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AND

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"The Constitutional Power of Congress over the Territory of the United States."

By Henry Wolf Biklé. 1901. Pp. 120. Price. $2.00.

A review of the decisions of the United States Supreme Court, prior to the insular tariff cases, which dealt with the power of Congress over the public domain not organized into states. The essay is divided into a consideration of the two questions of the source of the power to acquire territory and the extent of the power to govern territory when acquired; the controlling purpose of the essay being to discover the tendency of the decisions relating to such matters at the time of the acquisition of the insular possessions of the United States. The last seventeen pages of the publication constitute a supplement to the essay, dealing specifically with the insular tariff cases which were handed down after the completion of the body of the work.

"Suggestions as to the Nature and Extent of the Liability of Telegraph Companies for Failure to Properly Deliver Messages."

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"The Use of the Phrase *Res Gestae* in the Law of Evidence in Pennsylvania."

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THE INTENTION AND WISDOM OF THE DIVISION OF LEGISLATIVE POWER BETWEEN CONGRESS AND THE STATES.

If there is one principle that our forefathers, founding the Constitution, had more at heart than any other, it is personal liberty,—personal liberty as guaranteed by the universal right to equal law, the laws made by their own home representative bodies, administrated in their own home courts, and based on the common law of England; and the common law of England has ever been jealous of all but common law tribunals, wholly rejects any administrative law peculiar to the government as is known in continental countries, and abhors any tribunal, board, or commission, drawing its authority from the Executive, and which, while not a proper court of justice, undertakes to settle judicial questions.

To secure all this, the great principle of the separation

NOTE.—This article formed the subject of an address delivered by Mr. Frederic J. Stimson before the Society of the Alumni of the Law Department of the University of Pennsylvania at their annual meeting on Friday, April 10th, 1908, and is published through his courtesy and kind permission.

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of the powers of government was adopted and carried to its full extent. In the splendid words of the Massachusetts Bill of Rights:

"In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws and not of men."

The cardinal liberties secured by the Bill of Rights are put forever under the aegis of State legislatures and local common law courts and their independence from the Executive duly secured. And furthermore, we have the State autonomy forever secured by the independent, indestructible State, as well as by the separation of the three powers in both State and nation. And of these cardinal rights, no man may be deprived but by twelve men of his equals in his own country, nor, in criminal causes, be deprived for one day of his personal liberty, but by a finding of twenty-three of his neighbors that there is probable cause for holding him guilty of crime. The totality of all these principles we will sum up in the convenient phrase "local self-government",—but remembering that this phrase means much more than administrative government alone.

To show how strong was this feeling, we will read from a few of the earliest State constitutions adopted both before and after the Federal Constitution of 1789; first that of Pennsylvania, September 28, 1776; then in the same year, that of Maryland, November 11, 1776, and North Carolina, November 18, 1776, and of Vermont, 1777.

"That the people of this State ought to have the sole and exclusive right of regulating the internal government and police thereof."

In the same year is that of Connecticut:

"This Constitution adopted by the people of this State, shall be and remain the Civil Constitution of this State, under the sole authority of the people thereof, independent of any King or Prince whatever. And that this Republic is, and shall forever be and remain, a free, sovereign and independent State, by the name of the State of Connecticut."

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In 1780, we have the constitution of Massachusetts and in 1784 that of New Hampshire.

"The people of this commonwealth have the sole and exclusive right of governing themselves as a free, sovereign and independent State and do, and forever hereafter shall, exercise and enjoy every power, jurisdiction, and right which is not, or may not hereafter be, by them expressly delegated to the United States of America in Congress assembled."

And for an example of a later constitution, we have that of West Virginia, in 1872.

"The government of the United States is a government of enumerated powers, and all powers not delegated to it nor inhibited to the States are reserved to the States or to the people thereof. Among the powers so reserved by the States is the exclusive regulation of their own internal government and police, and it is the high and solemn duty of the several departments of government created by this constitution to guard and protect the people of this State from all encroachments upon the rights so reserved."

Solicitude for local courts apart from the centralized courts even of our own government reaches right back to Magna Charta.

(Chapter 17) "Common pleas shall not follow the King's Court, but be held in some certain place."
(Chapter 20) "Fines to be assessed by honest men of the neighborhood."
"The writ called Praecipe shall not in future be issued, so as to cause a freeman to lose his court."

So in the Virginia Bill of Rights, he must be tried by a "jury of his vicinage," and the Maryland Constitution of 1776 says:

"That the trial of facts where they arise is one of the greatest securities of the lives, liberties and estates of the people."

And this is repeated in the Massachusetts Declaration of Rights and expressly recognized in the Federal constitution, Article 3, Section 2, providing that all trials shall be held in the State where the crime is committed and shall be by a jury; and in the Sixth Amendment the venue is further limited to the district where the crime is committed; and

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by the Seventh Amendment the right of trial by jury is preserved also in civil cases and the Federal power is forbidden to retry any cause other than according to the rules of the common law.

