliamentary system . . . .

"Such a system is more democratic in that it imposes scarcely any check on the expression of the will of the people. It would be more in harmony with our claims that we are a democratic people capable of governing ourselves . . . ."[4]

Mr. Houston did not believe that the time was ripe for

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[4] *The World's Work*, Feb., 1926, p. 360-0.

such a development, but one of our leading magazines recently remarked editorially that perhaps the best solution of the Cabinet question "would be for the President to form the habit of appointing his Cabinet from members of Congress—Senators and Representatives—who, of course, would retain their membership in that body, where they would introduce legislation pertaining to their several fields and be prepared to explain and defend it at any time." The editor went so far as to suggest the names of members of Congress who he thought would be acceptable as the President's Cabinet.[5]

This proposal derives especial interest as well as point from an incident which occured early in 1925. The Senate, it will be recalled, took the almost unprecedented step of refusing to confirm the President's appointee to the Attorney-Generalship—the significance of which resulted wholly from the circumstance that the head of the Department of Justice, under long-established but extra-legal usage, happens to be a member of the President's group of personal advisers or Cabinet. Confirmation was regarded by the President as a personal matter and he was not disposed to give in without a struggle.

Looked at from the legal point of view every advantage in such a contest lies with the Senate. It is expressly with the consent of the Senate that the President may appoint "ambassadors, or public ministers, and consuls, judges of the Supreme Court and all other officers of the United States," whose appointments are not otherwise provided for in the Constitution.[6] On the other hand constitutions tend to be modified by habit and habit tends to assume the sanctity of law. A prominent editor has asserted that the principle of untrammeled selection by the President of his personal advisers is "just, fair, even righteous", "a principle fixed by tradition and practice as firmly in our fundamental law as the Monroe Doctrine itself."[7]

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[5] Ib., Dec. 1924, pp. 122, 123.

[6] Article II, section 2.

[7] *Washington Post*, March 16, 1925.

To one holding such an opinion of our Constitution the Senatorial action just alluded to must have seemed altogether revolutionary.

The Constitution is entirely silent on the subject of the Cabinet; "the president—not the cabinet"—to quote Judge Cooley, "is responsible for all the measures of the administration, and whatever is done by one of the heads of department is considered as done by the president, through the proper executive agent."[8]

It is of interest that a passage in the bill for creating the Department of Labor, which provided that the new department head should "be a member of the cabinet", was stricken out prior to enactment. The institution of the Cabinet is itself a usage not unlike the habit of the Senate of accepting without question Presidental appointments of department heads. There is no reason in law why the President should limit[9] the membership in his Cabinet to department heads, why he should summon his department heads to meet with him in the form of a Cabinet, or why he should not form a Cabinet of some other group of persons. Consequently the President is free at any time to discontinue the present organization of the Cabinet and, in its stead, to summon to regular consultation at the White House a select group of Senators and Representatives.

Such a group of Congressional leaders would, under the supposed circumstances, become the President's Cabinet. The change would be more revolutionary in degree only than the Senate's reversal of a habit of sixty years by rejecting the President's appointee. Members of a Congressional Cabinet would in no sense be executive officers; they would hold no official

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[8] Bouvier's "Law Dictionary", Vol. 1, p. 410, quoting 1 Cooley's *Bla. Com.* 232.

[9] Mr. Coolidge, when Vice-President, accepted President Harding's invitation to meet with the Cabinet.

position except membership in the national legislature.[10]

Do present needs require the institution of a Congressional Cabinet? Adequate criticism demands more elaborate analysis than the obvious presumption of resulting greater team-work in government. Such an analysis may appropriately proceed from the point of view first, of the President; second, of the heads of department; third, of the Congress and, fourth, of the Government as a whole.

(1) The first fruits of the adoption of a Congressional Cabinet would be a solution of the question regarding the President's right to name his own advisers. No future rejection of an appointment for head of department would be challenged on that ground. But a field of choice limited to the 531 members of Congress might seem too costly a ransom for technical escape from Senatorial advice and consent, and the President is popularly expected to draft the "best minds" of the country, wherever found, into his board of advisers.

In practice, however, the President must usually, as in 1913, choose his Cabinet largely from outstanding figures in his party, often disregarding not only their fitness for their administrative tasks but even the matter of their full and loyal acceptance of his policies. The hand of political expediency has not relaxed its hold upon the Cabinet as now constituted. The President must and does continually consult with the leaders in Congress about all manner of questions. He could do this more effectively if the necessary custom were regularized and institutionalized.

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[10] Meanwhile, of course, the President would be left at liberty to "require the opinion, in writing, of the principal officers in each of the executive departments, upon any subject relating to the duties of their respective offices" (Constitution of U. S., II, 2). He could maintain such additional relations with the deparmtent heads as he might choose to do.

Many questions of detail would confront the President in constructing the first Congressional Cabinet. For the sake of continuity he might maintain a membership of ten. He might try to include a man especially qualified to advise and consult with the head of each of the executive departments: for example, chairmen of corresponding committees.[11] He might ask them to supervise the respective departments, at the same time instructing his department heads to offer appropriate facilities, and in this way establish such degree of collaboration between executive and legislature as should seem to him desirable.[12]

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[11] So long, however, as the seniority rule is maintained in selecting committee chairman, the President would probably make rather restricted use of such criterion. Obviously, he would have need for actual, not merely titular, Congressional leaders in his Cabinet.

[12] Since the department heads are the President's appointees, subject to the consent of the Senate, and are removable by him alone, there would seem superficially to be no cause for serious difficulty at this point. In practice, however, the contact between department heads and Congressional Cabinet members expected to supervise them, might easily constitute the largest difficulty in the way of establishing a Congressional Cabinet. It would be important to maintain this contact because it is important that Congress, through its members sitting in the Cabinet, should be thoroughly conversant with departmental problems and responsibilities. But it requires little ingenuity to perceive that, among human beings, such a contact between executive and legislative officials might readily generate friction.

The way out would seem to lie in the expedient of Presidential tactfulness. A president who is not without wisdom would avoid relaxing his control of the executive departments. Indeed, under the Constitution, which vests in him the executive power, he surely must wield it. The President would also remember that he can actually exercise less effective control over the members of his Congressional Cabinet than over his heads of departments. Accordingly, he would presumably endeavor to reduce the points of possible dispute between them to a minimum by confining the authority of the former to matters of high departmental policy and he might well arrange for personal decision in case of difference of opinion between a department head and the supervising Cabinet member.

The essential principle of the Congressional Cabinet, *i. e.* integration of the legislative and executive branches of the Govrenment, would, however, still survive should experience prove that actual participation by Cabinet members in departmental conduct is unworkable. The sole formal contact of the Cabinet with the executive departments would then be through the President himself, who could advise his Cabinet concerning departmental matters and instruct his department heads in accordance with Cabinet decisions.

Under modern conditions the effective conduct of the Federal Government is generally believed to require a high degree of Presidential prerogative. The successful Presidents in recent years have been men who have made themselves the real leaders of Congress. To such Presidents a Congressional Cabinet offers a means of closer cooperation, firmer leadership and consequent surer success in the accomplishment of programs of legislation.

(2) In considering the effect of a Congressional Cabinet upon the executive departments the question arises, would "best minds" consent to undertake the toilsome administration of these big but often dull organizations, without the compensating prestige of Cabinet membership?

To be head of one of the great departments is an outstanding opportunity for patriotic service in high public office. It seems unlikely that men of superlative mentality would be wanting when appointments offered. Real ambition to accomplish programs of public welfare would welcome in exchange for a shadowy prestige the opportunity afforded by a Congressional Cabinet for accurate and adequate presentation of departmental policies to the Congress.

With considerations of Presidential policy and partisan strategy relegated from department heads to the members of Congress composing the Cabinet, the former would be freer to devote all their energies to departmental work; they might even become non-partisan. If so, when an outstanding success has been made by a head of a department, a change of President, even though involving a change of party, need not deprive the country of the Secretary's services. There is seldom any cleavage between the policies of political parties in respect of departmental administration, but cabinet membership naturally precludes retention of department heads of opposing partisan adherence.

A decrease in partisan emphasis in the choice of depart-

ment heads and an increase in stress upon administrative ability and knowledge of departmental affairs (seldom obtainable except through long service) would have extremely advantageous reactions. The departmental career would be made more attractive by the reasonable hope that outstanding ability might lead to the highest departmental office. Vision in the conduct of lesser positions and intimate knowledge of the lower grades of work are excellent assets for successful administrators of the highest places. Close supervision by responsible members of Congress should prevent any danger of bureaucratic inertia.

(3) How would Congress like to have its leaders incorporated into a Cabinet of the President's choosing? While opposition or even refusal to participate in a Cabinet is conceivable, so great is the Presidential prestige and so habitually do Representatives and even Senators look to him for political direction that the idea of refusing to become one of his group of counsellors could hardly be seriously considered. Very probably seats in Congress would attract more men of ability, and rivalry for Cabinet honors would in all likelihood be keen. Congress is not unaware of its need for leaders. Organized leadership is now confessedly difficult and seldom manifest. A Congressional Cabinet would provide a recognized agency for formulating Congressional policy and for steering it to realization. The Cabinet would, indeed, be chosen by the President; but if it lost the confidence of the Congress it could no longer function and the President, unless he were content to preserve a deadlock, would replace its members by others who could command a majority following.

(4) A Congressional Cabinet would cut deeply into the time-honored theories of checks and balances and the separation of executive and legislative powers. Such, indeed, would be its purpose. When democracy feared government a Newtonian balance of part against part was deemed necessary, lest governors gravitate into tyrants. Now that democracy needs

government to execute its aims, cooperation between those who make the laws and those who must administer them becomes paramount. If a Cabinet member should become unable to work with the President, he should resign. If, having with the President formulated an administration program, the members of the Cabinet could not command the majority of each House necessary to its realization, they should resign in a body. The remaking of the Cabinet might involve compromise of Presidential aspirations with Congressional actualities. It should nevertheless be undertaken and the selection of new advisers should be the signal of a Government again ready to function.

Should the President's party lack a majority in either or both Houses members of the party in power might be included in the Cabinet. With one party controlling the Executive and another the Congress only non-partisan and compromise measures could be adopted. A bi-partisan Cabinet would probably be the best instrument for working out the necessary compromises. Similarly, when no party is in control or where blocs arise a coalition or compromise Cabinet might be the most eligible way of making the best of a difficult situation.

Half the democracies of the world attest to the normalcy of such procedure. It is, indeed, as Mr. Houston says, inherently democratic; it increases executive responsibility by providing an effective means for intelligent legislative supervision and it increases legislative efficiency by developing a legitimate and at the same time real leadership in the executive. If a country wishes to insure against executive dictatorship on the one hand and legislative anarchy on the other, a legislative cabinet offers a well-tried and thoroughly trustworthy means to the end.

Of all the sources of discord between the President and the legislative branch of the Government, probably the most fertile is the President's conduct of foreign affairs — which must, so far as it operates through treaties, be carried on by

and with the advice and consent of the Senate. The probably resulting improvement in our ability to deal with the outside world under the terms of the American Constitution might easily prove sufficient compensation for the institution of a Congressional Cabinet.

In conclusion, there seems to be real reason for accepting much of Colonel House's inference that the essential function of a Cabinet is to enable the Executive to lead in legislation and that the best type of man for a department head is not the best type for a member of a Cabinet so conceived. The Congressional Cabinet is the obvious method of securing an organ of executive leadership in the legislature; its substitution for the present method of cabinet-making would make possible avoidance of the sacrifice, which the Colonel was willing to make, of departmental best interests.

It is a sign of a healthy political life when a people continually subjects to careful scrutiny the organization and operation of its own institutions. Americans are probably as efficient in this as in any of the attributes of self-government. On the whole Americans are probably as intolerant of persistent abuses merely because they date from a heroic past, as are the people of any country[13].

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[13] For an able discussion of the question raised by this paper, see "Executive Participation in Legislation as a Means of Increasing Legislative Efficiency", by James W. Garner. *Proceedings of the American Political Science Association*, vol. X (1913), pp. 176 et. seq.

THE DOCTRINE OF ULTRA VIRES

ESTES KEFAUVER

Corporations were once thought of as evil in the commonwealth, as pernicious organizations, to be distrusted and feared.[1] They are now common to everyone, and the medium through which most of the big business is carried on. The layman's, as well as the Court's, conception of a carporation's respectibility and usefulness, has undergone a most marked change.

The states of the union, to meet and keep pace with the economic desire for corporate existence, have passed laws permitting the formation of corporations, to engage in practically every kind of business that is legal.[2] The state and federal courts by "Judicially Legislating," have become more lenient in interpreting the laws applicable to the rights, powers, privileges and immunities of corporations.[3]

This article is to deal with what the courts, particularly the Courts of Tennessee, are doing with those acts of a corporation which it was not authorized to do by its charter. The doctrine of *ultra vires* is the means by which the courts have worked out the answer to this question. What is *ultra vires?* There are many definitions. The acts of a corporation

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[1] 26 Law Quarterly Review 320 "An infirmity of a commonwealth is the great number of corporations which are, as it were, many commonwealths in the bowels of another, like worms in the entrails of a natural man."

[2] Shannon's Code, Section 2024, and following.

[3] Compare Miller v. Insurance Co. 92 Tenn. 167, with Tenn. Ice Co. v. Raine 107 Tenn. 151, 64 S. W. 29. Also compare Central Transportation Co. v. Pullman Co. 139 U. S. 24, with St. Louis Ry. v. Terre Haute Ry. 145 U. S. 393.

which it has no expressed or implied authority to do.[4] Where it is beyond it corporate powers.[5] Or any act of a corporation in excess of those granted powers is *ultra vires.*[6] At any rate, the powers, rights or privileges of the corporation are set out in its charter or articles of association, there are also some implied powers.[7] Statutes, too, may place express prohibitions upon the exercise of certain powers.[8] There are many acts of corporations which are on the border line between *intra vires* and *ultra vires,* and it is often perplexing to ascertain on which side of the line a particular act should fall.[9] Albeit, it is even more confusing and intricate to deal with what legal consequences will be attached to an act of a corporation that is admittedly *ultra vires.*

The answer to what courts are doing with *ultra vires* acts, is not clear and simple, but contradictory, vague and often unjust.[10] Most courts and law writers agree that there is an insurmountable irreconcibility of decisions. Machem puts it well[11], "To attempt to unravel the tangle so as to show what rules of law are adapted in each jurisdiction, would be

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[4] Cook: Principles of Corporation Law, 347.

[5] Clark Section 62.

[6] Miller v. Insurance Co. 92 Tenn. 176.

[7] See Shannon's Code, Section 2054 and 2076a3.
Also, Union Bank v. Jacobs 24 Tenn. 505.

[8] Shannon's Code Section 2059, "By no implication or construction shall the corporaiton be deemed to possess any powers except those hereby expressly given or necessarily implied from the nature of the business for which the charter is granted, and by no inference whatever shall said corporation possess the power to discount notes or bills, deal in gold or silver coin, issue any evidence of debts as currency, buy or sell any agricultural products, deal in merchandise or engage in any business outside the purpose of its charter."
See—Shannon's Code, Section 2076a4.
Public Acts—1927. Chapter No. 20.

[9] Cook, 437.

[10] Brice, Doctorine of ultra vires. (2nd. ed. 1877) p. 5.

[11] Machem, Modern Law of Corporations (1908) sec. 1021.

a protracted, if not an impossible task." Some courts say the state alone can object, but most courts have gone further and have, to a greater or less extent, denied validity to the transaction between the parties.

There seems to be two general concepts of corporate existence which are directly opposed to each other, and which are responsible for much confusion.[12] According to one, a corporation is a group of persons with general powers, acting as a unit in some respects, but prohibited from acting as a unit beyond the authority given. This theory is commonly called the General Capacity Theory.[13] The basis of this theory is that a corporation like a person, can do acts beyond its authority; when a person so acts, it is human action, therefore when a corporation goes beyond its bounds, it is nevertheless, corporate action.[14] The other theory of corporate existence is usually known as the Special Capacity Theory. According to it, a corporation is a highly artificial entity deriving its powers and its existence from the state, and having no rights or powers beyond those given it by the state.[15] Lord Coke said,[16] "A corporate aggregate of many, is invisible, immortal, and rests only in intendment, and consideration of law.[17] He could not feature how unauthorized corporate action could be possible. This is the basic idea of the theory.[18]

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[12] See Mr. Carpenter's Article, 33 Yale Law Journal, 49.

[13] For a discussion of the General Capacity Theory, see Comstock, J. in Bissall v. Railroad 23 N. Y. 258.

[14] Warren, in 23 Harvard Law Review, 503.

[15] Marshall, C. J., in Dartmouth College Case.

[16] Cook, page 3.

[17] England has corporations of both types. Corporations with Royal Charters have practically the capacity of natural persons. See So. Africa Co. v. De Beers, I Ch. 354.
Statutory corporations on the other hand, have no power or right to transcend their charter. Ashbury Ry. Co. v. Riche 7 H. L. 653.

[18] Eastern Building Assn. v. Williamson 189 U. S. 122.

The legislature of Tennessee evidently intended that the Special Capacity Theory should apply to corporations in this state.[19] The older cases stringently took this view.[20] But it is submitted that when corporations are organized under general laws, as they usually are today, and persons are permitted to associate themselves together to form a corporation with such power, practically, as they provide in the articles of association, this conception becomes inaccurate. There has been a relaxation if not in words, at least in result.[21] Thus, is a corporation a person within the meaning of *ultra vires?* Is a corporation incapable of committing an *ultra vires* act? Is an *ultra vires* act illegal? There can be no stereotype answer to these questions, the answer depends on the courts concept of corporate existence and more aften to factual situation of each particular case.

The Special Capacity Theory is best set out in the Pullman Car Company case[22], where Mr. Justice Gray said: "A contract of a corporation which is ultra vires in the proper sense, that is to say, outside the object of its creation, as defined in the laws of its organization, and therefore, beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

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[19] Shannon's Code, Section 2059, Supra Note 8.

[20] Marble Co. v. Harvey 92 Tenn. 169, 20 S. W. 247, 18 L. R. A. 252; Transport Co v. Pullman Car Co. 139 U. S. 24.

[21] Providence Corp. v. Downey 294 Fed. 641.
Tenn. Ice Co. v. Raine 107 Tenn. 157.

139 U. S. 24. Supra Note 20.

In accord with the view that a corporation lacks power to make *ultra vires* contracts, as set out above, there are decisions lu the other Federal Courts, [23] in Tennessee,[24] Alabama,[25] Illinois,[26] Maine,[27] Maryland[28] and Massachusetts.[29] However, even the courts of these states are not uniform and cases can be found in all of them to the contrary.[30] It is though, from the courts of these jurisdictions that most of the severe "*ultra vires*-void-no-legal-effect" cases are found. However, in the other states which are supposed to follow the general capacity idea and attact legal consequences to *ultra vires* contracts, cases can be found in which the court said the corporation had no power to enter into the contract, and it is therefore void.

In Tennessee, there may be some doubt as to the exact status of the law on *ultra vires*. The law was at one time definite, severe, and possibly unjust. This original doctrine following the Pullman Case,[31] is clearly stated by Lurton. J. in *Marble Co. v. Harvey*,[32] where the Court said:

"A corporation's contract for purchase of shares in another corporation, unless by powers specifically granted by its charter or necessarily implied in it, is *ultra vires* and absolutely void. No suit can be maintained by either party in furtherance or affirmance of said void contract, not even by the party

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[23] Lewis v. National Bank 274 Fed. 587.

[24] Supra Note 20.

[25] Steiner v. Steiner 120 Ala. 128.

[26] Merchantile Trust Company v. Kastor 273 Ill. 333.

[27] Light Co. v. Gas Co. 85 Me. 533.

[28] Railroad Co. v. Bridge Co. 102 Md. 307.

[29] Davis v. Old Colony Ry. Co. 133 Mass. 258.

[30] Blaire v. City of Chicago 201 U. S. 400.
Memphis Lumber Co. v. Security Bank 143 U. S. 140.
See other cases cited in Clark on Corporations, Sect. 67.

[31] Supra Note 20.

[32] 92 Tenn. 115, 20 L. R. A. 765. The Court quotes the Pullman Case with approval.

who has fully executed the contract on his part. Such illegal contract creates no estoppel on either party."

This decision was reiterated and sustained a year later in *Miller v. Insurance Co.*[33] where an insurance company had made an *ultra vires* insurance contract, the court added that such contracts are in contravention of public policy. Likewise, an unauthorized lease of corporate property, was held *ultra vires* and void, and being partly executed, did not give it validity.[34] A railroad corporation whose charter allowed, "such additional powers as may be convenient for the due and successful execution of the powers granted," was held not to have the authority to grant specific dividends on its stock.[35]

Under Shannon's Code,[36] prescribing the charter powers of discount and savings banks, the contract of such a bank through its officers to purchase of the stockholders of another bank, their stock therein, was held absolutely void, as being *ultra vires.*[37] The Court used the majority of its opinion in weighing the equities of the parties, and then used some of the *ultra vires*-void language and cases to sustain its holding. A like result was reached in *Hotel Company v. Dyer.*[38]

The above Tennessee cases hold *ultra vires* transactions as void, invalid or unenforceable, apparently without regard to

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[33] 92 Tenn. 167.

[34] Mallory v. Oil Company 86 Tenn. 598.

[35] Elevator Co. v. Railroad 85 Tenn. 703.

[36] Secs. 2083, 2084, 2085.

[37] Wood v. Green 131 Tenn. 538.
See also Lumber Co v. Wiggs 144 Tenn. 113.

[38] 125 Tenn. 302. See, also, Acuff v. Robbins Co. 1 Tenn. App. Cases 708 (1926). Wholey v. King 140 Tenn 1.
On the analogy of ultra vires, it has recently been held that an executory contract cannot be enforced where the amount of the contract is greatly in excess of the amount of capital stock subscribed. Eastern Products Co. v. Tenn. Coal & Iron Co. 151 Tenn. 239.

whether the contract is fully executed or executory,[39] or whether benefits have been received by the defendant. No notice seems to be taken of the fairness of the result. The rule seems arbitrary, regardless of what party is suing or setting up *ultra vires* as a defense. The courts in these cases reason that it would be contradictory to say that a contract is void for an absolute want of power to make it and yet become legal and valid as a contract by way of estoppel or because executed. The *ultra vires* contracts are usually held void and unenforceable on the following grounds: Because the corporation lacked the power to make the contract,[40] because the contract is illegal,[41] because the contract is against public policy,[42] because parties dealing with a corporation are charged with notice of its corporate limits,[43] and because a corporation should not transcend the powers given in its charter.[44]

It is submitted that holding *ultra vires* contracts void on the grounds of illegality, does not reach a desirable result, because the nature of the objection to illegal contracts differs fundamentaly from the nature of the objection to the usual *ultra vires* contract. The first is against social welfare, the second is prohibited by statute; there is nothing inamical to social welfare in *ultra vires* acts in itself. It seems absurd to

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[39] Mallory v. Oil Co., Supra Note 34, is a possible exception to this statement, as the court in this case said the contract was only partly executed. But compare the Miller and Harvey Cases.

[40] Hotel Co. v. Dyer 125 Tenn. 304.

[41] Mallory v. Oil Works 86 Tenn. 598.

[42] Public Policy. "The statutes of the state, or of the United States, and the settled decisions of the highest court of the state, are the sources from which public policy must be learned." Clark v. Memphis St. Ry. 123 Tenn. 232. Also if it is contrary to good morals. Marble Co v. Harvey Supra.

[43] Hotel Co. v. Dyer 125 Tenn. 304.

[44] See cases cited in notes 32-35 inclusive.

hold *ultra vires* acts void, as illegal, when the contract has been so executed that an innocent party may suffer.[45] As regards capacity, a corporation is said to be incapable of committing a tort insofar as it transcends the powers given by its charter, yet in all jurisdictions, a corporation is held responsible for its torts;[46] so why not for its *ultra vires* acts? Nor is the theory that persons dealing with corporations, are charged with notice of its powers, as set out in its charter, a sound reason for denying redress on *ultra vires* contracts. Because in this day of many corporations, a person can hardly be expected to know the charter of every corporation with which he may do business. This doctrine goes beyond agency and partnership law.[47] There is usually little or no public policy involved in a contract between an individual and a corporation.[48] Public policy is generally vague and untrue. There is also a public policy to prevent men and corporations from breaking their fair contracts. Another reason given for not enforcing *ultra vires* acts is that it violates the rights of shareholders[49] or of creditors.[50] But a creditor can restrain the *ultra vires* transaction when his security is endangered and share holders even a minority can by injunction enjoin the entering into the contract by the corporation, or if the corporation has entered into the contract, he has an action against the officers for breach of contract.

Courts in most all jurisdictions, including Tennessee, realizing that it is unfair, unjust and illogical to refuse to give

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[45] Most Courts make a distinction between acts which are *malum in se* and *malum prohibitum*. See Woodward, Quasi Contracts. Secs. 136-145. Also courts make a distinction when the parties are not in *pari delicto*. Hospital v. Forman 29 Md. 524.

[46] Machem, sec. 1072.

[47] Mechem, Agency (2d. ed.) Sec. 752.

[48] See Leslie v. Larillard 110 N. Y. 519.

[49] Pittsburg Ry. Co. v. Bridge Co. 131 U. S. 371.

[50] 14A. C. J. 2164.

effect to any *ultra vires* transactions, have, to some extent, gotten away from the "ultra vires-void-no-legal-effect doctrine." Albeit, it is hoped that when a proper case is presented to the Tennessee Supreme Court, that they will express the present day rule in Tennessee more clearly.

Even in the *Marble Co. Case*,[51] the court said that probably the plaintiff could dissafirm and sue for an accounting. This right was made positive one year later in *Miller v. Insurance Company*.[52] Recovery on *quantum meruit* is now allowed in all jurisdictions.[53] The court, in *Mallory v. Oil Company*, [54] was careful to put its decision on the grounds that the contract was unexecuted.

In *Hawkins v. Railroad*,[55] where a railroad, made an *ultra vires* contract, it was not allowed to defend on *ulrta vires* and specific performance was granted. The Court saying:

"While the contract remains unexecuted on both sides, a corporation may defend against its enforcement on the grounds that it was *ultra vires*, but if the other party proceeds in the performance of the contract, expending his money and his labors in the production of values, which the corporation appropriates, it will not be excused from payment or performance on the grounds that the contract was *ultra vires*."

This is submitted as the true and prevailing rule in Tennessee. It is well expressed in *Tennessee Ice Co. v. Raine*,[56] where an action was brought for the balance due for beer sold; the defendant company demurred on the grounds that its char-

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[51] Supra Note 20.

[52] Supra Note 6.

[53] Rankin v. Enright 218 U. S. 27, and cases cited.

[54] Supra Note 41.

[55] I Shannon 290.

[56] Supra Note 3.

ter did not give it power to buy and sell beer, and therefore the contract was *ultra vires* and void. The court overruling the demurrer, said:

"Courts will not enforce *ultra vires* contracts when the contracts are executory, but when the contract has become fully executed on the one hand and the other party has received benefits, the rule is different, and upon repudiation of the contract by the party who has received the benefits, the opposing party may sue to recover the proceeds withheld.[57]

Mr. Justice Green, in *Memphis Lumber Company v. Banks*,[58] where a corporaiton was trying to set aside a conveyance on the grounds of *ultra vires*, renunciates the doctrine of the *Raine* case. Also, the want of power in a corporation to contract for and hold land, creates no equity in behalf of the vendor to rescind an executed contract of sale.[59] Where a corporation, by its charter, is allowed to own a limited amount of property, it can, as trustee, hold money in excess of the limit in its charter, and its right can only be questioned by the state on *quo warranto*.[60] The cases are divided, where the corporation attempts to hold both the legal and equitable title.[61] A corporation, when sued for the debts of its dummy, is not allowed to set up *ultra vires* as a defense,[62] or hide behind the "entity" to escape liability.[63] *Ultra vires* transactions are also generally upheld where a corporation has been the conduit of

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[57] Holt v. Winfry Bank 25 Fed. 312, a strong case cited with approval.

[58] 143 Tenn. 136.

[59] Barrow v. Turnpike Co. 28 Tenn. 302.

[60] Heiskell v. Chickasaw Lodge 87 Tenn. 668.

[61] Hubbard v. Art Museum 194 Mass. 280, says the state alone can object. *Contra see* in re: McGraws Esatte 111 N. Y. 65.

[62] Dillard Coffin Co. v. Cotton Oil Co. 140 Tenn. 290.

[63] Acuff v. Robbins 1 Tenn. App. 708—See also Gilbert v. Citizens National Bank, Annotated in L. R. A. 1917, A. 149.

title;[64] where a corporation tries to escape tax on an *ultra vires* business;[65] where a grantor or his heirs attach the title to property conveyed *ultra vires* to the corporation;[66] or where the corporation has taken property as security *ultra vires*.[67]

The law, however, as before shown, is in great confusion, there is little consensus of opinion in any state. Each case, it seems, of necessity, must be decided on its own particular facts. The courts have many questions to confront in dealing with an *ultra vires* case, such as: What kind of a statute was this corporation formed under? Is the contract executed, partly executed, or executory? Is the act *malum in se* or *malum prohibitum*? Who is setting up *ultra vires?* Who is the plaintiff? Is there any public policy involved, and if so, what is it? What relief is being sought? What kind of a corporation is this particular one?[68]

But out of all the complexity and confusion, three rules have been formulated as labeling what the courts of all states are doing.

1. If the contract is entirely executory, no court will enforce it.[69]

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[64] Kerfoat v. Farmers Bank 218 U. S. 281.

[65] Salt Lake City v. Hallister 118 U. S. 254.

[66] Jones v. Habersham 107 U. S. 174.

[67] National Bank v. Gadsden 191 U. S. 451.

[68] The rules of ultra vires have been greatly relaxed as regards private corporations. But Public Utility corporations are still held strictly to the powers given them. Cook, 455.

[69] Harris v. Gas Co 76 Kansas 750, is given as the one exception, the language is unqualified, but the facts seem to show that the lease was partly executed. But see 14A. C. J. 2166, cases cited. Eastern Products case, 151 Tenn. 239.

2. Where the contract is fully executed on both sides, practically all courts hold the contract valid, and the foundation of rights and liabilities.[70]

3. Where the contract has been fully executed by the plaintiff, and benefits have been conferred on the defendant, the defendant cannot plead *ultra vires* and escape liability.[71]

The cases in the partly executed region, are in great confusion. It is these cases that cause most of the trouble. Wherever the contract is upheld, it is usually on the grounds that the defendant is estopped to deny the validity of the contract.[72] This estoppel doctrine was not at one time recognized in Tennessee.[73]

In conclusion, it is pleasing to note that the courts of Tennessee as of most states, have gotten away from the doctrine of the *Pullman* case and the *Miller* case. Logic was probably with the old doctrine that a contract which the parties could not make, could not be enforced. The courts, though because of the unfairness and commercial inconvenience of this rule, have, in a measure, re-examined the premise, and our courts at present, seem to treat contracts made beyond the limitation of chartered activity, as prohibited, but not void, and where the contract is executed on both sides, or on one side and the defendant has received benefits, the contract is usually enforced, and the state is left to its rights to punish the corporation.

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[70] See 14A. C. J. 2168 and cases cited. Whitney Arms Co. v. Barlow 63 N. Y. 62, is a strong case.
Memphis Lumber Co. v. Security Bank 143 Tenn. 140.

[71] Tenn. Ice Co. v. Raine 107 Tenn. 157, 14A. C. J. 2169.

[72] 14A. C. J. 2170, 143 Tenn. 140.

[73] Marble Co. v. Harvey, Miller v. Ins. Co., supra note 20.

REFORM OF FEDERAL PROCEDURE[1]

THOMAS J. WALSH

Senate bill 477, introduced by Senator Cummins, chairman of the Committee on the Judiciary, under consideration by that committee, if enacted, would authorize the Supreme Court of the United States to prescribe by general rules for the district courts of the United States "the forms of process, writs, pleadings, and motions and the practice and procedure in actions at law." It proposes to abandon the system dating from the Judiciary Act of 1789, by which it was provided that "the practice, pleadings, and forms and modes of proceeding in civil cases other than equity and admiralty causes in the circuit and district courts shall conform, as nearly as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the State within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."[2]

Bills of similar import have been pending before the Congress for more than the full period of my service, 13 years. Twice they have been rejected upon full consideration by the Judiciary Committee of the Senate, in the year 1916 and again in 1925. Some engrossing duties rendering it impossible for me to be present at all meetings of the committee in the year last mentioned, it was on an occasion when I was absent, without debate, reported favorably, but upon being recommitted action was taken as heretofore indicated. Such reverses neither

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[1] Address delivered at meeting Tri-State Bar Association at Texarkana, Ark. Tex.

[2] R. S. U. S. sec. 914.

discourage nor deter the principal proponent of the measure. It defies death. It is being urged now with a pertinacity which commands respect, and with indorsements which threaten seriously to impose the innovation upon the country. Its main sponsor is Hon. Thomas W. Shelton, of Norfolk, Va., a most estimable gentleman and excellent lawyer, a prominent member of the American Bar Association, which has, on his initiative, repeatedly approved his plan of reform without ever having heard an argument against it. He has circularized the State bar associations many of which, on a one-sided presentation, have resolved in favor of it, a method of persuading Senators of certain types much more effective than open debate. Mr. Shelton is an ardent admirer of the practice system of Great Britain, with which he is familiar from immediate contact with it on a number of occasions and which is the model of that he proposes.

It is argued in its behalf that it will bring about uniformity in the practice in actions at law in the Federal courts and simplify the procedure, thus relieving the courts and the bar of the heavy burden they now carry in consequence of controversies that continually arise quite apart from the merits of the litigation with which they are concerned. It is undeniable that it would insure uniformity as between the different States, but it is equally undeniable that it would result in a lack of uniformnity as between the practice in the courts of a State and the practice in the Federal courts in the same State. The legislator is concerned with the question as to which variety of uniformity, if such expression may be permitted, is the more to be desired. Uniformity as between the several States would be convenient, no doubt, for Mr. Shelton and his associates among the members of the American Bar Association who try cases in many States, but the humble lawyer whose practice is confined to the State in which he resides may be pardoned for looking at the matter in quite a different light. It is not to be understood that any accusation is made that

those urging the legislation are actuated by consciously selfish motives. Their sincerity and the purity of their purpose is past all doubt. But mankind long ago realized how potent is self-interest to warp the judgment and how easily one inclines to the belief that what is to his advantage is likewise in the public interest. But upon what consideration should the Congress impose the burden of mastering a new practice system upon the multitude of lawyers who never encounter any embarrassment because of a different system of practice in some State other than their own for the accommodation of the relatively few whose practice is more extensive. I am for the one hundred who stay at home as against the one who goes abroad.

Under the existing system the lawyer who has mastered the practice prescribed by the legislature of his State or developed by the decisions of its courts upon the foundation of the common law is equally equipped to institute, prosecute, and try actions at law in the Federal courts, save that in certain particulars arising from the difference in the organization of them, a matter of relatively little consequence, the State practice can not be followed. The task is to be imposed upon him of acquainting himself with another system that may differ radically and is certain to differ in detail from that in which he has been trained, and with which, by experience, he has become intimatley familiar. The burden would be a heavy one upon the young and active mind, but it would be oppressive in the case of the practitioner of advanced years wedded to the system learned in his youth, and all would be subject to error that might be serious or even fatal by confusing the requirements of the one with those of the other. Moreover, the rules prescribed would approximate those of the practice at common law, in which case lawyers bred under the code would be perplexed, or they would in general conform to the principles of the code, in which case the common law lawyer would sweat, or they would be quite different from either, harassing everybody.

The consideration, however, is of minor importance. The more grave aspect of the question is that miscarriages of justice without number would undoubtedly ensue until by adjudication of doubtful questions of the construction and application of particular provisions the new system would be resolved. It is a tragedy when a good cause of action is lost by failure to observe some rule of practice or to misconceive the true purport of a statute in relation to procedure, or when a valid and meritorious defense becomes unavailable for a like reason.

Having in mind the innumerable controversies coming before the courts of England involving the construction of the statute of frauds and possibly business losses arising from failure to observe it, a critic said that it had cost the King a subsidy, to which it was retorted that nevertheless it was worth two subsidies. Whether the gain to be anticipated from the change proposed will compensate for the loss certain to ensue and for the uncertainity that must vex the business interests of the country while it is being tried out will be considered later.

It is said that the lawyer is even now burdened with the necessity of mastering two systems of practice in as much as that authorized by the State is applicable only so far as may be in Federal court, and that in many particulars the State system has been adjudged to be inapplicable. A list of the particulars is found in most works on Federal practice with the decisions holding the State practice inapplicable. Though considerable in number, they cover only a relatively small part of the whole field and in most instances the inapplicability is perfectly obvious. No one could be in doubt, for instance, that statutory provisions concerning change of venue from one county to another would not apply to proceedings in a Federal district court. Then Congress has legislated with reference to some particulars of practice, noticeably concerning the taking of deposiitons, introducing some diversity, but on the whole it is accurate to say that the practice is the same.

This brings me to the consideration of the second argument advanced in favor of the plan proposed.

It is offered as a perfect solution of the troubles of litigants, the bar and the courts over questions of practice. Instead of the cumbersome, intricate and involved systems in vogue, it is said the Supreme Court will lay down a few simple rules so plain in their language that no one can go awry either as to their construction or their application. The practice in equity under rules prescribed by the Supreme Court is pointed to as indicative of what may be expected under the system proposed for the procedure in actions at law. The proposal coming to a vote in 1916 before the Senate Judiciary Committee, consisting of 17 members, a favorable report was ordered. A draft of the report of the majority was made by the present Associate Justice Sutherland, then a Senator from the State of Utah, but minority views were signed by nine of the members of the Committee, one having changed his attitude upon a more careful study of the question, reversing the position of the Committee. The report of Senator Sutherland dwelt at length upon the admitted evil of the constantly recurring questions of practice. Tables were included showing from the printed syllabi the number of cases in which such questions arose and engaged the attention of the court, appalling in the aggregate, not infrequently of sufficient gravity to control the disposition of the lawsuit. It was assumed that this evil would disappear under the new system, or at least be reduced to negligible proportions. But what ground is there for indulging in any such assumption? Are not the lessons of history against it? Must we not discard all that experience has taught to imagine anything of the kind?

It has generally been regarded as axiomatic in the law that it is beyond human ingenuity or talent to frame statutes or rules suited to every contingency expressed in language concerning the interpretation of which no controversy of substance may arise. The Constitution of the United States is

justly extolled for the clarity and the purity of its language, but after the lapse of 137 years since it came into operation the courts are still endeavoring to discover the true meaning of particular provisions of that remarkable work and their applicability or nonapplicability to the facts developed in particular cases. The statute of frauds, after centuries of discussion and adjudications without number, is still a fruitful source of forsenic debate. We are not without experience in this particular work of the simplification of judicial procedure. David Dudley Field, a towering figure at the American bar, had the same dream with which the advocates of the measure to which these reflections are directed are enchanted. He too deplored the immense loss of energy, to say nothing of rights, attributable to procedural rules and statutes. He too conceived that the difficulty could be removed or minimized by the adoption of a few simple rules. The best years of his life were devoted to the most exhaustive study of the problem, as a result of which he produced the New York Code of Procedure, adopted by the legislature of that State through his active advocacy in 1848. The labor involved, as his biographer tells us, was almost incredible. Instead of eliminating quesitons of practice, it gave rise to such a multiplicity of them that various series of Practice Reports were published for the guidance of the bar and the courts. It became the model for the codes of approximately 30 of the States of the Union. It has undergone several revisions in the State in which it first went into effect, all the work of eminent lawyers of that State, who have labored to remove, as far as possible, the uncertainties of the law and to complete the simplification of the practice. Similar revisions have been made in many of the code States, all having the same end in view, the revisers having the advantage of the numberless adjudged cases. Notwithstanding all this effort, no one conversant with the situation can think that the end has been reached or that questions of practice will not continue perhaps even to the end of time to vex the courts of the States that have thus labored to make

simple their procedure. However, the general principles have been measurably settled and doubt has been removed in no end of detail.

A similar development has been in progress in the States that have not adopted the so-called reform procedure. By statutory enactment and judicial decisions the practice has been settled, speaking generally, to the satisfaction of the bar and presumably of the people. Why should the work of years be discarded and an untried system be instituted to go through the same dreary, disappointing and frightfully expensive process? What reason is there to believe that the Supreme Court of the United States will succeed where Field failed, or came so near failing, that after three-quarters of a century no inconsiderable number of the States have declined to adopt his code. What member of that august tribunal can bring to the task to be imposed upon it, should the legislation so persistently urged be enacted, a fraction of the fitness for it he possessed? It is impossible to disguise the fact that the Supreme Court could not and would not do the work. It is overwhelmed with the labors now before it. Some radical change is needed to check the flood of cases that get a place on its calendar. It would be obliged to appoint a commission to prepare the draft of a code to the revision of which it would give such cursory attention as its other exacting duties would permit. The proposed law makes no provision for the appointment of such a commission nor for the creation of any fund out of which the members might be paid, or clerk hire or other expenses met. Indeed, I am convinced that the well-meaning proponents of the measure have no adequate idea of the magnitude of the task which would be imposed. They talk and write of "a few simple rules" and evidently contemplate a work in compass approximately that of the equity rules. The equity rules are simply a modification of the rules that obtained in the English courts of chancery, the development of centuries of experience and determinations in those tribunals, with slight modifications to fit the peculiar jurisdic-

tion of the Federal courts. For the resolution of any doubt concerning their construction or to meet situations not specifically and plainly provided for in them, the practicioner goes to the works on English chancery practice or to the American works on equity practice, both resorting to the same original sources, the procedure in the English courts.

The argument for the system proposed proceeds upon the assumption that the equity rules are so simple that he who runs may read and understand and that if they have ever been the subject of controversy the adjudications have been negligible in number. The little book of Judge Shiras on the rules issued a generation ago cited under each a long list of cases in which questions arising under them were raised and determined, and the whole subject of the practice in equity is sufficiently abstruse to justify the publication of perhaps a dozen works on that subject, including the three massive volumes by Daniell. I dare say there are few lawyers here who have not been retained in equity cases in the Federal courts by country practitioners of skill and ability who confessed that the practice in such was a sealed book to them. It is reasonable to conclude that if the innovation which Congress is asked to institute should be sanctioned the practice in the Federal courts in actions at law would become, as the practice in equity is, to no small extent a specialty.

The view that the evil, the magnitude of which was so elaborately set out in the report of Senator Sutherland heretofore referred to, would disappear under a system founded upon rules formulated by judges rather than upon a code or statutes enacted by a legislature finds no support in the experience of the people of England. A law writer who has taken pains to inform himself apprises us that "between 1875 and 1890 the English courts handed down 4,000 decisions on the judicature rules and the principles intended to be worked out by them." The practice in the State of New Hampshire is controlled by "rules" promulgated by its supreme court.

One of these recites that a declaration "will be sufficient * * * which states the facts clearly and concisely * * * if such facts constitute a cause of action." Those familiar with the code system will recognize a striking similarity between this language and that in which under it are defined the essentials of a complaint or the initial pleading by whatever term it is designated. Thus the New York Code prescribes that the complaint shall contain "a plain, concise statement of the facts constituting a cause of action without unnecessary repetition." The language of the California Code is almost identical. That of Ohio says the first pleading must obtain "a statement of the facts constituting the cause of action in ordinary and concise language." How can it be contended that controversies can be avoided as to the sufficiency of a pleading filed under the New Hampshire rule that would arise under the statute of New York, California, or Ohio?

To recur, however, to the scope of the work to be devolved upon the Supreme Court. The slightest reflection will satisfy anyone that it can not be measured by the volume of the rules in equity. Provision must be made for impaneling a jury and for provisional remedies among the more outstanding features of legal as distinguished from equitable proceedings. The 1925 edition of the New York Practice Act of 1921 is a volume of very considerable proportions, 309 pages of which are devoted to the act proper, exclusive of provisions relating to the inferior and surrogate's courts, comprising 90 articles, that dealing with pleadings embracing the following sub-heads, viz, General rules of Pleading, Amended and Supplemental Pleadings, Bill of Particulars, Verification, Complain, Answer, Counterclaims, Reply, Construction of Pleadings and Objections to Pleadings.

Pick up the code of procedure of any State and find for what an infinite variety of contingencies it has become necessary to provide; for example, the parties to actions generally, necessary or proper, and to actions of a specific character, such

as those brought upon promissory notes or other written obligations to recover real estate or by or against trustees. Even more extensive, perhaps, will be found the sections dealing with the limitation of actions and with provisional remedies.

This leads to a further consideration to which apparently the advocates of the proposed reform have given little attention. It is not alone that the volume of the work is great, but it embraces subjects upon which the widest diversity of opinion prevails throughout our vast territory as expressed in the statutes of the various States concerning remedies and remedial rights. Take the subject of limitations, for instance. As a rule the Western States accord a markedly shorter period within which actions may be begun than do the older and more eastern States. Under the law of Montana an action to recover real estate must be begun within 10 years from the time it accrues; on a written instrument within 8 years and upon a contract not evidenced in writing 3 years. When the Supreme Court frames its rules governing actions at law in the Federal courts, will it adopt the policy of my State touching the time of commencing actions, as evidenced by its statutes, or will it favor that shown by the laws of Massachusetts or Maryland? This inquiry exhibits the folly of attempting to apply to all our great expanse of territory a uniform system because it has been found satisfactory in Great Britain, the area of which is scarcely half that of the State of Montana.

The chairman of the Committee on the Judiciary who signed the minority report in 1916, afterwards becoming the majority report, as heretofore explained, and who has since been prevailed upon to support the measure under discussion, largely because of the repeated indorsement of it by the American Bar Association and by State bar associations, including, I believe, that of his own State, surprised by representations made to the committee concerning the magnitude of the task of framing rules, declined to accede to the view that they must of necessity cover all the subjects dealt with in an ordinary

code of civil procedure, and specifically questioned the contentions that they must comprise the equivalent of a general statute of limitations, apparently taking the view that such a statute is one defining a substantive right which the bill provides shall not be abridged, enlarged, or modified by the rules. It requires no elucidation before this assemblage that statutes of limitations appertain to the remedy and neither confer nor abridge any substantive right, that the period of the statute may be diminished or enlarged without violation of the Constitution of the United States, though it can not be reduced so as, in effect, to cut off all remedy.

The subject of provisional remedies will be found equally controversial. Some States, Iowa among them, as I am informed, refuse to sanction an arrest in any civil action, the ordinary arrest and bail provided for in most States in various classes of cases presenting some element of fraud or oppression, being regarded as violative of the spirit if not the letter of constitutional provisions forbidding imprisonment for debt. In those States in which this remedy is authorized the widest diversity exists touching the class of cases in which it can be resorted to. Will the Supreme Court in the rules it is expected it will be called upon to make adhere to the policy of those States according to this particular remedy, or to those in which it is forbidden, and if it is authorized will it extend to all classes of cases in which it may be employed in the States in which it is regarded with the greatest favor or only to the few in which it is available by the law or my State?

A like difficulty will be encountered in making rules touching attachment. Local statutes in relation to that particular remedy differ widely. In many it is permitted only in actions upon contracts, in others various classes of torts furnish a basis for this remedy, and in still others it is available for an injury resulting from a criminal act. The States differ as well touching the conditions precedent to the issuance of the writ.

They may be grouped into two classes strikingly different. In most of the Western States whose codes of procedure are founded on that of California, the writ may issue in any action to recover a debt due on contract, a simple affidavit affording sufficient proof of the fact as a foundation for the issuance of the writ. On the other hand, in many States, and in practically all the code States whose procedure is modeled upon the New York Code, as is well known, the writ can issue, except the defendant be a non-resident, only upon verified averments of fraud, perpetrated or in contemplation, or prospective departure from the State to avoid service. In not a few the statute is not satisfied with a verified statement of a fraudulent purpose, but the averment must be supported by the evidence. Which of these various classes of statutes will find a place in the rules? I am told that the system in vogue in Montana would be regarded as intolerable in the State of New York.

Take the subject of assembling a jury for the trial of a case. That involves, in the first place, from what class jurors may be drawn, whether women, for instance, may be called, the qualifications and disqualifications of jurymen, and exemptions from service: the manner of drawing, a field in which great diversity exists as between the several States, the grounds for excusing from service, and many other details. The task to be set the Supreme Court is not only appalling in its magnitude, but I venture to assert, in view of the radically different views of the bar, as exhibited in the statutes of the various States, the predilections arising from training and experience, it is a well-nigh impossible task.

Let anyone pick up or run through one of the modern works on practice and procedure, the two volumes by Kerr on codes of the Western States, or a like treatise by Poe on the Code of Maryland, or let him examine the New York practice act, article by article, or the Code of Civil Procedure of California, or of Montana, bearing in mind that these are the

results of efforts to make complete provision for the proper presentation of causes to the courts in the smallest possible compass and in the most direct and explicit language, and he can not fail to see the unwisdom of imposing upon the Supreme Court the duty of framing a code that is or ought to be reasonably satisfactory to Massachusetts and Kansas, Michigan and Texas, New Jersey and Louisiana, as well as the utter hopelessness of its discharging the duty to the satisfaction of itself or almost anyone else.

I enquire again, what is the substantial gain to be anticipated from this departure? Why does anyone want uniformity in the practice in actions at law in the Federal courts, except it be, as heretofore suggested, the lawyers whose practice extends over more than one State, a negligible number. It is offered in this connection that when the system comes into vogue the States, respectively, will conform their system to that prevailing in the Federal courts and thus uniformity will obtain throughout the Nation. One can understand how uniformity in respect to many subjects falling within the domain of substantive law is to be desired, and the work of the American Bar Association in promoting such uniformity touching negotiable notes, sales, etc., is eminently praiseworthy, but with respect to procedural law variety is a matter of relatively little consequence. But upon what ground is the prophecy based that the States will conform their practice to that prescribed by the rules of the Supreme Court? The lessons of experience must be disregarded to indulge any such belief. Field entertained the hope that his code, or something modeled upon it, would come into universal use. I have never been able to understand why it has not. Having been bred under it, I am convinced it approaches as near simplicity and perfection as any mere human work may. But I know that to a multitude of lawyers, among the most eminent and learned at the American bar, it is anathema and that a very considerable number of States will have nothing of it. How then shall we harbor the idea that, declining to accept the work of a great Ameri-

can lawyer,they will cordially take to their bosoms a system modeled upon the British reformed procedure, the authors of which not only acknowledged expressly their indebtedness to the work of Field, but paid him the compliment of devising a system in its essentials identical with his, the fact that it consists of rules established by the judiciary instead of statutes emanating directly from the lawmaking branch of the Government being unimportant.

Hepburn's work on the Development of Code Pleading gives the history of the agitation for the bandonment of common law pleading carried on simultaneously in the British Empire and the United States, and having dealt with the rapidity with which the example of New York was followed for a time until conversions ceased, when conditions became static, he discusses the codes of the British Empire in relation to codes of the United States, dividing the subject into two sections, the first canvassing The English Code, the second, Other Codes of the British Empire, a subdivision of the first section treating of The Suggestive Resemblance between English and American Code Pleading. The text declares "Their general purpose and main results considered, the English and American system of pleading are in remarkable accord." A writer in the London Law Magazine and Review for 1879 says that "anyone who has any knowledge of the two systems (that of New York and of England) knows how closely the latter system follows the former in theory, nomenclature, and substance." The English statute of 1875 numbers 100 sections, but it is accompanied with rules numbering 63, embracing 453 sections dealing with the subject of pleading, these having the authority of law, pursuant to the statute which authorized orders in council on the recommendation of certain judges for regulating the pleading, practice, and procedure of the High Court of Justice and Court of Appeal, and generally regulating any matters relating to the practice of the said courts.

It will be noted that the rules emanate from the privy

council, a body having wide legislative powers, though upon recommendation of the judges who were, however, empowered to alter the same or to make new rules. The act of 1873, however, provided that all rules made pursuant thereto were to be laid before Parliment within 40 days after being made, if it should be sitting; or, if not, within an equal period after its next meeting, when it might annul them, Parliment retaining, in effect, a veto power.

It has been urged in behalf of the measure to which these remarks are directed that it would relieve the practitioner, at least in the Federal courts, from the labor and embarrassment occasioned by the constant tinkering of State legislatures with the practice code or statutes. It is a tendency of our day, giving occasion to no end of criticism, to invoke the interposition of the Federal authority whenever possible to meet any situation arising from either the action or the inaction of the States. It is noticeable, however, that while there is a general disapproval of the absorption by the Federal Government of functions long regarded as peculiarly appropriate to the States, it is, as a rule, voiced by some one who has in mind a measure or measures to which he is opposed on other grounds, not legislation proposed or enacted in which he takes a sympathetic interest. However that may be, it seems a queer basis for Federal action that the States are unstable in their action in reference to this particular subject.

I think it quite likely that a very marked stability would characterize the rules system were it ever instituted. It is rare that one is elevated to a position on the Supreme Court until he has passed the meridian of life when, according to all experience and observation, a growing conservatism is to be anticipated. The judges would have no opportunity to know of the operation of the rules except as they should be reported by those coming into closer contact with trial work. If judges are to be intrusted with this function, heretofore regarded as legislative in nature, it would seem to be more wisely reposed

in the district judges rather than in the justices of the Supreme Court. The history of the equity rules leads to the conclusion that changes would be made with difficulty. They were continued in force without substantial change from the form in which they were originally promulgated for nearly 40 years after they were discarded in England and until their very language had become obsolescent and archaic. No perfect system has yet been devised. The New York practice act has undergone three general revisions, and the English rules an equal number.