And the separation of the powers is shown expressly in ten out of the thirteen of the first constitutions of the original States and is to-day recognized in every single one of the States of the Union with the solitary exception of the State of New York.

But the English principle of local liberty, local parliaments and county courts, and the control by the people at home of their own affairs, became to the thirteen colonies far more important; for instead of a small homogeneous country like England, they had, even in 1776, a country reaching from the sub-Arctic to the torrid zone, from ocean to prairie, with different climates and different institutions, made up of five different races, even if we count Scotch and English and Irish as one, and with at least four mutually hostile religious faiths; with a social system in the South as different from that in the North as black from white; and all the colonies agreeing only on this one thing, to preserve the cardinal liberties of the Bill of Rights. How reconcile these local liberties, this government by the people of their own affairs, with that strong yet far off central government they were about to create in order to regulate their foreign relations and the affairs that they deemed of national concern? Yet the experience of the Revolution showed that such a government was necessary.

It is a familiar truth that this reconcilement of national power with local liberty was their great invention; a strong central government for political, national affairs, working directly on the people, not, as in all previous confederations, on the component States; conjoined with absolute autonomy as to the making and the judging of laws, and the administration of their own affairs at home; also the control by the people of each State of the great money power, of the raising and expending of practically all the taxes, leaving the national government to support itself by indirect taxation only and

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the taxes to be imposed upon foreign commerce. I have not time to dwell on this point, which is familiar to all of us; I hasten to consider the actual division made by the founders of the American Republic of all sovereign power between the States and the central government. This is the special subject, I ask you to reconsider to-day; in a day when all things, even constitutional principles a thousand years old, must justify themselves to us anew.

Now if you will draw a sphere to represent the total domain of sovereign power under a constitutional republic, you have at once suggested our first distinction. For our governments, both State and national, must always remain republican and constitutional. They are not meant, as now seems to be thought, only to enforce the will of the majority, but in certain things to protect the minority, as well, and to guarantee forever free government and private rights. There is a vast domain of unlimited, sovereign, autocratic, imperial power, outside of this sphere, that may stand for those powers of conquest and oppression which are outside all law and may be wielded by an oriental despot or a European emperor; but these powers remain outside our constitution. Our forefathers intentionally and forever excluded them, withheld them from any and all governments they were about to create, Federal, State, or both together. Undoubtedly the people can set aside this constitution, and establish, if they like, an empire or an oligarchy; but until they do so, it is treason in any one to attempt it and a breach of the oath of every Federal officeholder, judical or executive.

As the king himself exists but by the law, so the Federal government is the creature of the Constitution. And this after all is really our greatest contribution to the history of humanity; the American people, forming a great nation, a sovereign people, forever denying to themselves and their own government imperial power, limiting it to be republican in form, their own legislatures to a written constitution, and both forever by the rights of each free man.

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Now between the central government and the State, how did they in fact divide the constitutional powers of government; these that are represented within this sphere that I have drawn? Let us first draw a zone A to represent the powers they granted to the nation and the Federal governments. Let us now draw a zone B to represent the powers given or reserved to the States. Where they cross, the segment AB will exactly represent the powers shared by both—where State and Federal jurisdiction coincide.

But this is a government not only of delegated but of limited powers. Large prohibitions were imposed upon the Federal government. Let us represent these by the zone X, and draw that farthest away from the zone A where we have put the powers allowed. And many such prohibitions were imposed, even in the Federal Constitution, on State governments or legislatures also; let us represent these by zone Z, farthest from zone B, the zone of the States' Rights. And in like manner, where those zones of prohibition cross, we shall have the double prohibition on both State and nation represented by the segment XZ, those great rights which the people chose to protect from either government.

Now, lastly, we have a central area left unnamed. What may be the meaning of this? The answer is obvious. This is the most important of all; for it is that vast realm of sovereign power reserved to themselves by the people, virgin yet, delegated by them neither to the State nor to the nation, kept in their own hands until such time as, by amendment to the Constitution, and by amendment only, they, the people, might choose to give them up. The things belonging to this area resemble those in the area XZ, the powers forbidden to the nation and the States, for powers forbidden are necessarily reserved; but in Y we will class those powers which, such as we find in the Ninth and Tenth Amendments, are by express words reserved to the people or to the States; the great principles of the Bill of Rights, the right to law and to equal law, the right to property, the right to vote their own taxes, those taxes to be for the benefit of all

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and to be expended by the people who pay them, the right to a republican form of government, in both State and nation, to be administered by the people themselves, or by officers who are their trustees and servants and are elected by popular suffrage; by an Executive who is not to be left in power one year without a meeting of the legislative branch; by an army that may not be maintained two years without a new vote of Congress; by judges, who, that they may not be dependent on the Executive, are appointed for life, and paid a salary that may not be reduced by Congress. These are a few of the principles that remain in the great central area Y, of which the States and people may never be deprived.

Now observe—this area we call Y, the central realm of the people's rights, alone is unlimited and indefinite; for it represents all the sovereign power in the world, *that remains*, —all that remains of all possible power of free government when you have granted away the eight definite subtractions of these other zones. Take eight from infinity and infinity remains. All other powers are definite, limited, defined; the people's powers alone are not.

But coming lastly to our special theme, there are two segments that I have not mentioned, AZ and BX. AZ where the zone of what is forbidden to the States cuts the zone of what is permitted to the nation; the area of absolute Federal power given to the nation, and at the same time denied to the States,—here, under the Constitution, is the realm of centralization, of imperialism. For what is in the rest of our zone A expresses powers which are merely *permitted* to the nation, not necessarily denied to the States; and this little difference between A and AZ is therefore to be one great problem of American Constitutional law. So, in like manner, in B simple, we shall find what the States may do and the nation also; while that part of B which is crossed by X represents all that is *withheld* from the Federal Government. Here therefore is the scope and realm, the home-ground, of what we call States' Rights. Let us not be prejudiced against

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them because the term is identified in our memories with the heresy of secession; purged of that fault, we may live to see that the cry, "States' right," embodies our truest liberties.

Now on these two qualifications hang all the law of our Constitution. If you can say what is to be AZ, and what is A; for instance, whether all corporations or industries are to be solely under Federal control or also under the power of the States—if you can tell what is to be BX and not B simply; for instance, whether the rights of property, trade, taxation are to be solely under the State or to be controlled by the nation—you shall tell me the future of our republic.

The Federal powers are political; that is the great criterion The State powers, on the other hand, are domestic, social. They relate to the relation between a man and his fellow men, to his control over his own property, and to the trial of his disputes with his neighbors, of his controversies with all except the Federal Government and of all his crimes or offences except only those which, like treason, relate directly to his duty to the Federal Government, or are committed in the places subject to its exclusive jurisdiction, such as forts, military reservations, national territory not incorporated into a State, and the high seas. The Federal Government is a political sovereign; but has almost none of the attributes of sovereignty for any other purpose. This broad fact is revealed to us with startling clearness when we note that it has generally neither the power of capital punishment nor, in effect, of direct taxation. It would be hard to find two more necessary attributes of sovereignty as commonly understood in the science of government, than the power over life and the power over property. Moreover, except for special purposes of national defense, etc., it cannot hold any land. Even its political power is far less than is commonly enjoyed by sovereign nations; it cannot, for instance, cede territory from any State. Moreover, our national sovereign is controlled by the most fundamental of all limitations. It may not, under the Constitution, that is to say, without going back to the people, which it rec-

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ognizes as the only source of power—change its form from a republican form of government not even to a pure democracy. It is even possible, under the Fifth and Fourteenth Amendments, that it may not adopt a system of socialism or communism, or permit a State so to do.

To see how completely this division between what is political and what is social, domestic, or relating to private right is carried out in the Federal Constitution, it will repay us to run over its provisions in some detail. The Preamble relates both to social and political objects, such as the common defense, but lays down at the beginning the great principle that it is the people and not the States who made the nation and the constitution. The first two sections of Article I relating to Congress are political. Section 3 forbids all direct taxes; that is, all taxes directly imposed upon property or individuals, except they be apportioned to the States according to their population and not according to their wealth. This not only is, but was intended to be, in effect a prohibition to the Federal Government of the power of direct taxation. All the rest of the first seven sections are also political; relating generally to the organization, election and liberties of the Congress, and the method of legislation. Section 8 of Article I contains almost the only powers given to the Federal Government which may, under our division, be called social; and while no one would desire to change the Constitution in this particular, it is highly significant that this exception has given rise to most of the litigation, most of the discussion, and to the leading division between the two great political parties today. That is to say, while the object of the Federal Government is to protect the nation from attack and manage its foreign affairs and impose taxes therefor "for the common defense and general welfare of the United States", the lesson of the existence of the thirteen States under the Confederation showed that they could not be trusted with the regulation of commerce passing from or to other States crossing their borders. This, therefore, was denied to the States, and necessarily left to the Federal power; doubtless, however, rather with the intention

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of preventing the States from interfering with such commerce than allowing the Federal Government to do so. Then, Congress is authorized to make a uniform bankruptcy law throughout the United States; the only matter in which the necessary advisability of uniform laws was recognized in the Constitution and expressly given to the Federal Government; and the power to establish post offices and post roads and issue national patents and copyrights, being a usual national power, is hardly an exception to our rule. Yet these matters, until we come to the Fourteenth Amendment, are the only subjects in which the Constitution clothes the Federal Government with any power relating to the citizen's individual affairs and his private business.

But even the political powers are not broadly given. The eight clauses of Section 9 in the first article consist entirely of negations; and there are many others. On the other hand, the entire sovereignty of the State over individual relations, social and domestic affairs, and property rights is shown by the very few restrictions and exceptions we can find in the Federal Constitution. And these exceptions are purely political.