Another merit said to be found in the proposed system is that conflict in decisions as between the several States on questions of practice arising under codes or statutes substantially identical or strikingly similar would be avoided or corrected. Quite likely a conflict over the interpretation of the rules between the circuit courts of appeals would be resolved by the Supreme Court, and it is probable that if a United States statute had not been construed by its court a decision of the United States Supreme Court on a rule prescribed by it, in substance like the statute, would be regarded as highly persuasive by the court of the State confronted with the necessity of interpretating its law, and so uniformity would be provided. But why should the Supreme Court be pestered with controversies over mere questions of practice? Happily it has relatively few such under the prevailing system. It accepts without question the construction given by the highest court of every State to its statutes, both procedural and of substantive rights and duties. It is only in the event that there are no local adjudications that it is called upon to resolve for itself questions of practice in actions at law. The system it is proposed to substitute would bring before it innumerable questions of practice, at least while the innovation is in the experimental stage. They would not be limited in number by the conflicts that might arise as between the intermediate Federal courts. One or more might conceivably be presented in every law case making its way before the over-burdened highest court. It would, of

course, be the final arbiter in every controversy over the rules, assuming that the case in which it arose reached the Supreme Court.

Restiveness under law's delay, a source of complaint that has survived at least since Shakespeare's time, comes to the aid of the proposed legislation, particularly as it is understood it is suggested by, if not modeled upon, the system prevailing in Great Britain, where it is popularly believed, as the fact no doubt is, the wheels of justice move with greater celerity than with us. There is a widespread belief that opportunities are presented and very generally improved to procrastinate in judicial proceedings by resorting to senseless technicalities required in abundance by our procedural law, badly in need of revision. Without more careful study than might be expected of lay writers, the press, on the assurance that all such would be removed, or at least reduced to a minimum by the reform proposed and thus the disposition of causes be expidited, has, so far as it has been noticed at all, quite generally approved it. Even the legal periodicals have, as a rule, contented themselves with caustic references to Members of the Senate who have deemed it their duty to oppose the legislation, comprising, as indicated, a majority of the members of the Committee on the Judiciary, notwithstanding the mutations it has undergone in 13 years, rather than to give their readers an analysis of the measure with a discussion of the objections to which it is said to be subject. Though they have been in form available at any time within the past 10 years, I have seen nowhere in any law journal any copy of the views of the majority of the committee, or even any review of the reasons impelling them to the course they have pursued. It is quite likely that to some extent the expedition with which causes are disposed of in England is due to the substitution of the reformed procedure for the old common law practice. It was with that end in view that the change was instituted, but it would be a mistake to assume that any part, at least any considerable part, of the greater dispatch which distinguishes their court proceedings as com-

pared with ours is attributable to the slight difference between their code system and our code system, or specifically to the fact that in the main their practice is governed by rules, while ours is controlled by statutes. One may easily fall into error in instituting a comparison of the rapidity with which justice travels here and there. They have a system of "county courts," the practice in which approximates that of justices' courts in America, though they entertain causes involving much larger amounts than those over which our justices have jurisdiction. Their competency extended originally only to cases involving sums not greater than £20, but lately this limit has been raised to £500, including some causes of an equitable nature, and they may entertain jurisdiction regardless of the amount involved with the consent of the parties. It might be advisable to copy this feature of their system generally, indeed courts similarly empowered are quite common in municipalities in this country, but their procedure, said to be "rudimentary," does not concern us in this discussion, neither is it of consequence that their proceedings are characterized by the utmost dispatch.

It is surprising how quickly the American mind, in our day at least, turns to the legislature for relief from every ill, actual or fancied. The courts are dilatory, justice is delayed. Remedy, change the law. Now I venture to assert that most of whatever difference obtains in respect to the time ordinarily required to dispose of cases in the courts of America and of England arises from the difference in the habits of the bench and the bar. Delays of the most exasperating character ensue with us because there are not judges enough to do the work. Indubitable evidence was submitted recently to a committee of the Senate that the Federal court for the southern district of New York is three years behind with its work, and that at least three and perhaps five additional judges should be assigned to that district. But assuming ample provision in that regard is made, we should still not move as rapidly as the English. I was told in London last summer by the attorney general that it is rare that the first 12 jurymen called into the

box are not sworn to try the case, both sides waiving their right to question then on their *voir dire*. Days and sometimes weeks are occupied with us in selecting the jury in any case which has aroused public interest or been the subject of general discussion. It took a day to secure a jury for the trial of Senator Wheeler at Great Falls a year ago, and predictions were ventured that it would take a week.

I listened during an afternoon to the trial of a case before an English judge and heard but a single objection to the introduction of evidence, on which the judge ruled promptly, though the point was important and by no means clear. The information was given me that the most skilled lawyer at their bar rarely makes an objection to the admission of evidence unless a vital question is raised by the tender, and that he often acquiesces in the admission of damaging testimony that might be excluded upon objection, his theory being that the cause of his client would be likely to suffer more from raising the objection than from the objectionable testimony. Upon like considerations counsel refrain, as a rule, from interrogating the jury or exercising challenges against them. The impression was left upon my mind that the formation of these habits was stimulated from the bench. I am sure much might be done by the presiding judge to cut short protracted inquiries addressed to jurors on the *voir dire* or dreary cross-examination. I am disposed to think that our more dilatory methods are in no small measure attributable to the example of the trial of Aaron Burr before Chief Justice Marshall, familiar to every cultured American Lawyer. The defendant who had been held to answer was permitted to conduct the most searching and exhaustive examination of those called to serve as grand jurors to investigate the charge, as a result of which a number were excused, the proceeding being punctured with eloquent speeches from counsel concerning the gravity of the charge, the circumstances under which it was brought, with veiled references to the political consideration underlying or involving in it. As the trial proceeded there were innumerable interruptions,

long debates, and recesses to permit the distinguished presiding judge to reflect upon the arguments, study the authorities, and write his opinion.

Such information as I have leads me to the belief that the judges of the appellate courts of Great Britain do not deliberate upon the cases submitted to them quite so long as do ours. In December, 1924, there was submitted to the Supreme Court of the United States an appeal from the order of a district court in the State of Ohio discharging from the custody of the Sergeant at Arms of the United States Senate one Mal Daugherty in custody for alleged contempt of that body in refusing to appear before one of its committees in obedience to a subpoena issued by it and served upon him, the legal question at issue being the power of either House of Congress to compel the attendance of witnesses before it or any of its committees conducting an investigation by its order or authority. The case is still held under advisement.[3] Meanwhile one Harry Sinclair, indicted in the District of Columbia for a like offense, refusing to testify, interposed a demurrer advancing the same contention, namely, that the Senate has no compulsory power except in connection with its quasi-judicial duites, and was permitted to take a special appeal to the District Court of Appeals from an order overruling his demurrer, which was argued and submitted in February, 1925. It is still before that court, which, it is understood, is awaiting the decision of the Supreme Court in the Daugherty case. It need not be said that the law is not at fault in the cases mentioned except it be the law that permits an appeal from the interlocutory order sustaining a demurrer. The question involved is one of surpassing importance, not free from doubt, and the court ought not to be hurried in ruling upon it. It would probably be more promptly determined in many countries, perhaps even in England, but the belief is general that the

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[3] 143 U. S. 670.

court will proceed as expeditiously as the difficulty of the case and the state of the business before it will permit.

Mention is made of the subject not only to demonstrate that all delays are not due to defects in the laws, but as well because some unmerited criticism in connection with the prosecutions referred to have been directed against the Department of Justice and the officers charged with the conduct of them.

It may be rash in anyone to question the constitutionality of the legislation that is the subject of these remarks in view of the long acquiescence in the act under which the rules in equity were promulgated. Were it not for that enactment, I should, with much confidence, submit to this assemblage of lawyers that the bill in question contemplates a delegation of legislative authority violative of the Constitution. In view of the acts of the legislative bodies of England and America, as far back as we have any record of their proceedings, it must be conceded that statutes regulating the procedure in courts of justice fall within the grant of general legislative authority. If it is a legislative rather than a judicial function, how can it be delegated to any court, particularly how can it be delegated to any Federal court, the jurisdiction of which is limited by the Constitution? Certainly the legislation under consideration falls entirely without the rule in *Field v. Clark*. Upon what theory can the delegation of authority to the Supreme Court to promulgate rules having all the force of statutes in relation to the practice, not in that court but in other courts, be justified that will not equally justify any delegation of legislative authority to that tribunal, at least any authority to enact rules in relation to the courts, as, for instance, what inferior courts should be constituted, what jurisdiction they shall have, how causes shall be removed from the State to the Federal courts, what salaries the judges shall have, and by what officers the courts shall be attended. Unqustionably every court may make its own rules not inconsistent with statutes, and statutes unreasonably restricting the action

of a court within its constitutional grant of power may be disregarded as unconstitutional. At least it has been so held. It is perhaps not open to doubt that if a court were created either by constitution or statute and no provision were made in either by which its jurisdiction was to be exercised, it would have the power by rule to prescribe how a suitor must appear and present his cause, how the defendant may be required to appear, how the issue should be made up and the trial proceed. It has been the universal belief, however, that such right yields when the legislative authority acts. It will be borne in mind, however, that this is no proposal to empower the Supreme Court to make rules governing the practice in that court, but to make rules governing the practice in other courts.

The Parliament of Great Britain may delegate its authority to some other agency. It confers wide powers, obviously legislative in character, upon the privy council, but Congress can not thus abrogate the powers nor escape the duties imposed upon it by the Constitution. Moreover, the court of King's Bench since time immemorial exercised a supervisory control over the other courts of the Kingdom. By the constitutions of many States the highest court thereof was by express language therein granted such supervisory control over the inferior courts therof. This grant has never, so for as I have been able to learn, been held to warrant the promulgation of rules governing the practice in such lower courts, but it might conceivably be construed to justify such an exercise of authority, at least in the absence of statutory regulation. But the Constitution vests in the Supreme Court of the United States no such authority, and I can find nothing in our organic law empowering the Congress to confer it. Indeed, that court acquires none of its authority from Congress, though its authority may be limited by Congress, and it has always yielded to the enactments of Congress concerning the manner in which and the conditions under which its jurisdiction may be exercised.

I do not care, however, to buttress my opposition to the proposed legislation by assailing its constitutionality. In my judgment it is unnecessary, would aggravate the evils to remove which is its purpose, would introduce confusion worse confounded, and result disastrously to our intricate and delicate commercial machinery, even if it were possible to frame such a code as is proposed that would be accepted by the bar and the business interests of our far-flung Union.

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The College of Law is fortunate in having Mr. R. F. Payne as a full time addition to its teaching staff. Mr. Payne is a graduate of the University of West Virginia with the B. S.

degree, and he has his LL. B. degree from Yale University.

In addition to the above named men, all of whom give regular curriculum courses, the following men will from time to time lecture to the law students on special topics: Karl E. Steinmetz, LL. B.; Irvin S. Saxton, B. A., LL. B.; C. Raliegh Harrison, LL. B., and Forrest W. Andrews, LL. B.

Due to the co-operation of the Knoxville Bar Association, the Law College has one of the largest law libraries in the South. Before the close of school last year the Knoxville Bar Association library was moved into the law school building; thus the law students have access to this large selection of legal books in addition to the large Law College library.

N. B.

THE REVIEW

This is the beginning of the sixth year of the publication of the Tennessee Law Review. From its inception the object of this periodical has been to serve as a medium—which is available to members of the Bar and other students of the law—for the candid discussion of the problems presented in the enforcement of the law and administration of justice. To the scholarly lawyers—those who love the law as a profession and not merely as a business—the existence of such a periodical is profoundly appreciated, because it is a medium through which they can be of service and value to the other members of the legal profession, and thus be of benefit to the entire country. Such a priodical, when properly supported, can be of untold value.

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CONSTITUTIONAL LAW — POWER OF CONGRESS TO COMPEL A PRIVATE INDIVIDUAL TO TESTIFY

In theory the powers of our government are divided into three distinct, separate, and coordinate branches; viz., judicial, executive, and legislative. This tripartite division of powers has never been entirely true in actual practice.[1] Because of the complexity of our governmental machinery, the line of demarcation between these different departments often is indefinite and uncertain. Each of the three divisions of our government does not, and perhaps could not, operate in a sphere quite separate and distinct; still this principle of the separation of the powers of government, comprising as it does a system of checks and balances, is fundamental to the constitutional government of this country.[2]

The recent case of *McGrain v. Daugherty*[3] presented the

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[1] 6 R. C. L., Constitutional Law sec. 146; 12 C. J. Constitutional Law sec. 235.

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question of the power of Congress to *compel* a private individual to appear before Congress and give testimony pertinent to cretain investigations of legislative purpose, and of quasi-judicial nature, being made by Congress.

The case arose out of a Senatorial investigation of the official acts of Harry M. Daugherty during his appointment as Attorney-General of the United States. Such flagrant charges of official misfeance and nonfeance had been made against him that the Senate concluded that a legislative investigation was needed. Accordingly, a Senatorial investigating committee was appointed. In the course of the investigation this committee issued and caused to be duly served on M. S. Daugherty—who was a brother of Harry M. Daugherty—a subpoena commanding him to appear and testify before this committee relative to the investigation in question; this subpoena, also, commanded him to bring certain specified records and papers. M. S. Daugherty ignored this subpoena. Thereupon a second subpoena was issued and duly served upon him. This second subpoena commanded him to appear and testify before the committee; nothing was said, however, in this second summons about the witness bringing any records, papers, and documents. Without excuse, he ignored this second subpoena.

When this matter was considered by the Senate, a warrant was issued authorizing its sergeant-at-arms to take M. S. Daugherty into custody and bring him before the Senate to testify. In the resolution justifying the issuance of the warrant it was said that the presence of Daughetry "is material and neccessary in order that the committe may properly execute the functions imposed upon it and may obtain information neccessary as a basis for such legislation and *other*[4] action as the Senate may deem necessary and proper . . ."[5]

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[4] Italics ours.

[5] McGrain v. Daugherty (1927 U. S. Sup.) 47 Sup. Ct. Rep. 319, 71 L. ed. 370.

Under authority of the warrant issued by the Senate, M. S. Daugherty was taken into custody by a deputy sergeant-at-arms of the Senate. He was released, however, on *habeas corpus* by the federal District Court in Cincinnati[6] because, in the opinion of the court, the investigation by the Senate was not for a legislative purpose but was a judicial proceeding because it was investigating not the office of the Attorney-General but was investigating the Attorney-General, himself; therefore, such action was unconstitutional.

From this decision the deputy appealed to the Supreme Court of the United States[7] which decided that either the Senate or the House of Representatives can, through its own process, "compel a private individual to appear before it or one of its committees and give testimony needed to enable it efficiently to exercise a legislative function belonging to it under the Constatution."[8] The court, also, decided that since the Department of Justice is maintained and regulated by Congressional appropriation, and because of the nature of the investigation, that the object of the investigation was to obtain information which would help in legislating; therefore, the investigation was of legislative purpose.

From the reading of former decisions, the court concluded "that the two houses of Congress, in their separate relations, posess not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective and . . . . that neither house is invested with 'general' power to inquire into private affairs and compel disclosures, but only with such limited power of inquiry as is shown to exist when the rule of constitutional interpretation just stated is rightly ap-

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[6] Ex parte Daugherty (1924 Dist. Ct.) 299 Fed 620.

[7] McGrain v. Daugherty (1927 U. S. Sup.) 71 L. ed. 370.

[8] McGrain v. Daugherty (1927 U. S. Sup.) 71 L. ed. 370, 376.

plied."[9] The court then said, "We are of the opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function . . . . The constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised."[10]

Epitomizing the decision, the court said, "We conclude that the investigation was ordered for a legislative object; that the witness wrongfully refused to appear and testify before the committee and was lawfully attached; that the Senate is entitled to have the witness give testimony pertinent to the inquiry, either at the bar or before the committee; and that the district court erred in discharging him from custody."[11]

It is indubitably true that the House of Commons in England has the power, without intervention by the courts, to punish for contempt.[12] The Supreme Court of the United States in one of its decisions,[13] however, concluded that the tripartite nature of our government, and the limitations imposed by the Constitution, negatives the conclusion that *by implication* Congress posesses this power in as full and complete degree as Parliament; because Parliament possesses this power as a result of the blending of judicial and legislative authority. This part of this decision has been criticised by some legal writers.[14] The contention of these writers being that the House of Commons exercises no more *judicial* power than does the

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[9] McGrain v. Daugherty (1927 U. S. Sup.) 71 L. ed. 370, 381; also, see 26 R. C. L. United States sec. 8.

[10] McGrain v. Daugherty (1927 U. S. Sup.) 71 L. ed. 370, 382.

[11] McGrain v. Daugherty (1927 U. S. Sup.) 71 L. ed. 370, 384.

[12] L. R. A. 1917 F. 289; 6 R. C. L., Contempt sec. 34.

[13] Kilbourne v. Thompson (1880) 103 U. S. 190; also, see 6 R. C. L., Contempt sec. 34; 39 Cyc. p. 700; 2 Willoughby on Constitution 1272; Cooley's Constitutional Limitations (5th ed. 1883) p. 161; Burdick's Law of American Constitution (1922) 169.

[14] Potts, Power of Legislative Bodies to Punish for Contempt (1926) 74 Pennsylvania Law Review 691; Landis, Constitutional Limitations on the Congressional Power of Investigation (1926) 40 Harvard Law Review 153.

American Congress; that a "careful study of the legislative history of England and America will show that the privileges of representative bodies and the power to punish directly the invasion of those privileges are a part of the common inheritance of the Anglo-American peoples."[15]

In some states the Constitution provides that the legislautre has the power to punish a recusant witness summoned in good faith for the purpose of getting information pertinent to contemplated legislation.[16] The legislative bodies of Virginia[17] and New York[18] have exercised the power of punishing for contempt and in these states the constitution is wholly silent on the subject. In brief, it can be said that an "American legislative body has the power to enforce its commands to a contumacious witness, when the investigation in which he is called is carried on in good faith for the purpose of getting information with a view to future legislation."[19]

In the case in question, failure to comply with the second subpoena was the charge of contempt against the witness; therefore, since this subpoena was personal—and not one *duces tecum*—it was unnecessary for the court to decide the question of whether Congress could *compel* a witness to produce specified papers, records, etc., which, though private in their nature, were pertinent and legitimate to enquiry which is of legislaitve purpose. It seems, however, that the reasons for con-

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[15] Potts, Power of Legislative Bodies to Punish for Contempt (1926) 74 Pennsylvania Law Review 698.

[16] L. R. A. 1917 F 292.

[17] Jour. H. of B. (1781) p. 8.

[18] Wichelhausen v. Willett (1860) 10 Abb. Prac. 164; McDonald v. Keeler (1885) 99 N. Y. 463, 2 N. E. 615.

[19] L. R. A. 1917 F. 294; 50 A. L. R. 21; also, Anderson v. Dunn 19 U. S. (6 Wheat) 204 in which it is stated that imprisonment for contempt of one of the Houses of Congress can not extend beyond the adjournment or periodical dissolution of such body.

cluding that Congress can compel a non-member to appear and give testimony pertinent to an investigation of legislative purpose would be equally as cogent when Congress issued — instead of a personal subpoena — a subpoena *duces tecum*. Most commentators upon this case conclude that Congress does possess this power of compelling the production of records and papers when such are pertinent to an investigation of legislative purpose.[20] Most legal writers, in commenting upon this case, concur ardently with the decision.[21]

N. B.

DAMAGES—MEASURES OF, IN CONTRACTS AND IN TORT ACTIONS

A physician sent a telegram to the plaintiff, another physician, requesting the plaintiff to call him over the telephone immediately. Due to the negligence of the telegraph company, the message was not delivered until the following day. The result was that the plaintiff lost the opportunity of performing two operations for which he would have been paid the amount claimed in the present action. The telegraph company contended that the loss of these fees was not, "within the contemplation of the parties" and for that reason could not be recovered. Held, that this contention was without merit and that the plaintiff was entitled to recover the fees which he would have earned if the telegram had been delivered promptly.[1] In the course of its opinion the Supreme Court of Tennes-

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[20] Supra note 14; and, 38 Harvard Law Review 234; 22 Illinois Law Review 194; 15 Georgetown Law Review 344; 7 Boston University Law Review 218; 13 Virginia Law Review 632; I Dakota Law Review 91; 5 Texas Law Review 439.

[21] Supra note 20.

[1] Western Union Tel. Co. v. Green, Tenn. (1926) 281 S. W. 778.

see said that the rule that damages are limited to those within the contemplation of the parties, is applicable only to breaches of contract and that the action at bar was a tort action. The court intimated that even if the action had been in contract the telegraph company had sufficient notice of the importance of the message to allow the physician to recover for loss of the opportunity to earn fees for professional services.

In a leading case the court stated, "the contemplation-of-parties" rule is as follows: "When two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fully and reasonably be considered either as arising naturally—i. e.—according to the usual course of things—from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it." In the great majority of cases the courts have refused to apply this rule to tort actions. The rule generally applied to tort actions is usually much broader. If the wrongdoer has acted wilfully or maliciously, he is liable for all the direct results of his acts; and if he has acted merely negligently, he is liable for all the natural and probable consequences of his act, or failure to act.[3]

In a few jurisdictions the courts have applied the "contemplation-of-parties" rule to actions *ex delicto* as well as to actions *ex contractu*.[4] The Florida courts seem to have adopt-

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[2] Hadley v. Baxendale (Eng. 1854) 9 Exch. 341, 156 Eng. Reprint 145, 5 Eng. Rul. Cas. 502.

[3] Wadsworth v. Wesern Union Tel. Co. (1888) 86 Tenn. 695, 8 S. W. 574; Tenn. v. Ward and Briggs, 9 Heisk. 100; Western Union Tel. Co. v. Potts, (1907) 120 Tenn. 37, 19 L. R. A. (N. S.) 479, 127 Am. St. Reps. 991, 113 S. W. 789; and cases cited in note 48 A. L. R. 318.

[4] Haas v. Metz (1898) 78 Ill. App. 46; Phillips v. Dickerson (1887) 85 Ill. 11, 28 Am. Rep. 607; Rosan v. Big Muddy Coal and Ice Co. (1906) 128 Ill. App. 128; Crater v. Binninger, (1869) 33 N. J. L. 513, 97 Am. Dec. 737, 10 Minn. Rep. 124; Solh v. Solh, (Neb. 1926) 207 N. W. 669.

ed the "contemplation-of-parties" rule where a tort action arises out of a breach of public duty, or out of a contractual relationship between the parties, but in ordinary tort actions the general rule of damages has been applied.[5]

In tort actions the underlying principle is that the person injured shall receive compensation commensurate with his loss or injury. This includes damages not only for such injurious consequences as proceed immediately from the cause which is the basis of the action, but consequential damages as well. These damages are not limited nor affected as far as they are compensatory, by what was in fact contemplated by the party in fault. The person who is responsible for negligent acts must answer for all the injurious consequences which flow therefrom, by ordinary, natural sequence, without the interposition of any other's negligent or overpowering force. Whether the injurious consequences may have been reasonably expected to follow from the commission of the act is not at all determinative of the liability of the person who committed the act to respond to the person suffering therefrom, the right of a person to recover damages for a wrong which he has suffered should not be limited by what the wrongdoer contemplated would be the result of his act—rather, he should recover damages commensurate with his injury.[6] For a tort a defendant should be liable for all the proximate consequences. For a breach of contract

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[5] Florida E. Coast R. R. Co. v. Peters (1916) 72 Fla. 311, 73 So. 151, Ann. Cas. 1918D 121; Western Union Tel. Co. v. Merritt (1908) 55 Fla. 462, 127 Am. St. Rep. 169, 46 So. 1024; Williams v. Atlantic Coast Line R. Co. (1904) 56 Fla. 735, 24 L. R. A. (N. S.) 134, 131 Am. St. Rep. 169, 48 So. 209; Hall v. Western Union Tel. Co. (1910) 59 Fla. 275, 27 L. R. A. (N. S.) 639, 51 So. 819; Briggs v. Brown (1908) 55 Fla. 417, 46 So. 325; King v. Cooney Echstein Co. (1913) 66 Fla. 246, 63 So. 659, Ann. Cas. 1916C 163.

[6] Mentzer v. Western Union Tel. Co. (1895) 93 Ia. 752, 28 L. R. A. 72, 57 Am. St. Rep. 294, 62 N. W. 1.

a defendent should be liable only for those consequences which were reasonably forseeable at the time when the contract was entered into, as probable if the contract was broken.[7]

G. F. B.

EQUITY — CONTRACT OF RENT-A-FORD'S EMPLOYEE NOT TO WORK FOR COMPETITOR SPECIFICALLY ENFORCED

Upon becoming an employee of the complainant who was engaged in renting automobiles to customers on the mileage basis, defendant entered into a written contract that he would not, for a period of five years, enter into a similar business in competition with his employer in the county in which the business was located, nor would he divulge any of the trade secrets. Defendant left the complaintant's employment and shortly afterward entered the service of a competitor in the same city. The question was whether a Court of Equity will enforce such a contract where no specific injury is shown. The Supreme Court of Tennessee,[1] in affirming the decision of the Chancellor in enjoining the defendant from continuing in the service of the plaintiff's competitor, *held* that the nature of the employment was such that it brought the employee in close personal contact with the customers of the plaintiff company, and that it enabled him to acquire valuable information as to how the business was carried on, hence, if he engaged in a competing business in his own behalf or for another he would be in a position to take an unfair advantage of his former employer. For these reasons, said the Court, and because of the contractual restrictions as to time and territory were no more than were reasonably necessary to secure the protection of the business of the complainant, the defendant should be required

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[7] Williston on Contracts (1920) Section 1344.

[1] Matthews v. Barnes (1927 Tenn.) 283 S. W. 993.

to specifically perform his agreement not to work for a competitor of the complainant.

Ordinarily Courts of Equity refuse to specifically enforce contracts whereby an employee agrees not to work for any one else. The chief reason underlying these decisions is that such contracts are against public policy because they would impose too much of a hardship upon the employee, if they effectively prevented him from working at his usual trade or calling for any one except the other contracting party.[2] But it is a well established rule that equity will specifically enforce contracts in which an employee covenants, as a part of the consideration for his employment, not to divulge the trade secrets learned while in the service of his employer[3] "damages being wholly inadequate because of the difficulty of estimating them and usually also because of the irreparable injury which would result."[4] Furthermore, even if there is not an express agreement as to the employee's not divulging trade secrets, it has been repeatedly held that there is a promise implied in fact to that effect.[5] It has been held also that even in the absence of any contract of employment, an injunction may be issued to prevent the divulgence of trade secrets learned through fraud.[6]

It is conceded that contracts of an employee to work for a plaintiff and not to work for anyone else for a specified time

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[2] Note 9 A. L. R. 1457.

[3] Peabody v. Norfolk (1869) 98 Mass. 452; Fralich v. Despar (1894) 165 Pa. St. 24, 30 Atl. 521; Westervelt v. Natl. Paper Co. (1900) 154 Ind. 673, 57 N. E. 552; Stone v. Goss (1903) 65 N. J. Eq. 756, 55 Atl. 736; Tode v. Gross (1891) 127 N. Y. 480, 28 N. E. 469.

[4] Clark, Equity (1920) 79.

[5] Sanitas Mt. Food Co. v. Cemer (1903) 134 Mich. 320, 96 N. W. 454; Thum Co. v. Tlvczynski (1897) 114 Mich. 149, 72 N. W. 140; Pressed Steel Car Co. v. Standard Steel Car Co. (1904) 210 Pa. St. 464, 60 Atl. 4; Hirrison v. Glucose Sugar Refining Co. (1902) 116 Fed. 304, 58 L. R. A. 915; Lamb v. Evans (Eng. 1892) 3 Ch. 462, 61 L. J. Ch. 681.

[6] Tabor v. Hoffman (1889) 118 N. Y. 30, 23 N. E. 12.

after leaving the services of the employer are capable of being specifically enforced as to the negative portions of the contarct only, where the services are unique, special or extraordinarily personal, as shown in the following instances where the defendant was enjoined from violating the negative parts of the contract of employment: An agreement by a famous opera singer to sing for the plaintiff and not for anyone else for a stipulated time;[7] A physician agreed not to practice his profession in a distant city where he was employed;[8] A physician agreed not to practice his profession in the county where he was employed;[9] A dentist covenanted not to engage in the practice of his profession in the town where he was employed;[10] A dentist contracted not to practice his profsesion in the town where he was employed;[11] A teacher in a private school contracted not to teach in a competing school in a city where he was employed, after the termination of his employment.[12]

In the principal case, the services of the defendant, consisted wholly in his being a mere clerk waiting on the customers of a company engaged in the business of renting automobiles on the mileage basis. Obviously such services were neither "special, unique, nor extraordinarily personal services requiring special merit or qualification," nor were they peculiar or individual in their character. Hence the case does not fall within that class of personal service contracts containing a specifically enforcable agreement not to work for others. It is sub-

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[7] Lumley v. Wagner (Eng. 1852) I De Gex, MacNaughten and Gordon 604.

[8] Styles v. Lyon (1913) 87 Conn. 28, 86 Atl. 564.

[9] Freudenthal v. Espey (1909) 45 Col. 488, 102 Pac. 280.

[10] Tillinghast v. Boothby (1897) 20 R. I. 59, 37 Atl. 344.

[11] Turner v. Abbott (1906) 116 Tenn. 718, 94 S. W. 64.

[12] Patterson v. Cobb (Tex. Civ. App., 1899) 51 S. W. 870.

mitted that the only ground upon which the case may be sustained is that the Court granted the requested injunction solely for the purpose of effectively preventing the defendant from divulging the trade secrets which he had learned while in the employ of the complainant.

J. D. P.

MASTER AND SERVANT — GOLFER'S DUTY TO WARN CADDY

The plaintiff, a youth of twelve years, while a caddy in defendant's service, was injured by a golf ball driven by the defendant's guest. Defendant knew that his guest was about to drive, and that his playing was poor; but the plaintiff had knowledge of neither fact. Too late, the warning "Fore," came from the guest and when the plaintiff turned, the ball struck him in the eye. There was some conflict in evidence as to whether or not the defendant gave a warning. Held that it was the duty of the defendant to warn the caddy of the impending danger.[1]

The general rule is, that the master has no duty to warn the servant of risks incidental to the employment, unless such risks be latent, or unless the master knows or should know that the servant is devoid of knowledge of such danger, because of his inexperience or youth.[2] The court held in *Merticle v. Acme Cement Plaster Co.*,[3] that it must appear affirmatively that the servant was ignorant of the risk, and that the master had, or is chargeable with having knowledge of such ignorance. A distinction is made by some courts between the cases of adult and minor employees; the duty being more pronounced as

[1] Biskup v. Hoffman (Mo. 1926) 287 S. W. 865.

[2] Evan v. General Explosives Co. (1922) 239 S. W. 487. Kewanee Boiler Co. v. Erickson (1899) 181 Ill. 549, 54 N. E. 1044. Swiercz v. Ill. Steel Co. (1907) 231 Ill. 456, 83 N. E. 168.

[3] Mericle v. Acme Cement Plaster Co. (1912) 155 Iowa 692, 136 N. W. 916.

regards minors.[4] There is a conflict in the authorities as to the degree of care a master must exercise in supplying youthful employees with a safe place in which to work. Likewise there is a variance of opinion as to the duty of an employer to warn an employee. According to some courts, mere youth alone, does not impose upon the employer, the duty to warn the employee.[5] Some of the cases hold that if the servant was in the usual course of his employment, and the injury was caused by a third person, the master was not chargeable with negligence for failure to give a warning.[6] Where the danger is patent, there exists no duty whatever, to warn, whether the employee is a youthful or an adult servant, according to a decision of an Arkansas court.[7] However, even though the danger is obvious, if unknown to the servant, other courts impose the duty of warning.[8] Where there is knowledge of danger, but it is not appreciated because of the servant's youth, there is a duty to warn.[9] If, however, the servant realizes the magnitude of the danger, the duty to give warning does not exist.[10] In the principal case, the court seems to have ignored

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[4] Peterson v. Cal. Cotton Mills Co. (1913) 20 Cal. App. 751, 130 Pac. 169. Bulson v. Int. Shoe Co. (1915) 191 Mo. App. 128, 177 S. W. 1084.

[5] L. & N. R. R. Co. v. Wilson (1909) 162 Ala. 588, 50 So. 188.

[6] Jaynes v. Bush (1918) 136 Ark. 602, 203 S. W. 693. Sommers v. Std. Oil Co. (1906) 146 Mich. 111, 109 N. W. 30.

[7] Fones v. Phillips (1882) 39 Ark. 17, 43 Am. Rep. 264.

[8] Chambers v. Woodbury Mfg. Co. (1907) 106 Md. 496, 68 Atl. 290.

[9] Fries v. Am. Lead Pencil Co. (1905) 2 Cal. App. 148, 83 Pac. 173. Lehito v. Atl. Mining Co. (1908) 152 Mich. 412, 116 N. W. 405.

[10] Kuich v. Milwaukee Bag Co. (1909) 139 Wis. 101, 120 N. W. 261; White v. Witteman Lithographic Co. (1892) 131 N. Y. 631, 30 N. E. 236; Branner v. Pettyjohn (1907) 154 Ala. 616, 45 So. 646; Ogley v. Miles (1893) 139 N. Y. 458, 34 N. E. 1059; Stegmann v. Gerber (1909) 146 Mo. App. 104, 123 S. W. 1041.

Houston's Adm'r v. Seaboard Air Line Ry. (1909) 123 Va. 290, 96 S. E. 270; Jynes v. Bush (1918) 136 Ark. 602, 203 S. W. 693.

the general rule, in holding that there was a duty to warn the caddy. Even though the defendant did create the danger, still it is submitted that such danger is incidental to the service of a caddy, and one which this caddy, with a year and a half's experience should appreciate. His reaction to the guest's delayed "Fore," evidences his understanding of the danger. It would seem that the master should not be held liable in such a case, since it is a danger to be expected by an experienced caddy, as likely to arise in the course of his employment.

O. V. M.

MASTER AND SERVANT — REFINING COMPANY HELD LIABLE FOR NEGLIGENCE OF GASOLINE DISTRIBUTOR

Due to the negligent handling by a gasoline distributor of gasoline belonging to defendant, a refining company, plaintiff's building was destroyed by fire. Held, that, the evidence sustained a finding that the distributor was an agent or an employee and not an independent contractor, hence refining company was liable for the loss.[1]

The principal case follows the great weight of authority in holding that the general test of whether a person is a mere servant or agent or whether he is an independent contractor, is whether the employer has the potential power of control.[2]

[1] Gulf Refining Co. of La. v. Huffman Weekly (Tenn. 1927) 297 S. W. 199.

[2] Standard Oil Co. v. Parkinson (1907) 152 Fed. 682; Magnolia Petroleum Co. v. Johnson (1921) 149 Ark. 553, 233 S. W. 680; Bucholtz v. Standard Oil Co. of Ind. (1922) 211 Mo. App. 397, 244 S. W. 973; Angell v. White Eagle Oil and Refining Co. (1926) 169 Minn. 183, 210 N. W. 1004; Powell v. Virginia Construction Co. (1890) 88 Tenn. 697, 13 S. W. 692; McHarge et ux v. Newcomer (1907) 117 Tenn. 595, 100 S. W. 700.

In legal theory the agent or servant represents his employer's will in every detail of his work, while the independent contractor engages to do a piece of work according to his own means and methods and is free from his employer's control except as to final results.[3] The employer's right to control extends to every detail of the service of a mere servant or agent.[4]

It is not the actual control which makes the difference, but th employer's right to interfere at any time. If he has the right to control, it is immaterial whether or not he exercises it.[5] If the employer does not choose to exercise his right of control, and no control is exercised, it would have no weight one way or another in determining whether or not a person is a servant or agent or whether he is an independent contractor.[6]

The designation of one as agent or servant is not conclusive of that relation. The rule of *respondeat superior* is not applicable where there is no right of control vested in the employer. The employer must have the authority to control his employee in his acts in the course of his employment so as to be able to prevent injuries to others by exerting this authority.[7] Unless the employer has retained this right to control in respect to the manner in which the work is to be executed, the employer is an indipendent contractor.[8] On the other hand one cannot be an independent contractor and at the same time and in the same employment be subject to control.[9]

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[3] 2 C. J. Agency sec. 10; Mechem on Agency (3rd. ed. 1923) sec. 506.

[4] 19 A. L. R. 253.

[5] 39 C. J. Master & Servant sec. 1518.

[6] 14 R. C. L. Independent Contractor sec. 3.

[7] I Bailey on Personal Injuries (2nd ed. 1912) p. 31.

[8] I Labatt's Master & Servant sec. 64.

[9] Knoxville Iron Co. v. Dobson (1881) 7 Lea (Tenn.) 367.

There is no one simple rule which can be applied to every case and thereby determine whether or not a man is an agent or servant or whether he an independent contractor, but there are a number of things which indicate what the status of the man is. For instance, the right to terminate the employment tends to show that he is a mere servant or agent.[10] Also, if the employer furnishes the materials the relationship of master and servant is indicated.[11] The employer may not retain any control and yet make his employee his servant by his conduct toward him. If the employee submits to control he is a servant although no right to control has been reserved to the employer.[12] The right to select and discharge an employee tends to show a right to control, and hence the relation of master and servant.[13] But if the employee has the power to control servants under him, and is paid a lump sum for the job, the relation of employer and independent contractor is indicated. The principal case seems to be a sound application of these rules.

R. S. C.

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[10] New Albany Forge & Rolling Mill v. Cooper (1892) 131 Ind. 363, 30 N. E. 204.

[11] I Bailey on Personal Injuries (2nd ed. 1912) p. 113.

[12] Klages v. Gillette-Herzog Mfg. Co. (1902) 86 Minn. 458, 90 N. W. 1116.

[13] Hand v. Cole (1890) 88 Tenn. 400, 12 S. W. 922.

[14] 39 C. J. Master & Servant sec. 1526.

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THE GENESIS OF THE TENNESSEE SUPREME COURT

SAMUEL C. WILLIAMS

The first court of justice organized in the Tennessee Country — that of the Watauga Association in 1772 — was that of a government independent of any of the Colonies; it functioned as a court of first instance and of last resort. The final determination of liability for crimes and in civil disputes was delegated by the Articles of Association, we must assume, to the court of five members of which John Carter was at first, or soon afterwards, the chairman. The Court being that of an independent community, appeals did not lie to the superior courts of North Carolina or Virginia; the laws of which last Colony were taken "for our guide, so near as the situation of affairs would admit."

The first change made in the court of justice was in 1776-7. On July 5, 1776, the western people "willing to become a party to the present unhappy contest" with Great Britain, petitioned the newly organized Provincial Council of North Carolina to be received under its jurisidiction. In November, 1776, the people of "Washington District" were incorporated into North Carolina's government. By an ordinance appended to the Constitution of that State (as contradistinguished from and succeeding the Province) of December, 1776, a corps of justices of the peace for Washington District was

named.[1] The ordinance, it seems, provided for no appeal from judgments of the justices sitting *en banc;* and like the Watauga Association Court, this was a court of last resort. John Carter was its chairman. The court functioned until the passage of an act (Chapter 31 of the Acts of 1777) enacting Washington District into Washington County. The new county was made a part of Salisbury District, and appeals were grantable to the superior court of the district sitting at Salisbury.[2] This court was organized February 23, 1778, with John Carter as chairman, John Sevier as clerk, and with a larger number of commissioned justices.[3] The first entry was: "Ordered that Amos Bird and John Smith be jurors to attend the next 'Supreme Court' (meaning Superior Court) for the district of Salisbury". Later entries show grants of appeals to the Superior Court.[4]

In 1782 the District of Morgan was created; Washington County and the recently erected County of Sullivan were attached to it, Morganton, Burke County, being the district site. But the same act, reciting that "the extensive mountains that lie desolate between the inhabited parts of Washington

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[1] The fact that a court of "Washington District" existed has gone unnoted by our historians. It is, therefore, interesting to know who were its members: John Carter, John Sevier, Charles Robertson, Valentine Sevier, Robert Lucas, John Haile, Andrew Greer, Thomas Simpson, Jacob Womack, John Shelby, George Russell, William Bean, Henry Clark, Zacharias Isbell, Aaron Pinson, John McNabb, Thomas Houghton, William Higgins, Isaac Johnson, Andrew Baker, Jr., and William Clarke. North Carolina State Records, XXIII, 995. See also N. C. Colonial Rec. XI. 653.

[2] N. C. State Rec. XXIV, 142.

[3] John Carter, James Robertson, John Sevier, Valentine Sevier, Jacob Womack, Robert Lucas, Andrew Greer, John Shelby, Jr., George Russell, William Bean, Zach'r Isbell, John McNabb, Thomas Houghton, William Clark, *John McMaihen, Benjamin Gist, J. Chisholm, Joseph Wilson, William Cobb, James Stuart, Michael Woods, Richard White, Benjamin Wilson,* Charles Robertson, *William McNabb, Thomas Price and Jesse Walton.* The names in italics those of new justices. American Hist. Mag. V, 344.

[4] Another instance where the Superior Court is called "Supreme Court," is found in the proceedings of the legislature of the Southwest Territory, Sept. 23, 1794, p. 33.

and the inhabited parts of Burke counties, make the transportation of criminals from the former to the latter difficult and on the way frequently find means to break custody and escape", provided for the holding of courts of oyer and terminer, at the Washington County court-house, by a superior court judge empowered to hear and determine criminal cases; and with the "power to receive and try appeals from the county courts of Washington and Sullivan". Experience had demonstrated that appeals to far-away Salisbury substantially worked defeats of justice, and thus there arose the first home-heard appeals in the Western Country. The same considerations led to the establishment shortly afterwards (1784) of Washington District; with Jonesborough as the judicial capital and site of the Superior Court. At the same time David Campbell was appointed assistant judge of Washington District.

The Superior Court of North Carolina was the sole court of appeal until the organization of the State of Franklin; when a court of like character and powers was established, with David Campbell as judge and two laymen, Joshua Gist and John Anderson, as "assistant judges".[5] Towards the close and fall of the Franklin government Judge Campbell accepted a commission as superior court judge from North Carolina, and the courts were held under the authority of that State until the organization of the Territory of the United States of America, South of the Ohio River.

In the Cumberland region (District of Mero) the first Court with second apellate jurisdiction (the power being to entertain appeals from and review by certiorari judgments of the County Courts) was held in November, 1788, by Judge John McNairy; Andrew Jackson serving as district attorney,[6] under North Carolina authority. An earlier effort to provide for such a court in the Cumberland Country was made in 1785 by the General Assembly of North Carolina. "Because of

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[5] Williams, *History of the Lost State of Franklin*, 55-6.

[6] By lapse North Carolina had failed to provide for a district attorney, and Judge McNairy appointed Jackson, who for years went uncompensated for his services.

the very remote situation of Davidson County" the act established therefor a Superior Court. John Haywood was elected judge of this court at the same session. After taking six months for consideration Haywood, then a young lawyer, wrote Governor Caswell urging as hinderances the troubles with the Indians in that Western Country, but expressing appreciation of the infinite honor done him by the General Assembly in selecting him for the "judicial post in the Western Country", and begging to be released. The Governor acceded to the wish of young Haywood.

At the next session of the General Assembly (January, 1787) John Brown, a lawyer of Wilkes County, who was at the time a member of the lower House of Assembly, was elected judge of the Davidson County Superior Court, but he also declined; and "the very remote region" was left without a court of appellate powers until November, 1788, though McNairy had been elected shortly after the refusal of Brown to invade the wilderness.

When, in 1790, North Carolina ceded for the second time to the United States her western territory, she stipulated "that the laws in force and use in the State of North Carolina shall be and continue in full force within the territory until the same shall be repealed, or otherwise altered, by the legislative authority of said territory." Thus was perpetuated in the West the Carolina type of Superior Court. North Carolina had no Supreme Court until 1805, though the constitution of 1776 had empowered the legislature to establish a Supreme Court.

President Washington on June 8, 1790, appointed as the three judges of the Court for the Southwest Territory, David Campbell and John McNairy, already in office, and Judge Perry, a non-resident. The latter declined to serve, and President Washington, in lieu, commissioned Joseph Anderson, of Delaware.

A third superior-court district was created; given the name of Hamilton, in honor of Alexander Hamilton, and Knoxville made the site of its sessions. The judgments and decrees of

this court were final, as had been those of the courts of like type in North Carolina and Franklin. The three districts, Washington, Mero, and Hamilton, were unchanged thereafter and the same judges occupied the bench during the six years of the Territory, 1790-1796. The court's recorded judgments and decrees are in existence; but there is trace of but three reasoned opinions. The court evidently handed down few written opinions, not being a court of errors and appeals.

In the formulation of the court system for the Territory (Act of September 29, 1794) the guiding hand of the Governor, Wm. Blount, was felt. The legislature of the territory placed on record its thanks "for the application of his abilities and attention especially in compiling and arranging the system of court law".[7]

The convention held in 1796 to form a Constitution for the State of Tennessee made no mandatory provision for a Supreme Court or a Court of Errors and Appeals. Such a tribunal was not mentioned in any of the proposals advanced. The first draft, in Art. V, Sec. 1, would have made the Superior Court a constitutional tribunal, as also the Court of Pleas; thus:

"The judicial power of the State shall be vested in a Superior Court, which shall consist of three judges; in a court of Pleas and Sessions, and in such other courts as the legislature may, in future, conceive necessary to be established."

The unwisdom of this proposal is obvious, particularly in confining the number of judges of the Superior Courts to three, in a State that was to grow in population in a proportion far in excess of the nation as a whole. James Robertson, of Davidson, moved, and John Rhea, of Sullivan, seconded a resolution to change the section to read in the final draft:

"The judicial power of the State shall be vested in such superior and inferior courts of law and equity as the legislature shall, from time to time, direct and establish."

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[7] Journal, Sept. 29, 1794, p. 39.

This constitutional provision created no sort of constitutional court, but unfortunately left the judicial branch of government subordinated to the legislative. It did, however, empower the legislature at will to establish a Supreme Court. It was, doubtless, deemed that the time was not ripe in the development of the Commonwealth for the creation of a revisory tribunal. Our system of jurisprudence was as yet patterned after that of the Mother State, and North Carolina, as seen, was slow to move towards the establishment of a Supreme Court.

The first legislature of the new State established a Superior Court (Act 1796, Ch. 1) with original and final jurisdiction in law and equity causes, and with appellate jurisdiction of cases arising in the Court of Pleas and Sessions; the last named being a county court with original jurisdiction much wider than that of our present-day county courts. Three judges of the Superior Courts were provided for. When the system went into effect in April, 1796, these were: John McNairy, the only territorial judge to be brought over, Archibald Roane and Willie Blount.

Due largely to the long distances to be traveled to reach the sites of the courts, and to the rapid promotion of the judges in political, military and other spheres, resignations were numerous. Few of the nominees to the bench were minded to pursue a judicial career solely or even chiefly. The first resignation was that of Willie Blount, in September, 1796, to be followed in office by W. C. C. Claiborne, of Kingsport, who resigned in the summer of 1797 to accept an election to Congress. This place was filled by David Campbell, who continued in office throughout the after existence of the system.

The second resignation from the first bench of judges was that of McNairy, on his appointment as United States District Judge, in May, 1797. He was succeeded by Howell Tatum, who served but one year, giving place to Andrew Jackson. The latter served until July, 1804. Jackson left the bench to devote himself to his private affairs which were in

a serious condition, and to his duties as major-general, to which rank he had been elected over Sevier in February, 1803. His place on the bench went to his warm personal friend, John Overton, who remained in office until the abolition of the court system.

Roane resigned in June, 1801, to accept the governorship, and was succeeded by Hugh Lawson White, who in turn resigned in April, 1807, to enter the State Senate. His place fell to Thomas Emmerson, another citizen of Knoxville, who served until the fall of the same year, to be followed by Samuel Powel, of Rogersville. An act of the legislature provided for an additional or fourth judge and Parry W. Humphreys, of Clarksville, was elected in 1807.

While this court was in no sense a Supreme Court, historians quite without exception have referred to the judges as "Supreme Judges". Particularly is this true of the biographers of Jackson, White and others. This is owing, perhaps, to the fact that opinions handed down in certain causes by this court have been reported in the Tennessee Reports. Our first precedent law is to be found in Overton's Reports, preserved by Judge John Overton and edited for the press in 1813 by Judge Emmerson. The entire volume of 1 Overton's Reports is devoted to the Superior Court decisions, and 2 Overton (pages 1-109) contains its opinions.

An examination of this output by the court demonstrates that, so far as written precedents are concerned, the bulk of the work fell on Judges Overton, White and Campbell, and, perhaps, in the order of their names.

The three cases first reported in 1 Overton are those decided by the Territorial Superior Court; all of them *Per Curiam*. Of the reported cases not in excess of ten were handed down during the tenure of Judge Andrew Jackson; all *Per Curiam*. It is, therefore, impossible to state whether Jackson, J., was the author of any of them — a point that has intrigued his biographers. The report of one case only sets out his name —*Miller's Lessee v. Holt*, 1 Tenn. (Overton) 49 — and then to recite Judge Jackson's previous ruling on a motion for a new

trial: "A verdict was found for the plaintiff, but Jackson, J., expressed his willingness to allow a rule to show cause for a new trial, so that the question might be considered."

That Judge Jackson was fairminded and painstaking as a judge is evidenced by ample notes taken by him of arguments at the bar, some of which are preserved in the Jackson MSS., vol. 118 in the Congressional Library.[8] He had no overweening estimate of his own legal ability. When, in 1803, Judge Roane was to retire from the bench, Jackson realized that the court (composed at the time of Roane, Campbell and himself) would be weakened in that regard; and he was tempted to retire. In this situation he wrote (September 9, 1807, from Jonesborough) to his warm personal friend and relative, Col. Robert Hays, saying:

"Mr. Hugh L. White who is really a lawyer has said on Terms that I would not leave the Judiciary, that he would accept the appointment of Judge if elected. he is a young man of cleverness, really the lawyer and I have no doubt but he will be chosen by the Legislature, and will fill Judge Roanes Seat with as much honour to himself and Benefit to the Publick as any Legal Charector in our State. Certainly the filling of Judge Roan seat in the Judiciary by such a charactor is and ought to be the wish of every Citizen — and nothing can be of greater importance to the State. To have this done is my greatest wish, and If my remaining in my present seat will be condusive to the object it is a duty I owe to my country to do so. But upon the event that Mr. White is not elected or same legal charector in whose Legal talents I can place as much confidence I will retire to my farm, and domesticate myself."[9]

Not only was it difficult to secure and retain lawyers of capacity to man the bench of the Superior Court, but the system was fast proving inadequate to the needs of a rapidly growing Commonwealth. Expansion in population, wealth

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[8] Bossett, *Correspondence of Jackson*, I, 78.

[9] Ib., I, 60.

and commerce required, more and more, that the precedents, which governed trade and determined titles to the immense tracts of land opening to settlement, should be made by a court of review; the judges of which should have time to deliberate and the learning correctly and wisely to formulate the precedent law of the State.

Discontent with the old Carolina system was growing in both the Mother State and in Tennessee. Strangely enough, it took the boldness of youth to start the agitation in Tennessee for such a change. A lawyer, less than three years at the bar and well-nigh briefless, began to advocate a change. Using the pen-name of Sir John Oldcastle,[10] Thomas Hart Benton, of the Franklin bar, opened a campaign by contributing a long series of articles to *The Impartial Review*, of Nashville, in advocacy of reform in the judicial system of Tennessee. He sought primarily two changes: the abolition of equity as a separate system and its being blended in application with law, and the creation of a Supreme Court. Other lawyers were provoked to take part in the discussion, under the names of Junius, Brutus, Pericles, etc., and public interest was aroused. Benton put back of the movement his strong and vigorous mentality that carried him so far and high in after-life. He urged:

"In the first place, I would have one Supreme Court, to be held alternately at Nashville and Knoxville, and to be perpetually in session, if business required it. This court should have no original jurisdiction. Its powers should be limited to the supervision and correction of the law proceedings of circuit courts, and the court itself should be held by one chief justice whose salary should be such as to command the best talents the State affords."[11]

In order to mature his plan, as far as possible, into a law, Benton was a candidate for the State Senate in 1809 from his district, and was elected. As a member of the committee

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[10] Sir John Oldcastle was in the fifteenth century a leader in the Lollard movement for reform in the Church of England.

[11] Impartial Review, of May 12, 1808.

of reference, it fell to the lot of Benton to draft the act for the reorganization of the judiciary system[12] though, no doubt, he applied to and received aid from the experienced Judge Hugh L. White who was a member of the Senate at the time.

The measure was carried to a successful issue on November 16, 1809, in the Act of 1809, Ch. 49, entitled "An act to establish Circuit Courts and a Supreme Court of Errors and Appeals", which went into effect January 1, 1810. The change was imperative. The growth and wider spread of population had already called for the creation of additional Superior Court districts and in 1809 it was deemed necessary to provide for five circuits and five circuit judges. It was impracticable for *three* Superior Court judges to ride to the widely scattered sites, and the Superior Courts were becoming more and more to be presided over by one judge. Further, the precedent law could not be adequate in the circumstances. The decisions were struck off in the hurry and under the pressure of *Nisi Prius* trials, and oftentimes at places where there were few law books to be consulted. The court was, in a very true sense, "a saddle-bags tribunal", with all that the term implies in the preparation of reasoned opinions.

The Supreme Court was composed of two judges, elective by the Legislature, with whom a circuit judge should sit, though not in cases appealed from his own circuit. The two judges were to each receive a salary of fifteen hundred dollars; fairly commensurate with present-day salaries when we consider the purchasing power of the dollar. The Supreme Court was to sit at Jonesbourough, Knoxville, Carthage, Nashville and Clarksville. Opinions on all material points, it was stipulated, should be in writing.

Benton failed in his purpose to have a chief-justiceship created. Two of the leading lawyers of the State were elected to serve as judges of the new court, Hugh Lawson White and George W. Campbell. Benton takes credit for White's selection. Speaking of White, he says in his *Thirty Years' View*, p. 184:

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[12] Benton's *Thirty Years' View*, 184.