National political powers, as well as powers of taxation, or relating to interstate or foreign trade, are, of course, forbidden to the States. Article II relates entirely to the Federal executive power and is entirely political; Article III to the Federal judicial power; and here the only time when the national courts may be invoked other than to interpret and define the Federal Constitution and laws is to guarantee a fair trial in an impartial tribunal between citizens of different States. Article IV, Section 2, does indeed, provide that a citizen of one State shall have all the social and contractual rights that are given in any other State to the citizens thereof; but this can hardly be said to give the Federal Government any power over social matters; rather it merely guarantees the right to law in each State to all citizens of other States, much as the Fourteenth Amendment later does to all citizens of the United States, and even as Henry II guaranteed it to all free men of England. Over the territories in-

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deed, Congress is expressly given full power, social and domestic as well as political; but it is only of late years that it has generally exercised it in any other way than to erect territorial legislatures; and in the older territories, at least, there is no meddling with individual rights.

The first eleven amendments are *all* restrictions; that is to say, they are at great pains expressly to withhold all social and domestic affairs, or cardinal liberty rights, from the Federal Government, and even some that are political; the first ten, therefore, showing a strong reaction in favor of the rights of the States and the liberties of the people, in 1791, while the eleventh Amendment was a still more decisive step in that direction, withholding all Federal judicial power where a State was directly concerned; much as James I endeavored, though vainly, to get Chief Justice Coke to rule that he would not consider a case where the interests of the King were involved. The Thirteenth Amendment is striking in that it is the only instance where the Constitution is expressly extended to any place subject to the jurisdiction of the United States, and where, as it has recently been put, "The Constitution follows the flag". Slavery, therefore, can exist nowhere, not even in the Sulu Islands; although even the other cardinal requirement, a republican form of government, may constitutionally be withheld from them as from the other territories.

The modern reaction in favor of the Federal power is shown first in the Fourteenth Amendment proclaimed July 28th, 1868, though the interpretation which might have revolutionized the whole State and Federal system has substantially been denied by the Supreme Court. The Amendment does, however, and for the first time, interfere between the State and the individual, if not between the individual and his neighbors. The State is forbidden to deprive any person of life, liberty or property without due process of law, or to deny any person within its jurisdiction the equal protection of the laws, and this directly by the Federal Government. The radical upholders of centralization, in reconstruction times, undoubtedly believed that this brought the

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hand of the Federal Government between a man and his neighbors and indeed all his private affairs; otherwise it would be surprising that it took nearly twenty years of great decisions by the Supreme Court to read the amendment in strict accordance with its simple words—that it applied only to a State and to due process of law of a State; that it did not, as had been done in early times after the Conquest, give the Norman Court, the centralized government, jurisdiction of all matters and causes on the mere plea of Englishry, or that a Norman was concerned. As it has therefore worked out, it is merely a new national guarantee, like that securing a republican form of government, of the cardinal liberty and property rights against law-making by the States; and it does not, under the plea that a person is being unfairly treated by a neighbor or an official, drag all matters of ordinary trade and private right into the Federal courts.

Whether the extreme interpretation of the interstate commerce clause now proposed will carry us to this length it is too early now to say; nor, indeed, is this a controversial essay. That there has been for some years a decided trend in that direction, one must admit. The history of the interpretation by the courts and by Congress of the words "regulate commerce among the several States" has been to extend the meaning of commerce from the things transported, the physical instrumentalities of interstate commerce, the necessary documents concerning it, to the corporations and persons conducting it, the conditions of their labor and the rates they may charge—this by the year 1908—and of the words "among the several States" from the natural physical transportation across State lines to a combination or contract made in one or more States intended to act in others or in effect carried out in others.

It is perhaps obvious that we intend to withhold the right of conducting interstate commerce from any *corporation* not conforming to a Federal standard. Whether we shall go further and deny it to individuals; whether, indeed, Congress has the constitutional right to deny it to indi-

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viduals; and whether, on the other branch of the definition, we shall extend it from commerce, in the sense of interstate traffic, to manufacturing, mining, or producing goods intended to be sold outside of the State where they are manufactured, mined or produced; and to the returns, or the profits, or the fortunes, or the disposition of the fortunes, derived therefrom; and still more, to the contractual relations, the conditions of labor, etc., of the persons so engaged,—are all matters for the future to settle.