"Bred a lawyer and coming early to the bar, he was noted for a probity, modesty and gravity—with a learning, assiduity and patience—which marked him for the judicial bench: and he was soon placed upon it—that of the Superior Court. Afterwards, when the judiciary of the State was remodeled, he was placed on the bench of the Supreme Court. It was considered a favor to the public to get him to take the place. That is well known to the writer of this *View*, then a member of the General Assembly of Tennessee and the author of the new modelled judiciary. He applied to Judge White, who at that time had returned to the bar, to know if he would take the place; and considered the new system accredited to the public on receiving the answer that he would. That is all he had to do with getting the appointment: he was elected unanimously by the General Assembly, with whom the appointment rested. That is about the way in which he received all his appointments, either from his State of from the federal government — merely agreeing to take the office if it was offered him; but not always agreeing to accept: often refusing."

White, while not named Chief Justice, presided over the court's sessions.[13]

George W. Campbell had served in Congress, and was a leader of the bar, first in East Tennessee and later at Nashville. The after-careers as national figures, as well as the earlier, of both of its first judges demonstrate that in its genesis our Supreme Court was manned by men of towering ability. White was twice offered appointments to the bench of the Supreme Court of the United States by President Jackson, but declined.[14] Had he accepted he would have been the predecessor of John Catron and Horace H. Lurton, who had also served on the bench of the Tennessee Supreme Court, and of Howell E. Jackson, James C. McReynolds and Edward T. Sanford, appointees from Tennessee.

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[13] Scott, Memoir of White, 17.

[14] Ib., 17.

WILSON'S FOURTEEN POINTS AS FOLLOWED IN THE POST-WAR COMMERCIAL TREATIES OF THE UNITED STATES

WALLACE MCCLURE

When the German Reichstag, on August 12, 1925, approved the commercial treaty concluded with the United States December 8, 1923, it made a definite contribution, doubtless all unconsciously, to the fulfillment of the peace conditions laid down by the American President in his war-time speech of ten years ago[1] which was destined to be accepted by all parties before the end of the year as the basis of the Armistice which brought the World War to an end.

"The program of the world's peace," which Wilson proclaimed as the program of the United States, included—

"The removal, so far as possible, of all economic barriers and the establishment of an equality of trade conditions among all the nations consenting to the peace and associating themselves for its maintenance".

The President later explained that by this language he meant nothing more in respect of the tariff than that "whatever tariff any nation might deem necessary for its own economic service, be that tariff high or low, it should apply equally to all foreign nations; . . . that there should be no discriminations against some nations that did not apply to others".

It is a far cry from the third of the Fourteen Points to the Fordney-McCumber Tariff Act of 1922; yet out of that act has come a commercial policy the essence of which is the "establishment of an equality of trade conditions" for American exports in all parts of the world and, in necessary consequence, for imports from all countries into the United States. The story of how a single principle found expression and sustenance in two documents seemingly so utterly at variance

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[1] January 8, 1918.

leads far back into the heroic first days of American nationhood.

From those first days until our own day the ideal of equality has been peculiarly dear to the American sense of the fitness of things. We proclaimed it in the very words that we used to declare ourselves independent and when we entered into our first commercial treaty we accepted some eloquent assertions regarding its applicability to the treatment of international trade—a pronouncement which John Quincy Adams, nearly half a century later, declared to be "to the foundation of our commercial intercourse with the rest of mankind what the Declaration of Independence was to that of our internal government".

Confronted with the ingrained discriminatory practices of most other commercial countries, early American statesmen proceeded prudently, refusing to accord unrestricted equality of treatment to countries that offered nothing substantial in return. Under the influence of new industrial conditions and new economic thought, a greater liberality in the treatment of foreign ships and foreign goods was developing. The United States was a leader in this movement and after half a century of diplomatic effort, supplemented by legislative enactments, definite progress had been made toward establishing equal conditions for ships in ports, regardless of what flag they flew. This principle, called the national treatment of shipping, has been generally recognized in international practice since the middle of the nineteenth century.

The United States has usually levied the same customs duties upon goods regardless of the foreign country from which they have come — thus observing with respect to countries generally what is called most-favored-nation treatment. Only the tariff acts of 1890 and 1897, in operation for a total of about sixteen years, effectively proposed to lay the foundation for a differential policy. Under international agreements negotiated in accordance with those acts certain discriminatory import duties were put in force. Moreover, a few "reciprocity" treaties, of which the one with Cuba, operative since 1903, is

the sole survivor, have from time to time provided for differential treatment apart from general legislative authorization. The tariff act of 1909 proposed to penalize other countries which failed to accord to American commerce equality of treatment—and this policy was elaborated in the tariff act of 1922.

The policy of equality as expressed in the national treatment of shipping was early made a part of American commercial treaties and the persuasion of other countries reciprocally to agree to such provisions was considered a triumph in our diplomacy. On the other hand, while usually practicing a general equality in its customs houses, the United States almost invariably refused to include an unqualified pledge of such equality in its international engagements. In its first commercial treaty (France), already mentioned, it initiated what has come to be known as *conditional* most-favored-nation treatment, which, while justifiable and even progressive in view of the practices of other countries in the eighteenth century, was not the expression of equality as the term is now in most quarters understood. In recent times the chief characteristic of the conditional equality policy has been found in the fact that it has left the country free to enter into the treaty with Cuba (and other "reciprocity" treaties) without obligation to apply the special tariff reductions which Cuban goods enjoy to the goods of countries with which treaties containing the most-favored-nation pledge are in operation.[2] It has left the other parties to American most-favored-nation agreements similiarly free to discriminate against the commerce of the United States.

Since 1860 the rest of the world, with few exceptions, has maintained that most-favored-nation treatment meant treatment as favorable as that accorded to any foreign country, without any condition.

Leaving out the condition most-favored-nation treatment means equality: with the condition it is no guarantee of equality. Thus the United States maintained the policy, even if not usually the practice, of inequality of trade.

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[2] In this connection see *Bartram v. Robertson*, 122 U. S. 116; *Whitney v. Robertson* 124 U. S. 190; *Shaw v. U. S.* 1 Ct. of Customs App., 426.

The difference between the American interpretation and the world interpretation of most-favored-nation treatment led to many diplomatic skirmishes. With no other country were such contests so hard-fought as with the German Empire.

Relations between the United States and the individual states of Germany were maintained under a number of early commercial treaties, beginning with that of 1785 with Prussia —the fourth treaty of amity and commerce entered into by the American Government. The treaty of 1828 with the most powerful of the German states was a pioneer in establishing unrestricted equality in the treatment of shipping but, like the others, contained what was considered in this country to be only a conditional promise of equality for goods in the customs houses. After the formation of the Empire, Germany held that the Prussian treaty of 1828 continued in force and that its operation extended over the whole imperial area. The United States did not dissent, but stoutly maintained the conditional character of the equality of treatment pledge when Germany sought to have it interpreted as though it were unconditional.

In 1884 the United States instituted the practice of varying its tonnage dues on ships according to two zones of nearer and farther ports of sailing. Vessels sailing from German ports were charged with the higher duties and the claim was made, not without plausibility, that this violated the treaty, regardless of whether the most-favored-nation clause was conditional or unconditional. Under the American tariff act of 1894, a duty was placed on German salt because Germany happened to tax that article, while salt from other countries continued to enter the United States free of duty; this action was apparently inconsistent with any interpretation of the most-favored-nation pledge. Agreements entered into between the two countries under the American tariff acts of 1890 and 1897 contributed nothing to the solution of the increasingly embittered controversy.

Relying upon the pledge of conditional equality merely, Germany put forward some seemingly valid but unheeded

claims for the treatment, or for opportunity to negotiate for the same, that the United States was granting to other countries, usually for compensation, but sometimes freely, as a result of the operation of reciprocity agreements. The continued existence of the Prussian-American treaty was judicially recognized in 1913 and certain kinds of wood pulp produced in Germany were declared to be entitled to free entry into the United States because freely admitted from Canada, without any reciprocal favor on the part of that country, under an Act of Congress adopted two years before.[3] The record of Germany itself,[4] on the other hand, shows a number of lapses from equality in the treatment of American commerce, some of which seem clearly in contravention of the treaty of 1828.

After the passage of the tariff act of 1909, which contemplated negotiations with other countries for the purpose of eliminating discriminations, a regime of equality, with the exception of the treatment by the United States of the products of Cuba, was established with Germany and, so far as the United States was concerned, with all other countries. This situation prevailed until the United States entered the World War. Meantime a certain amount of sentiment had developed in the United States in favor of abandoning the interpretation of most-favored-nation treatment which relieved the country pledging such treatment from obligation to enforce equality of trade conditions and which countenanced exclusive reciprocity favors to individual countries.

As early as Cleveland's first administration the President had withdrawn a pending reciprocity treaty in part because of the diplomatic misunderstandings which grew out of

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[3] Act of July 26, 1911. See *American Express Co. v. U. S.* and *Bertuch & Co. v. U. S.* 4 Ct. of Customs App., 146; *Cliff Paper Co. v. U. S.* 4 Ct. of Customs App. 186.

[4] Act of July 26, 1911, Section 2. This part of the act was operative notwithstanding Canada's failure to enact the reciprocal legislation contemplated by the remainder of the Act. *Express Company, et al., v. United States; Bertuch & Co., et al. v. United States;* 4 Court of Customs Appeals, 146. See also *Disconto-Gesellschaft v. Umbreit,* 208 U. S. 570

the American interpretation. The disadvantages of maintaining what was approximately its own private definition of the term was becoming apparent to the United States. In its treaty restoring friendly relations with Germany this country adopted the provision of the Treaty of Versailles under which Germany pledged to the Allied Powers for five years most-favored-nation treatment "unconditionally, without request and without compensation".[5] Similar pledges, though for shorter periods, were made in World War settlements with Austria and with Hungary.

Meantime the United States Tariff Commission had given studious attention to the subject of post-war commercial policy and had issued a convincing report which was generally interpretated as arguing against exclusive reciprocity treaties and in favor of seeking to establish an equality of trade conditions. The world generally had long since abandoned the practices which justified the conditional most-favored-nation clause in the eighteenth century. Industry had been developing with lengthening strides and had become eager for foreign markets. It was felt that American export trade needed primarily the assurance that it would not be discriminated against; that with an equal chance it could compete successfully in the markets of the world. Special favors and concessions seemed, moreover, to be inharmonious with one of the cardinal tenets of American foreign policy — the doctrine of the Open Door.

Accordingly the Congress, in enacting a new general tariff law in 1922, rejected provisions of which a policy of inequality would presumably have been the outgrowth and replaced them with a section which authorized the President to penalize discriminations against American commerce in other countries. The reflex of such a provision was inevitably a policy of equality in the treatment of the commerce of other countries in the United States.

The policy of President Harding's and President Coolidge's administrations, for giving effect to this feature of the

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[5] Article 267.

tariff law, has been to enter into arrangements with other countries reciprocally pledging unconditional most-favored-nation treatment, thus establishing so far as the two parties to each agreement are concerned an equality of trade conditions as contemplated by Point III of the Fourteen Points; and also marking not only a distinct and very important development in the history of American commercial policy, but the emergence of the United States as a vigorous and confident commercial power — for the conditional clause is a recognized instrument of comparative weakness, while a policy of unconditional most-favored-nation treatment is characteristically adapted to nations that, commercially, are strong.

Nearly a score of treaties and agreements giving expression to the new policy have been concluded and numerous others are in contemplation.[6] The first of these to receive the approval of the United States Senate, and thus fully to establish the policy of unconditional equality of treatment as the policy of the American Government, was the treaty of friendship, commerce and consular rights with Germany. This new treaty

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[6] By September 1, 1927, the following treaties and modi vivendi containing reciprocal unconditional most-favored-nation clauses governing customs duties had been negotiated in accordance with the policy of the tariff act of 1922:

Treaties in operation:

Germany, signed December 8, 1923, ratifications exchanged October 14, 1925.

Esthonia, signed December 23, 1925, ratifications exchanged May 22, 1926.

Hungary, signed June 24, 1925, ratifications exchanged September 4, 1926.

Treaties signed and awaiting ratification or exchange of ratifications:

Turkey, August 6, 1923.

Salvador, February 22, 1926.

Modi vivendi: Brazil, Czechoslovakia, Dominican Republic, Esthonia, Finland, Greece, Guatemala, Haiti, Latvia, Lithuania, Nicaragua, Poland (including Danzig), Rumania, and Turkey. These instruments, except in the case of Turkey, continue in force indefinitely unless action is taken to terminate them.

The existing treaty of 1881 with Serbia (Kingdom of the Serbs, Croats, and Slovenes) contains a most-favored-nation clause unconditional in language . The same is probably true of the existing modus vivendi with Spain, dating from 1906, though exceptions of a far-reaching character have been made through later agreements.

with Germany is a comprehensive document embracing the varied array of provisions customarily grouped in such international compacts. Its duration is, except as later explained, ten years and thereafter until terminated on a year's notice by either party. To its unconditional equality clauses are reserved certain commonly found exceptions, such as sanitary regulations and border traffic; also, in the case of the United States, commerce with Cuba, the Panama Canal Zone and its own dependencies.

The provisions of the treaty which stipulated equality of treatment for shipping (national treatment),[7] unlike those which dealt with customs duties and instituted for the United States the principle of unconditional most-favored-nation treatment, contained no departure from American tradition of a hundred years. Yet to them the Senate added a reservation designed to facilitate their termination in accordance with the policy of shipping discriminations found in the famous Section 34 of the Merchant Marine Act, 1920, which Presidents Wilson and Harding had pointedly condemned and which President Coolidge, also, had refused to enforce. While probably destined to remain without practical effect, the spirit of the Senatorial reservation was wholly reactionary and is the antithesis of a policy of equality of trade conditions.

Despite these minor disparities from complete equality, the treaty has constituted, since October 14, 1925, when upon the formality of exchange of ratifications it came into operation, an interesting and happy climax in German-American

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[7] Equality of treatment for foreign ships connotes national treatment, that is, the same treatment that is accorded vessels flying a nation's own flag, because national vessels and foreign vessels directly compete in a nation's own ports; where tonnage and other duties are levied. On the other hand, national, or home-produced, merchandise, consumed within a country, does not enter the customs houses of the country; hence, in the matter of import duties it has no direct competition with foreign merchandise. National goods being left out of consideration, merchandise of any one country receives equality of treatment if it receives treatment as good as the best accorded to any other foreign country, i. e., most-favored-nation treatment.

commercial relations and a justification of both Germany's pre-war most-favored-nation policy and the policy of the United States as prophetically expressed by President Wilson not only in his war-time addresses but through the work of the American delegation at the Peace Conference of Paris.

THE MISSISSIPPI BUSINESS SIGN LAW

WILLIAM HEMINGWAY

The subject selected for consideration is what is known in Mississippi as the Sign Law. It will be of especial interest to the bar of Tennessee who have clients that do business in the State of Mississippi. It is a law peculiar to three states, Mississippi, Virginia and West Virginia. It is contained in Hemingway's Code of 1927, Section 3334 and for convenience is copied here.

"BUSINESS SIGN, AND WHAT TO CONTAIN.

—If a person shall transact business as a trader or otherwise, with the addition of the words 'agent', 'factor', 'and company,' '& Co.,' or like words, and fail to disclose the name of his principal or partner by a sign in letters easy to read, placed conspicuously at the house where such business is transacted, or if any person shall transact business in his own name without any such addition, all the property, stock, money, and choses in action used or acquired in such business shall, as to the creditors of any such person, be liable for his debts, and be in all respects treated in favor of his creditors as his property."

This section is a part of the legislation embodied in the chapter on Statute of Frauds. It had its beginning in 1803 and was first included in Code of 1880 in its present form. Therefore, decisions of the Mississippi Supreme Court are based upon the Code of 1880 and subsequent Codes. It will be noted that it refers to traders with the words "agent," "factor," "and company," or "& Co.," and also to those transacting business using only their own name. It might properly be classified under the law of Principal and Agent under the subhead of "Undisclosed Principal."

It will be noted first that it refers only to traders, and the business of a trader has been construed frequently by the

Supreme Court of Mississippi. It also relates only to property acquired in the trader's business and does not apply to property neither used nor acquired in the trader's business.[1]

A person must be engaged in a business as a regular occupation in order to make him a trader, for a single sale is not sufficient under the statute to make one a trader.[2]

An insurance agent cannot be classed as a trader, for a person transacting business solely as an insurance agent is not within this section.[3]

The principle of barter and sale, while not specifically mentioned, seems to have been in the mind of our court for they did not hold the statute applicable to the case of a sale of a restaurant operated under the name of "The Elite Cafe" where merchandise is not sold in the usual mercantile way.[4] Neither is it applicable in the case of a person keeping a restaurant and boarding house, as she does not belong to the class of persons included in the section.[5]

A person engaged in the business of buying rough lumber, planing it for building purposes, and reselling it is not a trader within the definition as given by the Supreme Court.[6]

The section does not apply to a person conducting the business of milling and ginning in the country for the public, but only to traders and persons *ejusdem generis*.[7]

The acquisition and use of jitney busses in the business of operating automobiles for hire does not come within the section.[8]

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[1] Longino v. Delta Bank. (1898) 76 Miss. 395, 24 So. 901.

[2] Durham v. Slidell Liquor Co. (1904) 94 Miss. 140, 49 So. 739.

[3] Lyons v. Steel & Co. (1905) 86 Miss. 261, 38 So. 371.

[4] Carnaggio Bros. v. Greenwood (1926) 142 Miss. 885, 108 So. 141.

[5] Oliver v. Ferguson (1916) 112 Miss. 521, 73 So. 569.

[6] Willis v. Memphis Grocery Co. (1896) — Miss. —, 19 So. 101.

[7] Yale v. Taylor (1886) 63 Miss. 598.

[8] Orr v. Jackson Jitney Car Co. (1917) 115 Miss. 140, 75 So. 945.

The foregoing will be sufficient to convey the meaning of the word trader as used within this section.

> "The object of the statute was to prevent the assertion of secret claims to property as against creditors of the person who seems to be the owner of it evidenced by his dealing with it; and it conclusively fixes the ownership to be in the person whose sign is exhibited at the place where the business is conducted or who in the absence of any sign, is the manager of the business."[9]

In this case the rule seemed to have worked harshly. One, Thomas C. Buffington, was engaged in business of cotton buying in the town of Grenada. The cotton purchased by him was shipped to appellant, a commission merchant in New Orleans. Buffington had an office rented during the cotton season at which place he kept his desk, books, and samples of cotton purchased by him. In the local papers he published an advertisement stating his business inviting people to bring their cotton to him for sale. He posted a copy of this advertisement on the door of his office, and it was signed "Thomas C. Buffington". A strict construction was put upon the statute in this case, but the court held that he was a trader. He did not disclose his principal, and Judge Cooper said: "As to the creditors of Buffington whether they were antecendent or subsequent creditors, whether with or without notice of the fact that he was but an agent of another, whether they did or did not extend credit to him in the business or on the faith of his apparent ownership of the property, the property under this statute was his and subject to their demands."[10]

The court held that property used in the bar and billiard room conducted under the sign only of "Empire Saloon" is liable to execution on a judgment against an employee, who, for part of the profits, conducts the business under a

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[9] Gumbell v. Koon (1881) 59 Miss 264.

[10] Quin v. Myles (1882) 59 Miss. 375.

written contract with the owner that it shall be carried on under the name of the employee "& Co." in which name the city license is obtained. In this case the court stated: "We have heretofore held that we would enforce this statute as it was written."

"The whole object of the statute is to force a disclosure of the ownership by treating as owner him who so appears". The court further states: "The statute has nothing to do with a person who is doing business solely in his own name except to declare that all the property embarked in it shall be held and treated as his, though, in fact, it may belong to another."[11]

The court intimated in one case that the statute was not intended to apply to property in the hands of a factor or auctioneer or to a clear case of bailment where the property is temporarily hired or loaned to a trader or put in his hands as an agent to be sold for the exclusive benefit of the owner and the proceeds at once handed over to him.[12]

"Where the wife is actual partner of a mercantile firm and makes her husband her agent and manager, he thereby becomes her agent within the meaning of the Section and must disclose the name of his principal in the sign."[13]

Judge Campbell with his usual clearness, construed the statute so that its meaning may be very clearly understood. "Section 1300 of the Code does not apply except where the thing sought to be treated as the property of him who transacts business with it, is in possession in such business with consent of the owner. One who puts his property in the possession of another for use in his business, whereby that other is made to appear to be the owner, may justly be denied the right to assert his secret claim of ownership to such

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[11] Schoolfield v. Wilkings (1882) 60 Miss. 238.

[12] Shannon v. Blum (1883) 60 Miss. 828.

[13] Evans v. Henley (1888) 66 Miss. 148, 5 So. 522.

property as against a creditor of him who used it in his business, and that is the provision of the statute."[14]

The principle point in this case is, was the property held with or without the consent of the owner.

The statute as construed does not permit the use of a fictitious name. "Whoever transacts business without doing it in the name of another does it in his own name and character necessarily. The statute does not mean that it shall be defeated by the easy disguise of a fictitious name, or a real name of one not the owner or evaded by the artful dodge of not using any name at all. It proceeds on the assumption that if one transacts business without doing it in the name of another, he does it in his own name and it applies wherever one transacts business not in the name of another who is the true owner of the property employed."[15]

There is a dissenting opinion in this case which would be of interest to read. Another interesting point which might instead of preventing fraud, lead to fraud, was decided by the Supreme Court.[16] Lyon had a debt against O. E. Bufkin. O. E. Bufkin prior to the levy of the execution sold his goods to W. H. Bufkin, who took possession under the bill of sale. W. H. Bufkin then employed the former owner and vendor O. E. Bufkin, as his clerk, and he was in possession as clerk at the time of the levy. O. E. Bufkin after he became clerk, took down his sign and there was no sign at the time of the levy. This was held not to render the goods liable to Lyon under the statute. The Court distinguished the former decision in this case.[17]

Conducting a business is not within the statute and does not mean *transacting* business in his own name. In this

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[14] Adams v. Berg (1889) 67 Miss. 234, 7 So. 225.

[15] Hamblett v. Steen (1888) 65 Miss. 474, 4 So. 431.

[16] Bufkin v. Lyon (1890) 68 Miss. 255, 10 So. 38.

[17] Wolf v. Kahn (1885) 62 Miss. 814.

case there was no sign except "Alliance Store". The business was that of the wife and the husband was merely her clerk in carrying on the business, consequently the property was not liable for the debts of the husband.

Whether it is intended to perpetrate a fraud or not, the dealings of a clerk have been frequently questioned. The goods of a principal are not liable for the debts of a mere clerk. To make the goods liable to the debts of one not the owner under the statute, he must have "transacted the business in his own name."[18]

The right of the seller upon default to retake property, the title to which was reserved, is not destroyed by a voluntary assignment for creditors by the purchaser. In such cases the assignee cannot defend by proof that the property was used by the purchaser in his business and became liable to the creditors under Section 1300, Code of 1880.[19]

Where one transacts business in his own name without a sign at the place, disclosing that another has any interest therein, all the property used in the business is liable for his debts; and this although such other is interested in the business as a silent partner and personally assists in carrying on the business ostensibly as clerk.[20]

"Our view of Section 1300 of the Code is that it makes 'all the property, stock, money and choses in action used and acquired in such business' the property of him who transacts the business, and liable for his debts without regard to the sign under which the business may have been transacted. The statute does not make the sign the test of ownership, but has regard to who transacts business and deals with the property as apparent owner and stamps it as his for the purpose of liability to his creditors. Signs may deceive and mislead, but there is little difficulty in determining who transacts business

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[18] Carberry v. Burns (1891) 68 Miss. 573, 9 So. 290.

[19] Gayden v. Tufts (1891) 68 Miss. 691, 10 So. 53.

[20] Howe v. Kerr (1891) 69 Miss. 311, 13 So. 720.

as to property and without regard to the sign, the question is who transacted business with the property? He is to be taken as owner of all the property who transacted the business in which it was unless by a proper sign the true ownership is indicated. The business must be done under the name of the true owner of the property or else he who transacts the business is conclusively adjudged to be such owner because of his relation to it."[21]

Again in speaking of this section, Judge Campbell says: "Its langugae is plain and its meaning and purpose obvious. It first enacts that traders, and all of like kind, who employ signs, must by the sign truly indicate the ownership, or else the property, etc., used or acquired in such business, shall be liable to the creditors of him who transacts the business, and then, to meet the case of having no sign, it provides that he who transacts the business and has the property, and thus appears to be its owner, shall be treated as such, in favor of his creditors.

Where a sign is employed it must not mislead, and where there is no sign he who appears to be owner from transacting business with it or acquiring it in his business is to be so held and treated in favor of his creditors. That is the simple scheme of Sec. 1300. Its design is to promote honesty and secure justice, by precluding the assertion of secret claims of ownership against creditors of him who has been permitted to possess property in his business as a trader and appear to be its owner. Prior to the enactment of this section conditional sales of personal property of any kind whereby the vendor retained the title, although the vendee had possession, were valid, where this separation of the title and possession did not continue for three years, without any writing or record. *Ketchum v. Brennan,* 53 Miss. 596. This is still the law, except as altered by the section under consideration. By it a change was made as to the class of persons contemplated by

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[21] Loeb v. Morton (1885) 63 Miss. 280.

it, and while the former law as to conditional sales with all their incidents remains as it was as to the great body of the people, it was changed by this section as to all who fall under the designation of traders, and they are to be treated as the absolute owners of what they use or acquire in business, so far as its liability to their creditors is concerned. The evil of permitting a separation of title and possession was found to exist and bear its worst fruits among those called by the general designation of "traders," and hence the effort to correct it, as far as possible, by the just requirement of true signs, and in the absence of such indicia of ownership, by that springing from the possession, dominion, and control of the property.

This may operate harshly in some cases, but that is a common incident of laws which are designed for their general effect, and are to be judged by that and not by particular instances."

The statute has no application against the original seller of property who to secure the purchase money reserves title by an instrument signed by the purchaser and duly acknowledged and recorded.[22]

Where a hotel keeper purchased a cooking range under a recorded instrdument that the title was to remain in the seller until the price was paid, one who succeeded him as owner of the hotel cannot hold the range by virtue of this section.[23]

A purchase money lien is not affected by the statute.[24]

The place of the sign and the location of the goods has been passed upon.[25] Here the property in question was wagons

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[22] Tufts v. Stone (1892) 70 Miss. 54, 11 So. 792.

[23] Van Range Co. v. Allen (1890) 7 So. 499.

[24] Campbell Paint & Varnish Co. v. Hall (1923) 131 Miss. 671, 95 So. 641.

[25] Bank v. Studebaker (1893) 71 Miss. 544, 14 So. 733.

which were kept in a lot by a merchant adjoining his store without any sign whatever. They were to be sold on a commission as a part of the merchant's stock. The manufacturer reserved the legal title as security for the price. It was held that the wagons were subject to the debt of the merchant.

It has been held that the proceeds of the policy of insurance on goods acquired and used in business and burned while in such use is liable to the creditors of the party who transacted such business and may be garnished by them.[26]

In one case the sign read "J. M. Smitha, Proprietor". Smitha was insolvent and was carrying on the business of a livery and sales stable. He sold in good faith the property to a creditor in satisfaction of his debt. The statute did not apply in this case, because he only made such application of the property as the creditor might have enforced by law. The vendor reserved the title because vendee had the right to resell and the creditor acquired a good title.[27]

The Mississippi Court has given the definition of trader which has been adopted in all decisions, and it is: "A trader is one who is engaged in trade or commerce; one who makes it a business to buy, sell or exchange goods; one who has transactions as a dealer in bartering and trafficing."[28]

The court had this in mind when it held that the statute did not apply to an undertaker even though his business as undertaker was carried on by him in connection with his furniture and coffin business in the same building; for an undertaker is not a merchant or trader under the above definition.[29]

Probably one of the hardest cases for the real owner is that of a hardware company who, as agent, had possession

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[26] Meridian Land etc. Co. v. Ormond (1903) 82 Miss. 758, 35 So. 179.

[27] Columbus Buggy Co. v. Turley (1895) 73 Miss. 529, 19 So. 232.

[28] Merchants & Farmers Bank v. Schaff (1914) 108 Miss. 121, 66 So. 402.

[29] Sayers & Scoville Co. v. Doak (1921) 127 Miss. 216, 89 So. 917.

of an engine which it was demonstrating in the hope of making a sale, and whose place of business bore no sign showing that it was a mere agent for the manufacturer of the engine. The creditors were permitted to treat the engine as the property of the hardware company.[30]

In a similar case it was held that the receiver was entitled to possession of the property of the Harvester Company in an action of replevin by the Harvester Company commenced before the appointment of the receiver.[31]

Where a clerk in a store conducted by a partnership had the same sir-name as the partners and frequently drew checks on the partnership and the partners participated in running the business, creditors of the clerk could not hold the partnership property liable for their debts although there was no sign on the business naming the members of the firm.[32]

The property of a tenant acquired under a recorded contract of sale reserving title cannot be subjected by his landlord for rent although the tenant in transacting business as a trader, since in such case the tenant has no title to the property and the landlord is advised of this fact by the record. But such property is liable to the landlord for rent where the contract of sale reserving title is not recorded.[33]

An administrator cannot maintain replevin for a stock of furniture held by deceased who conducted the business of a trader in his own name, although another person actually furnished the money for purchasing the stock; since presumptively the administrator had the right of possession until all the creditors of deceased were paid.[34]

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[30] Gillaspy v. International Harvester Co. (1915) 109 Miss. 136, 67 So. 904.

[31] Payne Hdw. Co. v. International Harvester Co. (1916) 110 Miss. 783, 70 So. 892.

[32] Robinson, Norton Co. v. Godsey (1916) 111 Miss. 171, 71 So. 312.

[33] Fitzgerald v. American Mfg. Co. (1917) 114 Miss. 580, 75 So. 440.

[34] Hunter v. Forrest (1917) 115 Miss. 7, 75 So. 753.

The section has no application in a contest between creditors of the common debtor.[35]

It is erroneous to assume that the debtor by "conducting" the business was "transacting business in his own name within the meaning of the statute."[36]

The goods of a merchant whose business sign does not specify ownership, and the defendant in execution, are not liable to his creditors because the merchant caused goods purchased by him to be shipped in the defendants name and carried on the business correspondence and paid the privilege tax in his name, but without his knowledge or consent.[37]

The statute is fully explained and applied by our court so that it will be clearly understood.[38]

The foregoing gives the statement of the law as announced by the Supreme Court of Mississippi in all of the cases which have been decided since the Code of 1880, and to assure accuracy the language of the Court has been used almost verbatim throughout this article.

It is true of this law as of all other laws, that the rules work a hardship on some citizens, but it can be easily understood for it has been strictly construed. It would seem on a superficial examination to anyone transacting business in Mississippi very hazardous, but an analysis should remove this fear. The purpose of the act is to prevent fraud and perjuries, and it applies only to "traders" which occupation has been clearly defined and the definition is given herein. Its effect as to liability is to hold undisclosed principals and silent partners. The method is simple, — do not have either. If you do, inform the business world by the sign. There is another remedy which is inconvenient and costly. That is to retain lien to the goods and to record the lien. The location

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[35] Kinney v. Paine (1890) 68 Miss. 259, 8 So. 747.

[36] Harris v. Robson (1891) 68 Miss. 506, 9 So. 829.

[37] Albin v. Howard (1896) 74 Miss. 370, 20 So. 844.

[38] Dale v. Harrahan (1904) 85 Miss 49, 37 So. 458.

of the sign or the absence of it is not material. The question is who is transacting the business and is such transaction of the nature to indicate that the party owns all the property which he is using. The statute is highly penal in its construction and places the burden on the undisclosed principal because actual knowledge that another party owns the property will not take the case without the statute. The statute states only a part of the law of frauds and also only a part of the law of principal and agent, is declaratory of the evil to be corrected and attempts to afford a remedy. If the apparent owner could fill his shelves with property of another and incur debts and when sued could say that the property was exempt from seizure for his debts, unquestionably his act would be fraudulent. If the party who furnished the money and was not disclosed was sued, he could say that the debts were not his, and however onerous the burden, the result tends to fair and honest dealings, and at the least, that is the foundation of all commercial transactions.

The cases may be classified under several heads:
What is a trader?
When is the statute applicable or not applicable?
When the trader is transacting business in his own name.
Trading with the name or an undisclosed principal.
Trading without any sign whatever.

It is hoped that this review, brief as it is, of the cases on this section will be of some benefit to practitioners and the law students who may have clients with customers in Mississippi. For many years the Bar Asociation of Mississippi recommended the repeal of this section, but for many different reasons their recommendations were not accepted by the Legislature and now the statute is thoroughly understood and is never used except in bankruptcy cases.

There does not seem to be any decisions of the Mississippi Courts on several phases of this statute, or rather of conditions created by the statute. As an example of one of these phases we will suppose a case of an undisclosed principal and

the property of the apparent owner is seized by one creditor and such property is not sufficient to pay the creditors. It may be safely asserted that if at any time the undisclosed principal should be discovered, the statute would not prevent the creditors of the apparent owner from bringing an action against the undisclosed principal for the balance due them.

The same reason would apply to the silent partner. A statute cannot be presumed to have changed the law of Pr cipal and Agent, but only to force a disclosure of everyone interested in the property. Neither does the statute seem to have any effect upon goods sold to a trader for the purpose of a resale; for there all of the property used would be subject to the debts of the trader transacting the business.

It may be concluded, therfore, that the statute does not interfere with the fundamental law of Principal and Agent.

With this brief review of the decisions, the statute should have no terrors for anyone dealing fairly in Mississippi.

DECEPTION-TESTS AND THE LAW OF EVIDENCE[1]

CHARLES T. MCCORMICK

"The best test of truth is the power of the thought to get itself accepted in the competition of the market . . . . Every year if not every day we have to wager our salvation upon some prophesy based upon imperfect knowledge."—*Mr. Justice Holmes.*

Few of us would doubt, or need any evidence other than experience, that conscious lying produces in the ordinary man emotional disturbances. These may be thought of by the liar as shame, fear, embarrassment, or the like. Whether or not they are anything more than objective physical changes in the body, it is clear and all-important for our present purposes that these physical changes in the functioning of the body do occur whenever the subject would describe himself as afraid, ashamed, or embarrassed. These bodily changes are very far-reaching. Seemingly one of the first in the series of changes is the release by one or more of the internal glands of secretion (adrenalin, for example) into the blood-stream. This secretion, as it is carried to the heart, the lungs, and the superficial blood-vessels, brings about notable changes in the functioning of these parts of the human mechanism.[2] When the face of a person observed turns pale, or his breath comes quickly, or he swallows repeatedly, or his voice trembles or assumes an unnatural tone, or he breaks out in a "cold sweat," the existence of emotion is apparent to us laymen. Observation and, again, introspection teach us that frequently these latter outer visible signs of inner

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[1] The substance of this paper was given as a part of the proceedings of the remedies section of the Association of American Law Schools at the meeting held December 30, 1926. The supporting investigation has not been carried beyond that date. This paper was published in 15 Calif. Law Review 484, and is reprinted here by permission.

[2] Op. cit., Appendix, xx, p. 15, citing W. B. Cannon, Bodily Changes in Pain, Hunger, Fear and Rage (N. Y. 1915).

disturbance do accompany conscious lying. So much so, that if no other cause than lying appears for the emotional changes, we think them strongly persuasive that one who accompanies his assertion with such demeanor is a liar, and the truth is not, to this extent, in him, or if in him has not found an outlet.

So also we know, or think we know, from the experiences of living, that one who fabricates a conscious lie in answer to a question for which he has not prepared in advance, takes more time before replying than one who, speaking truth, feels free to answer unguardedly.

Judges and juries habitually and with sanction of law consider and give weight to their interpretation of these changes of appearance, expression, voice, respiration, etc., in passing judgment of truth or falsity upon the witness' testimony.[3] Obviously such an interpretation must be a crude and inaccurate one, for which the courts have developed no rules or science, nor could they be expected to do so.

If, on the other hand, the psychologists have worked out a scientific method by which these emotional indicia may be adequately evaluated and interpreted, so as, with substantial accuracy, to identify conscious lying as such, there is every reason why the courts should welcome the scientists' measurement and analysis of those factors which the courts have, for want of some better test, been accustomed to use as the basis for rough guess-work.

Is there such a scientific technique? To be adequate it would need, seemingly, (a) to isolate the emotional changes produced by conscious lying or concealment of truth from similar changes flowing from other causes, such as fear or excitement produced by the test itself, and (b) to identify the lying statement by its connection with the significant emotional reaction.

In the seventies and eighties, beginning with Francis Gal-

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[3] Wigmore, Evidence (1923, 2d ed.) secs. 273, 274, 946, 1395 (2); Boykin v. People (1896) 22 Colo. 496, 45 Pac. 419, 34 A. L. R. 147.

ton and Wundt, scientists commenced the active exploration of a fertile field of research, the field of association experiments. One of the methods used was the "free association-test." This of course consists usually of calling off to the person tested a list of words and requiring him after each word called to give as a response the first word that comes to his mind. The analysis of the character of these responses has been the constant and fruitful source of much psychological discovery. From it as a chief source has emerged the science, or pseudo-science, of psycho-analysis, for example.

But it was not for two decades after the first active use of such association-tests that their direction was turned toward the discovery of guilt or deception in testimony. Wertheimer and Klein in Austria in 1904, and Jung in Switzerland in 1905 suggested such use. The methods suggested were these: in the series of stimulus-words, designedly neutral in character, used to evoke the responses, were interspersed certain "key" or "crucial" words (as "strychnine," "dagger," "diamond,") pointing to elements of the crime, or fact inquired into. The responses to the crucial words were studied chiefly in two aspects. First, qualitatively, i. e., the response-word would be minutely analyzed as to whether from it could be traced some, perhaps hidden and obscure, indication of knowledge by the person of the facts inquired about. Second, and more objectively, the time-intervals between the crucial words and their responses were compared with the corresponding intervals between the neutral or non-significant words and their responses —the so-called "reaction-time method." Naturally it was inferred that where there was a knowledge of the facts which would prompt a significant response to the key-word, the time necessary to reject the first response and invent another not revealing knowledge of the crucial facts would be greater than in the case of the innocent and uncontrolled response of the neutral word.[4]

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[4] See op. cit., Appendix, i, p. 410, and op. cit., Appendix, xx pp. 4, 5, for summaries of the history of the tests.

As most of us recall, these methods were sensationally championed by Professor Munsterberg of Harvard a few years after their first suggested application to the testing of the veracity of witnesses, when in 1907 and 1908 he issued a series of popular magazine articles on the subject and published his book, "On the Witness Stand."[5] He likewise sharply arraigned the legal profession for its failure to make use of these methods. But in 1909 Dean Wigmore answered the attack by a humerous but powerful article,[6] in which he smashed the thesis of Dr. Munsterberg by pointing out the recency of the discovery of the technique suggested, its want of sufficient verification by experiment, and the general opinion of psychologists themselves that it was not ripe for court-house use. More specifically, and by way of counter-attack, he assailed the accuracy of these methods. He thought them dependent too largely upon the individual vagaries of judgment of the person who determines that the responses are or are not significant of guilty knowledge. Likewise he denied the practibility of their use as against criminal defendants, in that the accused could not be compelled to submit to the test without infringing the constitutional privilege against self-crimination, and that no guilty man would waive the privilege. Obviously, it was the first objection, that the tests were being picked before they were ripe, that was offered as the principal one, for the fact that the individual skill and judgment and even intuition of the operator condition the success of the tests is not conclusive against them any more than it is against the operation for appendicitis, and, as to the objection for the want of practicality, subsequent experience tends to show, as we shall see, that even a guilty man hesitates to refuse to take such a test.

Dean Wigmore's counterblast did not, and of course was not designed to, check the progress of the psychological experimentation in deception-tests; but on the contrary his con-

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[5] Op. cit., Appendix, v.

[6] Op. cit., Appendix, i.

troversy with Munsterberg seems to have stimulated interest, scientific as well as popular, in the subject. It seems to have caused, or at least been followed by, two distinct tendencies of the scientists. In the first place, they are inclined to be ultra-cautious in asserting the availability of their technique in legal proceedings, and in the second place they have concentrated upon more objective and mechanistic methods, and have sought to measure and interpret definite bodily changes, rather than to build inferences upon the hypothetical hidden meanings of response-words or upon hesitation in responding.[7]

Illustrating this latter tendency is the work of Benussi,[8] announced in 1914, who developed the plan of observing and measuring the breathing of the person examined when the crucial or key words were given. His rather complicated technique involved the ascertainment of the ratio of the time of intake of breath to the time consumed in breathing out, called the inspiration-expiration ratio. He found that where the response is false the intake and out-breath are more nearly of the same length (the "gasping" effect) after the response, whereas if truthful, the incoming and out-going breaths are more nearly the same in length before the response.[9] Using a technique similar to Benussi, Dr. H. E. Burtt, of Ohio State University, confirmed his results to the extent of showing that there was some correspondence between this ratio and falsehood. His experiments were performed with students who

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[7] The unreliability of the association-word and reaction-time method advocated by Munsterberg was disclosed by elaborate experiments made by Dr. H. W. Crane, now of the University of North Carolina. He had certain of a group of University students perform secret mysterious "stunts" calculated to give a feeling approaching guilt. Though previously entertaining high hopes of these tests, he was unable to detect by them, with any useful degree of dependability, the "guilty" from the "innocent." Op cit., Appendix, x.

[8] V. Benussi, *die Atmungsymptome der Luge* (1914) 31 *Archive fur der gesamte Psychologie*, 244-273.

[9] See op. cit., Appendix, xvii, p. 1, and op. cit., Appendix, xix, p. 17. ("Benussi states that this change is due to the fact that after falsehood the innervation of the inspiration is relatively stronger than it is after truth. That is, we gasp slightly after lying.")

were given cards with certain symbols (circles, squares, etc.) imprinted on them but differently arranged on each card. Some of the cards were so marked as to show that questions concerning them were intended to be answered falsely, but which cards were so marked was unknown to the questioner and to the audience. The student was instructed to lie about these cards, but to give truthful answers to all the rest, and the "game" was for the questioner and the audience to ascertain which cards he had lied about. Similarly, accounts of imaginery crimes were prepared, as to which the student could either "lie," i.e., draw on his imagination when asked questions about incriminating "facts," or "tell the truth," i.e., give the explanation to each fact provided along with the description of the crime, if he held a "truth" card. Again the questioner and the audience were ignorant whether the particular card containing the crime was a "lie" or a "truth" card. With the symbol card, the breathing-ratio correctly diagnosed truth or falsity in seventy-one per cent of the cases. With the "crime" cards, it correctly diagnosed in seventy-three per cent of the cases, whereas it is interesting to note that a "jury" who watched the witnesses was able from their observed demeanor to detect truth or falsity correctly in only forty-eight per cent of the cases.[10] Nevertheless, it is apparent that the percentage of correct judgments with the breathing-test as sole criterion is not remarkably high, though presumably it might yield more significant results if actual instead of make-believe states of facts and crimes were inquired about where the stake of the witness in some result would give him greater emotional tension. In making these experiments, however, Burtt likewise, for purposes of comparison, used another deception-test, now to be described, which gave a much higher percentage of correct results, to-wit, ninety-one per cent.[11]

This method is that of measuring the effects of heart-ac-

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[10] Op. cit., Appendix, xvii.

[11] Landis and his co-workers, however, got better results with the the breathing measurement than with blood-pressure. Op. cit., Appendix, xix, xx.

tion, such as changes in the rate of pulse or in blood-pressure. It was early suggested by Ferri and Lombroso.[12] But the pioneer in its development by actual experimentation, in this country at least, is Dr. W. M. Marston, who is unusually qualified in being both a psychologist and a member of the bar. In 1915 at Harvard, working under Professor Munsterberg, he was able to detect deception by noting changes in blood-pressure. He describes his method as follows: "The sphygmomanometer (instrument used to measure blood-pressure) is attached to the subject's left arm above the elbow, the subject seated comfortably before a table with his left arm resting on the top within easy reach of the operator, who then proceeds to take the subject's blood pressure from time to time while the witness is being cross-examined either by the blood-pressure operator, or, preferably, by a second operator who may be called the examiner. The effectiveness of the test depends almost entirely upon the construction and arrangement of the cross-examination and its proper correlation with the blood-pressure readings, a system of signals between examiner and the b. p. operator being necessary. Other tests of the nature of which the subject is ignorant, as well as periods of rest and series of questions upon irrelevant and indifferent subjects are also interjected into the examination of the subject in such a way as may, in each particular case, best enable the operator to determine the normal blood-pressure plus the fixed increase presumably present throughout the whole examination due to the excitement caused by the test or by court procedure. The form of the blood-pressure curve as correlated with the cross-examination is then carefully studied by the operators, and is found to indicate with surprising accuracy and minuteness the fluctuations of the witness' emotions during the tellings of the story. It was found that in the cases of actual defendants it was of great practical advantage to request the person to tell his entire story first in his own way without either prompting or questions from the examiner. Irrelevant matter was next impos-

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[12] Op. cit., Appendix, i, p. 410, n. 20.

ed, and the cross-examination could then be built up with great effectiveness upon the elements of the defendant's own story."[13] The importance of the individual skill in cross-examination of the person giving the test is apparent from this quotation. The possibilities of the method so appealed to the National Research Council that Dr. Marston while in the army was encouraged to continue his experiments. Using simulated crimes he tested thirty-five soldiers. He was able to form correct judgments in ninety-four per cent of the cases. Other soldiers untrained in the method were able to use it to perform correct judgments in seventy-four per cent of their attempts.[14] He likewise gave his technique the acid test of application to actual offenders. In Boston he examined twenty persons arrested for minor offenses, such as drug-using, liquor-selling, prostitution, drunkeness, and reported that his judgements as to the truth or falsity of the statements made by these petty criminals, based upon blood-pressure fluctuations, were one hundred per cent accurate.[15] The Psychology Committee of the National Research

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[13] Op. cit., Appendix, viii, pp. 553; 554.

[14] Op. cit., Appendix, viii, pp. 567-569.

[15] The following is an example of his case reports:

"CASE No. 17. MAN (WHITE). AGE 46 YEARS

Record of case given to examiner previous to Deception Test.

"White, 46 years of age. Defendant arrested for larency. (Examiner given no further details.)

"B. P. Judgment.

"Although defendant tells most improbable story about having found a pair of shoes in the hold of a ship whereon he was working, B. P. shows his story to be clearly truthful.

"Verification.

"Police discover that several other longshoremen, working on the same ship (which was being loaded with relief supplies for Halifax), had been systematically stealing the supplies and it was further found that one of these men had taken the shoes in question ,but had been obliged to drop them into the hold in question to avoid detection. Defendant's companions testified that he was badly intoxicated at the time he took the shoes and that he shouted up to the foreman in charge of the crew that he had found a pair of shoes in the elevator pit. Defendant has no criminal record and Officer C., who has known defendant for eight or nine years, testifies to his previous good character and clean record, both at Eastport, Me., and in other ports." — Op. cit. Appendix, viii, p. 564. The verification of the correctness of his judgments was often rather insubstantial as in case 16. Op. cit., Appendix viii, p. 564.

Council on the face of these results recommended that they be tried out in practical use by the Army Intelligence Department, but this was never done.[16] In 1919-1921, in studying the effects of emotion upon blood-pressure, without special reference to deception, he concluded that the range of fluctuation of blood-pressure in women is much greater than in men,[17] and that rises in the blood-pressure of men, though less in range, persist longer than in women,[18] and, curiously enough, that women are comparatively more responsive to anger and less to fear than men. He suggested, therefore, that the interpretation of blood-pressure changes must allow for sex difference.[19]

One of the most important results of the pioneer work of Marston was the adoption and refinement of his method by a later worker, Dr. John A. Larson. He conceived the idea of combining those of the tests which he deemed the most practical and reliable by concentrating them all upon the supposed liar at the same time and securing a continuous graphic chart of the result.[20] Under his plan the subject—victim, I had almost said—is given a series of question, some indifferent, some bearing on the crucial facts inquired into, all calling for "yes" or "no" answers. In addition, a series of association words with "key" words interspersed are also given,[21] and the subject called upon for response-words as under previous methods. During the examination instruments are attached to the person examined which register and trace in three separate lines, arranged parallel to each other on a continuous strip of paper, first, the course of fluctuation of the rate and volume and breathing; second, the reaction-times, i.e., interval between word or question and the

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[16] (1919) 26 Psychological Review, 134-136.

[17] Op. cit., Appendix, xxi, pp. 409-411.

[18] Op. cit., Appendix, xxi, p. 412.

[19] Op. cit., Appendix, xxi, p. 414.

[20] The method is described in op. cit., Appendix, vi, p. 622, and op. cit., Appendix, xviii, p. 261.

[21] Op. cit., Appendix, vi, p. 624.

subject's response; and third, the variations in the blood-pressure. The strip, which may be thirty to fifty feet long, dependent on the length of the examination, is marked so as to reveal at which point the particular words or questions were given, and then forms a graphic continuous[22] record of changes in heart and lung action, and in speed of response, of the person during the course of the test. Rises in blood-pressure and irregularities in breathing and reaction-times are (judging by the specimens reproduced as illustrations to Larson's articles[23]) quite apparent on inspection to the layman. While retaining the breathing-curve as a check, Larson seems to omit in his later tests the association-words and the records of reaction-time, and places his chief reliance upon the blood-pressure curve. With his method, called in police parlance the Berkeley Lie Detector, and by Dr. Larson the Cardio-Pneumo-Psychogram, or Polygraph, Dr. Larson has carried the deception tests from the neccessary first state, of experiment upon artificial "make believe" guilt and lying, to actual application to the stories of those actually charged with murder, robbery, burglary, larceny and the like. What Marston tried upon a few petty offenders, Larson has for several years done by wholesale upon hundreds of suspects, juvenile deliniquents, and convicted criminals. His first work was done in the Research Department of the Berkeley, California, Police Department, and for the past several years in the Department of Public Welfare of the State of Illinois. He reported that of 861 persons tested he was able to verify, by confessions or other reliable data, the correctness of findings based on the deception tests, as to 528 of these persons.[24] Since going to Illinois he has tested some 600 men in the penitentaries. He is thus accumulating a large amount of data bearing upon the reliability of the tests under actual working conditions. He reports that his methods have likewise been suc-

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[22] Marston had simply taken blood-pressure readings, at intervals.

[23] Op. cit., Appendix, vii, viii.

[24] Op. cit., Appendix, xviii, p. 257.

cessfully used in the Police Departments of Los Angeles, Oakland, Duluth, and Evanston.[25] His writings indicate that he is thoroughly convinced of the significance and value of the tests in detecting guilt and deception, and certainly there is no one else whose experience of the actual trial of the tests so well qualifies him to judge of their value.

Many other devices for registering various other manifestations of bodily disturbance, due to emotion, have been tried or suggested for use in testing veracity. None of them seem as reliable or diagnostic as the blood-pressure curve.[26] Among them are the measurement of those variations in resistance of the skin to electric currents occurring during emotional disturbance and attributed to changes in the activity of the sweat-glands. These variations may be measured with a great deal of exactness, and a New York psychologist, Dr. D. Wechsler, who has experimented with this method, extensively, considers it a useful index of deception, especially in view of the lack of control of the subject over such changes.[27] But Marston[28] and Larson[29] found that its very sensitiveness to minor emotional changes made it difficult to interpret. X-ray or fluoroscopic studies of the heart action have been suggested,[30] and also the measurement of the changes in the adrenalin content

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[25] Letter from Dr. Larson to the writer, dated December 10, 1926.

[26] I am here adopting the views of Burtt, Marston, and Larson, whose experience seems to carry more weight. Many psychologists would give preference to others of the methods described, e. g., Landis, see supra n. 11.

[27] David Wechsler, Researches on the Psycho-Galvanic Reflex, Archives of Psychology, Columbia University, N. Y., No. 76; Whately Smith, The Measurement of Emotion, Harcourt Brace & Co., N. Y.; Articles in New York Herald Tribune, part II, p. 5, by E. E. Free, Ph. D., and by the same author in Popular Science Monthly, Dec. 1926, Strange New Crime Remedies.

[28] Op. cit., Appendix, ix, p. 55.

[29] Op. cit., Appendix, xvi, p. 39; also (1922) 5 Journal of Experimental Psychology, 321.

[30] Op. cit., Appendix, vii, p. 422.

of the blood,[31] measurement of the eye-movement,[32] and of slight striped-muscles responses,[33] and of the rate of the body's combustion of oxygen. So far these have not been shown to have any advantage over the far simpler process of measuring blood-pressure changes. Nevertheless, any one of them may be so developed and perfected in the future as to displace all others in this field, where all is yet experimental.

Still another approach to the problem of detecting deception, from an entirely different angle, has been made by a Texas physician, Dr. R. E. House. In his practice in many hundreds of cases of child-birth he administered scopolamin to the mothers, to produce the once-famous "twilight sleep." While the mothers were in the state of semi-unconsciousness induced by the drug he discovered (so he reports) that they would answer questions correctly and that after regaining normal consciousness they would not recall questions or answers. The readiness and truthfulness of the answers led him to the belief that at a certain stage in the influence of the drug the subject has no such control of the will as to enable him to resist telling the truth as his memory serves it up. Dr. House reports repeated instances of administration of his drug to those who, for test purposes, were instructed to lie, and who under the drug gave consistently truthful answers. He likewise reports cases of convicts who volunteered for the test to prove their innocence, who, under the drug's sway, admitted not only the crimes for which they were convicted, but others. The administration of this test requires a special skill and experience (as yet only acquired by Dr. House himself) both in administering the drug and in the recognition of the particular stage of returning consciousness where the hearing and memory have emerged but the will has not yet returned, assuming that

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[31] Op. cit., Appendix, xviii, p. 268.

[32] Letter from Dr. Henry T. Moore, referring to a discussion by A. R. Gilliand and H. T. Moore (1921) Journal of Applied Psychology.

[33] Letter from Dr. C. H. Griffitts of the University of Michigan.

Dr. House is correct in his belief that such a stage exists. The great superiority of this method, if valid, is that it directly elicits truth, and not merely signalizes falsehood, and even more important, its results are not dependent upon any question of interpretation, as are records of emotional changes — here the truth springs forth full-armed. The great draw-back, the fly in the "truth-serum," is that it has never received tests adequate to enable a judgment to be passed upon it. The scanty experimentation of its originator, Dr. House, is suggestive merely, but in view of the revolutionary possiblities for good which the verification of the method would open up, it is surely sufficient to call for the furnishing to Dr. House of the facilities for the most extended clinical trials of his method, so that its value may be determined by experts in the light not of theory but of results.[34]

In describing the principal deception tests and the reports of favorable experience by their principal advocates, I do not wish to leave the impression that they have been without critics in the house of their friends, the psychologists. It is argued that guilt or deception has no characteristic emotional reaction which can be distinguished from reactions due to extraneous causes. No changes from a type that cannot be produced from fear or anger seem to have been found to accompany guilt or deception, but that seems no reason to doubt that significance may be attached to those changes in a particular case when they are elicited by words or questions which could probably have no emotional effect except those produced by guilt or deception. Thus where a thief steals a box containing money and a broken pair of scissors, the phrase "bro-

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[34] Articles on, or discussions of, the Scopolamin methods may be found in 42 Medico-Legal Journal, 138-148; The Police Journal for February and for October, 1926; also the article by Dr. Free, Strange New Crime Remedies (Dec. 1926) Popular Science Monthly, 14. Dr. House has made addresses on the subject before the American Research Anesthetist Association, the Medical Association of the Southwest, the Texas Medical Assn. (see [Sept. 1922] Texas State Journal of Medicine), and the Orleans Parish Medical Society (see 16 New Orleans Medical and Surgical Journal, No. 9). He lives at Ferris, Texas.

ken scissors"[35] is likely to cause no emotional effect at all upon one who knows nothing of the theft, and if it produces changes in blood-pressure the person so responding is not necessarily the thief, but the response is a circumstance rendering that influence a more propable one than it was before the response. True, such "key" words are not always to be found, especially when the newspapers have broadcast the details so that innocent as well as guilty know them. This might limit but would not condemn the tests. So also, if the test be sufficiently extended, it is possible, at least under experimental conditions, though some of the words may cause disturbances due to "complexes" having nothing to do with the crucial facts, to reach a correct diagnosis of truth or falsity from the results.[36] And Marston and Larson report that such fairly persistent conditions as abnormal blood-pressure due to excitement produced by the fear of the examination itself,[37] or due to a bad heart,[38] may be discounted by taking the heightened level as the standard or "norm" for the examination and considering only changes from that level as significant. Some conscious control can be exerted over blood-pressure and over respiration and reaction-time, but it would be difficult to distort them all over an extended examination. Larson reports that old offenders who try to "beat the game" offer no greater difficulties than others.[39] Obviously, a pathological liar unconscious of deception would not be susceptible to the tests, but such condition would doubtless usually be known or apparent.[40]

After all, the vital question is, do the tests work? The affirmative results of Marston, Larson, Langfield, Burtt and

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[35] An actual case, related by Dr. English Bagby of the University of North Carolina.

[36] Op. cit., Appendix, xxi, p. 411; op. cit., Appendix, xv, p. 323.

[37] Op. cit., Appendix, xviii, p. 262.

[38] Op. cit., Appendix, vii, p. 439, fig. 9.

[39] Op. cit., Appendix, xviii, p. 262.

[40] Op. cit., Appendix, vi, p. 626; op. cit., Appendix, xvii, p. 262.

others have not been obtained by all workers. Thus Landis and his co-workers reported in 1925[41] and again in 1926[42] that they were unable to diagnose truth or falsehood under experimental, "make-believe" tests using Burtt's method heretofore described, by the blood-pressure curve in more than thirty to fifty per cent of the cases. Nevertheless he reports slightly positive results with the Benussi breathing test, and even his lack of results with the blood-pressure curve does not prevent him from saying:

> "However, we are of the opinion that the blood pressure method of detection of falsehood is what Marston originally claimed for it, 'highly diagnostic,' if all conditions are favorable. The thing that is badly needed is an extensive and detailed experimental investigation of the conditions which affect diagnostic efficiency of the blood pressure record."[43]

Likewise, Miss H. G. Jefferson, a graduate student in the University of California failed to secure signficant indications of deception from blood-pressure readings of experimental "liars."[44] Her technique is criticized by Larson.

These reports pro and con contained in the psychological journals referred to do not enable a lawyer to answer with confidence the all-important question, what is the consensus of

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[41] Op. cit., Appendix, xix, p. 25.

[42] Op. cit., Appendix, xx, p. 18.

[43] Op. cit., Appendix, xx, p. 17. And in an article which is to appear in Industrial Psychology, and of which he has courteously given me a copy, he says: ". . . there is good experimental evidence to the fact that deception can be detected on the basis of cardiac and respiratory responses. Just at present, and probably for several years to come the practical significance of this evidence will be of somewhat questionable importance. A large amount of carefully controlled experimentation must be done before anyone, even the most skilled operator, will be justified in basing a judgment concerning the guilt or innocence of a suspect on the basis of these responses alone. They are however valuable aids even at present to the police, the examining magistrate or the prison authorities when used by one skilled in the methods and when their significance is properly evaluated."

[44] Op. cit., Appendix, VIII, p. 7

opinion of psychologists as to the value of these deception tests? So rather than indulge in a guess as to this, I have taken a canvass. A questionaire has been sent to eighty-eight members of the American Pcychological Association, selected by a pcychologist[45] as being likely to be interested in this field, asking for their opinion upon the question of whether deception-tests combining the measurement of reaction-time, respiratory changes, and blood-pressure changes furnish results of sufficient accuracy as to warrant consideration by judges and jurors of such results in determining the credibility of testimony given in court. Of those who replied to this question eighteen answered yes, with varrying qualifications;[46] thirteen

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[45] Dr. J. F. Dashiell, University of North Carolina.

[46] Among those who answered were: Drs. Walter D. Scott, Northwestern University; Samuel E. Fernberger, University of Pennsylvania "(Yes, if handled by an expert only."); Harold E. Burtt, Ohio State University ("Yes, should be administered by psychologists with laboratory training. Not fool-proof enough for laymen. Should go in with other expert testimony."); William M. Marston, New York City ("No. Emphatically not if the judges and jurors themselves are to interpret them. Yes, if the records are used as basis of expert testimony." "I should think the admission of expert testimony on deception one of the greatest steps toward *real* justice, toward eliciting *real* confessions, and toward deterring crime that ever has been made in court procedure. But I should expect the tests to become rapidly discredited if they were admitted as a sort of 'patent medicine,' a fortune-telling, penny-in-the-slot answer to whether the witness or defendant were telling the truth or not, or as a record which judge, jury, or anybody else could tell the meaning of as well as the trained legal-psychologist. Also, mere psy. training should have less value, I think, in qualifying the expert than legal, or criminological training in investigation and examining of witnesses."); A. P. Weiss, Ohio State University ("Yes, if not given too exclusive value. I regard them as supplementary. Much more experimental work needs to be done."); Charles H. Judd, University of Chicago ("Yes. I do not recommend reliance on the tests as *sole* evidence, but do regard them as very useful confirmatory evidence *when administered by competent people.*"); Hulsey Cason, University of Rochester ("Yes; they should be considered. But psychologists themselves would not conclude from these tests alone. None of them [the tests] are wholly reliable. However, they are being improved."); Robert M. Yerkes, Yale University ("I do. I consider present methods promising, but their use requires extreme care, caution, skill, and their application demands extreme conservatism. No jurist can safely accept results of such methods without the advice of competent psychologists."); M. R. Trabue, University of North Carolina ("I do, in most cases."); R. S. Woodworth, Columbia University ("Yes, not of course with 100% certainty, but with a considerable preponderance of

answered no;[47] and seven answers were of doubtful classifica-

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correctness."); Joseph Peterson, Peabody College, Nashville, Tenn. ("Yes: certainly to warrant *consideration*, but one should not be convicted on such tests alone."); F. Kingsbury, University of Chicago ("Yes, when administered and interpreted by *competent psychologists*. My answer does not imply my belief in their infallibility; but that they are of equal or superior value to the prevailing accepted types of evidence."); Max F. Myer, University of Missouri ("They should be considered, yes—as contributory evidence, not as absolutely establishing the credibility of the witness. Here as elsewhere in social progress one should follow such rules as 'Nec temere, nec timide' or 'Festina lente'."); Ralph Gundlach, University of Illinois ("Yes, if properly given."); C. H. Griffits, Ann Arbor, Mich. ("Under certain conditions. Particularly when the details of the crime are known only to the guilty person. Tests must be given and the results interpreted by one with considerable experience."); David Wechsler, 1291 Madison Ave., New York City ("Under certain conditions and with certain perfections of technique. Yes."); Harry T. Moore, Saratoga Springs, N. Y. ("Incidental consideration only").

[47] Including: John B. Watson, 244 Madison Ave., New York City ("No. All this is a thing for the laboratory for another 25 years. They might under favorable circumstances be *indicative*.—No more."); David Mitchell, 160 West 85th St., New York City ("No. A member of the Section of Consulting Psychologists of the A. P. A. using such tests as described could get suggestive leads but no formal test result would have the validity necessary for a court of law."); Edward G. Boring, Harvard University ("No. I do not believe that any tests of deception are *per se* reliable or admissable directly in court. It seems to me probable that there may be experts on the detection of deception whose evidence might be admitted as other expert opinion is admitted (perhaps after the degree of expertness of the person had been established by tests). I should expect such an expert *to make use of tests*, to interpret them according to his mature judgment, and to accept or reject their results accordingly. I can not avoid the conviction that Marston's success with the tests mentioned is more the success of Marston as an expert using the tests than of the tests themselves in any hands."); English Bagby, University of North Carolina ("Should not be used in court or in testimony before court. Used by detectives to establish possible guilt."); Herman C. Stephens, M. D., Elyria, Ohio ("No. (1) Because of the possibility of voluntary substitution of a response-word by a clever criminal. (2) Respiratory and circulatory changes are too variable even within normal limits. This negative attitude does not mean that reliable methods may not eventually be achieved. But I think one ought to be perfectly frank as to the *present* status of this method."); William Healy, 40 Court St., Boston ("Certainly not at present. Much more work in investigation needs to be done before such tests should be accepted."); John E. Anderson, Minneapolis, Minn. ("I do not, not because the tests themselves are of no value, but because the situation in court is so complex as compared with a laboratory situation. The tests are measures of emotional responses. In court there are likely to be many emotions in addition to those connected with deception.") E. B. Skaggs, 16575 Lawton Ave., Detroit (" Not at present —not optomistic as regards the future."); Morton Prince, Tufts Medical School ("No. All these tests only show an emotional reaction, and it

tion.[48] Of those who answered yes, eight limited their ap-

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is always a question of interpretation and inference. They justify suspicion of guilt, not evidence."); June E. Downey, University of Wyoming ("I believe the matter is still in the experimental stage."); Charles Bird, University of Minnesota ("I think the tests under rigid experimental conditions, and in one case, that of Larson at Berkeley, Cal., have yielded results which have been more accurate than those obtained from student juries. Yet I should hesitate to recommend their use to representatives of law because we actually need many more trials of the methods under law-court conditions. I think some research institute, cooperating with the police department, should make much more rigid tests under controlled conditions where the subjects are criminals. The results of Marston and those of Larson seem to supplement each other and psychologists who have used, in the psychological laboratories, the association tests have been successful in detecting simple deception to an extent far beyond that of a jury composed of students. Yet I think the time is not reached when these experiments warrant their use in the courts. If your report can stimulate the co-operation of the lawyers to institute an experimental investigation under actual court conditions much of value would result.").

[48] Including: Drs. H. A. Carr, University of Chicago ("You raise the question of 'sufficient accuracy.' If this means 100% accuracy, the answer is no. This raises the question of the degree of accuracy or rather the probability of accuracy in a given case that will justify their use, or rather the degree of credence given to them relative to other lines of testimony. This will always be a matter of good judgment, and indicates that any such tests would need to be employed as a *supplementary* device to other lines of evidence, rather than as a *crucial* bit of evidence."); Herbert S. Langfield, Princeton University ("Although I have seen some excellent results with blood pressure tests, I should not advocate this use as yet before a jury, especially if the jury believed such tests reliable."); J. B. Miner, University of Kentucky ("Positive responses would show that the witness was emotionally disturbed by certain facts. This might be useful if the witness had never heard of the facts. I believe that such tests are still in an experimental stage and that the opinion of an expert based on such an examination would be more useful to the court or jury than the test facts themselves."); W. V. Bingham, 40 W. 40th St., New York, N. Y. (". . . in my opinion, the deception tests which you mention are scientifically sound in theory. At the same time, it must be recalled that they require a great deal of ingenuity and insight on the part of the experimenter in preparing the list of association-words so that the findings will be clear-cut. Whether the time has arrived for their actual use in judicial procedure, I am in doubt. I do believe very firmly, however, that further experimentation in this direction on the part of courts and psychologists working in co-operation, should be strongly encouraged."); Carl E. Seashore, University of Iowa (". . . . it would seem to me that it could be made a very valuable tool for the purpose of gaining a lead in the prosecution or defense, rather than to use it as final testimony."); H. D. Kitson, Columbia University ("Possibly by the most enlightened judges, but surely not by judges of little intelligence. By the average jurors not at all. I cannot answer 'yes,' but I must admit that to a psychologist acquainted with the methods of psycho-

proval to evidence of experts giving their opinions interpreting tests made out of court. Some of those who answered no may have been merely intending to express disapproval of the actual conducting of the tests in court. Three volunteered the view that the evidence could properly be used by judges but not by jurors, eight that further experimentation was desirable. Five emphasized the thought that the tests should be used as the *sole* basis for a decision. Not more than seven of the replies could probably be interpretated as indicating lack of belief in the substantial value of the tests for any purpose.

So far as these replies reflect professional opinion they indicate a preponderence of belief in the scientific significance to some degree of the tests, but a fairly evenly divided opinion on the question of whether they are suitable for consideration by courts.

The scientific view being still one of suspended judgment, the courts must obviously wait for further verification and wider acceptance of the validity of these tests before relying upon their results as evidence. This is the holding in the only de-

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analysis such tests as those you mention give significant indications of guilt. Since the mathematical demonstration is not perfect, however—by that I mean the probable error is large—I doubt if they could be considered as proof of the undeniable sort required by law."); Christian A. Ruckmick, University of Iowa ("I do not think they are all on the same level of accuracy. Those reflexes, like the psychogalvanic, which are least under voluntary control would be much more indicative. In the final analysis, no one but a competently trained psychologist should be called upon to interpret the results."); L. L. Thurston, University of Chicago ("I am favorably impressed by the experimental work on deception. I have not personally done such experimental work. If the validity of these procedures has not already been demonstrated with perfcetion they are pretty close to it. The Jung association test method has always been successful whenever I have seen it tried. The galvanic skin reflex (psychogalvanic reflex), the blood-prsesure technique and the Jung association method are useful in bringing about confessions. The tests are not yet ready for adoption as legal procedures."); Warner Brown, University of California ("No. But a judge (not a jury) would be justified in considering the non-partisan opinion of an expert psychologist when the opinion is based on such tests.").

The foregoing quotations are not complete nor always representative of the entire view expressed, but selected as specially suggestive portions.

cision on the point that has come to my attention.[49] Meantime, however, an inquiring and open-minded attitude on the part of the legal profession is a becoming one. Conscious perjury is too often triumphant in our courts under our present methods of ascertaining truth[50] for us to assume too complacant a confidence in the sovereign remedy of cross-examina-

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[49] Frye v. U. S. (1923) 293 Fed. 1013, decided by the Court of Appeals of the District of Columbia, opinion by Van Orsdel, J., and annotated in 34 A. L. R. 147, (1924) 33 Yale Law Journal, 771, (1924) 37 Harvard Law Review, 1138, (1925) 28 Law Notes, 64, (1924) 24 Columbia Law Review, 429, 2 New York Law Review, 162. This was a prosecution for murder. The defendant, a negro, had confessed, but had repudiated his confession, and had before trial been examined by Dr. Wm. H. Marston as to the crime, and his blood pressure reaction recorded, and Dr. Marston had concluded, contrary to his previous belief, that the prisoner was innocent (letter from Dr. Marston). The defendant offered Dr. Marston as an expert witness to testify to the results of the test, but the evidence was excluded by the trial court, partly on the ground (printed record, pp. 12-13) that it was an attempt to show the truth, not of the defendant's testimony in court, but of a statement made out of court, i.e., at the time of the test. The judge also held that the soundness of the tests was not sufficiently of "common knowledge" to render their results admissible. The ruling was sustained on appeal, in the following language:

> "Just when a scientific principle or discovery crosses the line between experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs.
>
> "We think the systolic blood pressure test has not yet gained such standing and scientific recognition among physiological and psychological authorities as would justify the courts in admitting expert testimony deduced from the discovery, development, and experiments thus far made."

[50] Some psychologists have made comparisons of the accuracy of juries' verdicts with judgements based upon the tests, with suggestive results. Thus Burtt made 91% of correct judgments in blood pressure, whereas a jury passing on the same statements and judging truth or falsity from the witness' demeanor judged correctly in only 48% of the cases. Op. cit., Appendix, xvii, pp. 14, 15. Likwise, Dr. Marston (Studies in Testimony (1924) 15 Journal of the American Institute of Criminal Law and Criminology, 5-31) recounts some interesting experiments as to comparative accuracy in assessing testimony of trained judges and of juries. It is clear that our assumptions as to the power of juries to reach truth by common sense are going to be put to the test of scientific experiment.

tion. It is not always the weakling who is being cross-examined, nor the soul-searching terror to evil-doers who is conducting the examination. Successful exposure of the lie from the liar's lips requires cleverness and intuition in the cross-examiner which is all to often not forthcoming. If science bids fair to furnish a fairly effective technique for the exposure of deception we should not merely welcome it when it comes, but stimulate and encourage efforts to speed its coming.

Experimentation under laboratory conditions has carried deception testing far, but the great present need is for the continuation and extension of such work as Larson's with actual suspects and criminals in police and detective departments, and psychological research bureaus attached to courts, and in penitentiaries. Criminal court judges, district attorneys, public defenders, can often interest the authorities to undertake the trial of such methods. Law teachers can interest these judges, prosecuting officers and others in the tests and their possibilities.

The comments of some legal writers seem tacitly to assume that the deception-tests must be shown not only to be scientifically accepted as evidential or significant, but that they must be demonstrated to be error-proof.[51] But it is apparent that no capacity for anything like a hundred per cent correctness of results is required. The emotional curve is to be admitted merely as circumstantial evidence of a truthful intent or the reverse. If the test results are shown by scientific experience to render the inference of consciousness of falsity or truth substantially more probable, then the courts should accept the evidence, though the possibility of error in the in-

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[51] A law teacher's influence may have been felt in the decision in Frye v. U. S., supra n. 49, for in the prevailing brief for the government an expression of opinion of Professor Chafee (1922) 35 Harvard Law Review, 309) adverse to the present availability of Marston's test for court house use was quoted and relied on.

ference be recognized.[52] The admission of evidence that bloodhounds have followed a trail from the crime to the whereabouts of the accused,[53] of evidence of similarity of footmarks,[54] and of conduct to show insanity,[55] are all striking examples of the fact that conclusiveness in the interference called for by the evidence is not a requirement for admissibility.

Assuming that the tests prove, to the satisfaction of scientists, capable of furnishing definite and reliable data as to veracity, what will be their functioning in the administration of justice?

In the first place, their value will be inestimable as a method for the preliminary investigation of crime. With a crime-detection force generally without professional standards of training or security of tenure, faced by an insistent and impatient public demand, stimulated by the press for results in the form of definite charges against someone for all spectacular crimes, the inevitable line of lease resistance is the forced confessional. The sweat-box, the rubber hose, the electric battery are but grosser forms of a process, which, in more refined form, is torture still.[56] We demand results and are un-

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[52] "But as yet the competency of a collateral fact to be used as the basis of legitimate argument is not to be determined by the conclusiveness of the inferences it may afford in reference to the ligitated fact. It is enough if these may tend, even in a slight degree, to elucidate the inquiry or to assist, though remotely, to a determination probably found in truth. Indeed, to require a necessary relation between the fact known and the fact sought would sweep away many sources of testimony to which men daily recur in the ordinary business of life: and that cannot be rejected by a judicial tribunal without hazard of shutting out the light." Bell, J., in Stevenson v. Stewart (1849) 11 Pa. (1 Jones) 307, quoted in 1 Wigmore, Evidence (1923) § 38, p. 254, and in Smith v. U. S. (1920) 267 Fed. 665, 668, Williamson v. U. S. (1908) 207 U. S. 425, 451, 52 Sup. Ct. Rep. 278, Holmes v. Goldsmith (1893) 147 U. S. 150, 164, 37 Sup. Ct. Rep. 118.

[53] Wigmore, Evidence (1923, 2d ed.) § 177.

[54] Idem, § 415.

[55] Idem, § 228.

[56] For an example of torture by repeated questioning of a sick man, see Ziang Sung Wan v. U. S. (1924) 266 U. S. 1, 69 Sup. Ct. Rep. 131.

willing to pay for them by securing training and independence for the police, and we prove that we are holier than the Inquisition by pointing to our laws, common, statutory, and constitutional which forbid such practices. We should be as horrified if the laws were obeyed as if they were repealed. Certainly the introduction of scientific deception tests would be a move for the better. Their effective use calls for the expert, the trained psychologist. There is little or no temptation, seemingly, to the use of force to compel the prisoners to submit, as Larson's experience indicates that practically all suspects where it is established as routine will submit rather than incur the suspicion which is aroused by refusal.[57] The test, even though its results are not expected to be used as evidence in court often brings the state of mind which leads to confession, and where it indicates guilt in one of a number equally suspected gives the investigating officer a lead to the obtaining of usable evidence, as by search of the suspect's room for stolen goods. Furthermore, it tends to the speedy release of innocent persons held on suspicion, a form of detention often abused.

Secondly, as to their use as evidence in court. At the outset it may be doubted whether it will ever be practicable, at least as long as juries are retained, to conduct the tests themselves in court. While something is gained in the heightening of the emotional reactions accompanying conscious deception by the presence of judge, jury and audience, yet the undue consumption of the time of the tribunal and the danger of hasty misinterpretation of the results under these conditions, seem to render such use undesirable. In their present form, the tests should be administered before trial, and the results used in evidence only in the form of the opinion-testimony of an expert reporting and interpreting them. While the jury's interpretation of the record, unaided by the expert's explanation and opinion, would be worthless, the jury can very readily recognize and distinguish the variations and irregularities in

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[57] Only three out of eight hundred and sixty-four refused. Op cit., Appendix, xviii, p. 257.

the curves when pointed out by the expert and can form some judgment as to the extent of their significance.

Since the association-word responses and even the answers to question incident to the test are not used testimonially, i.e., as statements of facts to show their truth, there would seem to be no legal obstacle to compelling by court order the submission to the test before, or even during trial, on the ground of immunity from compulsion to confess, or privilege against self-crimination. The analogy is rather to the forced giving of finger prints, specimens of handwriting, or the like. In the case of the scopolamin method, however, the statement of the subject is used testimonially and could not, therefore, under present law be compelled in court, and would doubtless be an unlawful violation of personaly immunity if administered involuntarily before trial. As the drug is not dangerous, though it may produce nausea and discomfort, if it became accepted as a reliable eliminator of deception the courts could, and would, it is believed, admit confessions obtained under its influence, for it is the factor of unreliability that chiefly bars the forced confession under present conditions, and the individual interest of bodily security should yield to the public interest in eliciting the truth as to criminal charges.

As to the purposes for which the evidence of the results of the tests and the expert's interpretation of them would be receivable: their immeditae purpose is to show a *state of mind* of the subject on the occasion of the test, the state of *knowledge* of the fact of the crime or other transaction in issue or *ignorance* of it. Emotional disturbance tends to show *knowledge* (the inference being from *emotion* to *suppression*), lack of it, *ignorance*. *Knowledge* may be the basis for the further inference of *acts*, i. e., criminal acts may be inferred from knowledge that only the criminal would be likely to have. *Ignorance* of facts which would be known by the criminal similarly may found the inference of non-participation in the crime. Similar inference as to conduct in civil issues would be theoretically possible, but less often available, because the issue usually would

not be reduced to one of conscious lying, though sometimes it may, e. g., in cases of fradulent concealment of assets by the bankrupt, or of disputed identity of the driver of an automobile causing a personal injury. The foregoing considerations apply whether the subject of the tests goes on the stand or not. If he does become a witness at the trial, the results of the tests, so far as they disclosed supression-reaction, or failed to do so, with respect to the matters testified about later in court, would be admissible in impeachment or corroboration of the testimony, and if valuable at all they would seem much more significant than our present types of attacking or supporting evidence.

In conclusion: (1) Deception tests based upon measurement of bodily disturbances accompanying the response to test-words or questions seem to be accepted by psychologists generally as being based upon a sound underlying theory.

(2) The use of drugs to produce a state wherein conscious suppression is impossible has not won acceptance even in theory.

(3) The deception tests mentioned in (1) are not generally regarded by psychologists as having been sufficiently proven as to reliability of technique to warrant courts accepting their results in evidence at the present time.

(4) Lawyers, judges, and law teachers should encourage and open-mindedly observe the progress of experimental investigation of the tests in police departments and prisons upon actual suspects and criminals, in order that whatever value they may prove to have for the judicial ascertainment of truth may be promptly utilized by the courts.

APPENDIX

List of articles dealing with the subject. Those of special importance of interest to lawyers are in italic type. This, of course, does not purport to be a complete bibliography.

1. *John H. Wigmore, Professor Munsterberg and the Psychology of Testimony* (1909) 3 *Illinois Law Review*, 399-445. This provides a

very full bibliography of the literature on the topic in English and foreign language, up to that time.

ii. *Editorial comments on Frye v. U. S.* (1923) 293 *Fed.* 1013. *The Use of Psychological Tests to Determine the Credibility of Witnesses* (1924) 33 *Yale Law Journal*, 771-774, a brief but illuminating summary of scientific opinion and applicable legal theory.

iii. *John H. Wigmore, Evidence* (1923, 2*d ed.*) §§ 875, 990.

iv. *Edwin S. Oakes, Annotation to Frye v. U. S., Physiological and Psychological Deception Tests* (1925) 34 *American Law Reports, Annotated*, 147, 148.

v. *Hugo Munsterberg, On the Witness Stand, Essays on Psychology and Crime*, with foreword by Charles S. Whitman (1908, reprint 1925, Clark Boardman Co., Ltd., N. Y.) especially the chapters on *The Detection of Crime* and *The Traces of Emotions.*

vi. *John A. Larson, The Berkeley Lie Detector and Other Deception Tests.* (1922) 47 *American Bar Association Reports*, 619, 628.

vii. *John A. Larson, The Cardio-Pneumo-Psychogram in Deception* (1923) 6 *Journal of Experimental Psychology*, 420-454. This is the most informative of Larson's many articles on the subject, especially interesting for its numerous reproductions of curves or graphs recorded by the "lie-detector." It is reprinted as a Bulletin by the Department of Public Welfare of Illinois, 907 South Lincoln Street, Chicago.

viii. *John A. Larson and Herman M. Adler, A Study of Deception in the Penitentiary, with numerous illustrations on deception charts* (1925). *Bulletin of Department of Public Welfare of Illinois.*

ix. *William M. Marston, Psychological Possibilities in the Deception Tests* (1921) 11 *Journal of American Institute of Criminal Law and Criminology*, 551-570.

x. Harry W. Crane, A Study in Association Reaction and Reaction-Time (1915) 18 The Psychological Monographs, No. 4.

xi. William M. Marston, Systolic Blood Pressure Symptoms of Deception (1917) 2 Journal of Experimental Psychology, 117-163.

xii. William M. Marston, Reaction-Time Symptoms of Deception (1920) 3 Journal of Experimental Psychology, 72-87, advancing the theory of the "negative type" liar who may not "react."

xiii. Eva R. Goldstein, Reaction-Times and the Consciousness of Deception (1923) American Journal of Psychology, 562-581.

xiv. William M. Marston, Negative Type Reaction-Time Symptoms of Deception (1925) 32 Psychological Review, 241-247.

xv. Herbert Sidney Langfield, Psychological Symptoms of Deception (1920) 15 Journal of Abnormal Psychology, 319-328.

xvi. John A. Larson, Modification of the Marston Deception Test (1921) 12 Journal of American Institute of Criminal Law and Criminology, 309-399.

xvii. Harold E. Burtt, The Inspiration Expiration Ratio During Truth and Falsehood (1921) 4 Journal of Experimental Psychology, 1-23.

xviii. John A. Larson, Present Police and Legal Methods for the

Determination of the Innocence or Guilt of the Suspect (1925) 16 Journal of American Institute of Criminal Law and Criminology, 219-270.

xix. Carney Landis and Ruth Gullette, Studies of Emotional Reactions (III) Systolic Blood Pressure and Inspiration-Expiration Ratios (1925) 5 Journal of Comparative Psychology, 221-253.

xx. Carney Landis and L. E. Wiley, Changes of Blood Pressure and Respiration During Deception (1926) 6 Journal of Comparative Psychology, 1-21.

xxi. William M. Marston, Sex Characteristics of Systolic Blood Pressure Behavior (1917) 2 Journal of Experimental Psychology, 387-419.

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Constitutional Law—Sterilization of Mental Defectives

A Virginia statute[1] authorizes the performance of an operation rendering sexually sterile any inmate of a state instituiton for mental defectives who is affected with certain hereditary forms of insanity and feeble-mindedness. The statute aims to guard against possible abuses by giving the inmate a hearing before a special board and an appeal to the courts.[2] The Supreme Court of the United States in the recent case of *Buck v.*

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[1] Virginia Laws, Acts 1924, c. 394, p. 569.

[2] The statute states that "sterilization may be effected in males by the operation of vasectomy and in females by the operation of salpingectomy, both of which said operations may be performed without serious pain or substantial danger to the life of the patient."

In the case of Buck v. Bell (1925) 143 Va. 310, 130 S. E. 516, the Suprmee Court of Appeals of Virginia said: "The operation of salpingectomy is the cutting of the fallopian tubes between the ovaries and the womb, and the tying of the ends next to the womb. The ovaries are left intact, and continue to function. The operation of vasectomy consists of the cutting down of a small tube which runs from the testicle, without interference with the testicle. These operations do not impair the general health, or effect the mental or moral status of the patient, or interfere with his sexual desires or enjoyment. They simply prevent reproduction. In the hands of a skilled surgeon, they are 100 per cent. successful in results."

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Bell[3] held that this statute is constitutional; thus affirming a decision of the Supreme Court of Appeals of Virginia.[4] The inmate in question was " the daughter of a feeble-minded mother in the same institution, and the mother of an illegitimate child." In the proceedings against the inmate the statute was strictly followed. In overruling the inmate's contention that she was deprived of due process of law, the Supreme Court of the United States said there is "no doubt that so far as the procedure is concerned the rights of the patient are most carefully guarded . . . ." The inmate's contention that the statute is unconstitutional, because it applies only to those mental defectives confined in state institutions and therefore violates the equal protection clause of the Constitution of the United States, was likewise overruled. Mr. Justice Holmes, rendering the majority opinion, stated "that the law does all that is needed when it does all that it can, indicates a policy, applies it to all within the lines, and seeks to bring within the lines all similarly situated so far and so fast as its means allow." As a matter of substantive law, the Court said that there could be no meritorious objection to the statute, because: "We have seen more than once that the public welfare may call upon the best citizens for their lives. It would seem strange if it could not call upon those who already sap the strength of the state for these lesser sacrifices . . . . in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate off-spring for crime, or let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes . . . . . Three generations of imbeciles are enough."[5]

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[3] (1927) 47 Sup. Ct. 584, 71 L. ed. 663; Mr. Justice Butler dissented.

[4] Buck v. Bell (1925) 143 Va. 310, 130 S. E. 516.

[5] Relative to compulsory vaccination, see Jacobson v. Mass. (1905) 197 U. S. 11, 3 Ann. Cas. 765.

Statutes more or less similar to the Virginia statute have been enacted in twenty-two states.[6] In litigation relative to the constitutionality of these statutes various objections have been presented, and the decisions are not uniform.[7]

The courts of last resort in New York,[8] Michigan,[9] and New Jersey[10] declared unconstitutional statutes which provided for the sexual sterilization only of the feeble-minded inmates and certain criminals confined in state institutions; the reason being that this was an arbitrary classification, and therefore was a denial of the equal protection of the laws. In Michigan a later statute has been enacted which includes all mental defectives, and by a divided opinion the Supreme Court of Michigan decided that it is constitutional.[11]

The statutes in Indiana[12] and Iowa[13] do not provide, as fully as does the Virginia statute, for the courts to review the proceedings against the inmate. Accordingly, it has been held that the statutes in these states were unconstitutional, because the inmate being denied due process of law. In *Davis v. Berry* it was stated, "Due process of law means that every person must have his day in court, and this is as old as Magna Charta,

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[6] California, Connecticut, Delaware, Idaho, Indiana, Iowa, Kansas, Michigan, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Oregon, South Dakota, Utah, Virginia, Washington, and Wisconsin. For statutory cititations see note (1927) I Sou. Calif. Law Review 73.

[7] See following notes: (1927) I Sou. Calif. Law Review 72; (1927) 27 Columbia Law Review 873; (1926) 12 Virginia Law Review 419; (1925) 24 Michigan Law Review I; (1927) 25 Michigan Law Review 908; (1927) 76 Pennsylvania Law Review 95.

[8] In re Thomson (1918), 169 N. Y. Supp. 638.

[9] Haynes v. Lapeer Circuit Judge (1918) 201 Mich. 138, 166 N. W. 938.

[10] Smith v. Board of Examiners of Feeble-minded (1913) 85 N. J. Law 46, 88 Atl. 963.

[11] Smith v Command (1925 Mich.) 204 N. W. 140.

[12] Williams v. Smith (1921 Ind.) 131 N. E. 2.

[13] Davis v. Berry (1914) 216 Fed. 413.

that some time in the proceedings he must be confronted by his accuser and given a public hearing."

In Nevada[14] and Iowa[15] the statutes provide for sterilization of certain kinds of criminals. It has been held that these statutes provide for "cruel or unusual punishments", and therefore are unconstitutional since such is prohibited by the state constitution. In the Nevada case is was said: "Vasectomy in itself is not cruel . . . . . but when resorted to as a punishment, it is ignominious and degrading, and in that sense cruel. Certainly it would be unusual in Nevada."[16] Of similar purport is the reasoning in the Iowa case of *Davis v. Berry*. [17] In the very vigorous dissenting opinion in *Smith v. Command*[18] it was stated that if there is a distinction between sterilization and castration it is a "distinction without a difference."

The prohibition in state constitutions against "cruel or unusual punishments" merely prohibits the passage of a law imposing as a penalty for a *crime* a punishment that is cruel or unusual. Therefore it seems that a eugenical sterilization statute (like the one in Virginia which applies only to mental defectives) is not open to attack as being a "cruel or unusual punishment".

Objection has been made that the state cannot under its police power enact such a eugenical sterilization statute.[19] Obviously, this depends upon the greatness of the social need for

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[14] Mickle v. Henrichs (1918) 262 Fed. 687.

[15] Supra note 13.

[16] Also, the statement was made that "it is doubtful whether our penal institutions contain more than a small minority of those undesirables who are inclined to lawlessness and crime. It is easy to imagine that a brute guilty of rape, or who has a tendency to commit such crime, might regard it rather an advantage than otherwise to be sterilized. As a prevention of this crime vasectomy is without effect."

[17] Supra note 13; contra, see State v. Feilen (1912) 70 Wash. 65, 126 Pac. 75.

[18] Supra note 11.

[19] Supra notes 8 and 11.

such a statute. Mr. Justice Holmes deems the need sufficiently great; he stated that the statute was enacted "to prevent our being swamped with imcompetence." This conclusion connotes that in the opinion of Mr. Justice Holmes science has sufficiently demonstrated that feeble-mindedness is hereditary. Regarding this question of heredity, however, there is some dispute.[20] As an argument against the wisdom of such a statute, it may be said that if the feeble-minded are kept in the state institutions that no such sterilization is necessary, in order to prevent reproduction, because the inmates are kept segregated. If the purpose is to sexually sterilize the feeble-minded, and then allow them to go at large; in the opinion of some,[21] this would increase sexual immorality on the part the feeble-minded with a resulting increase in sexual disease. But, of course, mere doubt of the wisdom or policy of a statute is not decisive against its constitutionality.

N. B.

Game—Hunter's Rights With Respect To Wounded Game

The plaintiff and the defendant were both hunting deer on the same day. The plaintiff had wounded a deer, but not mortally, and while he was still in pursuit, the defendant shot and instantly killed the wounded deer. Held that the plaintiff could not maintain an action of replevin to recover the carcass of the deer as a hunter acquires no title to a wild animal by pursuit alone, even though there is wounding, unless the animal is followed up and reduced to actual possession.[1]

The instant a wild animal is brought under control of the pursuer so that actual possession is practically inevitable,

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[20] See the dissenting opinion in Smith v. Command (1925 Mich.) 204 N. W. 140.

[21] Supra note 8.

[1] Dapson v. Daly (Mass. 1926) 153 N. E. 454.

a vested property interest in it accrues which cannot be divested by another intervening and killing it.[2] Until a hunter deprives a wild animal of its natural liberty and reduces it to his power and control, its ownership is in the State for the benefit of all the people in common.[3] According to the great weight of American authority pursuit alone vests no property right in the hunter, even when accompanied with wounding.[4] In England the owner of the soil has an exclusive right to hunt on his property and game killed thereon by a trespasser, remains the property of the owner of the land. This view apparently prevails in one State in this country.[5] But the principal case is in accord with the weight of American authority in holding that the mere wounding of an animal *ferae naturae*, unless it is a mortal wound, is not sufficient to vest property rights in the hunter.[7]

O. V. M.

Process—Jurisdiction by Service on Agent Within County

A Tennessee statute[1] provides in part that when an individual principal has an office or agent in any county other

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[2] Liesner v. Wanie (1914) 156 Wis. 16, 145 N. W. 377.

[3] State v. Mallory (1904) 73 Ark. 236, 83 S. W. 955.
Ex Partie Maier (1904) 103 Cal. 476, 37 Pac. 402.
Kellogg v. King (1896) 114 Cal. 378, 46 Pac. 166.
Harper v. Galloway (1909) 58 Fla. 255, 51 South. 226.
People v. Bridges (1892) 142 Ill. 30, 31 N. E. 115.
State v. Snowman (1900) 94 Me. 99, 46 Atl. 815.
Sterling v. Jackson (1888) 69 Mich. 488.
State v. Niles (1905) 78 Vt. 266, Atl. 795.

[4] State v. Weber (1907) 205 Mo. 36, 102 S. W. 955.
Pierson v. Post (N. Y. 1805) Caines 175, 2 Am. Dec. 264.

[5] Blades v. Higgs (Eng. 1865) 3 Eng. Rul. Cas. 76.

[6] Rexroth v. Coon (1885) 15 R. I. 35, 23 Atl. 37.

[7] Pierson v. Post (Supra).

[1] Thompson's Shannon's Code, sec. 4542.

than that in which the principal resides that service of process may be made on the agent in all actions growing out of the principal's business. In *Knox Bros. v. Wagner & Co.*[2] the Supreme Court of Tennessee held that in so far as this statute purports to authorize service on individual defendants residing without the state it violated the due process provision of the Federal Constitution. While in the more recent case of *Frolich v. Barbour*[3] the same court held that in so far as the statute provides for substituted service on individual defendants residing within the state, but outside of the county in which the action is brought, this statute is constitutional.

The general rule is that in actions *in personam* no valid judgment can be rendered unless the court first obtains jurisdiction over the person of the defendant.[4] Jurisdiction can be obtained by personal service, by substituted service,[5] and by constructive service,[6] if the defendant is a resident of or is within the state. In order to be valid both constructive and substituted service of process must be reasonably calculated to give the defendant notice.[7] If the court once obtains jurisdiction over the defendant, jurisdiction continues at all stages of the action, even though the defendant leaves the state or acquires citizenship elsewhere.[8] A non-resident defendant outside the jurisdiction of the court may voluntarily consent to the jurisdiction by means of a general appearance.[9] If a non-resident

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[2] Knox Bros. v. Wagner 141 Tenn. 348, 209 S. W. 638; also, see Flexner v. Flexner (1915) 268 Ill. 435, 109 N. E. 327; Flexner v. Flexner (1919) 248 U. S. 289.

[3] (1927, Tenn.) 296 S. W. 353; Accord, see Joel v. Bennett (1917) 276 Ill. 537, 115 N. E. 5.

[4] Pennoyer v. Neff (1877) 95 U. S. 714.

[5] Bryant v. Shute's Executor (1912) 147 Ky. 268, 144 S. W. 28; Elliott v. McCormick (1887) 144 Mass. 10, 10 N. E. 705.

[6] Nelson v. Chicago etc. Ry. Co. (1907) 225 Ill. 197, 80 N. E. 109.

[7] Ouseby v. Lehigh Valley Co. (1887) 84 Fed. 602.

[8] Michigan Trust Co. v. Ferry (1913) 228 U. S. 346.

[9] Western Loan Co. v. Butte ect. Co. (1908) 210 U. S. 368.

defendant is within the state when served with process, the court has jurisdiction over him[10] unless he is privileged from service for some reason.[11] In an action purely *in personam* a court cannot render a valid judgment against his property within the state. But if the action is one *quasi in rem*, the judgment is valid to the extent of the property attached or garnisheed within the state; provided the property was attached or garnisheed at the commencement of the suit, and the defendant was at least served with notice by publication.[12]

In each of the principal cases, however, the action was *in personam* and the Tennessee Supreme Court is in accord with well settled principles in holding that it is within the power of the state legislature to provide for substituted service upon its own citizens so as to confer jurisdiction over their person. But in so far as the state statute purports to confer jurisdiction over non-resident individual defendants, who remain without the state, by substituted service within the state, the statute is unconstitutional.

W. S. B.

Schools—Expelling Pupil for Marriage

A private school for girls contracted to furnish board, lodging, and instruction to "Miss Helen Coombes" for the duration of a school year for the sum of $900 and $50 for extras. During the Christmas holidays Miss Coombes was secretly married. After her return to school, upon hearing and confirming the report of the marriage, the principal expelled her. Her grandmother, who had made the contract with the school authorities, sued to recover a portion of the $900 paid for the year's work. Held that a private school had a right

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[10] Lee v. Baird (1903) 139 Ala. 526, 36 Sou. 720.

[11] Stewart v. Ramsey (1916) 242 U. S. 128; Sofge v. Lowe (1915) 131 Tenn. 626, 176 S. W. 106.

[12] Supra note 4.

to expell a pupil who had secretly married, and that there could be no recovery of any part of tuition paid as the contract was not divisible.[1]

There is at least a promise implied in fact by a pupil entering a private school that he will abide by reasonable rules and regulations necessary for the government, discipline, and efficiency of the school, and in the event of his failure to do so, the school authorities are justified in expelling him.[2] In the following cases the right of the authorities of a private school to expell the pupil for a violation of rules was upheld by the courts: A mother took her daughter home over the week-end where the catalogue provided that absences from the school were to be limited to the regular recesses.[3] The pupil continually played truant and finally went home.[4] A cadet engaged in the forbidden practice of hazing.[5] A girl was connected with numerous disorders, such as hazing, ringing of bells, and turning out lights.[6]

In general, pupils may be expelled for the violation of reasonable rules necessary for the government, discipline, and efficiency of the school.[7] The principal case seems sound in holding that marriage will justify expelling a pupil from a private boarding school for girls. It might also be argued that the school contracted to receive the pupil as a "Miss" and

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[1] Hall v. Mt. Ida School for Girls, Inc. (1927 Mass.) 155 N. E. 418.

[2] Teeter v. Horner Military School (1914) 165 N. C. 564, 81 S. E. 767; 50 A. L. R. 1498; 11 C. J. Colleges and Universities sec. 31; 35 Cyc. Schools and School-Districts 1140, 41; Gott v. Berea College (1913) 156 Ky. 376, 161 S. W. 204; 51 L. R. A. (N. S.) 17.

[3] Curry v. Lasell Seminary Co. (1897) 168 Mass. 7, 46 N. E. 110.

[4] Fessman v. Seeley (1895 Tex. Civ. App.) 30 S. W. 268.

[5] Ky. Military Institute v. Bramblett (1914) 158 Ky. 205, 164 S. W. 808.

[6] John B. Stetson University v. Hunt (1924) 88 Fla. 510, 102 So. 637.

[7] 51 L. R. A. (N. S.) 975; supra, notes 1, 2, 3, 4, 5; 50 A. L. R. 1502.

hence there was an implied condition that this status would continue until the end of the school year.

However, in the principal case there was clearly a partial failure of consideration and it would seem only fair to allow the plaintiff to recover a part of the tuition charges which she has paid. But it has been generally held that contracts for tuition, board, etc., are entire, and cannot be divided up or apportioned. Upon principle, the policy of holding that the difficulty of measuring exactly what relief a party is entitled to, is a sufficient reason for giving him none, is difficult to support.[8]

The only Tennessee case in point applies the doctrine that tuition cannot be apportioned and attempts to explain it as follows: "The proprietors of school are put to the necessity of employing their forces of instructors, keeping up their properties, and otherwise equipping themselves for carrying out their contracts; and, in addition, they usually go to the expense of getting out catalogues and otherwise advertising; and for the reimbursement of all this outlay they must look to their patrons and enforce their contracts as made."[9]

J. D. P.

Torts—Liability of One Excavating For Resulting Injury To Adjoining Land and Building

The plaintiff and the defendant were adjoining landowners. The defendant excavated soil on his own premises and thereby caused the soil on the plaintiff's land to cave in and fall on the defendant's premises, and the house of the plaintiff to settle. Held that the defendant was liable both for the damages to the plaintiff's soil and the damage to his house.[1]

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[8] Woodward, The Law of Quasi Contracts (1913) sec. 130; 3 Williston, The Law of Contracts (1920) sec. 1974.

[9] Castle Heights School v. Russ (1913) 4 Tenn. C. C. A. 288.

[1] Gray v. Tobin (1927, Mass.) 156 N. E. 30.

It has often been said that the right of an owner of land to the lateral support of the soil by the adjoining land does not extend to buildings on his land.[2] This conclusion was reached in the leading case of *Wilde v. Minsterly*[3] in 1639 and has been followed in a number of decisions since that date.[4]

If this rule is strictly enforced it will work an injustice on adjoining landowners. Consequently it has been qualified somewhat in numerous jurisdictions. One qualification is that where the injury is due solely to the removal of the soil, and not to the added weight of the building, the owner of the building may recover for injury to it.[5] If an excavator acts maliciously, or with improper motives, in excavating, and thereby causes the building of the adjoining owner to be injured, the excavator would be liable in damages for the injury to the building.[6] Another qualification imposes liability on one excavating on his land for injury to buildings on adjoining lands caused by his failure to exercise reasonable care and skill to avoid the injury.[7] This negligence will not be presumed but must be proved by the party alleging it. Just what constitutes negligence usually depends on the circumstances of each case.

In order to give the owner of the adjoining building an opportunity to protect his building, some courts have held

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[2] Moody v. McClelland (1863) 39 Ala. 45, 84 Am. Dec. 770.

[3] (Eng.) 2 Rolle Abr. 564.

[4] Note 50 A. L. R. 487.

[5] Brown v. Robbins (1859) 4 Hurlst & N. 186, 158 Eng. Reprint 809; Stearns v. Richmond (1892) 88 Va. 992, 14 S. E. 847; Farnandis v. Great Nor. R. Co. (1906) 41 Wash. 486, 84 Pac. 18; Keating v. Cinn. (1882) 38 Ohio St. 148, 43 Am. Rep. 421. Other states in accord are Conn., Deleware, Ill., Iowa, Kan., Ky., Md., Mass., Wash., W. Va., and Wis.

[6] Winn v. Abeles (1886) 35 Kan. 91, 10 Pac. 443; McGuire v. Grant (1856) 25 N. J. L. 356, 67 Am. Dec. 49, Schultz v. Byers (1891) 53 N. J. L. 442, 22 Atl. 514.

[7] See 50 A. L. R. 499 for citations in accord.

that there is a duty on the part of the excavator to give notice to the adjoining owner of the proposed excavation.[8] The reasons for this view were stated in *Shultz v. Byers*[9] as follows: "Where the danger of loss in doing a legal act is not equally balanced, we should lean to the side that needs protection. Here a mere notice, which can cause but little trouble to the one who is honestly exercising his right of excavating his land next to his neighbor's house may enable the receiver of the notice to shore or prop his wall to prevent its falling, or it may lead to some arrangement by which neither will be injured . . . . The manner of giving notice may be only such as is reasonable under the circumstances, either to the owner of the property, or if he be difficult to find, it may be given to the tenant or the occupant who is interested in protecting the property." However, merely because an excavator has given notice does not entitle him to then proceed in the excavation in any loose and careless way, in which he chooses. He still has the duty to use due care and diligence in his excavating.

If the excavator promises to protect the adjoining buildings and the owner relying on this promise, refrains from taking steps for the protection of his buildings, the excavator is estopped to deny his liability for the injury to the building.[10] Likewise if the excavator undertakes to protect the buildings for the adjoining owner, he is liable for any failure to use reasonable care and skill in furnishing such protection.

G. F. B.

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[8] Davis v. Summerfield (1902) 131 N. C. 352, 42 S. E. 818; Beard v. Murphy (1864) 37 Vt. 99, 86 Am. Dec. 693; Walker v. Strosnider (1910) 67 W. Va. 39, 67 S. E. 1087.

[9] (1891) 53 N. J. L. 442, 26 Atl. 514.

[10] Walters v. Hamilton (1898) 75 Mo. App. 237.

Trusts—Creation of, By Use of Precatory Words

A provision of a will gave the testator's brother the residue of the testator's estate with the "special request" that he pay a designated sum to the testator's sister as soon as possible after the testator's decease, payments to be made in installments if necessary. The court said that the words quoted created a trust unless negatived by the context.[1]

The use of precatory words such as words of entreaty, wish, expectation, or recommendation in a will or a deed often make it difficult to ascertain whether the document gives the devisee, legatee or grantee an absolute interest or whether the property is given in trust for the benefit of another. It is well settled that a valid enforceable trust arises from the use of precatory words,[2] when there is clearly an intention to create a trust upon a fair construction of the precatory words in connection with the context as a whole.[3] The intent of the settlor or testator as expressed in the instrument has been termed the "pole star" and the "crucial test" of a trust. The difficulty in ascertaining the intention of the testator or grantor is probably due in no small part to the fact that often he does not know exactly what sort of an estate he desires to create. In order to create a trust the language, as gathered from the whole context of the instrument, must be imperative,[4] and leave absolutely no option,[5] alternative,[6] or discretion to the grantee.

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[1] In re Estate of Ferdinand Hochbrun (1926) 138 Wash. 415, 244 Pac. 698, 49 A. L. R. 7.

[2] Wash., Md., and N. J. *contra.*

[3] Hadley v. Hadley (1898) 100 Tenn. 446, 45 S. W. 342;
Ensley v. Ensley (1900) 105 Tenn. 107, 58 S. W. 288;
Hill v. Page (1895) - Tenn. -, 36 S. W. 735;
Loomis Institute v. Healy (1922) 98 Conn. 102, 119 Atl. 31.

[4] Anderson v. McCullough (1859) 40 Tenn. 615.

[5] Toms v. Owen (1891) 52 Fed. 417.

[6] In re Hutchinson & Tenant (1878) L. R. 8 Ch. Div. 540;
In re Adams & Kensington Vestry (1884) L. R. 27 Ch. Div. 394;
Eberhardt v. Parolin (1892) 49 N. J. Eq. 570, 25 Atl. 510;
In re Purcell's Estate (1914) 167 Calif. 176, 138 Pac. 704.

The term precatory trust has been called "a misleading nickname,"[7] since it indicates that there is a class of trusts peculiar and distinct from ordinary trusts. There is nothing of the sort. A so-called precatory trust has the same essential elements that are requisite to any trust, no more and no less. Fundamentally, all express trusts are of the same nature. Precatory trusts are like other express trusts in that they can only arise out of the express intent of the settlor, must be certain as to the objects or beneficiaries, and there must be a definitely and clearly defined trust res or subject matter. No technical language is essential in order to create a trust.[8] The only respect in which precatory trusts differ from other trusts is the use of words which may or may not be mandatory according to the manner in which they are used as determined by the context of the instrument in which they are used and the extrinsic circumstances which determine the trust motive.

The greatest difficulty which arises in construing precatory trusts is the problem as to how much weight to give the precatory words in determining the settlor's intent.[9] They are not imperative in themselves unconnected with context or extrinsic circumstances. "Any language which satisfactorily indicates an intention to stamp upon a gift the character of a trust will be sufficient."[10] There is no rule by which we can determine what language satisfactorily indicates such an intention when precatory words are used. The same words have been held by the same court to create a trust in one instrument and not to create a trust in another.[11]

The tendency of the early cases was to the effect that

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[7] 39 Cyc. 33.

[8] Cresswell's Adm'r v. Jones & Dunn (1878) 68 Ala. 420; Colton v. Colton (1887) 127 U. S. 300.

[9] Bogart on Trusts 47 (1921).

[10] 26 R. C. L. Trusts, sec. 18.

[11] Ogilvie v. Wright (1918) 140 Tenn. 114, 203 S. W. 753; Anderson v. Hammond (1879) 70 Tenn. 281. Phillips v. Phillips (1889) 112 N. Y. 197, 19 N. E. 411.

precatory words *prima facie* show an intent to create a trust.[12] According to this view, a trust was created by the use of precatory words unless something could be found to negative such a presumption.[13] Some of the early decisions considered such expressions a softened means of giving a command,[14] mere words of civility[15] addressed to a friend or relative, and, hence, just as binding as if more emphatic terms had been employed. However, these very courts show a lack of faith in their rule by immediately looking carefully about them for some expression or circumstance which can be said to rebut this presumption. So a great many things, such as an "absolute gift", a gift "in his own right", a gift followed by precatory words, and the fact that a trust was clearly created by appropriate words in another part of the instrument,[16] have been held to negative this presumption of intent. Also, such extrinsic circumstances as the fact that the testator was a lawyer, the fact that the grantee was interested in carrying out the objects, and the straitened circumstances of the alleged *cestui que trust* were considered destructive of this presumption.