The power of suspending laws or their application, or agreeing not to prosecute in certain cases or to pardon certain offenders, is a dangerous one in the hands of the Executive. Moreover, there is an increasing tendency today in Congress to grant legislative power to the Executive or to boards or commissions of his appointment. Notably has this been done in recent years in the case of making treaties, fixing customs duties, the rates of railways, and in the control of corporations,—all properly legislative matters. The excuse made is that Congress declares the general principle and the act of the President, for instance, in finding a state of affairs to exist upon which he may ratify a treaty or proclaim a commercial arrangement, is merely ministerial. An example of the length to which this theory may be carried is found in the recent railway regulation act or Hepburn Bill, where Congress merely proclaims that the rates shall be reasonable and without discrimination,—both mere expressions of the common law,—and leaves the determination of what is reasonable between the Interstate Commerce Commission and the Supreme Court, neither of them legislative bodies. The common law may, indeed, be decided by a judicial body; but it is difficult to see why the alteration of the common law is not legislation. When, therefore, the commission fix a "just and reasonable" rate,[1] if they are applying the common law, their act is judicial; if they are fixing other standards, it is legislative. Federal judges have

[1] U. S. Act of February 4, 1887, as amended June 29, 1906, Section 15.

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consistently, from the beginning, refused to exercise other than judicial functions.

The leading modern English historian ends a long account of the attempted centralization of English administration under the Norman kings with the boast that from that time on until now there is no body of ten thousand English speaking men in the world, which is not governed by the laws that they make themselves.

I believe that the constitutional decisions of the next ten years will prove the most important in the history of our own republic. It is peculiarly the duty of those of our profession to point out the dangers that beset the path upon which the people may wish to go. Legislation is now pending in Congress which seems to me to be more radical, more un-English than anything that has been enacted in an English speaking legislature for many centuries. It has been the proud boast of the great statesmen and lawyers of England that we have no administrative law, no law peculiar to the government or administered by government officials, but that every officer, civil or military, must answer for his acts in the common law courts, and that every individual or association of individuals has the right to have their legality tried there, and tried there alone. To submit the judgment of the great right of freedom of contract and association to the judgment of an administrative official would be well on the road to the introduction of the whole European system of administrative law and government by bureaucracy. When a man is responsible for his acts or contracts not to legislatures or courts and juries, but to executive officers, you cease to be American and become European, if not Oriental, and when you give up your care for local self-government and your home courts and juries, you are not far from the state of the kingdom of Italy or the Empire of Russia, where a mighty central government stretches its paralyzing hand between the laborer and his daily bread, the merchant and his trade, the citizen and his vote.

F. J. Stimson.

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WHEN IS A BANK THE BONA FIDE OWNER OF A CHECK LEFT FOR DEPOSIT OR COLLECTION?

The boundary of our inquiry may be more closely defined by leaving out all cases that were the subject of special agreement,[1] or that were so endorsed by the depositor as to retain intentionally his ownership.[2] These include a large number and involve the application of no principle save the most general one, that the agreement must be founded on proper authority, or be within proper legal limitations.

At the outset, it may be stated that the courts have always maintained that the title to checks deposited by, and credited to, a depositor who is a contemporaneous debtor, passes at once to the bank absolutely.[3] This principle is so strongly fortified by reason and precedent that the mere statement of the rule will suffice.[4] For the same reason, after an advance has been made thereon, the bank becomes either the absolute owner or a lienor for the amount of the advance.[5] The rule is equally clear that a depositor who is credited with a check, and not as cash, retains his

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[1] *Richardson* v. *Louisville Bkg. Co.*, 36 C. C. A. 307; *First National Bank of Elkhart* v. *Armstrong*, 39 Fed. 231 (C. C.); *Manufacturers' National Bank* v. *Continental Bank*, 148 Mass. 553.

[2] *Beal* v. *City of Somerville*, 1 C. C. A. 598; *Levi* v. *Bank*, 5 Dill 107; *First National Bank* v. *Reno Co. Bank*, 1 McCrary 491; *Sweeny* v. *Easter*, 1 Wall 166; *White* v. *National Bank*, 102 U. S. 658; *Cecil Bank* v. *Farmers' Bank*, 22 Md. 148; *Mechanics' Bank* v. *Valley Packing Co.*, 70 Mo. 643; *Milliken* v. *Shapleigh*, 36 Mo. 598.

[3] *Titus* v. *Mechanics' National Bank*, 35 N. J. Law 588, 592.

[4] *Balbach* v. *Frelinghuysen*, 15 Fed. 675, 682; *Armstrong* v. *National Bank of Boyertown*, 90 Ky. 431; *Taft* v. *Quinsigamond National Bank*, 172 Mass. 363.

[5] *Metropolitan Nat. Bank* v. *Loyd*, 90 N. Y. 530; *Armstrong* v. *Nat. Bank of Boyertown*, 90 Ky. 431, 436; *Balbach* v. *Frelinghuysen*, 15 Fed. 675; *Scott* v. *Ocean Bank*, 23 N. Y. 289; *Giles* v. *Perkins*, 9 East 12, 14.