The principal case, *contra* to the great weight of American and English authority,[17] seems to take the view that the word "request" created a trust because it was neither "so modified by the context as to amount to no more than a mere suggestion," nor was it "negatived by other expressions indicating a contrary intention." In this case there was a "special request" to pay a sum certain to a specific *cestui que trust*. There was to be no "unnecessary delay", it was to be paid over "as soon as possible", and might be paid "in installments" if nec-

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12 Whipple v. Adams. (Mass. 1840) I Met. 444.

13 Hunt v. Hunt (1897) 18 Wash. 14, 50 Pac. 578.

14 59 L. R. A. 22.

15 Erickson v. Williard (1818) I N. H. 217.

16 54 L. R. A. 427.

17 Supra, note 2.

essary. It would seem sounder to say that the intent to create a trust was expressed in these specific, explicit, insistent words surrounding the word "request" than to say that the word "request" was expressive of such an intent. To say that the word "request" is mandatory and imperative and that it creates a trust *per se* is to strip it of its natural and ordinary significance, and leaves no sure method of making mere directory statements in a will without having one's intention distorted by an arbitrary presumption to the contrary. Such a rule is now to be found only in a few American jurisdictions. The view taken by the weight of authority reverses the presumption that precatory words naturally imply an intention to create a trust, and say that there is a presumption that no trust is created unless the context of the instrument construed as a whole or the extrinsic circumstances surrounding the testator at the time the will was executed, show that he clearly intended a trust. Tennessee[18] follows this view which seems to be logical, natural, and more in accord with the probable intention of the settlor.

R. S. C.

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[18] Daly v. Daly (1920) 142 Tenn. 242, 218 S. W. 213;
Ogilvie v. Wright (1918) 140 Tenn. 114, 203 S. W. 753;
Bradley v. Carnes (1894) 94 Tenn. 27, 27 S. W. 1007;
Collins v. Williams (1896) 98 Tenn. 525, 41 S. W. 1056;
Clark v. Hill (1897) 98 Tenn. 300, 39 S. W. 339.

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LIMITATIONS UPON THE STATE'S CONTROL OF PUBLIC EDUCATION: A CRITICAL ANALYSIS OF STATE OF TENNESSEE v. JOHN THOMAS SCOPES

ROBERT S. KEEBLER

The case of *State of Tennessee v. John Thomas Scopes*[1] challenged the attention of the whole civilized world. It involved the constitutionality of what is known as the Tennessee anti-evolution act (chapter 27, Public Acts of 1925), which made it "unlawful for any teacher in any of the Universities, Normals, and all other public schools of the State, which are supported in whole or in part by the public school funds of the State, to teach any theory which denies the story of the Divine Creation of man as taught in the Bible and teach instead that man has descended from a lower order of animals." The violation of this statute was made a misdemeanor, subjecting the offender to a fine of not less than one hundred dollars nor more than five hundred dollars for each offense.

The trial in the *nisi prius* court at Dayton had all the stage setting and intensity of a grand tragedy. It turned out a comedy of errors. Confessedly it was a test case to determine grave constitutional questions. The accused admitted the facts alleged. The only questions were ques-

[1] Scopes v. State (1925) 152 Tenn. 424, 278 S. W. 57; Scopes v. State (1926) 154 Tenn. 105, 289 S. W. 363.

tions of law. The defense seized the opportunity to publish to the world the facts supporting the doctrine of evolution, and undertook to place on the stand certain distinguished scientists and to embody their testimony in the record of the case; whereas, even in the absence of such proof, the Court was judicially bound to take knowledge of this theory, which is perhaps the best known and most widely discussed generalization in all the realm of science.[2] The trial was conducted with all the solemnity of a religious inquisition. The trial court found the act constitutional, the jury found Scopes guilty, and the judge imposed the minimum fine of one hundred dollars. Scopes appealed to the Supreme Court of Tennessee. The bulky bill of exceptions and the learned testimony of the scientists was lost in transit, for the bill of exceptions was not certified within thirty days as required by law.[3] This was fortunate, as it left before the Supreme Court for consideration only the grave constitutional issues raised on the defendant's motion to quash and his demurrer. The main contentions of the defendant were:

1. That the indictment was void, as the facts constituting the crime were not alleged with sufficient particularity.

2. That the act is unconstitutional as violating the defendant's constitutional guaranty of religious freedom established by Article 1, Section 3 of the Constitution of Tennessee.

3. That the act is unconstitutional as giving a preference to a religious establishment in violation of Article 1, Section 3, and Article II, Section 8 of the Constitution of Tennessee.

4. That the act is unconstitutional in that it violates Article II, Section 12 of the Constitution of Tennessee, which

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[2] 23 C. J. Evidence, secs. 1964-1967.

[3] Scopes v. State (1925) 152 Tenn. 424, 278 S. W. 57.

declares that it shall be the duty of the General Assembly to cherish literature and science.

5. That the act is unconstitutional on the ground that it violates Article I, Section 8 of the Constitution of Tennessee, providing that "no man shall be . . . deprived of his life, liberty, or property but by the judgment of his peers or the law of the land."

6. That the act is unconstitutional in that it violates Section I of the Fourteenth Amendment of the Constitution of the United States, which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

One of the five judges of the Supreme Court died[4] after the argument of the case and before the court had announced its opinion; so that it was left for the four remaining judges to pronounce the opinion of the court. Three of these judges delivered written opinions.

Chief Justice Green held[5] the act to be definite, forbidding the teaching of the theory of the evolution of man from a lower type or order of animals in state-supported schools, and not forbidding the teaching of the doctrine of evolution except as applied to the human species. He therefore held that the indictment was not void for indefiniteness. He further held that the "due process clause" of the State and Federal Constitutions does not apply to public employment, in which the State has the same right to impose the conditions of employment as a private employer would have under like

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[4] Justice Frank P. Hall.

[5] Scopes v. State (1926) 154 Tenn. 108-121.

circumstances; and that the defendant's liberty to teach and proclaim the theory of evolution elsewhere than in the service of the State was in no wise touched by this law. He held further that the constitutional exhortation that the Legislature "cherish science" is directory and not mandatory; and further that no religious preference is involved, since belief or disbelief in the doctrine of evolution is peculiar to no religious establishment or mode of worship. However, the learned chief justice went outside all the assignments of error and contentions raised by the defendant to find error in the record, in that the trial judge had undertaken to impose upon the defendant the minimum fine of one hundred dollars fixed by the statute, thereby invading the constitutional prerogative of the jury to determine the amount of all fines in excess of fifty dollars. The learned chief justice concluded his opinion with this remarkable statement:

"We see nothing to be gained by prolonging the life of this bizarre case. On the contrary, we think the peace and dignity of the State, which all criminal prosecutions are brought to redress, will be better served by the entry of a *nolle prosequi* herein. Such a course is suggested to the Attorney General."

Mr. Justice Chambliss delivered an opinion[6] agreeing with Chief Justice Green that it is within the constitutional power of the Legislature "to so prescribe the public school curriculum as to prohibit the teaching of the evolution of man from a lower order of animals, even though the teaching of some branches of science may be thereby restricted." But he went on to hold that the constitutional objections raised by the defendant "do not apply for yet other reasons." The learned justice stated that there are two theories of organic evolution—theistic evolution, which maintains, "consistently with the Bible story, that God was the First Cause," and

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[6] Scopes v. State (1926) 154 Tenn. 121-129.

that He set in motion certain laws and forces which, after countless ages of change or development, evolved the human species; and materialistic evolution, which denies that God was the First Cause, "and seeks in shadowy uncertainties for the origin of life." The learned justice took the view that the Tennessee anti-evolution law was designed only to prevent the teaching of materialistic evolution; and that there is nothing in the act to forbid the teaching of "the theories held by Drummond, Winchell, Fiske, Hibben, Milliken, Kenn, Merriam, Angell, Cannon Barnes, and a multitude of others, who do not deny the story of the Divine creation of man as taught in the Bible, evolutionists though they be, but construing the Scripture for themselves in the light of their learning, accept it as true . . . In this view the constitutionality of the act is sustained, but the way is left open for such teaching of the pertinent sciences as is approved by the progressive God-recognizing leaders of thought and life." The learned justice concurred with Chief Justice Green that the case must be reversed for the error of the judge in fixing the fine, and that a *nolle prosequi* should be entered.

Mr. Justice Cook concurred with Justices Green and Chambliss that the act was constitutional, that the trial judge had erred in fixing the fine, and that a *nolle prosequi* should be entered; but it does not appear whether he agreed with Chief Justice Green that the act forbids the teaching of the theory that man is descended from a lower order of animals, or with Justice Chambliss that the act forbids merely the teaching of the theory that God had nothing to do with the evolution of man.

Mr. Justice McKinney dissented[7] from the majority view, holding that the meaning of the statute is "so vague that men of common intelligence must necessarily guess as to its

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[7] Scopes v. State (1926) 154 Tenn. 129.

meaning and differ as to its application," and therefore that the act was invalid for uncertainty of meaning.

In view of the obvious diversity of opinion between Justices Green and Chambliss as to the meaning of the act, Justice Green holding that the act meant what it said, and Justice Chambliss holding that the act did not mean precisely what it said, one is constrained to attach much weight to Justice McKinney's opinion. This confusion of the learned judges has created a profound uncertainty in Tennessee as to what may and may not be taught in conformity with the law. Recently Chief Justice Green, addressing the annual meeting of the American Association for the Advancement of Science held at Nashville in December, 1927, said concerning the teaching of evolution in Tennessee:

"Even if you stay and if you should talk in the schools, you would be safe; for the Supreme Court, that is, the majority of it, has never been able to agree as to what the evolution statute means."

It is unfortunate that the Supreme Court went outside the defendant's assignments of error and revoked the judgment of the lower court on a barren technicality of which the defendant did not desire to take advantage[8] and which could not possibly have done the defendant any harm; and it is doubly unfortunate that the Court directed the Attorney General to *nol. pros.* the case, thereby cutting off the defendant's appeal to the Supreme Court of the United States and preventing a final and authoritative decision of the issues involved, not only for Tennessee but for all American States.

Does anyone know what is lawful and what unlawful to teach today in Tennessee with respect to the evolution of man? Let me put a few test cases.

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[8] The writer was of counsel for Mr. Scopes in this case.

Case 1

Teacher A tells his pupils that the evolution of man from a lower order of animals is a theory generally accepted by scientists. He says nothing about the Bible, nor about First Cause, nor does he express his own opinion as to whether he believes or disbelieves such theory. Has he violated the statute?

Case 2

Teacher B tells his pupils that the evolution of man from a lower order of animals is generally accepted by scientists. He tells his pupils that he does not believe it, but that he believes the Mosaic story of creation as told in the first chapter of Genesis. Has he violated the statute?

Case 3

Teacher C tells his pupils that the evolution of man from a lower order of animals is a theory generally accepted by scientists, and he says that he believes it, but that they can believe it or not, as they may choose. He says nothing about the Bible nor about First Cause. Has he violated the statute?

Case 4

Teacher D places before his pupils in parallel columns the theory of the evolution of man from a lower order of animals, with the facts tending to support this theory, and the Genesis story of creation, with the facts tending to support this theory. He expresses no personal opinion on the subject. Has he violated the statute?

Case 5

Teacher E teaches both theories and the facts supporting each as in the preceding case; and he expresses his personal

opinion that the Mosaic story of creation is true. Has he violated the statute?

Case 6

Teacher F teaches both theories of creation, as in the preceding case, with the facts tending to support each; and he expresses his opinion that the evolution theory is true, but tells his pupils that they can believe as they choose. Has he violated the statute?

Case 7

Teacher G teaches the theory of the evolution of man from a lower order of animals, and teaches further that it does not contradict the Bible story of creation if properly construed, giving his reasons. Has he violated the statute?

Case 8

Teacher H teaches that man is of Divine creation, and that God created him through infinite gradations of change from lower to higher life. Has he violated the statute?

Case 9

Teacher I teaches that all life upon this planet except man has evolved from a primordial cell or cells through infinite gradations to the present manifold forms of life, and that the work of evolution is still in progress. When asked by a pupil if man also evolved from a lower order of animals, he says: "I have my private opinion, but I cannot express it. You must reason from the facts before you. However, if you are curious you might read any encyclopedia or dictionary on the subject." Has he violated the statute?

Countless other illustrations might be given; but is it not plain that the interpretation of this law is in hopeless uncertainty? Is it not equally true that a like uncertainty

will attend the interpretation of any law designed to suppress freedom in the investigation and communication of truth and in the expression of one's opinion with respect thereto?

Two years ago it was difficult in Tennessee to discuss this question dispassionately. Notwithstanding the court's statement that belief or disbelief in evolution finds no place in any particular religious establishment or mode of worship, it was nevertheless true that persons theologically minded were divided into hostile camps on this very issue. But the world moves fast; and now that the smoke of battle has cleared away, one may view and discuss the issues calmly and dispassionately, without fear that his views will reach the headlines of the newspapers or that he will be charged with heresy. In view of the temper of the time when this case was tried and decided, and in view of the fact that we have an elective judiciary which, being human, must inevitably, though unconsciously be affected to some extent by public opinion, one need not wonder at the outcome of this famous case.

On one thing a majority of the judges agreed, that the act is constitutional. On an equally important matter they disagreed, as to what the act means. The school teachers of Tennessee are justified in interpreting the act in the same loose way as the Supreme Court has done, and in going ahead with the teaching of the doctrine of evolution as if the act had never been passed. Certainly they would be safe in so doing, according to the recent assurance of Chief Justice Green. The Supreme Court has saved the statute; but at the same time it has done all within its power, short of holding the act unconstitutional, to save the cause of science and education.

The purpose of this paper is to inquire whether the Supreme Court was sound in holding that the State has that same absolute right to dictate the terms and conditions un-

der which its employees shall work, as a private employer may do. This is the heart of the case. If in holding what a teacher may say to his pupils in the public schools the State is bound by those considerations which determine the validity of all police regulations, then this statute, as I shall try to show, is clearly invalid as tending to abridge the free expression of facts and opinions in a matter which does not affect the public safety, health, or morals. If, on the other hand, the State has all the authority of a private employer, the act is manifestly valid. And any act forbidding the expression of fact or opinion by a school teacher with respect to any other matter which a majority of the Legislature might desire to suppress would likewise be valid. The issue here considered does not involve questions peculiar to the Constitution of Tennessee, but involves questions which apply alike in all our American States. Is this act in violation of the "due process" clause of the Federal Constitution, or does it fall within a class of acts to which the "due process" clause is not applicable? We shall not discuss any questions peculiar to the Tennessee Constitution, with respect to guaranties of religious freedom or with respect to the duty of the Legislature to cherish science. The sole question is, have the Legislatures of our American States autocratic and absolute power in dealing with the public schools; or, are they bound by considerations of what is reasonable and proper, and what tends to promote or abridge the public health, safety, and morals?[9]

It is quite true that some of our courts of last resort, including the Supreme Court of the United States, have used far-reaching language of general application which, while proper when considered in the light of the facts before the Court,

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[9] 12 C. J. Constitutional Law secs. 441-443.

might not be proper under a different set of facts.[10] Chief Justice Green in his opinion quoted with approval the following passage from the case of *People v. Crane*, 214 New York 254:

"The statute is nothing more, in effect, than a resolve by an employer as to the character of his employees. An individual employer would communicate the resolve to his subordinate by written instructions or by word of mouth. The State, an incorporated master, speaking through the Legislature, communicates the resolve to its agents by enacting a statute. Either the private employer or the State can revoke the resolve at will. Entire liberty of action in these respects is essential unless the State is to be deprived of a right which has heretofore been deemed a constituent element of the relationship of master and servant, namely the right of the master to say who his servants shall (and therefore shall not) be."

With deference to the learned tribunals which have used this language, we take issue and maintain that the State, speaking through its Legislature, is not in the same position as a private employer, but is the position of a trustee[11] acting for the use and benefit of all the citizens of the State; and that while a private employer may act arbitrarily and according to whim or caprice, the Legislature may not do so, even with respect to the funds committed to it for disbursement or the positions which it creates and whose functions it determines.

The State collects money by taxation. This money goes into the coffers of the State, and it is within the power of the Legislature to dispose of this money. Doubtless it is

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[10] Waugh v. University of Mississippi (1915) 237 U. S. 589-597;
Atkin v. Kansas (1903) 191 U. S. 207, 220-224;
Heim v. McCall (1915) 239 U. S. 175;
Ellis v. United States (1907) 206 U. S. 246;
Leeper v. State (1899) 103 Tennessee, 500, 516, 536.

[11] 6 R. C. L. Constitutional Law, secs. 67-80.

not mandatory upon the Legislature to establish any system of public education or to expend any funds of the State for any particular purpose, except as such funds may be allocated by the State Constitution. But may the Legislature of Tennessee or of any other State direct by valid law that the State's money shall be buried under the State Capitol there to remain until the year 2000? A private capitalist might do so. He might bury his treasure or squander it at will. But the State Legislature cannot do so[12], because it does not exercise the broad prerogatives of a private capitalist. It is trustee of the fund committed to its hands; and the sole function of the Legislature is within constitutional limitations to enact measures for the health, safety, morals, and general welfare of its citizens.

The Legislature provides schools for the education of the citizens of the State. May the Legislature provide that all school houses shall be built on the banks of the Tennessee River; or that all school houses shall be ten feet square at the base and five hundred feet high? A private educator, expending his own funds, might do so. If the Legislature cannot, why not?[13]

The State Legislature provides for the employment of public school teachers. Can the Legislature require that all school teachers be red headed and wear horn rimmed spectacles? The proprietor of a private school might indulge his peculiar whim in this regard. If the State Legislature cannot do so, why not?

The State determines by law who may attend the public schools. Can the State say that only girls with bobbed hair shall attend, or that no minister of the Gospel shall

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[12] Lynn v. Polk (1881) 76 Tenn. 121;
Demoville v. Davidson County (1889) 87 Tenn. 214; 10 S. W. 353.

[13] 6 R. C. L. Constitutional Law, secs. 437-440.

ever enter the grounds of a State supported school? Stephen Girard might do so. The State cannot. Why not, if the Legislature has all the authority of a private employer in relation to its public schools?

The State Legislature equips the public schools with libraries and reference books. My the Legislature expurgate from all books, dictionaries, encyclopedias, and reference works in our schools, colleges and public libraries all references to the evolution of man, under penalty of fine or imprisonment? The owner of a private library or the proprietor of a private school might expurgate his library at will. If the State cannot do likewise, why not?[14]

The Legislature, or the agencies functioning under it, determines what shall constitute proper decorum in public schools. May the Legislature enact that all pupils and teachers inside our schools must walk on their hands under penalty of fine or imprisonment? If not, why not?[15]

The Legislature provides for the erection of other public improvements besides school houses and colleges. The public streets, parks, courthouses, and other public buildings are as much under the absolute control of the State as are the

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[14] 24 R. C. L., Schools, Sec. 23;
Meyer v. Nebraska (1923) 262 U. S. 390;
Pierce v. Society of the Sisters (1925) 268 U. S. 510;
Slaughter House Case (1872) 83 U. S. 36;
Adkins v. Children's Hospital (1923) 261 U. S. 525;
Child Labor Tax Case (1922) 259 U. S. 20;
Truax v. Corrigan (1921) 257 U. S. 312;
Hammer v. Dagenhart (1918) 247 U. S. 251;
Adams v. Tanner (1917) 244 U. S. 590;
Smith v. State of Texas (1914) 233 U. S. 630;
Dobbins v. Los Angeles (1904) 195 U. S. 223;
Connolly v. Union Sewer Pipe Co. (1902) 184 U. S. 540;
International Harvester Co. v. Missouri (1914) 234 U. S. 199;
See also:
Motlow v. State (1911) 125 Tenn. 547, 145 S. W. 177;
State v. McKay (1916) 137 Tenn. 280, 193 S. W. 99.

[15] 24 R. C. L. Schools, sec. 23.

school houses; and the citizens who use these improvements are as much amenable to regulation by the State as are the pupils in our public schools. Can the Legislature dictate what our citizens can and cannot talk about while using the public streets or public parks or public auditoriums or other public buildings? Is not the test of the State's disciplinary control in such matters based upon considerations of public health, safety, and morals, and upon such considerations alone?

In the foregoing illustrations we have considered matters which properly fall within the Legislative discretion; and it must be apparent to everyone that the Legislature has not unbridled control over matters which lie within its discretion. But there are matters within whose province it is not proper for the Legislature to interfere. The Legislature is that branch of the Government which considers and determines matters of public policy. It is not the function of any department of government to consider or determine what are the laws of nature. Those laws are determined by a higher power, over which the Legislature has no control. Those laws inhere in the order of nature, and the fiat of assemblies cannot make or unmake them. Scientists do not make laws, but merely discover them. It is no part of the Legislature's function either to make or to discover nature's laws.

The mathematical relationship of the circumference of a circle to its diameter is denoted by the Greek letter pi, and is approximately 3.1416. May the Legislature enact by valid law that the value of pi in Tennessee is 3.15? At one time the Legislature of Indiana attempted to do so.

There are those who believe in cellular cosmogony, that the world is a cell and that we live on the inside. May the Legislature enact that cellular cosmogony be taught in the schools, and that any teacher making any statement of fact or belief tending to discredit this theory in the public schools

of the State shall be visited with fine or imprisonment? If not, why not?

May the Legislature enact by valid law that two plus two equal five; or that Napoleon Bonaparte never lived; or that human history began on January 6, 4004 B. C.; or that water freezes at fifty degrees Fahrenheit; or that man did or did not evolve from a lower order of animals?

Are not all these matters entirely without the Legislature's province?

But it is insisted that the Tennessee anti-evolution law is negative; that it neither attempts to formulate any law of science nor to coerce any opinion or belief; that it is merely an act of neutrality, neither affirming nor denying the Mosaic or the scientific theory of man's origin. Is an act which forbids the teaching of anything contrary to the theory of evolution an act of neutrality? Can the Legislature any more lawfully forbid a man to express an opinion which he holds than it can compel him to express an opinion which he does not hold? And is it not apparent that this statute throws the protecting arm of the State around the Mosaic story of creation? Is an act which forbids the teaching of any history tending to cast discredit upon any Southern patriot an act of neutrality? Is an act forbidding the teaching of any economic theory contrary to the doctrine of free trade or the doctrine of a protective tariff an act of neutrality? Is an act forbidding the teaching of any scientific fact or theory which shall tend to discredit the miracles of the Catholic saints an act of neutrality? Is an act which forbids the teaching of any fact or theory contrary to "the story of the Divine Creation of man as taught in the Bible" an act of neutrality? Is it not apparent that the State is neutral only when it keeps hands off and allows the forces of reason, research, and human intelligence to have full sway; and that the State is not neutral when it interposes the shield of the

law to protect the ancient dogmas of the Christian and the Jew?

Can the Legislature dictate to the teachers in our public schools and colleges what they shall and shall not say in addressing their students? A teacher is employed to teach European history. Can the Legislature tell him that he shall say nothing about Julius Caesar, or that he shall not mention America? So long as one teaches the subject for which he is employed, and teaches it adequately, can the Legislature interfere with his freedom in expressing facts or opinions except upon considerations of the public health, safety, morals, and welfare? If a teacher is employed to teach biology, can he be forbidden to say anything about evolution, so long as such remarks do not interfere with the adequate teaching of this subject? If, on the contrary, such remarks not only tend to interfere with the teaching of his subject, but are imperative to the adequate teaching of it, is it not an impudent interference with the fundamental right of the teacher to express the facts within his grasp and his honest interpretation of those facts in scientific generations, if he be forbidden to teach evolution?

And shall the pupil be forbidden to inquire or to learn? The State furnishes the means of his education. Can it impose all the conditions surrounding it? Can it say to the students in our public schools and universities: "If you enter this institution, you must ask no questions about evolution. While here you must read no books on the subject. You must consult no articles pertaining to evolution, either in dictionaries or encyclopedias or current periodicals or elsewhere. On this subject your mind must be blank." Would not such an attitude on the part of the Legislature violate a fundamental right of human beings, the right to a free and inquiring mind, which is as necessary to human development

as the right to move or the right to breathe?[16] Is it not apparent that the Supreme Court was in error in holding that the Legislature has arbitrary power to control all that is said or done in our public schools?

Again, it is one thing for the Legislature to omit from the prescribed curriculum, as it easily may[17], the study of biology, geology, or any other branch of science. But it is a vastly different thing to say that no teacher may in any communication to his students in the public schools and universities teach them any fact or theory of biology, or geology, or any other science under penalty of fine or imprisonment. Such an act denies the fundamental right of freedom to think and freedom to express one's thoughts, which is an incident inseparable from the right to live. This right the Legislature cannot abridge, either in school room or out of school room, as a mere matter of autocratic right. Any abridgement of this fundamental human right must be on clear grounds of public policy, as tending to promote the public happiness, morals, safety, or general welfare; and if it does not, the act must fall, as an arbitrary invasion of individual freedom.

Again, our Legislature, or the agencies functioning under it, could doubtless discharge a teacher who, employed to teach Latin, spent much of his time outside his field discussing history, mathematics, evolution, or any other impertinent subject; not because of any inherent vice in the character of his collateral remarks, but because of his inefficiency in not sticking more closely to the task assigned. But what student has not been charmed to new love of learning by a great teacher who could go outside the beaten path to enrich by the fruits of a broad and liberal learning the pro-

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[16] Meyer v. Nebraska (1923) 262 U. S. 390, 399; Smith v. Texas (1914) 233 U. S. 630, 636.

[17] Leeper v. State (1899) 103 Tenn. 500, 53 S. W. 962; 24 R. C. L. Schools, secs. 92-93.

saic statements of the printed text? And what historian cannot better understand and teach his subject by a knowledge of biology, political science, and the evolution of life, manners, morals, and religion? Imagine Woodrow Wilson teaching American history by memorizing and parrot-like repeating the statements of some high school or college text book. Or imagine any great teacher attempting to teach biology or geology or anatomy or embryology or, indeed, political science, sociology, or history without taking his bearings and measuring his course by the facts of evolution.

Again, it is one thing for the Legislature to say that all school houses shall be painted red, and another to say that all school teachers shall wear red neckties or eat a prescribed diet during school hours. In the one case, merely material considerations are involved; while in the other are involved the freedom of the individual and the right of private judgment in matters of personal concern.[18]

If my reasoning thus far is sound, we must consider the Tennessee anti-evolution act not as falling within the field of the State's proprietary power over which the Legislature has unbridled control, but as falling within that field of Legislative acts which, if justified at all, must be justified as tending to promote the public health, safety, or morals, and not as arbitrary, capricious, and unreasonable infringements upon private freedom.

The Supreme Court did not consider the act in this aspect, taking the flat position that it came within the field of the State's autocratic power, and that the wisdom or unwisdom of the act was not to be considered. Indeed, the learned Chief Justice said: "If they (our public educators) believe that the teaching of the science of biology has been so hampered by Chapter 27 of the Acts of 1925 as to render

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[18] 24 R. C. L. Schools, sec. 23 and cases cited.

such an effort no longer desirable, this course of study may be entirely omitted from the curriculum of our schools. If this be regarded as a misfortune, it must be charged to the Legislature".[19]

But the learned counsel for the State, in briefing the case for the Supreme Court, realized that they must defend the act as a reasonable exercise of the State's police power, and they maintained that the act was not arbitrary, capricious, or preferential, but that it tended to promote the public peace and morals and that fundamental belief in Deity which is the basis and bulwark of all our institutions. Learned counsel maintained that this act is in consonance with that provision of the Tennessee Constitution stating that "no person who denies the being of God or a future state of reward and punishment shall hold any office in the civil department of this State;" and that the teaching of evolution tends to undermine Christianity; and that it is the highest function of the Government to preserve the categorical imperatives of religion as the first bulwark of orderly government. One may well ask why the story of the Divine Creation as taught in the Bible should not be taught in our public schools, if a belief in its authenticity is necessary to the enforcement of those categorical imperatives which are the bulwark of our Government.

Learned counsel for the State produced *dicta* from numerous decisions that this is a Christain nation, and argued that the teaching of evolution of man tends in the public mind to discredit Christianity. They pointed out numerous references to Deity in our great State papers, in our Constitution, in the oath required of public officials and administered to witnesses in our Courts.[20]

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[19] Scopes v. State (1926) 154 Tenn. 120.

[20] Vidal v. Girard's Executors, 43 U. S. (2 Howard) 127, 197-199. Holy Trinity Church v. United States (1892) 143 U. S. 457, 465-471.

It should be too plain for argument that the Legislature can no more protect the Christian Bible from the assaults of history or science than it can protect the Koran or the Rig Veda or the Book of Mormon or any other sacred book. It should also be too plain for argument that any law which permits the teaching of evolution of all animal and vegetable life from a lower order of creation, man alone excepted, is neither Mosaic nor scientific, and violates all the canons of human reason.

But does the teaching of evolution tend to break down the belief in any Deity which it is the duty of the State to safeguard by Legislative act? One is led to wonder what sort of belief in God it is within the province of the Legislature to defend and to protect. It is argued that no one who disbelieves in God can hold public office in Tennessee. Could Charles Darwin, or Thomas Huxley, or John Fiske, or Henry Drummond, or Lyman Abbott, or Charles W. Eliot have been denied the right to hold public office in Tennessee by reason of his belief in evolution? Is there a scientist in the world today who would be qualified to hold office in Tennessee if belief in man's evolution disqualifies one for such office? What definition of God will pass muster in Tennessee? Is a man disqualified for public office who believes that "through the ages one increasing purpose runs"; that from out the dim centuries there has been a struggle onward and upward through ever evolving, even more beautiful, ever more helpful forms of life; that there is some incomprehensible purpose running through nature which speaks through conscience, through history and through outward appearances, and urges all life onward and upward to a grander destiny? Will such a belief disqualify one for public office in Tennessee? Or must one believe that there is somewhere in the universe, and not too far away, a Being somewhat after the proportions and appearance of man, only larger and more glorious, who holds the reins of the universe in his hands,

who performs miracles for the needy, and answers the prayers of the pious, and before whose great assizes all men must appear in a grand final array for everlasting bliss or everlasting torment? To what view of God must one subscribe before he can qualify to hold public office in Tennessee? Can our Supreme Court give us a final definition of God? Can our theologians? Must our Supreme Court define God in terms of the mental concepts of the constitutional fathers; or may each of our citizens entertain his own idea of God, however unsatisfactory and tentative such idea may be? Must we accept Billy Sunday's definition of God, or that of Spinoza or Moses or St. Paul; or is every man entitled to his own opinion? How many of us could honestly qualify for public office in Tennessee if we had to pass the scrutiny of a public inquisitor concerning our idea of God and the hereafter?

In the foregoing discussion we have necessarily had to rely upon fundamental principals, because the law under discussion has invaded a new field of controversy, touching alike the fundamentals of education, of science, and of government. There is no case on all fours by which the issues are to be lightly determined. The world of learning was convulsed to the depths by this case. Science was involved. Academic freedom was involved. Religion was involved, the religion of the ancient creeds as opposed to the religion of the free spirit. Principles of government were involved; the world wished to know whether such a statute was possible in liberty-loving America.

The mountain labored and brought forth a mouse. The only thing actually and conclusively determined by the case was that the trial judge should have allowed the jury to fix the amount of the fine. It is true that the Court, without being able to agree on what the act meant, held it constitutional; but the Court shunted the major issue by having the case *nol prossed*, thereby blocking an appeal by Scopes to

the United States Supreme Court, where he had hoped to have the issues finally determined.

In this inconclusive and unsatisfactory situation the law now stands. But it is respectfully submitted that the majority opinion in *Scopes v. State* is unsound; and that the following propositions, axiomatic and fundamental, should have dictated a contrary decision:

The Legislature is only one of the three branches of our Government, all of which exist and hold their powers in trust for the common good.

The function of the Legislature is to determine matters of public policy; and in the exercise of this function in whatever field, whether in the exercise of proprietary or governmental powers, the Legislature must act with due regard to the public welfare, and not unreasonably, arbitrarily, whimsically, capriciously, or preferentially.

The public funds of the State are raised by the taxation of all the people, and these funds are impressed with a trust for the common good. The Legislature has no arbitrary or capricious power, in the expenditure and distribution of these funds, to anex conditions which are plainly repugnant to the public good, or which are plainly capricious, whimsical, arbitrary, or preferential.

The Legislature is not an academy of art or science. Its function is to determine matters of public policy, and not to determine the facts of history or to sit in judgement upon the formulas or findings of scientific men.

It is the legitimate function of science to investigate all the facts of nature, past, present, or prospective, on this planet and throughout the universe, with respects to all animate and inanimate things, and to correlate these facts into groups, laws, theories, and systematic records for convenience of study and for aid in further research.

It is not within the legitimate sphere of the Legislative authority to shield from honest criticism, public or private, direct or indirect, any system of cosmogony or other scientific theory or belief pertaining to matters within the field of science; and it is immaterial whether such a theory of cosmogeny or other scientific belief is or is not a part of the dogma or belief of any religious group, Christian or non-Christian. The ultimate power of the State in this respect is to forbid and punish blasphemy and other vulgar speech or conduct tending toward a breach of the peace and offensive to public decency or morals. (Sunday laws are to be justified as police regulations only, tending to promote public health, saftey, and morals.)[21]

America is not a Christian nation in any dogmatic or creedal sense; but only in the sense that historically the founders of our Government were members of various Christian groups, and that the underlying principles of our demoncracy, founded on the inherent worth and political equality of all men, are consistent if not coincident with the doctorines of Christianity, founded on universal human brotherhood under a common Father.[22]

The right to think and to communicate one's thoughts is the highest prerogative of man, inseparable from the right to live. This natural right cannot be abridged as a condition precedent to the acceptance of any public office or employment or to the enjoyment of any public place or bounty; but only under the State's police power to promote the public safety, health and morals.

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[21] 25 R. C. L. Sundays and Holidays, secs. 5-7.

[22] Reynolds v. United States (1878) 98 U. S. 145, 162.
"Our civil rights have no dependence on our religious opinions any more than our opinions in physics or geometry." — Thomas Jefferson, Virginia Statute for Religious Freedom.

The diffusion of sound learning among the masses of the people is vital to the success and progress of any society, and particularly to a democratic or republican government such as ours. While it is plainly within the legislative prerogative to establish schools and courses of study for the education of the citizens of the State, it is not within the legislative prerogative to determine what facts or theories shall or shall not be taught in the presentation of those subjects.

The fundamental requisite of education is the ability to think, to grasp facts and their relation to one another, and to reason from the particular to the general; and any system of education which shields any department of learning from the searching scrutiny of honest minds is inimical to the public good. The patient, honest, and thorough investigation of facts, whether of history or of science, and the generalizaitons of law or theory which careful and honest students may deduce from these facts cannot possibly be regarded as subversive to any view of religion or Deity which it is the legitimate object of the State to foster or defend.

In the foregoing discussion we have purposely refrained from laying emphasis upon the peculiar provisions of the Constitution of Tennessee forbidding prefenence to any religious establishment and guaranteeing complete religious freedom, as well as those narrower technicalities relating to formal matters peculiar to the forum in which the case was tried; preferring to rest our argument on the proposition that this act is repugnant to those fundamental human rights which are safeguarded by the due process clause (the Fourteenth Amendment) of the Federal Constituiton, and that such an act would be unconstitional and void, not only in Tennessee, but in every other American State.

Sound learning is violated by this act, and religion is not profited. Every major advancement of science has caused a shifting of emphasis with respect to religious values;

and if the time shall come when, as the tide of science sweeps onward — against which legislative assemblies and judicial tribunals and ecclesiastical councils may beat their mops in vain — religion shall at last be driven to lay its supreme and final emphasis on a clean and upright heart and a conscience void of offense toward God and man, who shall say that, however great the victory of science may be, religion will not reap the greater gain?

LEGAL PERSONALITY AS A PSEUDO-PROBLEM

RAYMOND J. HEILMAN

"Is the human Intellect, then, a slave? No; it is free; but its freedom is not absolute, it is limited by fact and by law—by the laws of thought, by the immutable characters of ideas and by their unchanging eternal relationships. Intellectual freedom is freedom to think in accord with the laws of thought, in accord with the natures of ideas, in accord with their interrelations, which are unalterable."[1]

In so far as the adoption or rejection of the term "legal personality" or other terms of similar implications is a part of the process of forming propositions whereby predictions of possible legal consequence may be expressed, the study of the use of the term is a study of "intellectual freedom and logical fate" (to use the words of Keyser), and therefore to the extent that judicial law-making is affected by the laws of thought it is a duty of the freedom and fate of human beings in their lives. We shall see that as respects the so-called "limitation of fact" that limitation, such as it is, is largely one of interpretations of experiences and of our being affected by our past interpretations of experiences, but once an interpretation has been made and attached to a term or "symbol" in the forming of a proposition a "destiny of consequences" (in legal and other thought) is determined "beyond the power of passion or will to control or modify" and "another choice of principles is but the election of another destiny."[2] This observation assumes that the statement of the proposition has no terms in it which are not sufficient-

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[1] Keyser, Mathematical Philosophy, (1922) 5.

[2] Ibid.

ly definite in meaning to make sense, for, indeed, otherwise the statement would not be a proposition but merely a propositional function, the term having been invented by Bertrand Russell, which "is perhaps the weightiest term", says Keyser, "that has entered the nomenclature of logic or mathematics in the course of a hundred years." He defines it as "any statement containing one or more real variables, whereby a real variable, is meant a name or other symbol whose meaning or value as we say, is undetermined in the statement but to which we can at will assign in any order we please one or more values, or meanings, now one and now another."[3] "To derive propositions from a propositional function it is *necessary* to replace the latter's variables, with what we may call constants or values — with terms of definite meaning."[4] But having done this, that is, having given meaning to the terms employed in the statement, "The fact which leaps naked into view is that logical deduction — mathematical demonstration — *all* valid proof in no matter what subject matter — depends *entirely* upon the *forms* of the premises, or postulates, and not at all upon any specific meanings we may assign to their undefined, or variable, terms or symbols."[5] This is descriptive of what is known as "automonous or postulational thinking," based on the logical system of Aristotle and applied by Euclid in his Elements of "geometry". It is important and necessary, first, to carefully distinguish between the "terms" and "relations" and note that the "form" of the statement in both the propositional function and the proposition may be the same (and actually the propositional function is but the skeleton or framework of the proposition), so that the latter is completed by attaching meanings to the terms of the former — the terms of the former being "real

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[3] Id.

[4] Id, 52.

[5] Ibid.

variables" while those of the latter are "constants". This is significant for our present problems for this question is raised: Does the term "legal personality", or do any of the terms used in possible similiarity, such as "corporation", "State", etc, amount to a "constant" so as to have sufficient meaning for useful purposes of thought or is it merely what Keyser calls a "real variable" with a number of possible meanings or perhaps absence of any meaning so that its employment may lead us into confusion or waste of mental effort.

Secondly, it is important and necessary to distinguish "between the process of thinking or learning which takes place in time and the logical relations discovered which do not form a temporal series at all."[6] This brings us to two main fundamental assumptions of Aristotelian logic:

> "(1) that in some way or other we can arrive at certain propositions which we know are factually true of the world in which we live these propositions being either general or universal truths or particular truths, (constituting) the premises of our syllogisms; (2) that by combining these general and particular truths in accordance with the laws of the syllogism we can arrive at new truths about the world by deduction."[7]

Thus it was believed that Euclid had arrived at certain "universals" or "axioms" which were factually true of the world of experience, i. e., that they were not merely statements of working hypotheses which could be used in logic or pure mathematics but that they were applicable and factually descriptive of phenomena in the field of applied mathematics, e.g. physics. The invention of other systems of so-called geometry which were based upon postulates other than those

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[6] Morris Cohen. (1918) 15 Jour. of Phil. etc. 673, 681.

[7] Walter Wheeler Cook. (1927) 15 Johns Hopkins Alumni Magazine 213, 216, American Bar Ass'n Journal, June 1927.

which Euclid had used showed that Euclid's postulates were not the only ones which were consistent with natural phenomena and therefore did not describe such phenomena as absolute "truth". It was further believed, as already mentioned, that by use of these *"discovered"* postulates or propositions new "absolute truths" could be proved entirely without the necessity of observation or experiment. A belief in *a priori* knowledge, discoverable and deductable. This doctrine, as Dewey says:[8]

"implies the prior and given existence of particulars and universals — that what we need and must procure is first a fixed general principle, the so-called major premise, such as "all men are mortal" then in the second place, a fact which belongs intrinsically and obviously to a class of things to which the general principle applies: Socrates is a man. Then the conclusion automatically follows: Socrates is mortal. According to this model, every demonstrative or strictly logical conclusion "subsumes" a particular under an appropriate universal. . . . It thus implies that for every possible case that may arise there is a fixed antecedent rule already at hand."

Another effective blow which shook this view with its "belief that the objects in the universe can be classified in a mode which is objectively valid"[9] was dealt by Darwin in his Origin of Species, wherein he denied[10]:

"the ontological validity of the notion of species and (proved) it to be only a subjective convenience — a convenience signally attested by the way in which biologists continue to distinguish species, although they no longer think of them as each a fixed and eternal metaphysical entity pervading its individual members and unaffected by their fortunes. Thus a species is really nothing but a temporary grouping of individuals, all of whom are indefinitely variable and capable

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[8] Dewey Logical Method and the Law (1924) 10 Cornell Law Quarterly 17, 21.

[9] Cook, op. cit. supra note 7.

[10] Schiller, Formal Logic, (1912) 56.

of developing in various directions. That they form a group at all in so far as they do — for the distinctions between 'species' 'subspecies' 'variety' and 'race' are fluid and arbitrary) is partly a matter of convenience, partly an accident. For we happen to snapshot them in that stage of their social development at which they may conveniently be grouped together. But it is a mistake on this account to regard them as steroptyped. If the course of events should be reversed before our eyes and all the past members of a species could be recalled to life, we should watch each species gradually fusing with its congeners, the genera coalescing with their families, individuals exhibiting the qualities of what have since become divergent kinds, and at last learn the lesson that all the various forms of life have had a common ancestry, and one never realized except in individuals, species therefore, ceases to exist as an ontological reality."

What has been set forth above has much significance on the question of whether the term "legal personality" or any other term applied similiarly is a useful one to reach the results which may be desired in determining legal consequences for particular factual situations. For example, our assumption that groups of individuals have legal personality, whatever that may mean, may involve our picking a minor premise under either an express or a tacit major premise that certain things are "true" of "legal personalities" e. g. that they have the legal attributes of human beings in all respects. The result of such a syllogism would be a conclusion which if we stuck to it certainly would affect our mode of treatment of the group involved in the particular case. This would be the effect as a matter of logical fate. Likewise if the major premise assumed that "legal personalities" have all human attributes, the mode of treatment would also be affected — just how we need not stop to work out.

Both of these possible assumptions supposed as major premises seem to be made by writers, as we shall note later, some of whom seem to join and others to confuse the two indistinguishably. That what seems too absurd to consider

possible to be done, actually is done shows errors which may follow or be involved in logic — it shows how logic like mathematics while it aims, as Bertrand Russell says, "at being true in all possible worlds" "may yet not be 'true' " in the sense of adaptable to our experiences "in this higgledy-piggledy job lot of a world in which chance has imprisoned us." The treatment by writers and judges of "legal personality" also carries the attribution of "essences" or "entities" as the above quotations from Schiller suggests. The notion was that the "true essences" or "beings" were discovered or encountered in their "state of nature" in the universe of which they were objective parts. These were said to be "abstracted" in thought from "existence". As Schiller elsewhere says[11]:

"The function of definition was to state the *Essence* of its subject in order that there might be deduced or demonstrated from this its essential attributes or *Properties*. It was a making known of *the* Essence, and it was taken for granted that things *per se* had such an essence, that they could not have more than one, and that human science could state it."

So we find writers and courts today speaking of "personality", "legal" or "natural" as if it were an essence, an entity. The significance of this will be brought out further in dealing more particularly with the use of symbols in its effect on the treatment of legal personality. Explaining the limitations of deductive logic while admitting the inevitability of the deductive process from major premise to conclusion and admitting that deductive logic is useful in bringing to our observation phenomena which we should not be aware of from the mere statements of the premises of a syllogism, Professor Dewey points out[12]:

"In a certain sense it is foolish to criticise the model supplied by the syllogism. The statements made about men and Socrates (above) are obviously true and the connection be-

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[11] Id. 63

[12] Dewey, op. cit. supra note 8, Italics are this writer's.

tween them is undoubted. *The trouble is that while the syllogism sets forth the results of thinking, it has nothing to do with the operation of thinking.* . . . If we trust to *an experimental logic, we find that general principles emerge as statements* of generic ways in which it has been found helpful to treat concrete cases. The "universal" stated in the major premise is not outside of and antecedent to particular cases; neither is it a selection of something *found* in a variety of cases. *It is an indication of a single way of treating cases for certain purposes or consequences in spite of their diversity.* Hence its meaning and worth are subject to inquiry and revision in view of what happens, what the consequences are, when it is used as a method of treatment. *As a matter of fact we do not begin thinking with premises, they begin with some complicated and confused case, apparently admitting of alternative modes of treatment and solution. Premises only gradually emerge from analysis of the whole situation. The problem is not to draw a conclusion from given premises, that can best be done by a piece of inanimate machinery by fingering a keyboard. The problem is to find statements, of general principal and of particular fact which are worthy to serve as premises. As a matter of actual fact, we generally begin with some vague anticipation of a conclusion (or at least of alternative conclusions) and then look around for principles and data which will substantiate it or which will enable us to choose intelligently between rival conclusions. In strict logic, the conclusion does not follow from premises; conclusions and premises are two ways of stating the same thing.* Thinking may be defined either as a development of premises or development of a conclusion; as far as it is one operation it is the other." Says Schiller:[13] "what is the real object of thought must be determined by reference to the particular case; it can never safely be decided by knowing about objects in general." Again in definition he says:[14] "*Relevance to purpose is* the primary requisite in a good definition, and that which governs all its other features. For definitions are needed, ... intended to bear on some problem or dispute. . . . . The 'essence' therefore, which every definition tries to state is simply the point which it is for the time being important to elucidate. It follows that

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[13] Schiller, op. cit. supra note 7, 18.

[14] Id. 70.

the essences and definitions of things or necessarily plural, variable, and 'relative', and never 'absolute'. . . . . A single unmistakable, and absolute definition of a thing, true without reference to any context, would have to be one that would serve for *any* purpose for which it is convenient or possible to use the term. All definitions must be nominal. They must be intended to *label* an object under inquiry or dispute in order to faciliate its investigation."

On "the meaninglessness of the inapplicable", Schiller explains[15]:

"To realize that there can be no sense in calling true a law that is inapplicable to the individual case, we have merely to suppose a discrepancy between fact and theory, to imagine on the one hand a perfectly coherent and symmetrical system of laws, and on the other a world to which that system was wholly irrelevant, in which things systematically happened otherwise than calculated. Surely no sane man would call such 'science' true? He might call it the Code of Fairyland, and admire its beauty and formal perfection, but he would have to devise another system for the mundane purpose of guiding his expectaitons. And it would be to this latter that he would reserve the title of 'true'. Unfortunately the abstraction of its standpoint conceals from Formal Logic the failure of its doctrine. Its habit of abstracting from actual meaning frequently beguiles it into abstracting from meaning altogether, and then supposing that it has reached the standpoint of the 'ideal'. It has never grasped the fact that the meaning of a doctrine depends on its application, and that if to evade objections, it is so interpreted as to become inapplicable, it simply becomes unmeaning. For it then escapes the only test by which its truth could be discriminated from its falsity, and its real validity established. A science which was only about kinds which were never exemplified by facts would be empty — a mere vagary of the imagination. It would float in the ether of fancy and never touch solid earth. If, therefore, the only way of making the doctrine of Predicables consistent is to disclaim application to the particular case, it is disclaiming not only all usefulness but also all real meaning."

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[15] Id. 50.

This may be compared with a statement by Gilbert Lewis on the tendency of the process of abstraction[16]:

"The word 'dog' is an abstraction from many Towsers, and as we cull the traits of similiarity from a larger and larger mass of observations we proceed from the special to the general. Towser, dog, mammal, vertebrate, animal, living thing, object, — these are successive products of the great process of abstraction. Often as we proceed in the direction of greater abstraction and idealization, we eliminate little by little the empirical material from which the abstractions were derived, but it seems probable that the empirical material from which the abstractions were derived, but it seems probable that the empirical is never wholly eliminated."

Any method which takes us away from observation of the data of our experiences and the pragmatic purpose which raises our problem in a particular case, takes us away to that extent from the solution of the problem and at most results in our solution of some other problem which does not correspond with the data of our experience. Among lawyers as well as among philosophers, to adopt an expression of William James, "the only things that shall be debatable shall be things definable in terms drawn from experience."[17]

"Principles", says Dewey,[18] "are methods of inquiry and forecast which require verification by the event . . . . Principles are hypotheses with which to experiment. . . . . Many men are now aware of the harm done in legal matters by assuming the antecedent existence of fixed principles under which every new case may be brought. They recognize that this assumption merely puts an artificial premium on ideas developed under conditions and that their perpetration in the present works iniquity."

"As it is neither the nature of being to be changeless, nor the nature of thought to mirror it and so to win exemption from the trouble of thinking, we cannot acquiesce in a single

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[16] Gilbert. Lewis. The Anatomy of Science, (1926) 10.

[17] Kallen. The Philosophy of William James (1925) 66.

[18] Dewey, Human Nature and Conduct, (1922) 239.

all embracing affirmation of what is, nor think by affirmation alone. The flux of experience has to be analysed, and 'things' have to be fished out of it by thought, and distinguished from other things, nor is there any end to the distinctions we may have to make in what at first we took to be the same' ".[19]

There is always present in the use of such a term as "legal personality" an "idea of stagnant, man-made concepts which all but wax models of a vital and fragrant flower."[20] There is even greater danger in making a wax model to hypostatize what should not be treated by unaware hypostatization at all. It is always safer in a case of real doubt (for without doubt there would be no problem of reflective thinking) to come back to "the scientific method" which Gilbert Lewis says[21]

"is hardly more than the native method of solving problems, a little clarified from prejudice and a little cultivated by training. A detective with his murder mystery, a chemist seeking the structure of a new compound, use little of the formal and logical modes of reasoning. Through series of intuitions, surmises, fancies, they stumble upon the right explanation, and have a knack of seizing it when it once comes within reach."

What has been one purpose of much that has been said or quoted above has been to indicate how ideas and processes of formal logic may run into and become implicated in our use of words and so into our interpretations affecting the solution of our problems. The question may be asked whether after all the so-called problem of "legal personality" is not largely or altogether a pseudo-problem of the use of a symbol or symbols which should be discarded as taking our observation from the data of our experiences. As expressed by Professor Sapir in the New Encyclopedia Britannica: "Many

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[19] Schiller, op. cit. supra, note 7, 139

[20] Gilbert Lewis, op. cit. supra note 16, 12.

[21] Id. 6.

of the problems which have occupied the attention of philosophers and logicians are shown to be not essential problems but pseudo-problems."

"Consider the terms in which our most vital problems are discussed. They were the creation of beings living in conditions not far removed from those of the higher apes, hunters and trappers primarily concerned with jungles and jaguars. The structure of our languages has not changed for thousands of years. Its crudities were standardized by Aristotle in a grammer and a logic which have effectively prevented us, until yesterday, from either avoiding the most futile arguments, or realizing the bearing on our lives of the outstanding discoveries of the last five centuries. . . . . Most of the so-called concepts and abstractions from which our controveries arise, are of purely linguistic origin, due to mistaken verbal analogies and the objectification of symbolic accessories (parts of speech). . . . Logicians project number symbols into imaginary timeless realms or ascribe 'properties' to logically subsistent 'propositions'; so that mankind has been perpetually agitated by the false problems of existence and reality, purpose and mind, which constitute the stock-in-trade of philosophers."[22]

We deal with the phenomena of our experiences by treating them as things by hypostatizing — even "the law" we hypostatize for, says Justice Holmes "a right is only the hypostasis of a prophecy" and "the prophecies of what the court will do in fact, and nothing more pretentious are what I mean by the law"[23] This is of significance for our present purpose — we use a symbol "law" and objectify it as a "thing" — that "thing" which we talk about as if it had "essence" consists of nothing but conduct and behavior, *ways of doing*. In using the term "legal person" we may be, and probably are, objectifying into an assumed "natural person" or human being, certain activities which by analogy we classify along with certain activities of human beings. But in

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[22] C. K. Ogden, Science notes, Forum, May 1927.

[23] Collected Legal Papers (1921) 313 and 173.

order not to misdirect our thought processes away from the factual data of our experience and our "problem purpose" we have to be careful to remain alertly aware of the distinction between the verbal symbol "legal person" the human being objectified, the activities of phenomena which we are classifying, and the purpose of the classification. Otherwise we shall deceive ourselves as to the nature and limits of the problem which we have professed to undertake to solve and shall miss the purpose at which we have projected our efforts. Suppose we used the term "legal wousin" for a given purpose — now unless the term used for convenience is intended to treat of certain legal phenomena as a totality of phenomena corresponding to those which are conveniently understood to occur when the term "wousin" is used is common speech[24] that is, "a negro in transit over a rail-fence with a melon under his arm while the moon is just passing over a cloud" we must make sure that we keep in mind only those elements of our problem which we treat as corresponding to the phenomena of "real wousin" which we wish to treat of and exclude from consideration elements corresponding to phenomena observable in a "real wousin" but which are not observable in the particular problem we are trying to solve. The case at hand may not have any element to correspond to the negro in "real wousin" or to the melon or to the moon, or to the fence or to the cloud or to the inter-relations of these as they are observable in real "wousin." Unless the elements which do not correspond are excluded by our thought process we will solve a different problem than that of our experiences that is a hypothetical problem with negro, melon, moon, fence, cloud, and the inter-relations between them which are understood in common speech by the word "wousin." We treat things as signs and signs as things. In using the signs treating of things there is a reference to

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[24] Ogden and Richards. The Meaning of Meaning (1st ed. 1923) 131

things to which we had acquired a symbol, previously. There is always a reference back to an experience of ours — this is the process of interpretation.

"Our interpretation of any sign is our psychological reaction to it as determined by our past experience in similar situations and by our present experience."[25]

"Since words only symbolize thing, said Anselmn, if we would say what it is that words symbolize we must say what things are."[26]

"The peculiarity of interpretation is that when a conduct has effected us in the past, the recurrence of merely a part of the context will cause us to react in the way in which we reacted before. A sign is always a stimulus similar to some part of an original stimulus and sufficient to call up the engram formed by that stimulus, (i. e. "to call up an excitation similar to that caused by the original stimulus"). An engram is the residual trace of an adaptation made by the organizm to a stimulus. The mental process due to the call up of an engram is a similar adaptation. So far as it is cognitive what it is adapted to is its referent and is what the sign which excites it stands for or signifies." [27]

Thus to see a watermelon may cause a reaction in me similar to my previous reaction upon seeing a "wousin" for the first time. Said Taine, whom William James pointed to as "the first writer to emphasize the importance of symbol-substitution in thought"[28]:

"We do not conceive infinite objects or ideal objects but the abstract characters which generate them; we do not conceive abstract characters but the common names which correspond to them. However far we go, we always come back to names. Things the most far removed from our experience and the

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[25] Id. 384.

[26] Id. 101

[27] Id. 125

[28] Id. 121

most inaccessible to all experience, seem present to us, what's actuallv present in such a case is a name, the substitute of an abstract character which itself is the substitute of the thing and this often only thru many intermediate stages until at last by a series of equivalents."[29]

The dangers of dealing with "bogus entities" or "phantoms" linguistically generated may be studied in the "abstractive" mental operations of Aristotelian logic, already spoken of whereby "connotations were hypostatized into essences." "The earlier (Greek) writers are too full of the relics of primitive word-magic. To classify things is to name them and for magic the name of a thing or group of things is its soul, to know their names is to have power over their souls. Nothing, whether human or suprehuman, is beyond the power of words. Language itself is a duplicate, a shadow soul of the whole structure of reality. Hence the doctrine of the Logos variously conceived as this supreme reality, the divine soul-substance, as the meaning or reason of everything and as the meaning or essence of a name. The nature of things, their *physis*, was regarded e.g. by Thales, as supersensible, a stuff of that attenuated sort which has always been attributed to souls and ghosts, differing from body only in being intangible and invisible. Heraclitus saw in language the most constant thing in a world of ceaseless change, an expression of that common wisdom which is in all men; and for him the structure of human speech reflects the structure of the world. It is an embodiment of that structure — "the Logos is contained and in it as one meaning may be contained in many outwardly different symbols."[30]

There was not only word-magic, but number magic. "The Pythogoreans on the other hand were chiefly puzzled by number symbols. 'Since everything appeared to be modelled in its entire character as numbers' says Aristotle, 'and numbers to be the ultimate things is the whole universe, they became convinced that the elements of numbers are the elements of everything.' In fact in its final stages, Pythagoreans pass-

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[29] Id. 42

[30] Id. 43

ed from a doctrine of the world as a procession of numbers out of the one to the construction of everything out of number-souls, each claiming an immortal and separate existence."[31]

In India today in the Yoga philosophy there is "hypostatization of verbal entities combined with a belief in ascending planes of reality where these entities reside."[32] By another Indian sect, sound is believed to be eternal, for the "beating of a drum reveals it to our ears but does not call it into being and when any letter is pronounced in our hearing we recognize it at once with absolute certainty, which would be impossible if its existence were only momentary."[33] This is a true Aristotelian logic — those to whom the words "corporation" calls forth an "entity", which "really exists" have theological fellowships. To these latter — and to those in whom the word "state" produces the same reaction we may introduce the Buddhists of whom Ogden and Richards say: "The rejection of misleading forms of language was carried still further by Buddhist writers in their rejection of the "soul". Whether it was called *satta* (being) *atta* (self) *jiva* (living) *Digha* (principle) *or puggala* (person) did not matter. " For these are merely names and expressions, terms of speech, designations in common use in the world. Of these he who has won truth makes us indeed; but he is not led astray by them." (Digha N. I. 263)[34]

Gilbert Lewis remarks: "Certainly far more may be accomplished by studying the physical chemistry of vital processes than by speculating about a thunderstorm's purpose or an atom's loves and hates."[35]

The Aristotlian logic abounds not only in the legal profession but in the medical profession as well — patients are treated by it and live and die by it for Doctor F. G. Crookshank tells us:

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[31] Id. 112
[32] Id. 57
[33] Id. 56
[34] Id. 518
[35] Gilbert Lewis. op. cit. supra note 7. 194

"In hospital jargon 'diseases' are 'marked entities' and medical students fondly believe that these 'entities' somehow exis in *rebus naturae* and were discovered by their teachers as was America discovered by Columbus. . . . . Teachers of medicine on the other hand seem to share the implied belief that all known or knowable clinical phenomena are resumable and to be resumed under a certain number of categories or general references as so many diseases, the true number of these categories, references of diseases being predetermined by the constitution of the universe at any given moment. In fact for these gentlemen, 'diseases' are Platonic realities; universals *ante rem*."[36]

Bearing in mind what has been quoted and said above, let us consider the various meanings which seem to be given to the term "legal personality" by the courts and writers. The two main theories are the socalled "realistic theory" and the socalled fiction theory." The arguments of some advocates of the "realistic theory" will be taken up first. In this theory the hypostatization is most extreme.

A preliminary consideration is to attempt to define the terms "legal personality." This calls for a determination of the meaning of the two words separately and in combination. But this it seems had better be treated along with the various explanations of the different theories as a whole. However, we should be on the lookout for shifting of meanings and ambiguity. The term "legal personality" seems sometimes to be used as if the word "personality" were alone; the term "personality" seems sometimes to be used in the same way as the words "legal personality" are used elsewhere and at still other times the term "legal personality" seems to have been given no more meaning than the adjective "legal" would have when applied to any appropriate noun with which it makes sense.

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[36] Ogden and Richards op. cit. supra note 24, 518

Mr. W. Jethro Brown is a defender of the realistic theory. He says the "personality of the corporation is not a mere metaphor or fiction. The rights attributed to it by law are either the rights of the corporation or else rights without a subject."[37] And yet he seems to approve of the definition of "legal personality" as "competency to act in law."[38] Now I do not see how the latter definition adds anything to what would be equally possible to say of the legal consequences which might be attached to the group if nothing was said about personality as legal competency or about it being necessary that the corporation should be the subject of the rights. I will go further and say that I do not see that it adds anything to what might be said if the group were called a partnership or unincorporated association. Does "legal personality" as "competency to act in law" mean, the power of the group of persons associated to bring about legal consequences of a particular kind (i.e. corporate)? If so, nothing is added by joining an additional but unincarnated entity as a sort of fifth wheel to the coach — it is merely extra weight for the lawyer's mind to carry around, as much so as an assumed ball and chain. If Mr. Brown means the power of the corporation as an entity apart from the group to bring about legal consequences of a particular kind (i.e. corporate) then individual members of the group, it seems, must first exert power on the spirit to move it and then must gather the results of the spirit's exertion to themselves as fruit is gathered and it is hard to see why if the law can work such a transfer from the visible being to the invisible and then from the invisible back to the visible it could not work the same result, i.e. attach the same legal consequences, in the more direct but less marvelous way of allowing the spirit to enjoy rest and leisure.

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[37] The Personality of the Corporation, (1905) 21 Law Q. R. 365-376.
[38] Id. 376-379

Now as far as Mr. Brown feels that the corporation must as a separate conceptual entity be the subject of rights, the question may be asked; in any case can not the rights which are held be taken advantage of by the members of the association and are not any duties borne rested in the last analysis upon them? To say that they cannot hold rights or have duties mediately would seem to deny that they could hold rights or bear duties in the ultimate analysis as well. Finally, Mr. Brown's difficulty is in the hypostatization of all the legal phenomena which he treats of without realizing his own hypostatization of what is merely conduct of the courts in determining what the legal consequences of the behavior or conduct of the members of the group acting collectively shall be. No legal consequences hit or affect the entity which he says must be the subject of the rights and of the duties too. I suppose none that are visible to the naked eye. He says "this is no mere partnership" — then he goes on to explain the difference of legal consequences which depend on that distinction, unaware that after all the only distinctions which have a meaning in law are distinctions of consequences — for that is what law is made up of — consequences and the predictions of them. The terms "corporation" and "partnership" only make sense from the point of difference in legal consequences. One kind of group behavior results in consequences of a certain kind — another kind of group behavior in consequences of another kind. The behavior must include more "red tape" in the case of the so-called corporation and generally the members do not have to dig down in their private pockets to pay the corporate debts but sometimes they have to, as under the California statute placing them under quasi-joint liability.

Mr. Brown's chief contention seems to be that in the corporate group the "physical realities" are different from those in an unincorporate group. Now of course the group will act differently according to whether their expectations of legal

consequences of their behavior are those described by reference to the term "corporation" or those described by reference to the term "parnership" but it is equally true of the partnership association as of the corporate association that the members of the group will act differently when engaged in a collective enterprise than they would if engaged singly and individually in separate businesses. Mr. Brown says: "Whenever men act in common they inevitably tend to develop a spirit which is something different from themselves taken singly or in sum." He quotes Bluntschli to the same effect. This is the same idea often expressed by saying that the "total is greater than the sum of its component parts" which is true enough if you add in a certain way, i.e. by leaving out part of the total. Lewis expresses the idea in an attractive way[39]: "If some accident breaks the violin to bits it still has the same atoms and molecules attracting and repelling each other in the old way, but the tune of the violin is forever lost. Every complex structure is more than the sum of its component parts, and if a wireless set is demolished or a living creature dies, something was that is no more."

What Mr. Brown says and what Mr. Lewis says would be true also of a mob or of a group of children at play — the mob could easily be said to have an oversoul and this could be hypostatized; in fact the term soul is a hypostatization. Any number of persons act differently and are usually treated differently, as a group, than if all were isolated or placed in a vacuum. Mr. Hohfeld's reply to Mr. Brown's argument is this[40]:

"When all is said and done, a corporation is just an association of natural persons conduction business under legal forms, methods, and procedure that are *sui generis*. The only conduct of which the state can take notice by its laws must spring from natural persons — it cannot be derived from

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[39] Op. cit., supra, note 16, 126

[40] Hohfeld, Fundamental Legal Conceptions (1923) 198.

any abstraction called the "corporate entity". To be sure, the conduct of those individuals will be different when they are cooperating in their collective or corporate projects than when they are acting independently of one another — in a word, the "physical realities" will be different; but ultimately the responsibility for all conduct and likewise the enjoyment of all benefits must be traced to those who are capable of it, that is, to *real* or *natural* persons. We are merely employing a short and convenient mode of describing the complex and peculiar process by which the benefits and burdens of the corporate members are worked out."

On our general problem, in a footnote, Mr. Hohfeld also says[41]:

"It is of course possible, as a mere matter of words and definitions, to say, even with an intention to speak *literally*, that the association of natural persons is itself a person — a "legal" or "juristic" person. But doesn't this do some violence to the vocabulary? The generic term *person* thus acquires an unfortunately wide and peculiar denotation and a somewhat muddled connotations hardly consistent with our usual modes of thought and speech. Is it not like calling a drove of horses a horse or a pack of cards a card? The law is constantly suffering from a loose, undiscriminating, and misleading terminology; and, in the opinion of the present writer, this is particularly true of the law of corporations."

A violin is simply certain materials combined in a certain way. A corporation is a group of persons associated or aggregated in a certain way — a partnership in another way — the terms describe the manner of association and in terms of legal consequences. Note, too, that in this latter argument Mr. Brown is not speaking of "legal competency" which was his definition of "legal personality" but has shifted to something else which he seems to treat as the meaning of the term.

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[41] Id. 199

It is also said by Brown, Gierke, Maitland and others that a corporate group whether of socalled "corporation" or of the state has a distinct "will." Dewey's final answer to this is[42]:

"If we recur to the logical method of conception by "extensive abstraction," "will", like "interests" denotes a *function* not an intrinsic force or structure."

To this argument pressed especially strongly by Treitschke and other German writers in respect to the state as a "legal personality" Dewey's statements elsewhere about "the will" and "the will to power" are enlightening. Speaking of habits and will, he has said:[43]

"All habits are demands for certain kinds of activity and they constitute the self. In any intelligible sense of the word, they *are* will. They form our effective desires and they furnish us with our working capacities."

That is the term "will" as applied by Dewey to a human being is functional and relates to behavior — to apply the term "will" to the state one must put a different meaning into it or hypostatize "the state." Dewey does not hypostatize in using the term "will." Of will to power he says[44]:

"In the beginning, this is hardly more than a name for a quality of all activity. Every fulfilled activity terminates in added control of conditions in an act administering objectives. . . . . Each impulse or habit is thus will to its own power. To say this is to clothe a truism in a figure. . . . . The achieved outcome marks the difference between action and a cooped up sentiment which is expended upon itself. Each impulse is a demand for an object which will enable it to function."

According to John R. Cammons functional method of treating associated groups as "going concerns":

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[42] Dewey, Historic Background of Corporate Legal Personality (1926) 35 Yale L. J. 655, 663.

[43] Dewey, op. cit., supra, note 19, 25.

[44] Id. 140

"The going concern may be looked upon as a person with a composite will, but this so-called "will" is none other than the working rules of the concern operating through the actions and transactions of those who observe the rules."[45] Laski's arguments seem hardly to add anything to what Mr. Brown has argued although he has a distinctive and attractive style. [46]

W. M. Geldart[47] argues:

"The corporate name by which a body can contract and hold property, can sue and be sued, is not a John Doe put forward by some recognized and well defined person or persons who for some technical reason need such a disguise."

Hohfeld's statement quoted above answers this and we may add:

"How would Mr. Geldart distinguish the use of a partnership name under the Uniform Partnership Act, authorizing the "title" to firm property to be held in and transferred to and from the firm, except that the corporation name may so be used in more ways of exercising legal power etc. than may a partnership name?"

Mr. Geldart says further:

"Shall we say that every shareholder in the Great Western Railway Company is in truth an owner of an undivided share in every mile of its permanent way and in every engine and carriage that runs on its line?" (Answer — yes, ultimately, at least by my conception of "ownership," — why not say so?) If that is a true co-ownership, it ought to involve, if not a right to partition, at least a right to possession." (Answer — not necessarily — this may be a different type of co-ownership — there are special and peculiar purposes for having the legal relations other than in some types of co-ownership.) "Let the shareholder try to travel on his own line without paying the fare and see how far his co-ownership will avail him." (Answer — same as to preceding question,

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[45] Commons, Legal Foundations of Capitalism (1924), 147.

[46] Laski, The Personality of Associations (1916) 29 Harvard L. R. 404.

[47] Geldart, Legal Personality, (1924) 4-19, 19-21

adding — the legal relations may differ in number and kind in different degrees of ownership — to have less than the maximum in number and degree of legal relations does not necessarily mean that you have no ownership at all — of course this all depends on what legal relations you use the word *ownership* to describe.)

"If we are going to get nearer to the facts, we must at least add the notion of a contract to that of co-ownership, a contract made by every shareholder with every other, limiting his right of ownership to a right to share in profits and to vote at stockholders' meetings, contracts between each shareholder and every person who supplies a ton of coal or steel rails; innumerable contracts to the making of which he has not given a moment's thought. To escape from the fictitious person we have fallen into the arms of the fictititous contract."

(Answer — there is no insuperable objection to the law's describing the legal consequences in the terms of "contract" — the author (Geldart) assumes a definition of a contract which requires a promise for a promise in the actual sense of "promise") but how does he explain the doctrine that a principal is held to be bound in a contract where the promise (if any) was made merely by his agent and in his absence?) Mr Geldart's definition of "legal personality" seems to be contained in the following statement:

"If corporated bodies are really like individuals the bearers of legal rights and duties, they must have something in common which qualifies them to be such, and if that is not personality we may fairly ask to be told what it is. Or if the rights and duties attributed to them are not really theirs we may again fairly ask to be told whose they are." (Answer — the associated individuals are the bearers of the rights and duties — whether the latter are attributed to "the corporation" or not. Mr. Geldart having once seen a negro and now having come upon a "wousin" calls it a negro). Space forbids examining further arguments similar to those set forth above.

Of the fiction theory, Professor Freund says:

"The fiction theory creates an artificial unit and asks us to accept it in place of the required personal holder. But if the nature of the right, for psychological and moral reasons demands that it be vested in a person, it is manifest that a fic-

titious person will not do. The fiction theory therefore leaves the difficulty where it is. Its positive fruit is the satisfaction of a technical requirement; and that it burdens with the spectre of an imaginery person which may claim all power and disclaim all liability."[48]

What has been the method of the courts in determining legal consequences in cases in which the term "legal personality" and its meanings may have confronted the courts — to what extent has the old logic of absolutes and classes affected the process of judicial decision? Looking at the matter on broad lines, it appears that notwithstanding, the old logic the courts have determined legal consequences on empirical and instrumental bases of policy as individuals decide their problems however well or little they understand their own reflective processes. Using the language of the courts in describing what they have done we find that "legal personality" has been attributed to inheritance in Roman law but not estates in Anglo-American law. In India it was attributed to a Hindu idol[49]. Animals have not been regarded as having "legal personality" although in cases of socalled charitable trusts they have been treated somewhat similarly to the way in which a human *cestui que* trust has been treated. Also in "cruelty to animals" cases — animals have been protected in the way somewhat analogous to the way in which minor children are protected. The family although bound by strong cohesive psychological ties has not been regarded as a "legal person." In England the collective group of subjects or inhabitants has not been regarded as legally personified into the state but the King has been treated as an exalted individual. Partnerships have not been regarded as having "legal personality" though a so-called corporation is so regarded. Yet in some respects partnerships and joint stock companies have been treated as to legal consequences as if the group

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[48] Freund, Legal Method of Corporations 13-14, 49-54.

[49] Pramatha Nath. Mullick Pradyumna Kumar Mullick, L. R. 52 I. A. 245 (1925), see comment (1925) 41 Law Q. R. 419.

of their members were organized into a corporation. Corporations have had some of the legal consequences attached to them (by statute) which previously were attached only to partnerships.[50] After all, however, I submit that the term "legal personality" has in some instances at least merely been used as a device to explain what the courts did, as in the case of the Hindu idol[51]. Looking for a moment at the treatment of unborn children as "natural persons" — they have been treated as not natural persons for purposes of determining whether what would be homicide of a human being killed after birth— was homicide as to them; for purposes of inheritance they have been treated as human beings. In tort cases to recover for injury to them before birth, the courts have divided.

"The fact of the case is that there is no clear-cut line, logical or practical, through the different theories which have been advanced and which are still advanced in behalf of the "real" personality of either "natural" or associated persons. Each theory has been used to serve the same ends, and each has been used to serve opposing ends. The doctrine of the personality of the state has been advanced to place the state above legal responsibility on the ground that such a person has no superior being — save God — to whom it answers; and on behalf of a doctrine of the responsibility of the state and its officers to law, treating a person as having rights and duties, etc. The personality of the state has been opposed to both the personality of "natural" singular persons and to the personality of groups. In the latter connnection it has been employed both to make the state the supreme and culminating personality in a hierarchy, to make it but *primus inter paros*, and to reduce it to merely one among many, sometimes more important than others and sometimes less so. These are political rather than legal considerations, but they have affected law. In legal doctrines proper, both theories have been upheld for the same purpose, and each for opposed ends. Cor-

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[50] Risdon Iron and Locomotive Works v. Furness, (1906) 1 K. B. 49 Thomas v. Matheisen, (1914) 232 U. S. 221, 34 Sup. Ct. 312

[51] Supra, note 49.

porate groups less than the state have had real personality ascribed to them, both in order to make them more amenable to liability, as in the case of trade-unions, and to exalt their dignity and vital power, as against external control. Their personality has been denied for like reasons; they have been pulverized into mere aggregates of separate persons in order to protect other laborers from them, to make more difficult their unified action in trade disputes, as in collective bargaining, and to enable union property to escape liability, the associated individuals in their severalty having no property to levy upon.

The group personality theory has been asserted both as a check upon what was regarded as anarchic and dissolving individualism, to set up something more abiding and worthful than a single human being, and to increase the power and dignity of the single being as over against the state. Even the doctrine that true personality resides only in the "natural" person has been worked in opposed directiors. It was first used to give church or state a short and direct road of approach which would lessen the power of the singular being over against the collective being, while lately, through being affected by "natural" in the sense of natural rights, it has been employed to exalt private, at the expense of public interests."[52]

Duguit who wishes to make all government officials legally responsible "denies will and personality to both the state and all other groups."[53] Barker who agrees with Duguit in desiring to have government officials held legally responsible would personify the state.[54]

While the courts in these socalled legal personality cases have made their decisions on grounds of policy as well as in other fields, it seems very clear that the machinery of judicial decision has been clogged in its workings by the notions of the

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[52] Dewey, Supra note 42, 669-670.

[53] Id. 672, Duguit, Law in the Modern State (1919), 205.

[54] Barker, The 'Rule of Law', (May 1914) The Political Quarterly 117, 123.
Borchard, Government Liability in Tort (1914) Yale L. J. 1, 129,229.

old Aristotelian logic of classes, absolutes, and pre-existing postulates which the judges have held. The term "legal personality" has been a most convenient handle on which to hold out these absolute ideas to the cases raising the judicial problems. That apparently has been its only function — discussing the real problems. It has been a symbol with a reference to a supposed analogy which was rarely applicable. It was adapted to treatment as a "universal" discovered and from which "truth" might be drawn without new data. It set up a hypostasis which disregarded the necessity of data for it appeared to be complete. It had the appearance of completeness which held the eyes of the judges while conditions of life changed greatly and rapidly. It tended to what Dewey calls:

"The philosophical fallacy, which consists in the supposition that whatever is found true under certain conditions may forthwith be asserted universally or without limits and conditions. Because a thirsty man gets satisfaction in drinking water, bliss consists in being drowned. Because the success of any particular struggle is measured by reaching a point of frictionless action, therefore there is such a thing as an all-inclusive end of effortless smooth activity endlessly maintained. It is forgotten that success is success of a specific effort, and satisfaction the fulfillment of a specific demand, so that success and satisfaction become meaningless when severed from the wants and struggles whose consummations they are, or when taken universally."[55]

The term "legal personality" is in my opinion, nothing but a "real variable" capable of having any one of a number of meanings attached to it, which superficially may seem to be sufficiently definite to form a term of a proposition when actually it forms nothing more than a misleading propositional function. To state legal problems in the terms into which they must finally be resolved makes coincidence or lack of coincidence between problem and solution apparent to the high-

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[55] Dewey, op. cit. supra note 18, 175.

est possible degree; to state them otherwise tends to place the actual problem out of sight. Closer, more accurate observation of data and adaption of tools takes more time and pains but it is simpler because it leads to attending to the actual problem, not merely a false or fictitious problem.

"Diagnosis . . . . too often means in practice the formal and unctuous pronunciation of a name that is appropriate and absolves from the necessity of further investigation."[56]

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[56] Dr. Crookshank in Ogden & Richards, Meaning of Meaning (2d ed. 1927) 343.

The writer wishes to acknowledge his great debt to Professor Walter Wheeler Cook for whatever ideas of value may have been set forth above as to legal personality in particular and jurisprudence in general and to Professor Arthur L. Corbin, likewise, as to legal analysis, though whatever conclusions have been stated are the writer's own.

THE LAW OF THE LAND[1]

ROSCOE POUND

As we look out over the heterogeneous materials of a law library of any pretensions, at first sight there is a mass of obsolete or obsolescent statutes, of forgotten, almost unreadable black letter folios, of text books in crumbling law calf bindings covered with dust, all of which in their time made part of the state of the law at some given date, in some given place. Yet, when we examine that mass of material more closely, there seems to emerge out of it a universal, permanent, enduring element which is in very truth irrepealable. If we look only at the present, we seem to find something that gives form and consistency to the legislation which pours forth biennially or even annually from the lawmaking bodies of forty-eight states. We seem to find something which gives consistency and unity to the mass of decisions coming forth from forty-eight Supreme courts, each with full authority to declare the common law, from the federal Supreme Court, and nine Circuit Courts of Appeal, and from the courts of England and Ireland and Canada and Australia. Even more, as we look back over the legal history of English-speaking peoples, we seem to be conscious of something which binds the law of our time and place, not merely to the law of Blackstone's time, not merely to the classical common law of the time of Lord Coke, but even to medieval English law—to the law of thirteenth-century England. Indeed there are at least two states today which print Magna Charta in the forefront of their statute books as presumably a part of their living law.

If we give to this permanent, this enduring element, the name of the common law, or its medieval name of the law of the land, I suppose there is no phenomenon of our legal or social history which is so marked as the persistence and the

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vitality of this law of the land. It has come into competition with the great rival tradition of the modern world many times and in many places, and has never taken a backward step. Only historians know that the Custom of Paris once obtained in Michigan, Wisconsin and Illinois. The map contains many reminders that the territory of those states was once politically French. But there is not an item in their law today to suggest that historical fact. The Spanish-Roman law was once in force in Florida, and architectural remains of the Spanish regime are still to be seen. But there is not a mark upon the law of Florida today to indicate that it was ever other than a common-law jurisdiction. With the one exception of Louisiana, the great commonwealths which were carved out of the Louisiana purchase are common-law jurisdictions without a mark upon their law to suggest that the French Roman law once obtained over that domain. Even in Louisiana itself, which is governed in form by a Civil Code translated almost word for word from the Civil Code of France, the whole technique of judicial precedents, the whole apparatus of finding the grounds of decision in recorded judicial experience, has become that of the comman law. Except for the terminology of certain subjects, except for family law, the law of inheritance, and some parts of the law of property, the basis of the law in that jurisdiction has become substantially the common law. Even more, wherever in the modern world the jurisdiction of the Judicial Committee of the Privy Council extends over countries which had inherited the civil law, more and more we find that their legal materials are making over by our common law technique of precedents and judicial action on the basis of reported decisions, and are ceasing to be Roman law in anything but terminology. Moreover, Scotland, which received the Roman law in the sixteenth century, has become more truly a common-law than a civil-law jurisdiction. If you leave out the Scotch Romanized terminology, you will find that somehow or other, on points of divergence, the English technique and the English doctrines have prevailed over the

methods and doctrines of Justinian's Digest.

Nor has the law of the land shown less of persistence and vitality in competition with other political and social forces. In the twelfth century it came into conflict with the church, the most powerful force in medieval society, and by the so-called compromise, which gave to the King's courts all that was worth while in the way of jurisdiction over controversies between man and man, it emerged definitely the victor. In the sixteenth century when the reception of Roman law was going on throughout Western Europe, the common law stood steadfast, and England alone of the great nations of that era of rising nationality did not replace the law of the land by the Roman law. In the seventeenth century the common law doctrine of supremacy of law came into conflict with Stuart kings in a period of absolute government, in a time when passive obedience was the ruling political dogma. A long and bitter struggle went on between common-law courts and the Crown, and in the end the common law was able to impose upon the crown its doctrine that the King rules under God and the law. In America, at the beginning of the nineteenth century the law of the land was confronted by the rising tide of Jeffersonian democracy. It was sore beset to overcome the odium of its English origin at a time when all things English were under suspicion and men were turning with favor to things French. Its ideas as to the obligation of contract were distasteful to debtors in an era of economic depression. Its doctrine of the supremacy of the law, and consequent judicial power under a written constitution, was distasteful to those who looked on the legislature as preeminently representative of the popular will, and conceived that judicial scrutiny of the translation of popular impulse into chapter and section of the written law was nothing short of ursurpation. Yet the legal triumph of the common law was not less complete than the political triumph of democracy. Finally, at the beginning of the present century the common law came in conflict with the rising tide of social legislation, and once more encountered the

strongest force of the time. Agitation for recall of judges and of judicial decision threatened the very foundations of the law of the land, the independence of the judiciary and the supremacy of law. Yet at the end of two decades that agitation had subsided and the law of the land had imposed upon a sovereign people its doctrine that they, too, ruled under God and the law.

Yet when we come to ask ourselves just what this law of the land really is, just what it is that makes the law of forty-eight states in the Union in essence one system, just what it is that makes American law one with the law of England and Canada and Australia, just what it is that gives continuity to the law of English-speaking peoples today and the law of medieval England — when we ask this question and seek to answer it critically, I venture to think we shall find it hard to put our finger upon anything definite.

Certainly we cannot maintain that there is an identity or continuity of legal precepts. One need only pick up a volume of Canadian reports or Australian reports or English reports or reports of different states of this Union in order to see that the actual precepts by which justice is administered differ notably as you go from place to place. Diversity of geographical conditions, diversity of economic conditions, diversity of social conditions lead to palpable diversities in the legal precepts which actually obtain in the different jurisdictions of the English-speaking world. Moreover, when we look back over our legal history, we cannot but be struck with the relatively short lives of rules of law, that is, of legal precepts affixing definite detailed consequences to definite detailed states of fact.

Not long since I had occasion to make a somewhat critical study of one hundred and fifty years of American judicial decision, from the Declaration of Rights of the Continental Congress in 1774 to 1924. I soon found that I could not put my finger upon much of anything in the reports of 1774

and say with honest conviction, "Here is a rule which actually obtains in practice in the adjudication of causes in contemporary America." What do we find in the books of that time? They are full of minutiae of procedure upon imprisonment for debt. They are full of technical details about the settlement of paupers. They are full of technical details of real actions and of the old feudal land law, which was already dead in a large part when it was imported to this country, and has had to be made over perhaps more than once. They are full of the technicalities of the formal over-refined procedure of the eighteenth century English law. What were the first books that came out of American law schools? The first effort of American legal writing in law schools was a treatise on the law of Baron and Feme, the title of which speaks for itself. The second in point of time was a treatise on real actions. Outside of New England that title hardly evokes a memory in an audience of lawyers. Except as the writ of entry survives in New England, it may be that an occasional older lawyer may have read about real actions when he read Blackstone in his youth. But I dare say he skipped that part and turned to parts that had some relevance to the matters of the day.

Clearly we cannot find unity of law in English-speaking lands and continuity of law, even from Blackstone's day to the present, in any indentity or continuity of legal precepts. Perhaps, then, we are to find this unity and this continuity in certain principles. It may be that there are certain fundamental, universal principles which are to be found wherever English law has followed English speech. It may be that this small fund of common principles tie us to the Middle Ages and ties us to the law of England and Canada and Australia. I would like to think that this is true. And yet when we come to search for those principles, we shall find them very elusive. Beyond a few fundamental ideas of justice, which are common to civilized peoples, a small body of axioms of justice which we share with the civil law, one finds

it very hard to put his finger upon a proposition and say, "Here is an essential, characteristic, common-law principle, which has obtained from the Middle Ages to the present, and obtains wherever the English law obtains." We may trace the beginning of principles; we may see their rise and fall. If we look into the axioms of Doctor and Student, we shall not find one that is of importance in the administration of justice today. If we look at the principles laid down in Coke on Littleton as the foundations of legal reasoning they make us smile today, so scholastic, so pedantic, so unrelated to what we think of as the realities of justice do they appear. We cannot, I undertake to say, put a finger with confidence on any proposition and say, "Here is a principles that binds us to the great English judges of the Middle Ages — to Coke and Bryan and Fortescue — that binds the law of the Dakotas to the law of England and Canada and Australia."

Let me illustrate. Take such a supposedly fundamental proposition as the one by which we set so much store in the last generation, namely, that there was to be no liability without fault or undertaking; that a man's liability was to flow from intentional agression, or from culpable conduct, or from voluntary undertaking, and from these only. As late as the seventeenth century this was not true of trespass upon the person. It has never been true as to trespassing animals. It has not been true in England since 1865 with respect to things of potential danger which one maintains rightfully upon his land. It ceased to be true as to blasting operations in New York a good while ago when such operations came into common use in connection with the building trades. We can trace its beginning in the books. Likewise we can trace the growth of doubts and qualifications and explanations and exceptions which suggest that it may yet have an end.

But there is another possibility. If this law of the land, or common law, of which we speak so confidently, is not a body of precepts, and we cannot be sure that it is a body

of principles, in the sense of a body of abiding, universal, authoritative premise for legal reasoning, which distinguish our law from the law of the Continent of Europe and its derivatives, perhaps the universal and characteristic element of which we are in search is to be found in certain institutions. It may be that there are certain peculiar common-law institutions which mark off Anglo-American law from the civil law, and which are to be found wherever the English law prevails. If there are such universal and characteristic institutions, I suppose all would agree in pointing to three: The doctrine of precedents, the doctrine of supremacy of law, and trial by jury.

Certainly such a hypothesis is attractive. Yet the doctrine of precedents has been relaxing within the memory of those now at the bar. Whatever our theory, our practice by no means gives controlling weight to a single decision, as the lists of overruled cases in every jurisdiction abundantly witness. And while we are relaxing our doctrine, something very like it is growing up in Continental Europe. Whatever the theory of the Civilians, in practice, as recent French writers admit, the course of decision of the courts has come to be a form of law. Nor is it more clear when we look critically at the doctrine of supremacy of law. This doctrine has been regarded as characteristically Anglo-American. But it has been carried much further in this country than in any other English-speaking land, in our doctrine of judicial power with respect to unconstitutional legislation, and that doctrine has been worked out by courts in South Africa on the basis of Roman Dutch and civil law authorities. Moreover, we are developing something very like administrative law in England and in the United States, while at the same time, when we look at the administrative tribunals of France, for example, we soon find that. whatver they are in name, in spirit and in conduct they are ordinary courts. Thus Dicey's confident distinctions at least lost their edge, and we cannot be

so positive that we have here a peculiar common-law institution.

As to trial by jury, the civil jury is almost extinct in England, and there are signs that is is moribund in this country. Even the criminal jury is under attack, and legislation modifying it, in directions which may yet lead to extinction, is urged in more than one state. The one feature upon which, perhaps, we may put our finger with confidence, as an abiding universal common-law institution, is that mode of trial of cases as a whole which has grown out of the exigencies of jury trial. As to that, we must remember that such was the Roman mode of trial. Nor should we overlook that the exigencies of causes involving expert evidence have been pushing us in more than one instance in the direction of inquisitorial rather than controversial procedure.

Moreover, if we have some residuum of permanent, universal, characteristic common-law institutions we must note that today they are under attack from every side. For one thing there is legislation. You may say that the danger from legislation is not great. It deals with transient details not with enduring principles. The common law gives a background to legislation which moulds legislation to its dogmas. Legislation is interpreted by common-law canons and is given shape by the received ideas of a profession trained in the common law. Moreover, if you look into legislation it does not always seem to carry with it a danger to the common law. I like to think of a statute by which is was enacted that "It shall be unlawful for any person or persons to discharge any loaded firearm or firearms in, along, or upon any public road or highway in the state, except for the purpose of killing some obnoxious or dangerous animal or an officer in the pursuit of his duty." No doubt common-law institutions are in no great danger from such legislation. Yet as one studies legislation its corrosive and destructive possibilities cannot but be brought home to him.

Thus, in England today by statute the real property of a deceased passes to his administrator. In Oklahoma today by statute the personal property of a deceased passes to his heirs. In other words, we have here two radically different statutory alterations of what had been supposed to be a fundamental common-law dogma. Nor is that an isolated instance. Consider the growing frequency of statutory crimes without *mens rea* which go counter to the very common-law conception of a crime. Consider the growth of statutory liens of all sorts whereby we are coming to forget the nature of a lien at common law. Consider the continual legislative development of negotiability at the expense of the common-law dogma that one can transfer nothing more than he has. Legislation is continually undermining legal precepts, legal dogmas, and legal principles which we had identified with the common law.

But legislation is not all. A much more serious phenomenon is the rise of administrative jurisdiction. Within a generation there has been a wonderful development of administrative justice. I would not decry this development for a moment. No doubt it was inevitable. No doubt administrative justice is called for in increasing measure by the rise of an urban, industrial society where we had a rural agricultural society. But let us note its effect upon what we should conventionally think of as the common law.

What is the characteristic method of the administrative tribunal as contrasted with the common-law tribunal? Is it not that the former seeks to individualize the treatment of cases, whereas the latter seeks to treat each case as but an example of some type to be referred to some legal principle? Recently I was talking with a physician about this growing tendency to individualize the treatment of controversies. "Why," he said to me, "the same thing is happening in medicine. When I came into the profession we used to treat the lungs, the liver, the heart, the stomach, as if they existed of themselves. We found a man whose symptoms indicated trouble with his lungs,

his liver, his heart, or his stomach. Our books told us what to do for the abstract lungs, the abstract liver, the abstract heart, the abstract stomach, and we treated him accordingly. Today," he said, "we have learned to deal with John Doe and Richard Roe whose lungs or liver or heart or stomach are not functioning as they should."

Now it is that same tendency, which we find in every field of human activity today, that is bringing us to attempt individualization of legal remedial treatment; that is leading us to proceed by affording guidance to the actual business of the actual man as it must be dealt with in the crowded world of the time, if business is to go on, rather than by prescribing abstract formulas for abstract businesses. So I do not for a moment fear anything from this rise of administrative justice in and of itself. And yet let us look at it from the standpoint of the common law.

In his Second Institute, Lord Coke tells us that there can be nothing in the way of oppression between man and man and nothing affecting the life or liberty or fortune of the subject, and no manner of mis-government, but that it shall be reviewed ultimately, in the King's courts and due correction be made. Such was the common-law ideal, and such was the practice of common-law countries from the seventeenth century at least till the beginning of the present century.

But times change. In England the House of Lords now holds that in an administrative appeal from an administrative officer to an administrative appellate tribunal, the ordinary decencies of judicial appellate procedure do not obtain, that the tribunal may act on a secret report of an inspector who makes a secret inspection which the appellant may not see, may not criticize or contradict, and may not explain by independent evidence or extrinsic argument. It now holds that provided the administrative appellate tribunal applies its ordinary procedure and deals with John Doe's case or Richard Doe's as it habitually deals with any one else's, there can be

no complaint even though its mode of dealing with the case is that of Haroun al Raschid or of St. Louis under the oak at Vincennes. Where the common law thought of every case as one of a type, so that the decision was to be referred to some principle governing a group or a class of cases, so that it was necessary to hear arguments in order to ensure right classification and accurate generalization, administration thinks of each case as unique, or seizes upon its unique features, and deals with it concretely as if no other case like it ever existed or could ever come before the tribunal. In such a view the next case will not be affected by what is done and no argument is needed to insure a correct solution of future controversies.

Well, you will say, that is England, and we all know that queer things have been happening in that ancient Kingdom; that for some time the mother country has been edging toward socialism in legislation, and so why not in judicial decision. But let us look at our own administrative law. In the same year in which the House of Lords was deciding that an administrative appeal might be heard after the manner of Haroun al Raschid, it happened in one of the largest cities of the land that an employee of an ice company came home one evening in a very dilapidated condition. He was shaky, nervous and pale and had no appetite for his supper. When his wife asked him what was the matter he said that the boys had been putting in ice in the basement of Hogan's saloon and that a three hundred pound block of ice had fallen on him and shaken him up badly. He got no better. His wife sent for a physician to whom he told the same story. The physician looked him over and sent him to a hospital, where he died the next morning — of delirium tremens. His widow brought in a claim under the Workmen's Compensation Act for the death due to an injury in the course of her husband's employment. In the course of an investigation of her claim it appeared that there was no abrasion or mark or bruise upon the body of the deceased. Also from the unanimous testimony of those who had been at work upon the wagon that morning, it appeared

that he had spent his time neither upon the ice wagon nor upon the water wagon, but that while the ice was being put into the basement of Hogan's place he was at all times in the interior thereof laying the foundation of the fatal attack which took him off the next morning. But the statute said that, in administering the act, the commission was not to be goverened by the technical rules of evidence; and it seemed to the commissioners a highly technical rule of evidence to require proof of any casual connection between the employment on the ice wagon and the fatal result. Likewise when the case came before the highest court in the state that court found itself much embarrassed. The testimony as to what the husband said was before the administrative tribunal as evidence. If the tribunal chose to act on that evidence to the exclusion of the evidence of all who had immediate first-hand knowledge, if it was the regular wont of the tribunal to proceed on such testimony as a basis of award in the face of the manifest evidence, how was the court to interfere? If the commission proceeded not on a general principle of causation, but on a principle of distribution of the economic surplus with reference to the immediate parties to the claim, could the court insist on the judicial rather than the administrative attitude? You will perceive how fundamental common-law ideas are subject to corrosion and destruction in this rise of administrative justice.

But legislation and administration are not alone in this tendency to treat every situation as unique. When we come to study current adjudication we may perceive the same corroding process. The courts of forty-eight states, each with a mouth speaking great things, are competent to lay down the common law and determine what shall be the universal common law for each particular jurisdiction. Hitherto, the art of the common-law lawyer's craft, applied to the authoritative traditional legal materials, kept a reasonable uniformity. Very likely it will continue to do so. But note how the reasonable uniformity may be in the administrative direction. Note, for example, what has been happening to the fundamentals of agency. At

common law, a parent is not responsible for the independent tort of his child. He is not liable unless some agency of the child can be made out; unless the child was acting on the concerns of the parent and within the scope thereof, or unless the parent himself was in some way at fault. But these propositions have been much shaken of late by the rise of the judicial doctrine of the family automobile. If little Willie took out the family horse and buggy, he could not do much in the way of damage to any one but his father. So the courts asked was he an agent? Was his father culpable in allowing him to be at large with the horse and buggy? Or was Willie out unknown to his parents on a frolic of his own? But the automobile is such a dangerous instrument, and its possession seems to indicate such affluence on the part of the parent, that regard for an equitable distribution of the economic surplus as between the parties to a particular cause, has called for invention of the judicial doctrine of the family automobile. It has been suggested that the principle behind that doctrine is *qui facit per auto facit per se.*

But enough of examples. I submit that in legislation, in administration, and even in judicial decision, we may see a steady wearing away of what we had regarded as common-law principles, of what we had taken to be fundamental common-law doctrines and dogmas. Now I do not fear this process. I do not believe that it portends any evil, I do not believe that it is a symptom of decay, legal or moral or political. Legal history is full of such things. There are eras of legal stability and there are eras of legal growth. When for a time the rise of new interests or new conflicts of interests call for new adjustments, we revert for a season to a process of trial and error until we learn how to do things better. In that process of trial and error there is always bound to be not a little of error.

Shall we say, then, that there is no common law except in historical retrospect? Shall we say there is no irreversible,

irrepealable, enduring element in American law? Shall we say there is but a mere illusion of continuity in our legal history, with nothing but a common historical origin behind us and the Courts of Westminster? Shall we say that nothing but a certain common historical terminology holds together the law of England, of the United States, of Canada, and of Australia?

They tell a story of the great Bishop Wilberforce, that when he became Bishop he made a resolution that he would visit every parish in his diocese, and thus would keep up its spiritual life. Accordingly, in due course, he went into one remote parish where there was a fine old fox-hunting parson who was wont to go through the morning service pretty rapidly and then get on his horse and go about his more immediate pursuits. The Bishop was much shocked. He said to the parson: "This won't do. We must have some spiritual life in this parish." "Well," said the parson, "I thought so, too, when I came here forty years ago. But forty years in this parish tend to disabuse one of such ideas." "Oh," said the Bishop, "that won't do. I will show you what you should do. I will come down here next Sunday and preach and set you an example." So the next Sunday the Bishop came and preached as only he could on the text, "The fool hath said in his heart there is no God." After the service the parson said, "Now we shall see what the parish makes of the sermon." So he sent for Hodge, an honest old farmer, to come up and be presented to the Lord Bishop. Hodge came twisting his cap in his hands and very much embarrassed, and was duly presented. "Now, Hodge," said the parson, "tell the Lord Bishop what you thought of the sermon." "Oh, my Lord," said Hodge, "it were a powerful sermon; it were indeed a powerful sermon. But, my Lord, I cannot help thinking there do be a God after all."

After all the doubts I have expressed as to the hypothesis of a universal, enduring, continuous common law, I still

feel that there "do be" a common law after all, and I shall venture to suggest to you where I think it may be found. For I submit that our trouble comes at bottom from a certain ambiguity in the term "law". It comes from our thinking of law as something simple. It comes from our thinking of law as merely an aggregate of laws and from thinking of laws as rules — as simple definite precepts attaching definite detailed legal consequences to definite detailed states of fact. Undoubtedly such rules — for example, the Rule in Shelley's Case, the statutory rules as to the number of witnesses required for a will, the rule as to what words are words of negotiability, and as to the effect of such words — such rules are a very important element in the law. Some of them are traditional. Some of them are statutory. But such rules are not all even of the body of legal precepts of which we commonly think when we speak of the law. Along with such rules there are principles, authoritative starting points for legal reasoning, such as the principle that one person is not to be enriched unjustly at the expense of another, or that one who does something which on its face is injurious to another must answer for the consequences unless he can justify. Here no definite detailed legal results are prescribed for any definite detailed state of facts. There are no rules. There are instead premises from which to deduce rules. Then, too, there are other precepts which enjoin conformity to certain standards, like the standard of due care which we apply to all conduct, or the standard of fair conduct which we apply to fiduciaries, or the standard of reasonable facilities and reasonable rates and reasonable service which we apply to public utilities. It will be seen that even the element of legal precepts is far from simple.

Over and above the mass of legal precepts, however, there are other elements which are no less a part of the authoritative apparatus with which justice is administered every day in the courts. One of those elements is a traditional technique of finding the grounds of decision in the mass of precepts

both statutory and traditional; a technique of developing the grounds of decision of particular cases out of the authoritative materials; a technique of shaping precepts to meet new situations, of developing principles to meet new cases, and of working out from our whole body of legal materials the precepts appropriate to the concrete situation here and now. This element is, as it were, the art of the common-law lawyer's craft.

Another element in the law is a body of received ideals of the social order, and so of the legal order; a body of received ideals of what law is for, and so of what legal precepts and legal principles ought to be, and how they ought to be applied in the light thereof. These ideals are the background of all judicial action, whether in finding law, in interpreting it, or in applying it. They give content and form to legal precepts and dictate their application. This is the element we have in mind when we speak of law as universal and rooted in the eternal verities. It is this element which the philosophical jurist has in mind when he tells us that law cannot be made but can only be found. With his eye on this element only he thinks of legislation not as creative, but as a mere formulating process. As he sees it, the reality of law is in this ideal element; legislator and judge do no more than give definite formulation to details drawn from this ideal picture of the whole. English and American lawyers have been wont to ignore this element and to look exclusively at the element of legal precepts. But to understand law, we must understand all three.

When we look at these three elements which go to make up the law, it is evident that the element of legal precepts is more or less fleeting. By going through the reports at intervals of about fifty years, it can be shown that for practical purposes the whole body of precepts changes in not much more than a generation. I suppose when you think about the law today you are likely to think of contracts and torts as the

great subjects. But if you look in Blockstone for what we call the law of contracts today, you may look a long time and find very little. And as to Torts, the first book upon that subject was written in 1859, and as late as 1874 there were doubts whether there was such a thing as the law of torts. The law which was significant one hundred and fifty years ago, real actions, the technicalities of the feudal land law, the settlement of paupers, imprisonment for debt, the niceties of eighteenth-century common-law practice — well, "Where are snows of yesteryear?" The law of taxation, the subject which is to the fore in the reports of today, was scarcely heard of a generation ago.

Received ideals, the third element in the law, are not so fleeting. Relatively they have a long life. Though they, too, change, they change slowly. That this element does change may be seen readily when we compare the received ideals of the age of Coke, when lawyers still thought in terms of the relationally organized society of the Middle Ages, with the received ideals of the last generation, influenced profoundly by the classical economics, by the political ideas of the French Revolution, and by the indentification of the immemorial common-law rights of Englishmen with his natural rights of man. The controlling part which these received ideals play in judicial decision is made manifest whenever courts are called upon to apply to social legislation the constiutional guarantee of due process of law. That some change may be taking place is suggested by the common phenomenon of five to four decisions in such cases in the Supreme Court of the United States.

But the element which is enduring, the element which gives consistency, unity, and continuity to the law, the element which distinguishes the common law from the civil law, the element which makes us conscious of a real unity of English law and American law and Canadian law and Australian law, is the traditional art of the lawyer's craft, the traditional

technique of deciding cases on the basis of recorded judicial experience, of applying legal materials, and shaping them and reshaping them and developing them as the exigencies of the administration of jusitce require. There is the decisive point of difference between the common law and the civil law.

From Roman times the civilian's technique has been one of interpreting, developing, and applying written texts. To the civilian the form of the law is typically that of a code, ancient or modern. When he is confronted with a case requiring decision, he manipulates the authoritative texts by his traditional technique. His method is one of logical development and logical exposition of supposedly universal propositions. To him the oracles of the law are academic teachers, the books of authority are codes, and the text books are commentaries upon codes. The whole tradition is one of the logical handling of written texts.

On the other hand, our common-law technique is a technique of developing and applying judicial experience. It is a technique of finding the grounds of decision in the reported cases. It is a technique of shaping and reshaping principles drawn from recorded judicial decisions. The oracles of our law are not teachers but judges. Our books of authority are reports of adjudicated cases. Our text books are treatises on subjects of the law developed through comparison and analysis of recorded judicial experience.

More important, however, as I see it, is the frame of mind that lies behind this traditional technique of the common-law lawyer. It is a frame of mind which looks at things in the concrete, not in the abstract; which puts its faith in experience rather than in abstractions. It is a frame of mind which prefers to go forward cautiously on the basis of experience from this case or that case to the next case, as justice in each case seems to require, instead of trying to refer everything back to suposed universals. It is a frame of mind which is not ambitious to formulate universal proposiitons and disinclined

to deduce the decision for the case in hand from a proposition formulated universally, as like as not by one who had never conceived of the problem by which jurist or tribunal is confronted. In other words, our technique rests on that sure-footed Anglo-Saxon habit of dealing with things as they arise in the light of experience, instead of putting one's faith in abstract formulas.

If the spirit of this art of the common-law lawyer's craft is the spirit of the common law, it seems to me our most precious legal possession. It is the duty of the common-law lawyer to preserve this attitude of mind in its full vigor, that it may be handed down as a living instrument of justice among all English-speaking peoples.

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BANKRUPTCY—TRUSTEE NOT ENTITLED TO CASH SURRENDER VALUE OF BANKRUPT'S LIFE INSURANCE

The trustee in bankruptcy brought suit to recover the cash surrender value of certain life insurance policies which the bankrupt had effected upon his life. The bankrupt's wife was named in the policies as beneficiary. In the recent case of *Dawson v. National life Ins. Co.*[1] it was *held* that there could be no recovery.

It is well established that the cash surrender value of a life insurance policy does not pass to the trustee in bankruptcy where such is an exemption allowed to bankrupt by the state laws.[2] This result is reached on the theory that the Federal Bankruptcy Act sec. 70a(5), providing that the title which the bankrupt had in any insurance policy shall vest in the trustee as of the date of the adjudication of bankrupcy, deals only with property which passes to the trustee and does not qualify section 6a which adopts the exemption laws of the state of the bankrupt's domicile. The result of this construction is that section 70a(5) applies only to insurance policies which are not exempted under state laws.

By statutory enactment in Tennessee it is provided that "life insurance effected by a husband on his own life shall inure to the benefit of the widow and next of kin . . . . free from the claims of creditors."[3] It was contended by the trustee in bankruptcy that no exemption attaches, under such provisions, until the death of the insured. In overruling this contention, the Court said that the object of the Legislature was "to enable the husband to provide a fund, after his death, for his widow and children, so that they would not

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[1] (1927, Tenn.) 300 S. W. 567.

[2] Holden v. Stratton (1905) 198 U. S. 202, 25 Sup. Ct. 656; 3 R. C. L. Bankruptcy 59; 7 C. J. Bankruptcy sec. 619; 46 L. R. A. (N.S.) 148; 1 Collier on Bankruptcy (13 ed., 1923) 322; 2 Collier on Bankruptcy (13 ed., 1923) 1747.

[3] Shannon's Code sec. 4030 and sec. 4231.

become dependents." If creditors could appropriate the insurance (or part of the proceeds of the insurance) before the death of the insured the object of the statutory provisions would be defeated.

In the case in question, the Court did not cite any decision which purported to interpret or construe the statutes involved in this litigation. In a Federal District Court decision[4] it was said that these statutes "do not exempt in favor of the husband *during his life*[5] policies of life insurance payable either to himself or to his estate; and since such policies remain subject to assignment by him during his life, they pass to his trustee on bankruptcy . . . . subject to his right to redeem the same by paying the surrender value." This decision was criticised in *Matter of Stansell*[6] which held that the cash surrender value of life insurance payable to the wife of the bankrupt was exempt; even though the bankrupt had reserved the right to change the beneficiary. In this later case, however, the decision was not predicated entirely upon the exact statutes involved in the case in question.[7] But it is submitted that the object of these statutes can only be protected and preserved in its entirety by reaching the decision announced in the principal case; namely, that the cash surrender value of life insurance effected by a husband upon his own life is not subject to payment of his debts and, therefore, does not pass to his trustee in bankruptcy.

N. B

EVIDENCE—ADMISIBILITY OF A PRIOR CONVICTION IN A SUBSEQUENT CIVIL SUIT

In an action for divorce on the ground of adultery the defendant defaulted. To prove adultery a conviction of the

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[4] In re Morse (1909, D. C., Tenn.) 173 Fed. 679, 23 Am. B. R. 109.

[5] Italics ours.

[6] (1925, Referee, W. D. Tenn.) 6 Am. B. R. (N.S.) 566.