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ownership.[6] And, likewise, a depositor who is credited with a check provisionally in anticipation of payment, but having no right to draw against the sum credited.[7]

We now approach the class of cases that are the special subject of inquiry—those that are deposited and credited to the depositor *with the right to draw immediately for the amount of the credit.* Some courts have held that the ownership was not transferred by such action on the part of the bank; other courts have maintained the opposite ground. The unquestioned tendency is to hold that the effect of such a transfer is to vest their title in the bank. The highest court in the land recently adopted the rule, using the form of expression by the Court of Appeals of New York, which said:[8] "The general doctrine that upon a deposit made by a customer, in a bank, in the ordinary course of business, or of money, or of drafts or checks received and credited as money, the title to the money or to the drafts or checks, is immediately vested in and becomes the property of the bank, is not open to question."[9]

It follows that, if the title thus passes to the bank, the depositor's control over them ceases. Suppose a depositor should wish to recall a check before collection on which no advance has been made, would the bank surrender it? Would it surrender a note that had been discounted, the

[6] *Bailie* v. *Augusta Sav. Bank*, 95 Ga. 277, 280; *St. Louis and San Francisco Railroad Co.* v. *Johnston*, 23 Blatch. 492; *Thompson* v. *Giles*, 2 Barn and Cres. 422.

[7] *Midland Nat. Bank* v. *Brightwell*, 148 Mo. 358; *Freeholders of County of Middlesex* v. *State Bank*, 32 N. J. Eq. 467; *Beal* v. *City of Somerville*, 5 U. S. App. 14; *Haslett* v. *Commercial National Bank*, 132 Pa. 118; *Rapp* v. *National Security Bank*, 136 Pa. 426; National Butchers' *and Drovers' Bank* v. *Hubbell*, 117 N. Y. 384; *Richardson v. New Orleans Coffee Co.*, 43 C. C. A. 583; *First National Bank of Trinidad* v. *First National Bank of Denver*, 4 Dill. 290; *Levi* v. *National Bank of Missouri*, 5 Dill. 104; *Armstrong* v. *National Bank of Boyertown*, 90 Ky. 431, 437; *Midland National Bank* v. *Brightwell*, 148 Mo. 358.

[8] *Cragie* v. *Hadley*, 99 N. Y. 131.

[9] *Burton* v. *United States*, 196 U. S. 283, 302, citing *Thompson* v. *Riggs*, 5 Wall 663; *Marine Bank* v. *Fulton Bank*, 2 Wall 252; *Scammon* v. *Kimball*, 92 S. C. 362, 369; *Davis* v. *Elmira Sav. Bank*, 161 U. S. 275, 288; *Aebi* v. *Bank of Evansville*, 124 Wis. 73; *Flannery* v. *Coates*, 80 Mo. 444; *Ayers* v. *Farmers' and Merchants' Bank*, 79 Mo. 421.

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amount of which had been credited to, but not drawn by, the depositor, on the maker's request? If the title to the checks thus passes to the bank on crediting them, then it follows that if the bank afterward re-delivers them to the depositor at his request, this is done as a favor, and not as a right.[10] Surely, absolute ownership by the bank is inconsistent with the right of recall by the depositor.

Clearly established as the rule is, there certainly are some serious difficulties with the foundation on which it rests. There is no consideration for the transfer of the title unless this be the right to draw the money represented by the checks. This, however, is a shadowy thing, for unquestionably the bank has a right of withdrawing that credit at any time before the depositor has used it. The depositor, therefore, receives at most a qualified right to draw which may be defeated by the sole action of the bank. Furthermore, if the bank had not the right to withdraw its credit, it would hardly dare make such an advance, for the act of the bank rightly considered is a loan, or rather an agreement to lend, for such a period of time between the actual deposit and collection of his checks as the depositor may desire.

The right to cancel the credit has led some courts to hold that a transfer was not effected by crediting; in other words,[11] that this right was inconsistent with absolute ownership; but more frequently the courts have held otherwise.[12] In a well reasoned case decided by the Supreme Court of Kansas, it was said: "It may be conceded that if, after due and legal effort to collect a check, it should be dishonored, the bank would have the right to charge the amount of it to the depositor's account. Whether this

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[10] *Metropolitan National Bank* v. *Loyd*, 90 N. Y. 530, 535.

[11] *National Butchers' and Drovers' Bank* v. *Hubbell*, 117 N. Y. 384, 393, 394.

[12] *Ayres* v. *Farmers' & Merchants' Bank*, 79 Mo. 421; *Flannery* v. *Coates* 80 Mo. 444; *First Nat. Bank of Elkhart* v. *Armstrong*, 39 Fed. (C. C.) 231, 233; *Riverside Bank* v. *Woodhaven Junction Land Co.*, 34 N. Y. App. Div. 359.