[7] See Shannon's Code sec. 2265.

defendant of adultery in a criminal prosecution was admitted as persuasive evidence of guilt and a *prima facie* sufficient proof of guilt.[1]

According to the prevailing view, a criminal judgment is not admissible in evidence in a civil suit between the criminal defendant and a stranger as proof of the facts upon which the judgment was rendered. It is not competent as evidence tending to establish these facts.[2]

It is necessary to make a careful differentiation between the situations where this rule is applicable and certain other closely allied situations. A judgment is always evidence of its own rendition.[3] As between the same parties, the conviction is *res judicata* in a civil case where only a preponderance of evidence is necessary, unless there can be found some other adequate reason for denying it this effect.[4] If a person has pleaded guilty to an indictment, the record may be used as evidence against him in any civil suit in which he is charged with the same act, for this amounts to an extra-judicial admission.[5] If the action was originally *in rem*, the judgment is conclusive as to title or status but it is still not admissible as evidence of the facts upon which it was founded.[6]

Some American jurisdictions, while recognizing and following the general rule, relax the rule in a limited number of

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[1] Tucker v. Tucker (1927 N.J.) 137 Atl. 404.

[2] Sklebar v. Downey (1926 Mo. App.) 285 S. W. 148; 41 Harv. Law Rev. 241 (1927); 1 Greenleaf, Evidence (14th ed. 1883) sec. 537; Micks v. Mason (1906) 145 Mich. 212, 108 N.W. 707; 2 Freeman, Jdgts. (5th ed. 1925) sec. 653; 2 Black, Jdgts. (2nd ed. 1891) sec. 606.

[3] 36 Harv. Law Rev. 107 (1923); 2 Black, Jdgts. (2nd ed. 1891) sec. 606.

[4] 2 Freeman, Jdgts. (5th ed. 1925) sec. 657; State v. Hopkins (Mont. 1923) 219 Pac. 1106; Broom's Legal Maxims (14th ed. 1854) 248.

[5] 1 Bishop, Crim. Law (9th ed. 1923) sec. 977; 2 Freeman, Jdgts. (5th ed. 1925) sec. 655.

[6] 3 Freeman, Jdgts. (5th ed. 1925) sec. 1534.

situations where the circumstances demand it because of the peculiarity inherent in them. Where a civil suit can be considered as a sort of triangular proceeding with the state as an interested third party to the action, a criminal judgment is admissible. Divorce suits are considered of this class, since the state is interested in seeing that there is no collusion.[7] In suits for divorce a criminal judgment is admissible as persuasive evidence to go to the jury when the former suit can be considered as merely *quasi* criminal.[8] It is also admissible to aid the conscience of the court in such cases in discharging his duty,[9] and where the ground for divorce is the adultery charged in a former criminal prosecution. Notwithstanding these cases, some courts think it is still doubtful whether a judgment can properly be admitted as evidence in any civil suit.[10] The principal case states the general rule in the following language: "A conviction in a criminal prosecution is not admissible in evidence in a purely civil action to establish the truth of the facts on which it is rendered." Then it explains that the rule should be relaxed and should not obtain in its full vigor where in a civil suit, as the one under consideration, the defendant defaults; and where the evidence of the truth of the charge is offered merely to satisfy the conscience of the court that judgment against the defendant, upon his confession, by default, is justified. Criminal judgments are admissible in civil suits where the criminal action gave rise to the civil action, such as actions for malicious prosecution and false imprisonment. The theory is that the successful termination of

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[7] 2 Bishop, Marriage, Divorce, and Separation (1891) sec. 492, 498.

[8] Hahn v. Bealor (1890) 132 Pa. 242, 19 Atl. 74; Bauder's App. (1887) 115 Pa. 480, 10 Atl. 41.

[9] 2 Bishop, Marriage, Divorce, and Separation (1891) sec. 1406; 2 Freeman, Jdgts. (5th ed. 1925) 653.

[10] Anderson v. Anderson (Me. 1826) 4 Greenl. 100, 16 Am. Dec. 237.

the criminal proceeding exonerates the defendant in the civil suit from the charge made.[11]

The following reasons have been offered for excluding criminal judgments as evidence of the facts upon which the judgments are rendered: the parties are not the same; there is no mutuality; conviction may have been had upon the testimony of the plaintiff in the civil suit; if there was an acquittal, it may have been obtained by collusion; the defendant could not avail himself, in the criminal trial, of any admissions of the plaintiff in the civil action; in criminal actions the jury must be convinced beyond a reasonable doubt, while in civil actions the decision may be by a mere preponderance of the evidence.[12] These objections have been declared wholly inadequate. "Such a rule of exclusion, preventing the consideration of a relevant fact, which usually is of highly probative value, and oftentimes is the only evidence available, should have some real justification to warrant its existence."[13] When material evidence is found relevant to the issue, it ought to go, it seems, to the jury under proper instructions. Chancellor Leming in quoting from an English ecclesiastical court, to show that certain evidence should be admitted, said: "Courts of justice must not be duped. They will judge the facts, as other men of disernment, exercising a sound and sober judgment, on circumstances that are duly proved before them."[14] It is submitted that the above reasons for exclusion are mere stock reasons with little real merit for excluding evidence which, if it were before a court for the first time, should, in the light of modern jurisprudence, be admitted as evidence of the highest probative value. It seems that the sol-

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[11] 11 L.R.A. (N.S.) 663; L.R.A. (N.P.) 295; 62 L.R.A. 906; 2 Freeman, Jdgts. (5th ed. 1925) sec. 655.

[12] 2 Freeman, Jdgts. (5th ed. 1925) sec. 654; 1 Greenleaf, Evidence (14th ed. 1883) sec. 537.

[13] 41 Harv. Law Rev. 241 (1927).

[14] Luderitz v. Luderitz (1917) 88 N. J. Eq. 103, 102 Atl. 661.

emn adjudication of a court as to what the facts at issue are, based upon testimony which has been admitted should be regarded, at least, as of as high probative value as that testimony on which it was founded. The accused is allowed to make a defense, examine and cross-examine witnesses, to appeal from what he thinks is an erroneous judgment, and even to testify in his own behalf. He has, it appears, every opportunity to bring out the truth before it is passed upon by the court and jury who are under oath to render a true verdict. If the objections based on degree of evidence are sound as to acquittals, it is clear that they are unsound as to convictions for the foregoing reasons.[15]

In commenting on a statement that it is fundamental in our law that a criminal judgment cannot be admitted as evidence in a subsequent civil suit as evidence of the facts upon which it was rendered, Dean Wigmore said: "The opinion declares this to be fundamental and elementary, and it doubtless is, as a matter of law; nevertheless, it reveals an instance where some of our fundamental law is fundamental nonsense."[16]

No American case has been found where a criminal judgment has been admitted in a civil suit to evidence the facts upon which it was rendered without recognizing the rule to the contrary and giving reasons for making an exception in that case. England, in one case, has broken away from the rule and admitted a criminal judgment in a purely civil suit without making any apologies to the rule to the contrary, declaring it to be presumptive proof of the commission of the crime. The reasoning of this court is that, if the law was ever otherwise, it should, in the light of the circumstances attending trials for crime in these days, be reconsidered and revised; since the human mind revolts at the idea that our sys-

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[15] 33 Harv. Law Rev. 850 (1920).

[16] 2 Wigmore, Evidence (2nd ed. 1923) sec. 1346.

tem of jurisprudence would make it possible for a person or his legal representative to obtain or enforce any right resulting to him from his own crime.[17] The logic of this decision is highly conducive to the ends of justice.

R. S. C.

EVIDENCE—OTHER OFFENSES ADMISSIBLE TO SHOW MOTIVE OR INTENT

Defendant, in the capacity of a posseman and a deputy marshall went to the home of deceased with a warrant for a third party. The officer knocked upon the door, and after some conversation, shots were fired by defendant and the officer which resulted in the death of the deceased. In a prosecution for homicide there was conflicting testimony as to whether defendant and the officer or deceased fired first. *Held* that evidence that posseman and others had a short time previously robbed deceased of liquor while impersonating officers was admissible for the purpose of showing criminal intent and improper motive.[1]

The general rule is that evidence of collateral crimes is admissible to prove motive or intent in a criminal prosecution, in which one of the requisites of the crime charged is intent.[2] It is generally required that evidence of the collateral crime have some causal relation or natural connection between it and the crime charged.[3] Some of the Courts have made further limitations. One of these, laid down in an earlier Tennessee case, is that evidence of a distinct crime is admissible

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[17] In re Crippen, L.R. (1911) Pro. Div. 108.

[1] Carter v. State of Tenn. (C.C.A., 6th 1927) 18 F. (2nd) 850.

[2] Ryan v. State (1922) 83 Fla. 610, 92 So. 571; People v. Morani (1925) 196 Cal. 154, 236 Pac. 135; State v. Crabbe (1925) 200 Iowa 317, 204 N. W. 272.

[3] Ellison v. Corum (1922) 195 Ky. 370, 242 S. W. 368; State v. Gaines (1927) 144 Wash. 446, 258 P. 508.

only if it is a part of the *res gestae*.[4] In a prosecution for murder it has been held that the *res gestae* is not limited to the act of killing, but includes not only the murder itself, but also acts demonstrating the *quo animo* or motive.[5] Other Courts have decreed that to be able to introduce evidence of a collateral crime, it must be shown to be part of a common scheme or plan and so related as to show a common motive or intent running through the two crimes.[6]

Evidence of an offence other than the one charged is good only when it tends to prove motive,[7] and is not admissible if it is for the purpose of showing or proving the character of the defendants.[8] Evidence of collateral crimes are admissible only to show intent after the crime is proved, and not to bolster up charge of present indictment.[9] Evidence that is admissible to prove motive is not rendered incompetent because it tends to prove the defendant's guilt of other crimes.[10] Although Courts are sometimes stricter in admitting evidence of crimes committed after the crime charged,[11] it is generally permissible to introduce evidence of subsequent crimes if they are such as would throw light on the principal crime and provide evidence of intent.[12]

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[4] Mays v. State (1921) 145 Tenn. 118, 338 S. W. 1096.

[5] Smithson v. State (1911) 124 Tenn. 218, 137 S. W. 487.

[6] People v. Molineux (1901) 168 N. Y. 264, 61 N. E. 286; Kennedy v. State (1923, Okla.) 220 P. 61.

[7] Leyerle v. State (1925, Okla.) 237 P. 871; Lawrence v. State (1925, Ariz.) 240 P. 863; Frazier v. State (1925, Okla.) 239 P. 186.

[8] State v. Dobbs (1925) 148 Md. 34, 129 A. 275; People v. Powell (1923) 233 Mich. 633, 194 N. W. 502.

[9] State v. Davis (1926) 315 Mo. 1285, 292 S. W. 430; People v. Folignas (1926) 322 Ill. 304, 153 N. E. 373.

[10] People v. Bilburg (1924) 314 Ill. 182, 145 N. E. 373; Smithie v. State (1924) 88 Fla. 70, 101 So. 276.

[11] Gardner v. State (1908) 121 Tenn. 684, 120 S. W. 816.

[12] People v. Hendrix (1923) 192 Cal. 441, 221 P. 349; Com. v. Weiss (1925) 284 Pa. 105, 130 A. 403.

It is of course necessary to determine just what substantiation of collateral crimes is required to render the evidence admissible. The general rule is that the collateral crime need not be proved beyond a reasonable doubt, but there must be substantial proof that the crime was committed by the defendant.[13] Such evidence is not admissible if it is vague, or if the collateral crime introduced is remote in point of time.[14]

A. M.

EVIDENCE—PRESUMPTION OF INNOCENCE AS EVIDENCE IN CRIMINAL CASES

In a prosecution for murder the trial judge instructed the jury that it must be satisfied of the guilt of the accused beyond a reasonable doubt, but he omitted to charge that the defendant was presumed to be innocent and that the state had the burden of proof. *Held* that this was not a reversible error, where the defendant did not request such instruction, and where the judge did instruct the jury that guilt must be proved beyond a reasonable doubt.[1]

The decisions of the various jurisdictions are in conflict on the question as to whether the presumption of innocence is evidence in favor of the accused, or whether it merely casts upon the state the burden of going forward with the evidence and the burden of proving its case beyond a reasonable doubt. Both views are supported by numerous cases, but the latter view seems to be the preferable one. The leading case in this country which held that the presumption of innocence is evi-

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[13] Scott v. State (1923) 107 Ohio St. 475, 141 N. E. 19; Lenton v Awana 28 Hawaii 546.

[14] People v. Jarvis (1923) 306 Ill. 611, 138 N. E. 102; State v. Bean (1922) 184 N. E. 730, 115 S. E. 176.

[1] State v. Boswell (N. C. 1927) 139 S. E. 374.

dence is *Coffin v. United States*[2] in which the United States Supreme Court said "the fact that the presumption of innocence is recognized as a presumption of law demonstrates that it is evidence in favor of the accused; for in all systems of law, legal presumptions are treated as evidence giving rise to resulting proof to the full extent of their legal efficacy." This case had a powerful influence on the courts for some years, but in the case of *Agnew v. United States*[3] the Supreme Court of the United States refused to follow its former decision, and held that a refusal to charge that "legal presumptions are treated as evidence" was proper.

Professor Thayer in his Treatise on Evidence[4] criticises the holding of *Coffin v. United States*[5] and maintains that a presumption itself contributes no evidence and has no probative value. In this treatise he also criticises Greenleaf's statement that "this presumption of innocence is to be regarded by the jury in every case as a matter of evidence, to the benefit of which the party is entitled."[6] Dean Wigmore also is of the opinion that this presumption is not evidence, but means either that the state has the burden of going forward with the proof, or that the guilt of the accused must be proved beyond a reasonable doubt.[7]

But in a number of jurisdictions it is reversable error to

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[2] (1896) 156 U. S. 432, 162 U. S. 664. In accord: Allen v. U. S. (1896) 164 U. S. 492; People v. Ambach (1910) 247 Ill. 478, 93 N. E. 310; Everett v. People, (1905) 216 Ill. 478, 75 N. E. 188; State v. Brady (1903) 121 Ia. 561. Contra: People v. Moran (1904) 144 Cal. 48, 77 Pac. 777; McDuffee v. State (1908) 55 Fla. 125, 46 So. 721; Com. v. Holgate (1916) 63 Pa. Super. Ct. 256; Morehead v. State (1878) 34 Ohio St. 212.

[3] (1847) 165 U. S. 36.

[4] (1898) Preliminary Treatise on Evidence, Appx. B, 551.

[5] Supra note 2.

[6] Greenleaf on Evidence, Vol 1 Section 34.

[7] 5 Wigmore on Evidence (2nd ed. 1925) Sec. 2511.

omit to charge that the accused is presumed to be innocent.[8] It has also been held that the failure to charge that this presumption continues throughout the trial and should be considered in reaching a verdict is error.[9] Some courts have held that this presumption is synonymous with reasonable doubt[10] but there are also decisions to the contrary.[11] There are many cases holding that the presumption of innocence is some evidence in favor of the accused.[12] But there is a rapidly growing tendency[13] on the part of the courts to take the view of the principal case and regard the presumption of innocence as merely casting upon the state the burden of going forward with the evidence, and requiring the guilt of the accused to be proved beyond a reasonable doubt. An attempt to give the so-called presumption of innocence any additional effect as evidence would seem logically to result in the absurd argument that defendants in criminal cases are so much more often innocent than guilty that a permissible inference in favor of innocence may be drawn.

G. F. B.

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[8] Com. v. Anderson (1923) 245 Mass. 177, 139 N. E. 436; State v. Hall (1923) 96 Vt. 379, 119 Atl. 884; Finch v. State (1919) 24 Ga. App. 339, 100 S. E. 793; Coffin v. U. S. supra note 2; State v. Tyree (1927) 143 Wash. 313, 255 Pac. 382.

[9] Monaghan v. State (1913) 10 Okla. Cr. 89, 134 Pac. 77; Flynn v. People (1906) 222 Ill. 303, 78 N. E. 617; People v. O'Brien (1895) 106 Cal. 104, 39 Pac. 325; Sims v. State (1925) 197 Ind. 311, 147 N. E. 520.

[10] Stevens v. Com. (1898) 20 Ky. L. 48, 45 S. W. 76; Cochran v. State (1911) 4 Okla. Cr. 393, 114 Pac. 747.

[11] Coffin v. U. S. supra note 2; Butts v. State (1913) 13 Ga. App. 274, 79 S. E. 87.

[12] Davis v. State (1924 Ala.) 98 So. 912; Weiner v. U. S. (1923) 282 Fed. 799; Crawford v. State (1923 Ark.) 245 S. W. 189; U. S. v. Kenny (1898) 90 Fed. 257.

[13] People v. Grant (1924) 313 Ill. 69, 144 N. E. 813; Com. v. Madeiros (1926 Mass.) 151 N. E. 297; State v Linhoff (1903) 121 Ia. 632, 97 N. W. 77; State v. Brauneis (1911) 84 Conn. 222, 79 Atl. 70; State v. Reilly (1911) 85 Kan. 175, 116 Pac. 481; Com. v. Sinclair (1907) 195 Mass. 100, 80 N. E. 799; State ex rel Detroit F. & M. Ins. Co. v. Ellison (1916) 268 Mo. 239, 187 S. W. 23.

LIBEL AND SLANDER—RELEVANT STATEMENTS IN PETITION ABSOLUTELY PRIVILEGED

The defendant filed with the county judge a petition containing libelous matter, protesting against the induction of the plaintiff into the office of sheriff. The allegation was pertinent to the issues. Held that the allegation is absolutely privileged, tho actuated by malice.[1]

The English law is well settled that judges, counsel, parties, jury, and witnesses are absolutely exempt from liability to an action for defamatory words published in the course of judicial proceedings even tho the publication is actuated by malice.[2] The American courts quite generally follow this rule in regard to judges but qualify the rule in regard to parties, counsel, and witnesses so as to require their statements to be material to the case and pertinent to the issues.[3] Thus statements in pleadings are privileged regardless of malice, if reasonably thought to be material to the cause of action or defence.[4] However the words used must be pertinent to the inquiry before the court or have a legitimate relation thereto.[5]

An exception to this general rule, that statements in pleadings are absolutely privileged when pertinent to the issues, was at one time recognized as existing in Tennessee. In *Rouhs v. Backer*[6] it was held that allegations with reference to one not

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[1] Roberts v. Parker (1927, Tenn.) 299 S. W. 799.

[2] Henderson v. Broomhead (Eng. 1859) 4 H. & N. 569; Seaman v. Netherclift (Eng. 1876) L. R. 2 C. P. Div. 53; Munster v. Lamb (Eng. 1883) 11 Q.B.D. 588; Revivs v. Smith (Eng. 1856) 18 C.B. 126.

[3] White v. Carrol (1870) 42 N. Y. 161; Smith v. Howard (1869) 28 Iowa 51; Hoar v. Wood (1841 Mass.) 3 Met. 193; Baten v. Houston Oil Co. of Texas (1919) 217 S. W. 394; Pecue v. West (1922) 233 N. Y. 316, 135 N. E. 515; Bussewitz v. Wisconsin Teachers Ass'n (1925) 188 Wis. 121, 205 N. W. 808.

[4] Lisanby v. Ill. Central R. R. Co. (1925) 209 Ky. 325, 272 S. W. 753.

[5] Dayton v. Drumheller (1919) 82 Idaho 283, 182 Pac. 102.

[6] (1871) 6. Heisk. 395.

a party to the action are only conditionally privileged. But in the later case of *Crockett v. McLauhan*[7] this view was repudiated and the Supreme Court of Tennessee held that an allgation in the pleadings pertinent to the issues, which falsely and maliciously charged a stranger to the action with having voted illegally is absolutely privileged.

The following statements have been held absolutely privileged: statements in an affidavit to be used on a hearing in equity,[8] representations to a police magistrate,[9] statements in an affidavit in support of a motion for a new trial,[10] written protest filed with a county judge that officer-elect is not honest and not fit for office.[11]

The principal case appears to be sound and in accord with the law in other jurisdictions. In order that cases may be tried on their merits sometimes parties must allege facts which ordinarily would be libelous. Although this immunity from a libel action may at times be abused, yet on the whole public policy would seem to require that judicial investigations should not be hampered by fears of groundless libel actions against those involved in the proceedings.

C. W. A.

MASTER AND SERVANT—POSTHUMUS ILLEGITIMATE CHILD NOT ENTITLED TO BENEFIT UNDER WORKMEN'S COMPENSATION ACT

One Saunders was killed while in the course of his employment, and his employer paid the amount due his depend-

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[7] (1903) 109 Tenn. 517, 72 S. W. 950.

[8] Bibb v. Crawford (1909) 6 Ga. App. 145, 64 S. E. 488.

[9] Flynn v. Boglarsky (1911) 164 Mich. 513, 129 N. W. 674, 32 L. R. A. N. S. 740.

[10] Keeley v. Great Northern Ry. (1914) 156 Wis. 181, 145 N. W. 664.

[11] Jaybee Jellico Coal Co. v. Carter (1925) 208 Ky. 241, 270 S. W. 768.

ents into court, under the Workmen's Compensation Act.[1] Up to the time of his death Saunders continued to contribute to the support of his lawful wife and children whom he had left in another county. In the county in which he worked, he represented that he was a single man and without obtaining a legal separation from his wife, he went through a marriage ceremony with another woman, with whom he lived and also supported up to the time of his death. Within five months after Saunders' death, the woman with whom he had last lived gave birth to a child of which he was the father. The lower court denied the claim of this illegitimate posthumous child to a share in the compensation fund. The Supreme Court of Tennessee affirmed the holding of the lower court.[2]

In the relatively recent Tennessee case of *Portin v. Portin*,[3] compensation was allowed to an illegitimate child supported in fact by the deceased employee up to the time of his death, on the ground that such a child was a dependent within the meaning of the Workmen's Compensation Act.

In the principal case the attorney for the posthumous illegitimate child quoted two English cases, *Williams v. Ocean Coal Company*[4], and *Schofield v. Orrell Colliery Co.*[5] In the former case it was held that a legitimate posthumus child could get compensation under the English statute. Chief Justice Green of the Tennessee Supreme Court stated that this case "could easily be followed in Tennessee", as there is a conclusive presumption of dependency in favor of a legitimate posthumus child but said that this case had no bearing on the principal case, since the claimant here was an illegitimate

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[1] Public Acts of Tennessee 1919, Chapter 123.

[2] Saunders v. Fork Ridge Coal & Coke Co. (1927 Tenn.) 299 S. W. 795.

[3] (1924) 149 Tenn. 530, 261 S. W. 795.

[4] (1907) 2 K. B. 422.

[5] (1909) A. C. 433.

posthumus child. The second English case cited held that a posthumus illegitimate child could recover compensation under the English Compensation Act. But the Supreme Court of Tennessee refused to follow this decision on the ground that it was due to some peculiar provisions in the English Act which were not in the Tennessee Act and said that for an illegitimate child to enjoy the benefits of the Tennessee Act he must have been actually suported by his father, the injured workman.

A survey of the compensation cases in Tennessee reveals that the Supreme Court on the whole has been liberal in construing the statute, both as to the question as to whether the injury arose "in the course of the employment", and as to those who are entitled to compensation awards.[6] In the following cases it was held that the injury arose in the course of employment: The employee was hurt while using an emery wheel after being told by a superior not to use it because it was not effective, and the employee did not use the safety appliance.[7] An employee of a county quarry was injured while riding home in an automobile after work hours, along an adjacent uncompleted highway.[8] The employee was shot by a mechanic aiding a shipping clerk who undertook to take the deceased before the president of the company for rebuke.[9] An employee who was killed by an explosion of gas in a mine was held not "wilfully negligent" so as to bar recovery by his dependents when he went into a room with a lighted lamp, under his foreman's orders, although he and the foreman had tested the room for gas about three hours previous

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[6] The earlier cases are collected in a note in (1927) 5 Tennessee Law Review 257.

[7] Kingsport Foundry & Machine Works v. Sheffey (1927 Tenn.) 299 S. W. 787.

[8] Washington County v. Evans (1927 Tenn.) 299 S. W. 780.

[9] Early-Stratton Co. v. Rollinson (1927 Tenn.) 300 S. W. 569.

and found that it would be dangerous to work therein.[10] The widow of a deceased employee was allowed compensation, although she had been abandoned by her husband for several months prior to the accident.[11]

J. D. P.

TORTS—NO RECOVERY FOR FRIGHT RESULTING FROM WITNESSING INJURY TO ANOTHER

In *Nuckles* v. *Tennessee Electric Power Co.*, the plaintiff's minor child was run over negligently by the defendant's street car, whereby he received injuries which necessitated the amputation of his leg. Plaintiff avers that she witnessed the accident and as a result thereof was frightened and shocked to such an extent that permanent physical injuries to her have followed, for which she seeks to recover damages. *Held* that the plaintiff can not recover for fright and shock resulting from witnessing such a tragedy.

Where the defendant intended to frighten the plaintiff a recovery is generally allowed.[2] But according to the great weight of authority mere fright alone cannot be made the basis of a cause of action, though resulting from defendant's negligence, and damages are not allowed for fright alone.[3] It seems that the chief reason for denying recovery in such a case is the danger of opening the door to fictitious litigation and the difficulty of estimating the damages.

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[10] Mullins v. Tennessee Stave & Lumber Co. (1927 Tenn.) 290 S.W. 975.

[11] Pratee v. Memphis Concrete Pipe Co. (1927 Tenn.) 295 S. W. 68.

[1] Nuckles v. Tennessee Electric Power Co. (1927 Tenn.) 299 S. W. 775.

[2] Clark, The Law of Torts (1922) sec. 212.

[3] Williamson v. Central of Georgia Railroad Co. (1906) 127 Ga. 125, 56 S. E. 119; Atchison T. & S. F. R. Co. v. McGinnis (1891) 46 Kan. 109, 26 Pac. 453; Elgin A. & S. Tr. Co. v. Wilson (1905) 217 Ill. 47, 75 N. E. 436; Pullman Co. v. Kelly (1905) 86 Miss. 87, 38 Southern 317.

Many cases hold that since there can be no right of action for mere fright, it must logically follow that there can be no recovery for injuries whch result from, or are the consequences of, fright.[4] Fear of consumption has not been held an element of damages to be allowed against a railway company because of whose neglect to heat its station a passenger is made ill with cold and fever.[5] Another case held that insanity resulting from fright and excitement caused by a railway accident, there being no bodily injuries, was not the natural result of the negligence of the railway company so as to make it liable therefor.[6] A Pennsylvania case[7] held that no recovery could be had for a miscarriage resulting solely from fright caused by the car in which she was riding bumping over the track at a switch which had been negligently left open, there being no actual bodily injury. In Kentucky it was held that "a carrier is not liable for fright of a passenger by wrongfully assaulting her father and ejecting him from the train in her absence, leaving her to pursue her journey alone."[8] An Indiana case held that an action will not lie for damages for fright resulting in nervous prostration and permanent impairment of health, when such fright does not arise from impending or apparent danger to the party demanding damages, but from impending, apparent, and possible danger to another.[9]

The Supreme Court of Tennesse in giving its decision in

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[4] St. Louis I. M. & S. R. Co. v. Bragg (1901) 69 Ark. 402, 64 S. W. 226; Trigg v. St. Louis, K. C. & N. R. Co. (1881) 74 Mo. 147, 41 Am. Rep. 305.

[5] St. Louis I. M. & S. R. Co. v. Buckner (1909) 89 Ark. 58, 115 S. W. 923.

[6] Haile v. Texas P. R. Co. (1894, La.) 23 L. R. A. 774, 60 Fed. 557.

[7] Morris v. Lackawanna & W. Valley R. Co. ( ) 228 Pa. 198, 77 Atl. 445.

[8] Chesapeake & Ohio Ry. Co. Appt. v. Elizabeth Robinett (1913) 151 Ky. 778, 152 S. W. 976.

[9] Cleveland C. C. & St. Louis R. Co. v. Stewart (1900) 24 Ind. App. 374, 56 N. E. 917.

the principal case said, "We are not aware of any considered decision which holds that there can be a recovery for fright or shock because of danger to another or injuries upon another in the presence of the plaintiff, even though the person imperiled or injured was near and dear to the plaintiff."[10]

Because of the practical difficulties of proof and the danger of imposture, the principal case seems sound in holding that, in the absence of physical impact, the plaintiff cannot recover for fright or shock resulting from witnessing injuries negligently inflicted upon another in the plaintiff's presence.

O. V. M.

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[10] Supra Note 1.

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THE RATIONAL BASIS OF THE COMMON LAW

E. D. WHITE

I shall not attempt to define the concept—law, we have had a thousand definitions from the philosopher down to the University lecturer. I can only think of law as a *force* put in motion by human want and will. While I have taken for discussion, the subject, *"The Rational Basis of the Common Law,"* I want to negative this position in my first statement, and affirm it has none. Has this system of law been the growth of reason or the evolution of barbaric emotion, life and thought? I shall contend that history demonstrates this position and agree with Justice Holmes of the United States Supreme Court when he says: "The life of the law has not been logic, but experience."

The Common Law lies in three strata with *magna lavas* still above them all.

First: the Pre-Saxon stratum; Second, the Anglo-Saxon stratum; Third, the Norman stratum, and above the Norman layer, a vast sediment has been laid down from time to time, and has almost submerged it, but here and there we see the outcroppings of them all, even the fangs of the first barbarism, the Picts, the Scotts, and the Celts beyond the Fifth Century. When we view this fossil age before the Anglo-Saxon came, we see a land and people without church, school, or courthouse, the British Isle, the home of our heritage. The land of Woden, the creator who presided over the destinies of man. These were the times when the law was in the hand and heart of the individual, not in the community or State. There was

no State. This is the first horizon of our law. In these dim and distant days lie buried the roots of many of our laws.

Can we imagine the social and economic life of this people! It was an age of self-help and private revenge, the age of distraint and distress. In these concepts all law had its center and from them radiate method and system.

The idea that the mind could create a legal obligation by contract had never dawned on that be-knighted age. Hence, contract law was unknown. The acts of the body were held liable only. All law centered around trespasses on land, chattel stealing and wounds inflicted on the body. The idea and concept of property, that is title or real ownership, had not germinated in the mind of that age. Occupancy and user and physical injuries, the possessory idea, and wounds to the body lie at the base of the whole system. The concept—property, originated from the ideas and act of theft, the loss of the thing stolen developed the idea of value and from value title came. Hence, property law is a by-product of the criminal law. Chattel stealing, chattel meaning cattle in that age, was one of the greatest crimes. The killing or the wounding of a kins-man heated the blood of the whole tribe as far as kinship reached. The loss of occupancy where same was taken by force was a crime. For the thing stolen, the only remedy was by recapture of the stolen property by the loser. The law of self-help prevailed as there was no writ and no officer. This doctrine of self-help still prevails in our law and is permissible, if the social order is not disturbed. But in those days, the public had no concern or hand in legal adjustment. Not only the thief was held liable for the theft, but his kinsman's stock and store was gone into because they are presumed to shield the thief, and a partner in this crime, whether so in fact or not. There is no alternative, but restoration and the loser must be put in *statu quo*. The thief's trail leads to the home or stall of all his kinsman under the feud or self-help law.

If one was wounded or killed the guilty stood in peril

at the hand of some member of the family of the deceased, and nothing but the life of the offender satisfied the law of the Blood Feud. The question of guilty or not guilty, whether the slayer had to kill to save his own life, was no defense, and not considered or investigated. The feeling must be appeased and the law was not satisfied until normality was restored. Blood was the serum cure. This law also permitted the aggrieved to take satisfaction upon the life of the offender's kinsfolk. Hence, family against family, this blood feud law raged until whole families were sacrificed and exterminated by this barbarous ideal and legal adjustment. It was not altogether either the blind rage of the animal, but a real ideal of justice in the realm of the feelings. Finally, a metamorphosis came when the first tender bud of the human instinct appeared. In this change from a blood to a value adjustment lies the root of our modern action and law of damages for personal injuries, intentional or unintentional. The human mind, in its long struggle passed into the property concept for legal adjustment. This meant a subsidence of the feeling of rage, and the dawn of the intellect entering the arena of the law. Finally, the blood feud could be bought off. A scale of values gradually evolved, putting a price upon the slightest wound up to the life of the slain. Not of money, but of the thing or *res.* This was called *"Weregild,"* the value of man down to the least injury. Instead of satisfying the law the old way, you could pay it off. This was a great advance and reform as we would call it in these days. It preserved life. When we can swap property for life it marks a great epoch in history. During this gruesome age, there was neither legislator, judge nor jury. No written law, nothing but the recognized idea that each had the *right* to place himself in *statu quo,* in feeling and physical relation with his own heart, hand and club, his feelings being the official executive power.

The most tragic aspect of this period is the status of woman. That woman had no right was one of the most just

and healthy concepts or feelings of this age. Yet, we deny we took this idea over into our system, and it is but recently that woman has been accorded legal personality. Such is the view and ideas of justice we see in the first horizon of our boasted heritage, the Common Law.

We pass from the blood feud stage to another barbarism which took over many of the ideas of the first, and whose fangs we see and feel here and there in our system. We reverse the telescope again and view the rugged road behind us. To know it as it was, has been and where we are, we must emerge again from a welter of blood and miracle. We follow a new psychology for a season. Law and history move side by side. In the Fifth and Sixth Centuries, the Anglo-Saxon, and their or his allies cross the English Channel, stung to death or drove into the mountains, these people who were evolving into a new dawn. The Saxon had passed the stage of the native Briton, but he was still a robber and robbed the Briton of his rights, and used the robber's code, *that might is right.*

Among this people were low-browed assassins with matted beards, mugs of beer in one hand, and dagger in the other. But long before these robbers, our ancestors, swarmed in *Germania,* they had developed some organization and had a community or state idea of the law, a real social status. But, with them law did not approach modern principle. When we dig down to the "grass roots" of their system we find sacrifice of human rights and a welter of blood. Their theology colored largely their law. They, too, saw Woden in the sky. He would not permit a crime to go unpunished, or the innocent to suffer. Just here and there, we see a monk or a saint attempting to break down Wodenism, and pointing to the Star of Bethlehem. Woden's reign was dark and gloomy. The Monk or the Saint was the distant ray of the Canon Law wedging in and penetrating the dark gloom of Wodenism, and which finally organized and dominated the High Church of England in the process of Ecclesiastical Evolution. But Woden

reigned and worked miracle after miracle in the domain of law for centuries among this people.

In this period, we pass through miracle law. Two grand modes of trial were instituted to try offenders; trial by ordeal and trial by battle. The community had taken over the law and modes of trial. In the great Court of Ordeal, the offender against Woden and the social order had the right and privilege to carry a red hot iron three steps, or run his arm up to his shoulder in boiling water, and if he was not guilty, he came out unburned and unscalded. For centuries, the British Isle glowed with hot iron or steamed with boiling water. Justice was administered under the improved and humane system of our Saxon fathers, and not according to the barbarous system of our first Common Law of the Pre-Saxon peoples.

Along with this jurisdiction of the Ordeal Court was organized the battle system and its jurisdiction. This had somewhat the advantage of the Ordeal system to scald or burn justice in or out, as it gave the opportunity of valor and prowess. The hero came off not only with the property and vindication, but he carried off the laurels of honor, with the victory. He was only required to fight, from sun up to sun down, his antagonist in the presence of and under the direction of learned judges versed in the law. Woden would not permit the innocent to be overcome. If he was weak and right, he gave him strength and courage. If strong and at fault, his courage was made to fail, his arm weakened until his antagonist beat him down just as the sun set and closed his all-seeing eye upon this knightly contest in the sublime realm of the law.

From this grand system of miracle law and butchery, the battle law, sprung all of those exalted principles of chivalry and knighthood that have inspired the pages of English history and literature. And from this great system emerged and bloomed the American duel, and its matchless code of honor to settle

on a high civilized plane the differences between man and man, like Burr and Hamilton; Jackson and Benton.

Again in the blending of the Pre-Saxon and Anglo-Saxon genius where there was elimination and substitution of remedies, holding onto the good and discard of the bad, another of the Saxon and Norman culture appears for a more intelligent method of righting wrongs, and grinding out justice. This was the mode of trial known as "Wager of Law." It was another great advance on either of the former methods. It demanded neither blood, pain or property. It is true, there were no *facts* used in this method of trial, but it is the connecting link between the old system and our modern ideas and methods of reaching justice. The beauty of the system was that it only required the good opinion of one barbarian of another, his neighbor, thief or robber. If the defendant made oath that he did or did not do the thing, and could produce twelve men who would state they believed him, he was acquitted or won his cause. This was the *"opinion"* stage of our law.

The defendant had only to be vouched for by twelve character witnesses. But if the accused was *"Tithbysig"*, that is, of bad character among his fellow robbers he was already tried, he had no chance of a trial, no status in court and came already condemned. Guilty or not of the particular charge, his character was such he was guilty of every charge and of violating all the laws of the realm. From this long cherished mode of trial Wager of Law, as a precedent in our system, we inheritated two very important instruments of law and justice. And, without humor, we metamorphosed from these concepts and methods and got our jury system and character witnesses which are a real reform. The twelve oath helpers became our jury and set a precedent in practice, and principle, that character should be a factor in arriving at justice. Under these ideals and system of law, the Saxon lived, drank, fought and died for over five hundred years. Evolution in its first stages

worked slowly. During this long period, the Saxon was not disturbed except by the Dane for a short season, when he fought back the Dane by Saxon valor.

Among these people we inherited many germs of the Common Law. Some of these little bugs are still in it. They have wonderful vitality having lived over a thousand years. It is true we have killed a lot of them by legislative surgery, but we still feel their bite and sting here and there, and wherever they infest our system, justice is worm-eaten. They are an ugly brood. During the Anglo-Saxon period criminal law covered the whole area of both criminal and civil law. There had not been a differentiation in the two ideas. The law was Janus-faced and all remedies came from the criminal side of the system. Feudalism had only a tendency. No contract law had emerged and property law was at zero, just beginning to incubate. The mind was nothing. The body was all, its feelings and appetite. From these bases all law was administered. Hence, we repeat, that property law is a by-product of the Criminal law. We will now pass from the Saxon times *for we see the Norman coming with his sword.*

The Duke of Normandy was the greatest land-law-maker in the world. He is the central figure in the Common Law of the next period. We look back near nine hundred years ago and see his ambitious and restless spirit in northern France. The life of the fossil Saxon must be broken up, and rejuvenated in the march of history. After the Saxon came, had cleared forest and field and built the towns, the Norman came with spur and sword. From northern France a descendant of sea rovers and land pirates rushed across the British Cannel, under the stilted title, the "Duke of Normandy". He was a barbarian of ability. He impressed his iron will on the whole Island. This is when the Common Law took on solidarity. With diplomacy he appeased some and with sword he crushed others. He had power and he wanted property. Norman culture was far ahead of Saxon valor in plan and purpose. The Island

was ripe for exploitation and appropriation. With one fell blow the Norman put the Saxon at his knees. In twenty-one years he acquired more property than any potentate on earth. His title, too, was not just the State title, the larger element was a personal title, and right independent of the governmental status, and conception, though used for governmental purpases. After he had conquered the Anglo-Saxon Heptarchy, the seven petty kingdoms under the King of Wessex, he made a wholesale confiiscation of all lands and chattels and reduced to tenant and military slavery the entire population on the Isle.

He did two things that showed business capacity and organization. He first took an inventory of all the property of the Island, both personal and real, and a census of the population. Second, he summoned every land owner on the British Isle, 60,00 0of them, to meet him on Salisbury Plain. Here he took over all the lands, 30,000,000 acres, and all the personal property and registered the Inventory and Census taking in a book call *"Domesday Book."* He thus acquired intimate knowledge of all the *facts.* Here is a different ruler with a different policy. This was real business and shows the stamp of English diplomacy to this day. But the law was still then *on* the sword. You do not need much law or courts with the sword hanging ever you. His next step was to have every land owner take an oath to be his *tenant,* and pay him taxes in a dozen forms. He had all the estate, he had an oath between him and his tenant and military slave. No more unity of purpose and consummation in fact was ever cenceived in and worked out by the brain of man. He held the sword and scales of justice, knowing the scales was impotent without the sword.

Thus, was born full grown the feudal system. Henceforth, *"TENANCY"* became the biggest word in English law, and when you speak of the Feudal System, you cover ninety percent. of the Common Law from 1066 for centuries thereafter.

But there was only one land owner of 30,000,000 acres of land. The deed to it was written by the sword. The seal on it was the bloody finger prints of William Duke of Normandy. The seal was blood, not wax or a scroll. The days of "covenant" had not come. There was no need of covenanting about anything; there was nothing to covenant about. One land owner of the Island, all others slave tenants. The formula was *"A tenet de B."* A holds of or for B. A was the people and B was the Duke. After completing the confiscation when he was "Monarch of all he surveyed," people and property, he rented out the whole Island to the first men of his kingdom, the Barons, in large tracts, binding them under feudal ties. The Barons, in turn, parcelled out the land in small tracts to sub-tenants, requiring taxes, oath and fealty of them until the feudal ties reached from Serf to Crown. This arrangement created tenancy, and right of possession followed tenancy, and mutual interest evolved in the system and duty and obligation had to reach *down* as well as *up*, when the Lord of the fee was bound to protect the vassal. The original title of the Duke became worm-eaten by the law of occupancy, right of possession or right of occupancy and the right of possession appeared as a distinctive law and had to be protected, or chaos would reign and much of the tyranny in the system broken down when the individual again emerged to the surface after centuries and saw in the coming ages a right in fee and that he was entitled to part of the common earth given to man. Statute after statute was passed disintegrating the Feudal tie and bondage. But so important was tenancy, and so complicated was the tangled wire system that volume after volume was written showing the relationship of Lord and Vassal to the lands held by the one and parcelled out to the other. The most important of these books were Littleton's "Tenures" and Coke on Littleton. The latter work covers three large volumes.

The back waters of the Feudal System reached the Am-

erican shores. Their waves beat upon the Atlantic coast and settled far inland. When the Colonists came they brought the Common Law in their lives, religion and customs. The Norman germ poisoned our American land law with the rules and doctrines of tenancy, heirship and entails. It is true that we did not take over the feudal tie and the social caste and titles of nobility. Our Constitution severed us forever from this abominable caste system of society and made all equal before the law. We did inherit the application of feudal principles in relation to land titles, inheritances and successions and herein is where the conflict comes with our American legislation and adjudication and has embarassed the easy and speedy administration of the law. The tangled Rule in Shelly's case covers thousands of pages of American law books and decisions of the courts in trying to apply the rule to a new system of law, one foreign to the social and economic conditions that existed when the rule originated. Fortunately, the rule has been abolished in most of the States or has been ignored in adjudication. But the back-wash left its sediment in every State in the Union except Louisiana, where the Civil Law dominates under the Code Napoleon. The Common Law began its life and had its growth under a Monarchy, not under a Democracy. It had no Constitutional guide for direction, restraint and development. Our social, economic and industrial life is radically different from that of the ages of the Saxon and the Norman. We have other Ideals, a different psychology. But we are still under bondage, and it is hard to tear lose from the old system. The Ancient is sacred. It is like the polyp resisting with a thousand arms, its hold upon the coral reef, to sever from the past. We are still disfigured with the scars of those ages and the fangs of the barbarian are still showing here and there in our system. It is true we have had constitutional and legislative surgery and have cut out a lot of the old appendices such as primogeniture, attaint and corruption of blood, forfeiture to the crown,

etc., but there are many other fossils left in the scaffolding. The law of evolution has worked slowly in discarding the worn out and unfit.

To show the grip of the past upon our life and thought we have just awakened to consciousness and corrected the greatest wrong recorded in English history, and in the Common law, placing upon equality before the law with man, his mother, his sister, his daughter, his wife. We have just learned that a woman is not a part of man, she is a distinct and separate entity and by Nature has the same *inherent* rights as man.

We inherited this hated doctrine of subordination and merger of woman's personality into her husband's from the barbarous codes of the Saxon and the Norman and have just reached the height that Rome did two thousand years ago. But if we will think again, we are still under bondage to the gross and base ideals that made the Common Law and still hold to the barbarian concept in the social realm of thought by clinging to the double standard of society. The same act that relegates woman to the lower stratum of life and society in man is forgiven and forgotten and he stands accredited in our civilization. Even woman herself shares this perverted ideal and takes to her bosom the wretch wreaking in shame and condemns her sex.

I cannot leave this thought without calling to mind the Reason of Rome which has entered our law. Finally the Tiber overflowed, a silver stream from the Civil Law gently reached the Isle. I said gently, for Caesar's sword left no track nor trace of the Civil Law. It came through books. The pen is mightier than the sword. It mingled with the murky waters of the Common Law that had carried down its debris, through the centuries and mixed with Saxon and Norman culture. The Bacon and Coke contest raged over the introduction of the maxims of the Civil Law, maxims of Equity, those sparkling gems here and there, which made radiant the

dark field of the Common Law. Like the Apostle Paul, we had to appeal to Rome for the larger justice. In them is the kernel of our best law. They are Nature's beautiful suggestions of justice, reason and truth to the brain of man. Bacon won over Coke and a Court of Equity was established. Without this reason of Rome our law would still be a desert moor with but a heather plant here and there.

It is one thing to prohibit and command and another to enforce prohibitions and commands, when those prohibitions and commands are but the crude notions of a primative people. A thousand experiments have been made in methods of getting the facts before the court, after we reached the fact stage in legal evolution and development, leaving behind the Feud, Ordeal, Battle, and Wager of Law. We have now passed from a world of blood, miracle, and opinion into the fact age, of the world and business. We have struck rock bottom. At first we had to tell our tale of woe orally to the court before it could decide. Then we were called upon to write our facts according to certain theories of liability. Nature's cry for justice was simple and plain, but we left simplicity, and invented many fictions, and interposed many cross currents that created chaos and confusion. Who will write or mark out the correct route or road to the heart and brain of this personified being of the law and justice, the Judge, who knows neither litagant. This was a great problem of the English lawyers. Many a right was felt but no remedy provided. Adjective law, the law of pleading, was of late date in the history of the Common Law as it was finally put on paper. The so-called forms of action were not all created at the same time. After certain acts were recognized as a wrong there was no writ nor remedy provided so that the injured party could take the facts before the Court. Many a right perished and many a wrong suffered before the genius of our forefathers could devise a remedy. Again, the strata of society hindered a just and healthy development of proceedure.

A vassal's wrong was a baron's right. All men were not created equal. There was no equality before the law.

Finally, out of the chaos of ideas there evolved from time to time ten machines within which to mould the facts and grind out justice. One of the first of these machines was the Trespass machine to take care of all those acts of man which he did directly with his own physical body. Liability for negligence had never been incubated in the thought of the age and was in the dim and distant horizon, hardly discerned by the ablest lawyers and judges of the time. If one struck you with his hand or a club in his hand, it was his act, but if his beast damaged your crop or bit or kicked you, though he knew it was vicious, and let it run at large, this was not the act of the owner and he was not responsible. He must be tangent to the person injured. Anything between him and the injured party, animate or inanimate, though under his control, protected him from suit. A bull could destroy your crops, a jack could kick or bite you for a hundred years, known to be both a rouge and dangerous, the owner could not be reached by the law for there was neither law nor remedy to fit the case. There was no bull or jack law, especially, for this particular species of them. In all these cases of loss and injury, the *res* was the guilty party, not the owner of the *res*. The Trespass machine was built about the year 1250, and was one of the first of the ten. Mental evolution struggled for near a hundred years when it dawned on the minds of the great jurists that the owner of the trespassing object could be held liable on the ground that he should keep control of its actions. Here the doctrine of negligence budded into our law which has blossomed into the greatest field of human rights in this age.

Then the trespass-on-the-case machine was built to cover the injurious acts caused by agents, whether animate or inanimate, of the possessor and owner of them. But the law was still on the physical plane. The mind of man could not

do anything that would create liability. Contract law had not appeared and we lived in an age of torts. Finally, there were six tort machines built and each machine was built for a particular state of facts or species of facts. If you did not put the facts in the right tort machine, a cog slipped and you went out of court. Trespass facts would not fit a trespass-on-the-Case machine and so on. If a man beat or wounded you, you used the trespass machine. If his vicious beast wounded you, you must use the trespass-on-the-case-machine.

Again, evolution made another leap across the muddy chasm of superstition and ignorance, and man was held liable for his mental interferences into the business relations of life, and contract law emerged from the dark nimbus of the ages of superstition. Three contract machines were built by this hybrid blend of the Saxon and Norman genius; assumpsit, debt and covenant. Here we leave the field of torts, and deal with agreements of different species, mostly expressed but sometimes implied from the facts, duties and obligations of life in man's relations with one another. One of these character agreements had to have the finger print of the maker on it before he could put it in suit and if you did not put it in the "covenant" machine you were non-suited. All of these are old models, built about 600 or 700 years ago. New York tore them down in 1848; Tennessee in 1858. Even England, where they were built, tore them down in 1875. Now nearly all the States have either scrapped them or let them rust down and dumped them into the junk pile or preserved them in some museum for curiosity or amusement. The tendency is to build one machine for all the facts, the law arising from the facts, from the relations of man to man, from our environment in this living, throbbing world of activity. The law is not stored in the dry husks of the Middle Ages. A little child is the best pleader in the world. It utters Nature's cry for justice. "Papa, John hit me! Papa, Jim took my

marble!" Here are statements of two facts, one criminal, and one civil, with an appeal for justice. "He hit me." "It is mine." Socrates said: "Until either philosophers become Kings, or Kings philosophers, States will never correct their evils."

The greatest problem of the ages has been the reconciliation of government with liberty. Protection against the protector. *"Homo Homini Lupus."* Under the Common Law there was a maximum of government and a minimum of liberty.

I want to add to Judge Holmes' statement; the life of the law has been a struggle, a striving for existence, the highest law of all living creation. All law has been obtained by blood and strife. We wrung it by force. It has taken its toll of millions to reach the height we have obtained, but sentence of death has been pronounced on medievalism, and the Renaissance has displaced the old regime.

THE CRYPTIC "SS"[1]

MICHAEL J. JORDAN

There are no two letters in the history of the law which have given rise to so much conjecture as the "SS" used in so many legal forms. Hardly a day passes in the life of a lawyer or judge that these mystic symbols do not look out upon him. They are a constant challenge to his ingenuity and learning. The same cold, hard glint surrounds them as we read in the eyes of the sphinx.

Lawyers have ceased to question the meaning of these strange letters. But lawyers do not generally leave problems unsolved. The difficulty of the solution is increased, as we consider that the same "SS" appears on the collar worn now by the Lord Chief Justice of England. No Lord Chief Justice who has ever worn the collar has been able to give the slightest explanation of the cabalistic symbols, at least no one has left any explanation.

Some writers tell us "SS" are the initials of St. Simplicianus, a martyr of the 4th century. He was strangled to death. His followers, we are told, formed a confraternity. To perpetuate the memory of the founder, they wore a chain around their necks with the symbol "SS". But this assumption, to say the least, is far fetched.

What became of the "SS" from the fourth century, the date of the saint's death, and the time these letters first show themselves in authentic legal history? They do not appear any where on the continent of Europe nor in the history of England until the 14th century. But then when they suddenly flare out in England there is nothing certain about them.

They apparently defy an intelligent explanation. When we

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examine the attempt to explain them, we find only conjecture confounded. They may have been the symbols of the Equestrian Order, because at the point on the horse's bit where the reins are fastened, the iron was shaped in the form of an S on each side of the horse's head. There were, therefore, two S made into the knight's accoutrements and we are met with the suggestion that here lies a possible explanation.

There are many obvious objections to this answer to the enigma. In the first place, "SS" was never a badge peculiar to knights. Secondly, the badge was evidently worn long before there is any evidence that it became associated with knights. Lastly, it is entirely unlikely that the casual form of the horse's bit should become associated with the historic conundrum of "SS".

A much less likely explanation is that the letters were taken from the initials of the Countess of Salisbury, at the time of the introduction of the Order of the Garter.

Still further afield the guessers go and say that the letters represent the Latin word "Signum" (sign), or "Sanctus, sanctus, sanctus," (Holy, holy, holy) in the old Catholic ritual of Salisbury.

It will be seen at once that there is no reason for such a guess. Why should the word "Signum"; or, the word "Sanctus", used in a part of the Mass be taken as the key to the letters? Any one familar with the words of the Mass will understand that these words cannot have any special significance that would associate them with SS. They occur at the end of what is known as the Preface of the Mass, and cannot, by any stretch of imagination, be applied to any insignia of honor.

If it could be shown that these words were used in conconsecrating the robes of a king, or the banner or insignia of a knight, some reason might be suggested for this hypothesis.

But no such claim has ever been suggested. The guesses still continue.

We are told the letters were an abbreviation of "Souveryane", a motto used by Henry VI, but the SS collar was known and worn long before his time.

The words are said to mean "Souvenez-vouse de moi". Remember me. An entry in the exchequer rolls 8, H. IV, would seem to give some color to this derivation, for it is there stated a goldsmith was paid "£385.6.8 for a coler of gold marked with the motto, 'Soveignez' and the letter 'S' garnished with a great parade of valuable jewels." (2 Devas Issues of the Ex. 305).

It is certain that any of these explanations do not rise above the value of mere guesses. It may throw some light on these obscure symbols if we try and find when they first appear in England. Collars of gold have been used as personal ornaments from very ancient times. Pliny informs us that they were known in his time. Manlius Torquatus derived his surname from the golden collar he took from the neck of his conquered foe. But we do not find in the histories of the times any accounts of the use of such collars on the Continent of Europe, at least, since the days of the Gauls. None of the early Heraldic emblems seem to exhibit the collar of gold. Nothing was known of the laws of Chivalry or Heraldry in England prior to the 14th century. Liveries and badges were first know in England in the Reign of Richard II. John of Gaunt wore a collar with symbol S. (Kalendars and Inventory of the Exchequer III, 321.21).

An interesting scene meets our eyes at the opening of one of Richard II's parliament. The great nobles were all assembled to hear the wishes of the King. Up spoke the Duke of Arundel, evidently prepared beforehand, and among other charges against Lancaster, complained, *"que le roi deust porter la lievere de coler de duc"* (that the king was wearing the col-

lar-livery of the Duke). "Not at all", said the King, "but when the Duke returned to England, *'Le Roi prist le colar du cool de son oncle et mit son cool meme qu'il vorrait porter et user an signe de leur amour d'entier coeur, aussi comme il fait des liveries de ses autres oncles."* (Rolls of Parl. III 213B). (The King took the collar from the neck of his uncle and put it on his own neck, which he would wear and use as a sign of their whole-hearted love, as he had done with the liveries of his other uncles).