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right may be said to rest merely on the custom of banks, or whether the custom has been crystallized into a rule, and the right now may be said to be an implied condition attaching to the transfer of the paper, makes no difference. It is, nevertheless, in strictness, the right of an endorsee against an endorser, and hence is not, in any sense, inconsistent with ownership."[13]

On three grounds, then, the right of ownership may be maintained with the right of charging a check back if it is not paid. First, the right is not absolute in a technical sense. Though that word has been occasionally used by the courts in that connection, yet it has been used inadvertently, since absolute ownership and the right of charging back are manifestly inconsistent. The courts have doubtless meant essential or conditional ownership, since the occasion for charging checks back rarely occurs, considering the vast use of checks in modern society. Second, if a check could not be charged back, a depositor would ordinarily save nothing, since he would be liable on his endorsement. This is a liability independent of the transfer by the depositor of ownership to the bank. But as the legal enforcement of this right by suit may be prevented by permitting the collecting bank to charge the check back, this can be done.[14] Third, as the seller of personal property impliedly warrants the title, the purchaser is no less an absolute owner because he has redress against the seller should his title fail.

But if the title is absolutely transferred to the bank by crediting with the right to draw, in the technical sense in

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[13] *Noble* v. *Doughten*, 72 Kan. 336, 345.

[14] In *Metropolitan Nat. Bank* v. *Loyd*, 25 Hun. 101, 106, Daniels, J., said: "As this check was transferred to and received by the bank it became its property, and the fact that it had the right in case of non-payment, upon presentment, to charge the amount of it back in the account of the customer, did not change the nature of the transaction through which it was received, for that right resulted, not from any agreement existing between the parties upon the subject, but from the rights which the bank might derive from proceedings afterwards taken to charge the depositor as the endorser."

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which the term "absolute" is used, then the right to charge the check back if the collecting bank fails without any negligence on its part to complete the collection, clearly does not exist. This is a logical rule and has been upheld by the Supreme Court of Massachusetts. Nevertheless, a bank has a remedy on the depositor's endorsement, for this is an independent liability. On the other hand, the Supreme Court of the United States has declared that "the mere credit of a check upon the books of a bank, which may be cancelled at any time, does not make the bank a bona fide purchaser for value."[16] This may be easily reconciled with the rule in the Burton case by also holding that technically when the ownership of a check passes, it cannot be charged back. Yet doubtless that court would hold, as the courts in New York, Kansas and other States have held, that as the depositor is liable on his independent contract of endorsement, the easier way of adjusting the difficulty is to permit the collecting bank to charge back the uncollected check.

By such an interpretation of the decisions, they can be harmonized with the rule that prevails when a note is discounted for a borrower who is credited with the amount. On such occasions, it has been decided that a bank is not a bona fide holder until it has paid the money. Let us begin our review with Daniel: "The apparent purchase must have been a purchase in fact and not a mere bookkeeping entry. Mere discount and credit do not of themselves constitute a bona fide purchase for value. To occupy that position, the holder must actually have parted with something of value for the note."[17] In the American and English Encyclopedia of Law,[18] it is said: "Where a bank discounts paper for a depositor who is not in its debt and gives him credit upon its books for the proceeds of such paper, it is not a bona fide holder for value, so as to be protected

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[16] *Taft v. Quinsigamond Nat. Bank*, 172 Mass. 363, 366.
[17] Neg. Inst. Sec. 779 b. 5th Edition.
[18] Vol. 4, 2d Edition.

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against infirmities in the paper, unless, in addition to the mere fact of crediting the depositor with the proceeds of the paper, some other and valuable consideration passes. Such a transaction simply creates the relation of debtor and creditor between the bank and the depositor."

Passing from these statements of text writers to original sources, ample confirmation is found. In *Central National Bank* v. *Valentine*,[19] the Court said: "The plaintiff by its president discounted the notes and gave the makers credit on the books of the bank for the amount, no money was actually paid or thing of value parted with by the plaintiff upon the strength of the endorsement or the discount. Under such circumstances, the plaintiff cannot be regarded the bona fide holder of said notes for value. * * * The mere giving of credit by entering the amount on the books and not actually parting with a dollar upon the strength of the endorsement, cannot be regarded parting with value in the sense in which the law contemplates. The parties in whose favor the credit was given might never draw or appropriate any portion of the fund."

Fifteen years afterward, the same court said in a case of similar character: "The bank could not become a holder for value of the note by crediting its amount to the cashier. Unless he received the money as an individual, and not as cashier, the bank parted with nothing as a consideration for the note."[20] And in a still later case, the same court declared concerning a note which had been discounted for the payee who had been credited with the proceeds on the books of the bank: "The plaintiff must have actually paid out and parted with the proceeds of the discount before it could acquire an indisputable title thereto."[21] One more citation may be given from the court in the same State; the Appellate Division decided three years ago: "A bank is

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[19] 18 Hun. 417.
[20] *Dykman* v. *Northbridge*, 80 Hun. 258.
[21] *Sixth National Bank* v. *Lorillard Brick Works Co.*, 46 N. Y. St. Rochester 235.