Now John of Gaunt was senschal or steward of the kingdom. It may be assumed that the letter S was then merely an abbreviation of his office. But if this is so, it is the only case we find in history where the initials of any office were worn as an ornament.

From the time of Richard to Elizabeth, we find occasional glimpse of the collar of "SS". A rich collar is inventoried in the estate of H. V. *"en primis la riche coler . . . . l'or du dite coler pois XXXVI unc."* First the rich collar . . . . the gold of the said collar weighs 36 ounces. (Rolls Parliam. Vol. IV 214a).

The fashion of wearing the collar now grew apace. So much so, that Henry VIII limited the use of the gold collar—named a collar S—to knights. (24 H. VIII).

Not many years earlier, the use of symbols and liveries had become a nuisance. Henry IV abolished the liveries and signs, except that princes and bannerets were allowed the use and livery of the king "de la coler".

On the accession of Edward IV, the insignia of the house of York, the collar of roses and suns was substituted. Henry VII, however, brought back the collar SS.

Before trying to find an explanation for the letters, let us see how they were connected with the judges. In the olden times, when the lawyers held high revel at the Inns of Court,

they were always decked out in their finest array. "At the time when Lewekinor and six others were admitted to the rank of Serjeant-at-law on Wednesday past *'mensem Paschae'* in the Middle Temple Hall," Sir John Popham has left us an interesting account of the ceremony. "All the justices were assembled, and the two chief justices and chief baron sat upon the upper bench of the same hall, in their scarlet robes and collars of "SS", and every one of the other justices and barons in their Ancienty on the one side and on the other side in their scarlet robes also, and then came the new serjeants in their black gowns before the justices and the two eldest being put before the Chief Justices of England, and so every one," etc. 36 Eliz. 1594.

It is worth while to notice, in passing, that the ethics of the profession have not much changed since that time. For, says the Lord Chief Justice, in his speech on that occasion, "worldly benefits have greatly abounded to such as have walked straightly and honestly in that Calling", yet there are some "who come in sometimes in an extraordinary manner and give scandal to the Profession." One notable example of the latter disagreeable fact was the Chief Justice himself. In his youth, he had associated himself with the rowdies who held up travelers and robbed them. His conversion was like Henry V when he abandoned Falstaff.

An example of another kind was Kelyng, who became Chief Justice in the time of Charles II. He seems to have added miserliness to his other qualities, because the rings given by the Serjeant to the Chief Justices weighed only eighteen shillings apiece, instead of twenty shillings, the Chief Justice had one of the new serjeants come before him and censured him for departing from ancient custom.

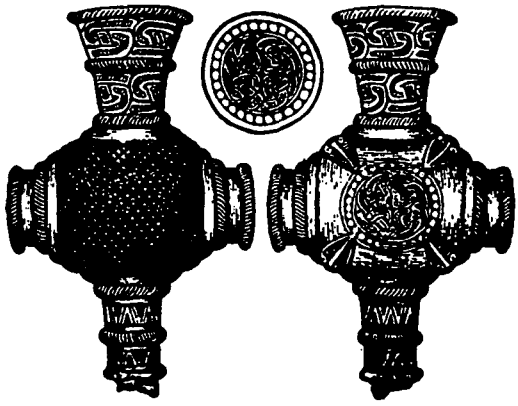
Up to the time the rank of serjeant was abolished, the serjeant and the Chief Justice of the King's Bench and of the Common Pleas and the chief Baron of the Exchequer were also

privileged to wear the collar "SS". The Courts of Exchequer, Common Pleas and King's Bench are now merged.

Let us turn to Ireland for a moment, and see if she furnishes us with any clue to the answer. Well, we have in the first place this interesting fact, that in the reign of Ferrideheach Fionnfachtach Moran, the son of Maion, the chief justice of Ireland, when delivering judgement wore a collar of gold. In the popular imagination, this collar was endowed with the marvelous power of closing tight over the throat of an unjust judge. When placed around the neck of an untruthful witness, it would close and strangle him if he persisted in untruth. The historical fact, however, remains.

Collars of gold were worn in Ireland by the kings and certainly by judges. The collar of gold became a mark of power. Moore in his beautiful ballad "Let Erin Remember the Days of Old" refers to this fact—"When Malachi wore the collar of gold which he won from the Proud Invader." Malachi drove the Danes out of Dublin and became the High King of Erin, in the year A. D. 984.

There is no doubt that the collar which Richard II placed on his "cool mesne" (sup. p. 2) was a collar of gold. I have above referred to the golden collar worn by the English kings in after years. Now, there is one fact known in connection with Irish jewelry which needs no proof. I may say, like the great Irish scholar, O. Curry, if any one doubts it, he need only visit the Royal Irish Academy to dispel his doubts. I refer to the beautiful and artistic designs worked on ornaments of gold, silver and bronze. There were two kinds of designs notably of Irish character. They were the interlaced and trumpet patterns. As we look on these spiral interlaced designs, they throw a flood of light upon the subject of this article. Even at first glance, these delicate interlacings stand out as a series of "SS" intertwined. So that the reader may see for himself, I present the head of the pin of the famous Kilkenny



Brooch. Much more clearly these "SS" interlacings appear in the famous Tara Brooch. The "S" spirals cannot help but make an instant impression upon the reader. They are the only explanation of the letters SS appearing in the collar of the Chief Justice of England.

The spiral design in Ireland dates back to a period between the fifth and tenth centuries. During this period, the collars of gold worn by the Irish kings and judges were ornamented with such designs. Ireland was pillaged century after century by Danes and Normans. The gold and silver ornaments were carried to the continent and to England. If not an original, the collar SS worn by John of Gaunt was inspired by an Irish original. It was an emblem of power, not merely an ornament.

Richard's suspicions are well hidden in the lines with which Shakespeare opens the play of Richard II. "Old John of Gaunt, time honored Lancaster." Lancaster conspired, from the death of the Black Prince, to obtain the throne of England. His son effected this purpose, deposed Richard and became King.

It is then plain that the words which the Earl of Arundel

used were an intimation to the King, of the pretentions of his uncle of Lancaster.

The use of these collars soon became the fashion. The beauty of their workmanship made them the style. We have seen that the English goldsmiths tried to reproduce them.

By the reign of Elizabeth, the "SS" collar had become firmly established as a distinguishing part of the robes of the Chief Justice. Sir Matthew Hale wore the collar while he was Chief Justice in the time of Charles II. Even the interregnum of Cromwell did not cause the use of the collar to be abandoned. His Chief Justice John Glynne is represented as wearing the collar "SS" adorned with roses. The collar worn by the Chief Justice was, however, a modified form of the original collar of gold. It is made of cloth and heavily worked over with knots and roses and showing letters "SS" at the corners. The Lord Mayor of London has today the privilege of wearing such a collar. It is now embroidered with 28 SS, 14 Roses, 13 Knots, and weighs 64 ounces. The significance of the 28 SS is that they are simply an adaptation of the interlacements shown upon the collar of gold. The collar of the Chief Justice is similarly worked.

In Ireland the tradition coming down from earliest times persisted under the English kings. We are not, therefore, surprised to find Charles II presenting a collar "SS" to the Lord Mayor of Dublin, nor when we see William of Orange presenting of a similar collar to Sir William Homberidge, the Lord Mayor of Dublin at that time.

The collar continued to be an emblem of official power. Irish thought influenced English feeling and opinion in many ways. The old coronation stone of the Irish Kings — "Lia Fail" is now preserved in Westminister Abbey. The Celtic word *"triubas"* was Anglicized as "trowsers". The word Barrister is not a combination of the Celtic root Bar and the Latin word *"Stare"* (Literally to stand at the bar). It is a combina-

tion of the Celtic root Bar and *"Astar"* or *"Istir"*, third person singular perfect indicative, which means "he pleaded." The function was attributed to the one who functions, and Barrister became the man who pleaded.

The history of the "SS" collar worn by the Chief Justice is an interesting story. We must satisfy ourselves here by stating that the collar worn by the present Chief Justice was bequeathed as an office loom by Sir Alexander Cockburn when he retired from the King's Bench in 1881. There is only one instance in record where the collar seems to be associated with the Lord Chancellor's office. In Holbein's picture of Sir Thomas More, the Chancellor is shown wearing the collar "SS". The collar "SS" is a prominent part of More's coat of arms, as shown on the following cut.

But now if we have solved the "SS" enigma upon the collar of the Lord Chief Justices, how are we going to solve the still further enigma SS which confronts us upon the caption of so many legal documents. What is the meaning of Suffolk SS? Suffolk clearly means that the venue of a certain action is laid in Suffolk. But what then is the force of SS? Most lawyers who have thought of SS in this connection answer that it means *"Scillicet"*, but this answer insists upon another question — Scillicet, what? Scillicet has taken on the meaning of "to wit", but again we must ask "to wit" what? "To wit" in pleading has a specific meaning. It limits a preceeding allegation to the words which immediately follow "to wit." For example, when the allegation is: C.D. performed the obligation of his bond in Middlesex, to wit in the City of London, the force of "to wit" is to limit the venue marked by Middlesex to the smaller venue of London.

Now the SS at the head of our legal documents cannot with any semblence of logic be said to qualify any succeeding words. The word Suffolk on our writs is used for the purpose of showing the venue; and there are no words of more specific venue following the SS. In fact, in the old writs, there was no such caption. I have, therefore, no hesitation in saying that SS never meant Scillicet. I know the *"a posteriori"* argument seems at first sight against my contention. For example, in the old records of Suffolk County in the year 1692 (Volume 32 Page 37 Case of Margaret Price for Witchcraft) I find Essex and the words SC-specifically written instead of SS: thus Essex SC. All this possibly can mean is that the scrivener thought SC was the equivalent of SS. He seems to have been alone in this conception, because nearly everywhere else in the same volume wherever such a caption is used, we always find SS and not SC. Now, if SS does not mean Scillicet, it is very clear that it could never have been used in any sense as part of the caption showing the venue. And SS cannot mean Scillicet. There are well known rules used by

the old writers in abbreviating Latin words. Scillicet is composed of two word Scire, Licet. SC might be taken as an abbreviation of Scire. But the natural abbreviation of Scire Licet would be SL.

We find in canonical writings "SS" means *"sub scripsi"*, and the words "Baron Sans Son Femme" for example, are written sometimes Baron "SS" Femme. In these two cases, SS means the first letter of sub and scripsi and Sans and Son respectively.

How then can SS be abbreviated into SC? I find nowhere in the history of pleading the slightest suggestion that they can be so abbreviated. Of course, it is taken for granted that they are so abbreviated, but there is no statement or proof that the two combinations are the same. I have looked into every nook and corner of old Westminster Hall to find Alladin's Lamp which might show me the cave and the key to unlock the box that holds the secret. I found the doors wide open with no light; not even a pathway. I called on Brackton, Glanville, Fortescue, Littleton, Cook, Bacon, and Blackstone. Silence only answered my cry. I looked through the Registrum Brevium, the Year Books, all the old Reports from Elizabeth down to George III. I found no kind of an intimation even of the meaning of these letters. I looked through Norman French vocabularies and met with only the same stony stare. But as I was about to turn away, I heard the voice of Lord Hardwicke saying "Come with me." To my surprise, he said to me (*Godderell* v. *Cowell*, 2 Lee's K. B. R. 543). "The word SS, I verily believe, was not originally meant to the County but only a denotation of each paragraph or section of the records." Lord Hardwicke according to Lord Campbell was "Universally and deservedly considered the most consummate judge who ever sat in the Court of Chancery." He had been Lord Chief Justice. When such a distinguished lawyer unqualifiedly destroys the theory of SS meaning "Scillicet", or "to wit," it seems to me no further argument is

needed to settle that point. I may say, on the contrary, the decision so far as in my favor, and the meaning of the decision is that Suffolk SS does not mean Suffolk Scillicet or Suffolk to wit. So that we must still look for the meaning of SS.

Lord Hardwicke has only given us a morsel of comfort. For how can his theory be substantiated that the letters apply to the paragraphs of the record. As a matter of fact, the letters SS were written only at the head of the paragraphs of the old Rolls. Can any answer then be given? Let me suggest one.

The Writs or Bills issued out of the Chancery office. They came from the Jurisdiction of the Chancellor. They were returnable to another jurisdiction, that of the Kings Bench, Common Pleas and Exchequer. They naturally fell there under the new and particular jurisdiction of the Lord Chief Justices, or the Lord Chief Baron, the chiefs of the Courts, to which they were returned. The Writ was recited in the Declaration, and on the upper left hand margin of the *Declaration* the words showing the venue—appeared—Middlessex SS. or some other County. The old Writs had no venue shown on the margin. When the case, however, was returned into Court, it became subject to the jurisdiction of the Lord Chief Justice or Lord Chief Baron. The SS on his collar was the special mark of his headship of the Court. It was therefore, carried into the declaration for the purpose of showing that the paper had passed into the jurisdiction of the head of the court to which it had been returned. It was now in the "SS" Jurisdiction. That is in the Jurisdiction of the Lord Chief Justice or Lord Chief Baron. The SS became the insignia of the jurisdiction. The whole scheme of heraldry is simply symbolism. Who would have thought that the pulse of the great British Empire is dead, until stimulated by the presence of Mace? The Mace was simply an old war club. Yet the House of Commons is not officially in session until the Mace is placed on the Table before the Speaker. What meaning could be giv-

en to the bundle of rods and the axe on the back of a Roman coin, if we did not know they symbolized the power of the Praetor. They were the Fasces carried in front of that officer. They were the special emblem of his office. This explanation, I venture to say, furnishes at least a tangible reason for use of the "SS".

And so the beautiful old Celtic spirals which shone resplendent on the robes of the Brehons (Judges) and Kings have lent some little interest, if not lustre, to the sombre features of My Lady the Common Law. Once again, "Captured Greece, captures Rome, her conqueror."

THE WORK OF THE AMERICAN LAW INSTITUTE[1]

HERBERT F. GOODRICH

Lord Chief Justice Reeve, of the English Court of Common Pleas, in 1791 wrote to his nephew, who was about to begin the study of law. He referred the young man to a list of fourteen law books, several of them intended as reference works only. These being examined, the student was directed "to give diligent attendance on the courts at Westminster, and to begin orderly reading the several reports, which must be read and commonplaced in such manner as . . . you will be able to advise yourself." The study of law in 1791, although lawyers and judges even then complained of the burdensome amount of recorded learning, was a simple matter. In Lincoln's time in our own country there were not half a dozen law libraries in Chicago that could boast a hundred volumes. Lincoln and his partner had a "superior" library—their Illinois reports and twenty or thirty volumes of various law books, legislative reports and congressional documents.

The Present Confusion in the Law

A few short decades have made an enormous change. The library of the practicing lawyer runs into thousands of volumes; that of a local bar association may run into the tens of thousands. The reports of cases decided by the court of last resort in Illinois now number 325 volumes, Pennsylvania 288, New York 244, Massachusetts 255,, Michigan 236. The last volume of the reports of the United States Supreme Court numbers 270. Decisions from the various appellate courts in this country whose opinions are printed now number about 30,000 a year. This does not mean that people in the United States start or try 30,000 law suits a year; it means

[1] This article originally appeared in The Annals of the American Academy of Political and Social Science, Volume 136, No. 225, March, 1928 pages 10-14, and is reprinted by permission.

that of the total tried there have been appeals, briefs, arguments and decisions by higher courts in this tremendous number. A lawyer would not have time to go through the physical labor of reading all this mass of material as it appeared if he devoted all his working hours to the undertaking. Much less could he examine it critically to see what it was all about. Each year the volume increases.

But this mass of reported decisions cannot be disregarded by the lawyer. To advise a client of his rights or liabilities, he must know what courts have said in other cases where the facts were similar to the one the client presents to him. To know what the courts have said, the lawyer must have access to the books in which the decisions of cases are reported. This expense of acquiring and keeping up the sets of reports is very great. Again, even with the help of indices and skillfully constructed digests, the time involved in looking up the law on a given point accumulates with startling rapidity. Yet the time must be devoted to the task; it is no longer safe to give a legal opinion, as in pioneer days, "by the grace of God and the light of pure reason." Furthermore, the lawyer's time must be paid for. He cannot do his work for nothing if he is to make a living. It is not only the large and important cases, either, that present hard problems; many small transactions bristle with legal difficulties covering a wide range.

The worst of it is that even when the lawyer has bought his large library of expensive law books, and spent many hours in looking up legal authorities on his client's problem, he may not be able to give advice with any feeling of certainty that the court in his own state will uphold him. Perhaps his question may never have come before the Supreme Court of his own state, but a dozen courts in neighboring states may have pronounced on it. Perhaps those courts have divided in their view as to the settlement of the question; a majority of them may have have dicided one way, but a respectable minority announced a different opinion and supported it by what seems

to the lawyer many convincing reasons for the result. It may well be, as it is in many places in the law, that either rule would work well enough if the rule could be authoritatively settled. But in the meantime the lawyer can only give a guess as to what his own court will say, and neither he nor the client can know whether the guess is right until a long and expensive litigation is concluded. If what the client wants is a guidance for future conduct, not help from a present predicament, his adviser must send him away empty-handed.

Because of our federal system of government in this country we have no one court which has authority to settle, once for all, the rule which shall stand as the law in all the states of the Union. The United States Supreme Court has final authority on matters involving the Constitution or laws of the United States, and the states must obey. It is the final arbiter in determining whether a state tax statute unlawfully burdens commerce among the states, or whether a man's life, liberty or property have been taken from him by a state without due process of law. But our federal Supreme Court has no authority to lay down a rule on general matters for the whole country which the states must follow. Such questions as the duty of the driver of an automobile to his gratuitiously carried guest, how long an offer to sell certain goods remains open for acceptance, whether an agent has power to subject his employer to liability by signing a note, are not reviewable by federal authority when once settled by the highest court of a state.

Formation of American Law Institute

It was from this confusion of tongues that the idea of the American Law Institute developed. A group of thoughtful lawyers asked themselves: Is there not some way which can be devised to relieve the law of some of its growing complexity and uncertainty? Cannot the judges on the bench, the practitioners at the bar, and the law schools and their faculties

together work out a solution of the problem? It was with this idea in mind that the organization meeting of the American Law Institute was held in Washington on February 23, 1923. Those present heard and considered the report of a committee which bore the formidable title of "The Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute." The committee was composed of distinguished lawyers; its report was made to a body of lawyers and judges of equal eminence. The American Law Institute was thereupon organized. Its declared purposes, as stated in its articles of incorporation are: "To promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work." Its honorary president from the beginning has been Mr. Elihu Root, whose judgment, counsel and enthusiasm have been of invaluable assistance. Its other officers, Mr. George W. Wickersham of New York, the president, Honorable Benjamin N. Cardozo, Chief Judge of the New York Court of Appeals, the vice-president, and Mr. George W. Murray, the treasurer, have, since the formation of the Institute, given unselfishly of their time and effort to further the work. Mr. William Draper Lewis, formerly Dean of the Law School of the University of Pennsylvania, has been the able Director of the Institute since the work started. He now gives his entire time to its various activities. The governing body of the Institute, its council and also its membership have uniformly been composed of lawyers of high standing. They have been chosen from men in active practice, judicial positions, and the faculties of the law schools of the universities.

The Restatement of the Common Law

The kind of work the Institute is doing has always been clear to that body, but has not always been understood generally. The Institute does not propose to reduce the various

branches of the law to a form of statement suitable for enactment into statute, and to recommend to legislatures for passage. Such work has already been done for more than a quarter of a century in this country by a very able body known as the National Conference of Commissioners on Uniform State Laws. That body has drafted statutes upon subjects such as negotiable instruments, sales of personal property, transfers of corporate stock, and has done its work very well. Uniform statutes upon these and other important matters are now to be found upon the books of many of our states. The Institute is in no sense competing with this Conference, nor is it covering the same field. It has made but one excursion into the realm of statute drafting. The criminal procedure in the United States has been the subject of so much discussion and criticism both in and out of the legal profession that it was thought proper to make a study of the various statutes upon the subject and to draw up what might be called a model code of criminal procedure, in a form which could be adopted by a legislature. The committee on this subject is now at work. But the main undertaking of the Institute is, to borrow Mr. Wickersham's language, "to restate in clear intelligent form the existing common or unwritten law upon such topics as from time to time may be taken up for restudy and restatement." The body has neither official position nor governmental backing. It is a voluntary association of men interested in the law, seeking its improvement. Its ambition is that, through the careful and painstaking work of the Institute and its committees, there can be made such a clear and accurate statement of the rules of the common law that lawyers and judges can accept this statement as "the law," without having to work back through the myriad of precedents and dicta upon which the statement is based. The accomplishment of this fine vision will be a critical test of American legal scholarship.

Funds for the carrying on of this great research project,

necessitating, as it does, an enormous amount of examination of law books, meetings of legal experts, and publication of the material, have been provided through the generosity of the Carnegie Corporation. This gift is sufficient to support the work, at its present rate, for a period of ten years.

The Method of Work

The law covers too wide a field to undertake a restatement of all of it at one time. Further, some of its conventional divisions, like that concerning negotiable paper or the sales of personal property, have become so largely statutory that restatement of the common law upon the subject is not urgently required. So a beginning was made by choosing a few subjects to work upon. Conflict of Laws, Contracts, Agency and Torts were selected.

The work of restatement is entrusted to a lawyer called the Reporter. In Conflict of Laws, the Reporter is Professor Joseph H. Beale of the Harvard Law School; in Contracts Professor Samuel Williston of the same school; in Agency, Professor Floyd R. Mechem of the University of Chicago Law School; in Torts, Professor Francis H. Bohlen of Harvard, formerly of the Law School of the University of Pennsylvania. These men, and the others chosen for similar positions since, have lived with these various subjects for many years. They have taught it to law students; they have written books and articles on its various problems; they have been counsel in litigation involving questions in their special fields. They begin this work with the Institute as experts in their respective branches of the law. They are provided with assistants who help in examination of all relevant material, reports of cases, legal essays, and textbooks in the particular branch of law.

The Reporter, having made a tentative outline of his subject, reexamines the source material of a subdivision of it and makes a draft of what he considers to be the correct rules of law therein. When in form and substance it appears satis-

factory to him, he submits it to a group of advisers. They are men also chosen for knowledge and experience in that particular field of law; some from the practice, some from the bench, some from the law schools. The Director, the Reporter and the Advisers, having studied the material, meet and talk it over. Differences of opinion develop over both the substantive law and the form in which the statements are made. If the rule under debate is one where courts have differed in opinion the merits of each side are fully discussed. One view or the other is chosen as the consensus of opinion. Reasons why the view chosen is considered preferable are set forth in a statement to be presented to the general meeting of the Institute. A forty-page pamphlet of material is covered and debated with difficulty in a session lasting three or four full days. Generally three, sometimes four such meetings on the same material are required to prepare it satisfactorily for submission to the Council. In the Council the tentative Restatement is again examined and again discussed. Finally it is submitted to the membership of the Institute for discussion at its annual meeting. Here, too, it is only tentative, still open to criticism, and suggestions for improvement. Many such suggestions are received and many improvements are made.

If this heroic process does not produce a carefully prepared, sound and accurate statement of the common law, it is hardly possible to see how one can be made. The work starts in the hands of one already an expert in his field, and is subjected throughout to close scrutiny by those hardly less expert than he. There is no effort to rush the thing through; each problem is carefully considered.

The form of the Restatement is perhaps novel to the profession. It is not designed for light reading, nor as a treatise to make every man his own lawyer. The statement of the principle of law appears as a rule in black letter text. This is followed by comment explaining the application of the rule.

Illustration follows, when deemed necessary, to show the application of the rule to a concrete set of facts. Following is a sample section, taken at random from the most recently completed portion of the Restatement of Conflict of Laws. It is from the chapter dealing with Corporations.

> Section 173. Unless forbidden by statute, a foreign corporation may acquire, hold, and dispose of real and personal property situated in the state.
>
> *Comment*:
>
> (a) The acquisition, holding, and disposition of property is governed by the law of the state where it is situated (see Sections 00). That state may by statute limit or altogether deny the power of a foreign corporation to hold real or personal property. There is no such limitation at common law.
>
> Illustrations:
>
> (a) A deed of land in state Y is made to the A Trust Company, a corporation of state X, in trust for B. The validity of the conveyance and the rights of the parties under it are settled by the law of State Y.
>
> (b) A charitable corporation of state X, with power to buy, own, and sell land. The statutes of state Y have no express provision as to the holding of real estate by charitable corporations. A will be permitted to hold land in Y.

The work has progressed steadily since the formation of the Institute in 1923. Some of the subjects are well along toward completion. In all of them substantial progress has been made. Work has begun in additional subjects. Property is to be stated under the direction of Professor Harry A. Bigelow of the University of Chicago Law School. Professor Austin W. Scott of Harvard has undertaken a statement of the Law of Trusts. The Director is working on the law of Business Associations. New work will be undertaken as time goes on.

An interesting test to make of the Institute's Restatement

is to take a portion of it in any subject and compare the rules of law as there stated with the decisions of one individual state on the same points. As might be expected, they run very closely together. There is this difference; the Restatement is logically stated and developed with great care; a body of decisions is necessarily a patchwork. Problems do not come before courts in logical order, but hit or miss, as cases of individual litigants which the judges must decide. And the value of an opinion expressing a court's decision varies with the ability of the particular judge who writes it. In the instances where comparison has been made, decision and restatement ran very close together. Only now and then a variation appeared. One variation alone makes no substantial difference. Twenty slight departures from general rules by one court appreciably effects that state's law. Multiply the twenty by the number of courts in our country, and no further demonstration is required of the great need for some authorative statement of the law that courts can follow. This is what the the Institute hopes to do.

Prospects are very encouraging for a large measure of success in the realization of these hopes. That the work is being thoroughly and carefully done there is no doubt. Though all the Restatements are still in tentative form, they have already been cited by high courts as correctly stating the law. The profession is greatly interested, and is giving the work its hearty support. For the future there must be the exercise of the same careful scrutiny over the work remaining as has been exercised over that already done. It is equally essential that all the lawyers the country over are kept in touch with the progress of restating the law.

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EQUITY—DEFENSE OF LACHES BASED ON DOCTRINE OF ESTOPPEL

In the case of *State v. McPhail*[1] a tax bill was filed on January 5, 1922, against several defendants to recover for state and county taxes for the year 1920, and to have liens declared on certain property and that property sold in satisfaction of the liens. On January 16, 1922, a subpoena to answer was issued for all defendants. The subpoena for the defendant Nisserson, was returned March 22, 1922, unexecuted with the notation "not to be found in my county." On June 3, 1927, the chancellor, on motion of Nisserson, dismissed the bill on the ground of laches in the prosecution of the suit. The Supreme Court of Tennessee reversed the holding of the chancellor, on the ground that the defense of laches was based on the doctrine of equitable estoppel, and that it was applicable only where the party invoking it had been prejudiced by the delay.

The attorney for the complainant in the principal case relied mainly on the holding in the recent Tennessee case of *State v. Patterson*.[2] In this case the court expressly found that the taxpayer Pegram was not a party to the suit, but rather he stood in the position of an innocent purchaser. Hence his defense of laches on the part of the State for four years was good, particularly since the delay was not satisfactorily explained. McKinney, J., in the opinion in the principal case, pointed out the difference in the facts of the two cases, and refused to apply the rule laid down in the Patterson case, especially since it did not appear from the record in the prin-

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[1] (1928 Tenn.) 2 S. W. (2d.) 413.

[2] (1927 Tenn.) 290 S. W. 973.

cipal case that the defendant had been injured or placed at a disadvantage by reason of the delay.

Where there has been an unreasonable or an unexplained delay in asking for relief or in the prosecution of the claim after the suit is filed, equity may refuse relief under the doctrine of laches.[3] Laches in a general sense is delay for unreasonable and unexplained length of time, under circumstances permitting diligence, to do what should have been done. Such delay taken in conjunction with other circumstances causing prejudice to an adverse party, operates as a bar to relief in a court of equity.[4] Obviously this doctrine applies chiefly to cases where the complainant delays in starting his action but it is well settled that the mere institution of a suit against a defendant does not make the doctrine of laches inapplicable. If the plaintiff fails to prosecute his suit with reasonable diligence after it has been started the doctrine may be applied.[5] It is equally well settled that unless a case is governed by the statute of limitations, there is no fixed period of time which may be said to constitute laches. Each case must be decided upon its particular set of facts by the chancellor in the exercise of his judicial discretion.[6]

Both the decision in the principal case, and the one relied upon by the plaintiff, apparently represent a sound view

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[3] Clark, Equity (1919) sec. 31.

[4] 21 C. J. Equity sec. 211.

[5] Johnson v. Standard Mining Co. (1893) 148 U. S. 360, 13 Sup. Ct. 558; Meyer v. Jonston (1894) 60 Ark. 50, 28 S. W. 797; Hagerman v. Bates (1897) 24 Colo. 71, 49 Pac. 139; Tinsley v. Rice (1898) 105 Ga. 285, 31 S. E. 174; Ex parte Baker (1903) 67 S. C. 74, 45 S. E. 143; Wooding v. Bank (1895) 11 Wash. 527, 40 Pac. 223; Thomas v. Van Meter (1896) 164 Ill. 304, 45 N. E. 405.

[6] Townsend v. Vanderweker (1895) 160 U. S. 171; 16 Sup. Ct. 258; Geter v. Simmons (1909) 57 Fla. 423, 49 So. 131; Ferguson v. Boyd (1907) 168 Ind. 537, 81 N. E. 71; Holzer v. Thomas (1905) 69 N. J. Eq. 515, 61 Atl. 154; Madison v. Copper Co. (1904) 113 Tenn. 331, 83 S. W. 658; Likens v. Likens (1908) 136 Wis. 321, 117 N. W. 799.

and are in accord with the weight of authority,[7] in holding that the defense of laches does not apply where the person interposing that defense fails to show that he was prejudiced, or damaged by the delay on the part of the plaintiff. An apt statement of the rule, quoted by Mr. Pomeroy in his treatise on Equity Jurisprudence,[8] taken from the decision in the case of *Chase v. Chase*,[9] is as follows: "Laches, in the legal significance, is not mere delay, but delay that works a disadvantage to another. So long as the parties are in the same condition, it makes little difference whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing its rights, he takes no step to enforce them until the condition of the other party has in good faith become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable, and operates as an estoppel against the assertion of the right . . ."

J. D. P.

EVIDENCE—TESTIMONY OF A THIRD PERSON AS TO COMMUNICATIONS BETWEEN HUSBAND AND WIFE

In a criminal prosecution the defendant offered as a witness the husband of the prosecuting witness to prove that the prosecuting witness made certain statements in the presence of her husband and of the defendant. *Held* that the exclusion of the evidence was reversible error.[1]

Where both the husband and the wife knew that a third party was present when the oral remarks were made either spouse may testify against the other because in such a case

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[7] Cases cited in notes 5 & 6.

[8] 4 Equity Jurisprudence (4th Ed.) 3418.

[9] (1897) 20 R. I. 202, 37 Atl. 804.

[1] Victor v Commonwealth (1927) 221 Ky. 350, 298 S. W. 936.

clearly no confidence was intended.[2] Even though husband and wife thought they were alone according to the weight of authority an eavedropper may testify as to a conversation between them.[3] There is no unanimity of opinion where the evidence offered consists of letters written by one spouse to the other. Some courts treat written communication as "inherently privileged" and refuse to admit them in evidence regardless of the manner in which they were obtained.[4] But most courts admit the letters in evidence where there has been no injury to the relations of the parties by the betrayal of the confidence reposed.[5] Thus where a husband inadvertently dropped letters received from his wife and they were picked up by a person occupying no fiduciary relation with either spouse, the letters were held to be admissible.[6] Likewise letters found on a cabin floor,[7] or in a coat,[8] have been held

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[2] Brown v Brown (1918) 134 Ark. 380, 203 S. W. 1009; People v Morhar (1926 Cal.) 248 Pac. 975; Cocroft v Cocroft (1924) 158 Ga. 714, 124 S. E. 246; Linnell v Linnell (1924) 249 Mass. 51, 143 N. E. 813; Long v Martin (1897) 152 Mo. 668, 54 S. W. 473; Reed v Reed (1902) 101 Mo. App. 176, 70 S. W. 505; State v McKinney (1918) 175 N. C. 784, 95 S. E. 162; Goforth v State (1925) 100 Tex. Cr. A. 442, 273 S. W. 845; Steeley v State (1920) 17 Okl. Cr. 252, 187 Pac. 821; State Bank v Hutchinson (1900) 62 Kan. 9, 61 Pac. 443; People v Garner (1901) 169 N. Y. 585, 62 N. E. 1099.

[3] Hildebrant v State (1922 Okl.) 209 Pac. 785; Commonwealth v Wakelin (1918) 230 Mass. 567, 120 N. E. 209; Whitehead v Kirk (1913) 104 Miss. 776, 61 So. 737, 51 L. R. A. (N.S.) 187; Pilcher v Pilcher (1925) 117 Va. 356, 84 S. E. 667.

[4] Scott v Commonwealth (1893) 94 Ky. 511, 33 S. W. 219, A. S. R. 371; Dalton v People (1920) 68 Colo. 84, 189 Pac. 37; Knapp v Knapp (1916 Mo.) 183 S. W. 576; Lancelot v State (1897) 98 Wis. 137, 73 N. W. 575; Mercer v State (1898) 40 Fla. 216, 24 So. 154, 74 A.S.R. 135; Gross v State (1911) 61 Tex. Cr. R. 176, 135 S. W. 373.

[5] O'Toole v Ohio German Fire Ins. Co. (1909) 159 Mich. 187, 123 N.W. 795.

[6] Supra note 5.

[7] Darnaby v State (1928 Cr. App. of Tex.) I S.W. (2d) 615; Truelsch v Northwestern Mut. life Ins. Co. (1925) 186 Wis. 239, 202 N.W. 352.

[8] People v Swaile (1909) 12 Cal. A. 192, 107 Pac. 134.

admissible. If the letters were obtained from the addressee voluntarily it would seem that they should still be privileged. Most of the courts who have passed on the question have taken this view.[9] It has been held that a message is still priviliged if it was taken from the spouse by force,[10] or by artifice.[11] Respect for the matrimonial confidence is reasonable and conducive to a happy married life and hence should be encouraged by the courts. But it is submitted that the importance of correctly disposing of litigation by permitting parties who actually know the facts to testify freely, is greater than the injury to the martial relation in all cases in which there is no fraud on the part of either spouse.

C. W. A

PUBLIC UTILITIES — REGULATION OF BUYING AND SELLING OF GASOLINE

A Tennessee statute[1] creates a commission for the purpose of securing data in regard to the marketing of gasoline and authorizes this commission to fix reasonable prices at which gasoline can be lawfully sold within the state. This statute also makes it unlawful to sell gasoline at different prices to purchasers in different localities in Tennessee except to the extent that such prices are affected by freight charges. In the recent case of *Standard Oil Co.* v *Hall*[2] it was held that this

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[9] 28 R.C.L. Witnesses Sec. 119; McCormick v State (1916) 135 Tenn. 218, 186 S. W. 95; Mohner v Linck (1897) 70 Mo. App. 380; Dalton v People (1920) 68 Colo. 44, 189 Pac. 37; Harris v State (1913) 72 Tex. Crim. App. 117, 161 S. W. 125.

[10] Ward v State (1902) 70 Ark. 204, 66 S.W. 926.

[11] People v Dunninghan (1910) 163 Mich. 349, 128 N.W. 180.

[1] Pub. Acts Tenn. 1927, Chap. 22; Shannons Code Tenn. sec. 6437.

[2] (1927, Dist. Ct. M. D. Tenn.) 24 Fed. (2d) 454.

statute was invalid as it violated the fourteenth amendment to the federal constitution in that it deprived both the buyer and the seller of the freedom to contract.

The power of a state to regulate a public utility and fix rates is well settled. The only limitations are that the rates must be reasonable and the right of a public utility to manage its own property must not be infringed upon. In none of the cases where it is admitted that the business is a public utility has it been held that regulation impairs the right of freedom of contract; the sole issue being whether or not the rate affords an opportunity to make a fair return on a fair valuation of the utility property used and usable for utility service.[3] Statutes that restrict the freedom of contract have been upheld in cases of emergency even where the business regulated was not a public utility.[4] If the business is a public utility, or if emergency demands it, the state can exercise this right of regulation through a proper exercise of its police power.[5]

It is necessary, then, to bring the marketing of gasoline into one of these two classes in order to render valid the regulatory statute. A state cannot, by a statute declaring a business to be so affected by a public interest, make it a public utility if it is not one in fact. The determining factor is the

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[3] Village of Saratoga Springs v. Saratoga Gas, Elec. Light, & Power Co. (1908) 191 N. Y. 123, 83 N. E. 693; McCardle v. Indianapolis Water Co. (1926) 272 U. S. 400, 47 Sup. Ct. 144; Missouri ex rel Southwestern Bell Telephone Co. v. Public Service Commission of Mo. (1923) 262 U. S. 276, 43 Sup. Ct. 544; Knoxville v. Knoxville Water Co. (1909) 212 U. S. 1; 29 Sup. Ct. 148; Minnesota Rate Cases (1913) 230 U. S. 352, 32 Sup. Ct. 729; Willcox v. Consolidated Gas Co. (1909) 212 U. S. 19, 29 Sup. Ct. 192.

[4] People ex rel Durham Realty Co. v. La Fetea (1921) 180 N. Y. Supp. 63, 130 N. E. 601; Wilson v. New (1917) 243 U. S. 332, 37 Sup. Ct. 298.

[5] American Coal Mining Co. v. Special Coal & Fuel Commission of Ind. (1920) 268 Fed 563; So. Pacific Co. v. Campbell (1913) 230 U. S. 537, 33 Sup. Ct. 1027; Home Telephone & Telegraph Co. v. City of Los Angeles (1908) 211 U. S. 255, 29 Sup. Ct. 50.

character of the business itself.[6] Is the gasoline industry in Tennessee at the present time of such a character as to be a public utility? In *Munn* v. *Illinois*[7] grain elevators were held to be public utilities. In declaring them to be public utilities and subject to regulation the Court said, "When one, therefore, devotes his property to a use in which the public has an interest, he in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created." However, this was not the entire basis for the decision in that case for the facts show there was a virtual monopoly, coupled with the public interest. In *Cotting* v. *Kansas City Stock Yards Co.*[8] stock yards were held to be public utilities. Here, too, there was a virtual monopoly, although the main basis for holding the yarding and feeding of stocks as a public utility business was that it was affected with a public use. In *Pannell* v. *Louisville Tobacco Warehouse Co.*[9] the business of buying, selling, and warehousing tobacco was held to be a public utility and subject to regulation. It is difficult to see how the above instances are more affected with the public interest that the principal case.

In *Tyson* v. *Banton*[10] it was held that a statute regulating the brokerage of theatre tickets was unconstitutional as depriving the broker of his freedom of contract guaranteed by the Fourteenth Amendment. But it was expressly held that the subject matter of the legislation was not affected with a

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[6] Michigan Public Utilities Commission v. Duke (1925) 266 U. S. 510, 45 Sup. Ct. 191; Wolff Packing Co. v. Ct. of Industrial Relations (1923) 262 U. S. 522, 43 Sup. Ct. 630; Frost v. R. R. Commission of Cal. (1926) 271 U. S. 583, 46 Sup. Ct. 605.

[7] (1876) 94 U. S. 113, 24 L. Ed. 77.

[8] (1901) 183 U. S. 79, 22 Sup. Ct. 30.

[9] (1902) 113 Ky. 630, 87 S. W. 630.

[10] (1927) 273 U. S. 418, 47 Sup. Ct. 246.

public interest, hence it was not a public utility. In *Fairmont Creamery Co.* v. *Minnesota*[11] a statute making it unlawful to purchase cream at higher prices in one locality than in others, after allowing for differences in cost of transportation, was held unconstitutional. It seems difficult to reconcile this case with the others cited, but this legislation was for the protection of the smaller dealers in the state, and not for the protection of the people in general. Looking at it from this angle, the industry was not, strictly speaking, affected with a public interest.

The extent that an industry must be affected with a public interest in order to be a public utility has never been settled. It is impossible to form a set rule because the status of industries and businesses continually change. However, it appears that the gasoline industry is affected with a public interest as much as grain elevators,[12] stock yards,[13] tobacco warehouses,[14] and coal mines,[15] all of which have been held to be affected with a public interest and to be public utility businesses.

Further analogy can be found between the gasoline industry and the others cited. Counsel for the State of Tennessee maintain that the Standard Oil Co. of New Jersey through the Standard Oil Co. of Louisiana and other subsidiary corporations have a virtual monopoly of the buying and selling of gasoline in Tennessee. It does not appear that this

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[11] (1927) 273 U. S. 1, 47 Sup. Ct. 506.

[12] Budd v. N. Y. (1892) 143 U. S. 517, 12 Sup. Ct. 468; Brass v. N. Dakota (1894) 153 U. S. 391, 14 Sup. Ct. 857.

[13] Cotting v. Kansas City Stock Yards Co., Stafford v. Wallace (1922) 258 U. S. 495, 42 Sup. Ct. 397.

[14] Pannell v. Louisville Tobacco Warehouse Co. (1902) 113 Ky. 630, 82 S. W. 1141.

[15] Rail & River Coal Co. v. Yaple (1915) 236 U. S. 338, 32 Sup. Ct. 359; McLean v. Arkansas (1909) 211 U. S. 539, 29 Sup. Ct. 206.

contention is tenable, inasmuch as there are other large oil companies operating within the state. But, is it necessary that there be a monopoly by *one* corporation? In *Munn* v. *Illinois* there were nine different companies owning and controlling the various elevators. In *Cotting* v. *Kansas City Stock Yards, Pannell* v. *Louisville Tobacco Warehouse Co., McLean* v. *Arkansas,* and similar cases it was held to be a virtual monopoly where the industry was controlled by a small group of operatives, and not entirely by one company. This is the case in Tennessee. The large oil companies have complete control of the sale of gasoline within the state. Thus it seems that by applying the decisions of the Supreme Court of the United States to the facts, the gasoline industry in the state of Tennessee should have been held to be a public utility, and consequently subject to regulation by the state Legislature. There is no emergency in Tennessee that demands the exercise of the police power, and if there is to be regulation it must result from the character of the business. Generally an emergency is held to exist only in time of great stress or unusual conditions.[16]

A. M.

TORTS—INVASION OF THE RIGHT OF PRIVACY

The following sign was posted in a conspicuous place in the window of the defendant's garage: "Notice. Dr. W. R. Morgan owes an account here of $49.67. And if promises would pay an account, this account would have been settled long ago." A recent Kentucky case[1] affirmed a judgment in favor of Dr. Morgan for substantial damages on the theory

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[16] Marcus Brown Holding Co. v. Feldman (1920) 269 Fed. 306, 41 Sup. Ct. 465; American Coal Mining Co. v. Special Coal & Fuel Commission of Ind. Supra.

[1] Brents v Morgan (1927 Ky.) 299 S.W. 967.

that the defendant was guilty of an invasion of his right of privacy, notwithstanding a Kentucky statute making truth a complete defense.

Apparently the right of privacy was asserted first by Messrs. Louis D. Brandeis and Samuel D. Warren in an article in the Harvard Law Review[2] in 1890. Today there is a split of authority as to whether or not there is such a right independent of statute, some courts holding that it is altogether a question of legislative enactment.[3]

Messrs. Brandeis and Warren outlined the extent of the so-called right of privacy as follows: 1. It does not prohibit the communication of matter of public or general interest. 2. It does not prohibit the communication of matter, although private in nature, when publication is made under circumstances which would render it a privileged communication according to the law of libel and slander. 3. No redress can be had for the invasion of the right by oral publication. 4. The right ceases on the publication of the facts by the individual, or with his consent. 5. Truth is no defense. Those courts that have recognized the right of privacy seem to be in accord with this classification.[5] Prior to this article, some courts based their decisions on the ground that property rights had been invaded, and where an invasion of such rights could not be shown, equity refused to interfere.[6]

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[2] "The Right of Privacy" (1890) 4 Harvard Law Review, 193.

[3] Henry v Cherry & Webb (1909) 30 R. I. 13, 73 Atl. 97. Robertson v Rochester Folding Box Co. (1902) 171 N.Y. 538, 64 N.E. 442; Atkinson v Doherty & Co. (1899) 121 Mich. 372, 80 N.W. 285.

[4] Supra Note 2.

[5] Dixon v Holden (1869 Eng.) 7 L.R. Eq. 499; Prince Albert v Strange (1849 Eng.) 1 Mac. & G. 25; Corliss v Walker (1893 Mass.) 57 Fed. 434; Colyer v Fox Publ. Co. (1914) 162 App. Div. 297, 146 N.Y. Supp. 999.

[6] Hodecker v Stricker (1896) 39 N. Y. Supp. 515; Brandreth v Lance (1839) 8 Paige 24, 4 N.Y. Ch. 330; Chappel v Stewart (1896) 82 Md. 323, 33 Atl. 542.

In a case somewhat analagous to the principal case, damages were allowed against a merchant who attached to furniture in front of his store, the following sign: "Taken from (X) who would not pay for it. Moral? Beware of deadbeats."[7] Placing a sign on a debtor's house, requesting him to call and pay his debts was held actionable by a Kentucky court.[8] Advertising a debtor's account for sale by displaying large painted signs has been held actionable.[9]

If the motives prompting publication are unjustifiable, some courts hold under State statutes that truth is not a complete defense to a libel. Following this rule, damages have been allowed for publishing in a newspaper that the plaintiff had refused to pay his debts,[10] and for mailing a letter to a debtor in an envelope containing the name of a "bad debt" collecting agency.[11] In the absence of such a statute it has also been held actionable to publish in a newspaper that a plaintiff had failed to pay overdue taxes; the court holding that the truth is not complete defense when unjustifiable motives prompt the publication.[12]

This right of privacy is a personal right, and special damages need not be proved to entitle one to recover for its invasion.[13] However, by entering public life the right of privacy is impliedly waived. Applying this doctorine, an injunction was refused by the court to restrain the publication of a biographical sketch of an inventor of world-wide repute.[14]

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[7] Woodling v Knickerbocker (1883) 31 Minn. 268, 17 N.Y. 387.

[8] Thompson v Adelberg (1918) 181 Ky. 487, 205 S.W. 558.

[9] Green v Minnes (1891 Can.) 22 Ontario Rep. 77.

[10] Turner v Brien (1918) 184 Ia. 320, 167 N.W. 584.

[11] Missouri v Armstrong (1891) 106 Mo. 395, 16 S.W. 604.

[12] Hutchins v Page (1909) 75 N.H. 215, 72 Atl. 689.

[13] Supra Note 1; Foster-Milburn Co. v Chinn (1909) 134 Ky. 424, 120 S.W. 364.

[14] Corliss v Walker, Supra Note 5.

Likewise, the attempt of Vassar College to restrain a manufacturer of candy from naming it the "Vassar Chocolates," proved futile.[15]

Courts look with disfavor upon such extreme methods of compelling the payment of debts, as was resorted to in the instant case, whether or not they hold generally, that truth is an absolute defense to a libel. The instant case in allowing damages for an invasion of the right of privacy in such a case, is in accord with the modern trend of decisions in similar cases.

O. V. M.

TRUSTS—A THIEF AS A CONSTRUCTIVE TRUSTEE

Larceny is a form of fraud by which a thief is unjustly enriched. Constructive trusts are raised to prevent fraud and unjust enrichment. It would seem that every thief should be declared a trustee of the property which he has stolen, and should hold it for the benefit of the true owner. But this are apparent. A trustee should have legal title to the subject seemingly simple remedy involves more difficulties that at first matter of the trust, while a thief acquires no title to the misappropriated property. There is usually no fiduciary relation between a thief and the owner of the stolen property and in many cases it is impossible to trace the stolen property so that we can lay our hands on it or its proceeds, so as to make it the subject matter of a trust. Also, it is often the case that the owner has an adequate remedy at law. Still, the relief in equity is often considered independent of any remedy the plaintiff may have in a court of law, hence this is not a serious objection.[1]

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[15] Vassar College v Loose-Wiles Biscuit Co. (1912 Mo.) 197 Fed. 982.

[1] (1928) Yale Law J. 654.

Theft does not necessarily prevent the thief from being held as a constructive trustee.[2] Courts have often regarded a thief as a constructive trustee, especially where the stolen property was the subject matter of a trust or for other reasons there was a fiduciary relation.[3] And, in such cases, the fact that the thief does not get the legal title does not seem to affect the decisions, although to regard the thief as a trustee of the very property he has stolen is directly contrary to the view that a trustee must have the legal title. But the courts have been slow to declare a thief a constructive trustee where only legal interests are interfered with and where the thief at the same time retains possession of the stolen property. The reason for this distinction is not clear. However, the courts seem content to leave the owner to his legal remedies when the thief neither occupies a fiduciary relation nor has legal title.[4] If the legal title is in the thief and there is a fiduciary relation between the thief and the owner, the thief may be declared a trustee. Where the thing stolen is money or certain negotiable instruments a thief has a power to convey a good title to an innocent purchaser. In some cases of stolen money or stolen negotiable instruments, courts of equity have been willing to declare a trust in order that justice may be done. In one case money and negotiable bonds stolen from a bank by robbers were taken from the robbers by police officers who were joined as parties defendant with the robbers and were

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[2] 1 Perry, Trusts, 293 (6th ed. 1911).

[3] Bank of America v Johnson (N.Y., 1843) 4 Edw. Ch. 225; Walt v Walt (1904) 113 Tenn. 189, 81 S.W. 288; Densmore v Searle (1896) 39 N.Y. supp. 948; Turner v Peligrew (1846) 25 Tenn. 438; Moffitt v McDonald (1850) 30 Tenn. 457; Bacon v Bacon (1925) 161 Ga. 978, 133 S.E. 512.

[4] Chambers v Chambers (1893) 98 Ala. 454, 13 So. 674; Doyle v Murphy 22 Ill. 502, 74 Am. Dec. 165.

declared trustees of the money and bonds for the benefit of the bank.[5]

The proceeds of stolen property in the hands of a thief are often held to be bound by a constructive trust.[6] In this class of cases the thief always has title, although it is a defeasible one. Here we have no difficulty with the legal title, since it is vested in the person whom we wish to have declared a trustee. The cases in this class fall into two subdivisions: first, those where there is no fiduciary relation between the thief and the owner, and second, those where there is a fiduciary relation. A thief or embezzler sometimes occupies a fiduciary relationship. Many cases do not consider whether or not such a relationship is essential to equity jurisdiction. The rule seems well settled that equity will declare a thief or embezzler a constructive trustee of the proceeds of stolen property where there is a fiduciary relation.[7] There is a split of authority where no fiduciary relation can be found. Some courts consider a fiduciary relation essential in order for equity to have jurisdiction.[8] Other courts take the view that no conventional relation of *cestui que* trust and trustee or other fiduciary relation is essential to the right of a court of equity to declare and enforce a trust with respect to the proceeds of stolen property.[9] It seems that the Tennessee courts take the view that a fiduciary relation is necessary in order to charge a thief as trustee of property con-

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5 Newton v Porter (1877) 69 N.Y. 133; Aetna Indemnity Co. v Malone (1911) 89 Neb. 260, 131 N.W. 200; Lightfoot v Davis (1910) 198 N.Y. 261, 91 N.E. 582.

6 Bogart, Trusts, 120 (1921); Nat. Mahaiwe Bank v Barry (1878) 125 Mass. 20; Pioneering Mining Co. v Tybreg (1914) 215 Fed. 501.

7 Supra, note 3.

8 Pascoag Bank v Hunt (N.Y., 1842) 3 Edw. Ch. 583; Warren v Holbrook (1893) 95 Mich. 185, 54 N.W. 712; 19 Harv. Law Rev. 511; Campbell v Drake (1845) 39 N.C. 94.

9 Neb. Nat. Bank v Johnson (1897) 51 Neb. 546, 71 N.W. 294; Lamb v Rooney (1904) 72 Neb. 322, 100 N.W. 410.

verted into another specie,[10] although many of the cases are not clear on this point.

The kind of property the thief receives in exchange for the misappropriated property is immaterial. A court of equity will impress a trust in *invitum* upon money, stocks, bonds, or any other property which comes into the hands of a thief as the proceeds of stolen property, so long as it has not passed into the hands of a *bona fide* purchaser for value without notice. In other words, the thief can not give away or transfer such property to a transeferee with notice so as to make it no longer subject to a trust. Equity does not stop with the first direct proceeds of the stolen property, but will declare a trust in favor of the injured party as to property purchased by a thief with the proceeds of his larceny. This right to have a trust declared continues and attaches to any securities, money, or other property in which the proceeds are invested, so long as they can be traced and identified, and the rights of a *bona fide* purchaser for value do not intervene.[11] But the proceeds of property obtained by theft may not be claimed as the subject matter of a trust against the thief or his transferee, unless some definite property can be identified as the proceeds of the property wrongfully taken. No identification —no trust, seems to be the rule.[12]

R. S. C.

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[10] Buck v Williams (1872) 57 Tenn. 264; Robinson v Harrison (1874) 2 Tenn. Ch. 11; Wilkinson v Wilkinson (1858) 38 Tenn. 305; Stewart v Greenfield (1885) 84 Tenn. 13; Hawthorne v Brown (1856) 35 Tenn. 462; Cunningham v Wood (1843) 23 Tenn. 417; Ensley v Balentine (1845) 23 Tenn. 233.

[11] Reese v Shook (Tex. Civ. App. 1920) 225 S.W. 429; Truelsch v N.W. Mutual Ins. Co. (1925) 186 Wis. 239, 202 N.W. 352; L.R.A. 1915B 442, 25 Mich. Law Rev. 313 (1927); Bass v Wheless (1875) 2 Tenn. Ch. 531.

[12] U. S. v Bitter Root Development Co. (1906) 200 U. S. 451; Pollack v Leonard (1925) 112 Okla. 276, 241 Pac. 158.

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