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not a holder of a note in due course as defined by the Negotiable Instruments Law (which in this regard, follows the common law), when the proceeds of the note are simply credited to the person from whom it was purchased.[22]"

It may be further noted that the tribunals of the State which maintain the rule concerning the bona fide ownership of a note that is discounted by a bank which credits the proceeds to the borrower, are the same tribunals which first clearly established the rule concerning the ownership of checks credited to depositors with the right to draw immediately against the amount credited. This was done in *Metropolitan National Bank* v. *Loyd,* by the Supreme Court of New York, whose decision was affirmed by the Court of Appeals and has been often cited to sustain later decisions. Said the Supreme Court in that case: "By the acceptance of the check by the bank receiving it as so much money, it became the debtor to the customer to the extent of the amount credited on account of it. And while he did not draw checks or drafts against it, but the bank was largely his debtor, he still had the right to do it if he had been so disposed. The account, including the amount of the check, stood with his assent as so much money subject to his disposal, and because of that circumstance, he ceased to be the owner of the check, and the title to it became vested in the bank or its own property and subject to its risk in case of loss."[23] This principle has been often affirmed both by the courts of New York and by those of other States.

Other States have maintained the same rule concerning notes discounted for, and credited to, the account of depositors. One of the latest deliverances is by the Supreme Court of Iowa, in which the court says: "If a bank discounts paper for one of its depositors, giving him credit

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[22] *Albany Co. Bank* v. *People's Ice Co.,* 92 App. Div. 47, 55; *Clarke National Bank* v. *Bank of Albion,* 52 Barb. 592; *Nat. Bank of Barre* v. *Foley,* 103 N. Y. Supp. 553.

[23] *Metropolitan Nat. Bank* v. *Loyd,* 25 Hun, 101, 105, affd. 90 N. Y. 530.

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therefor upon its books for the proceeds, it is not a bona fide holder unless some other and valuable consideration passes."[24] The Courts of Michigan,[25] Wisconsin,[26] Kansas,[27] have announced the same rule.

In a recent New York case, there is a disposition to bring the check rule into more perfect harmony with that which applies to notes discounted for, and credited to, depositors. After setting forth the four elements needful to constitute a bona fide purchaser by the Negotiable Instruments Law, and that one of these is that the Instrument must have been taken in good faith and for value, the Court says: "The authorities hold that the mere crediting to a depositor's account, on the books of a bank, of the amount of a check drawn upon another bank, where the depositor's account continues to be sufficient to pay the check in case it is dishonored, does not constitute the bank a holder in due course."[28]

This clearly marks a departure from the rule in the *Loyd Case,* and rests on a different foundation. The change of ownership of the check in the *Loyd Case* rested on the crediting of it as cash with the immediate right to draw for the amount, without the slightest regard to the condition of the depositor's account. In the *Cowles Case,* such a crediting with the right to draw did not change the ownership of the check, if the depositor's balance was adequate to pay the amount of the check thus credited, had it been drawn out regardless of the credit thus given.

Does not this rule rest on a more rational foundation? Indeed, is there any valid reason for applying a different rule to checks that are credited to their depositors as cash than is applied to notes that are discounted for and credited to depositors? The transactions are similar in every essen-

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[24] *City Deposit Bank* v. *Green*, 130 Iowa 384; *McKnight* v. *Parsons*, 113 N. W. 858.
[25] *Drovers' Nat. Bank* v. *Blue*, 110 Mich.; 67 N. W. 1105.
[26] *Manufacturers' Nat. Bank* v. *Newhall*, 71 Wis. 309.
[27] *Mann* v. *Second Nat. Bank*, 30 Kans. 412.
[28] *Citizens' State Bank* v. *Cowles*, 180 N. Y. 346, revg. 89 Ap. 280.

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tial respect. In both, the depositor has a right to draw when he pleases; in both, the debtor and creditor relation exists between him and the bank with respect to the deposit. In the one case, the bank owns or holds the depositor's note; in the other, his check. Its right and control over the one instrument is as perfect as its control over the other. The note can be given up before the money is drawn if the depositor should become insolvent, or, if it was forged, or possesses other infirmity not known when it was received, and the credit can be cancelled. A check can be returned if it was forged or otherwise imperfect, and should prove to be uncollectable after using the legally required diligence.

May not the decision in the Cowles case be regarded as a return to a more rational view concerning the ownership of a check credited to a depositor with the right to immediate payment? In other words, so long as a depositor checks against his actual cash deposit, he is not borrowing, and the bank is not the bona fide purchaser of checks credited to him, but not collected. When his checks go beyond this line, then the bank becomes the owner either absolutely, or to the extent of its lien.

Albert S. Bolles.

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SIR MATTHEW HALE.

Sir Matthew Hale was born nearly 300 years ago, on November 1, 1609. Milton was born in the previous year, 1608, and both Milton and Hale were born as they say in England, in the middle rank. He was not descended from the highest, nor from the lowest class in the State, but from the class between them; that great middle class that does the most of the world's work.

His father was a lawyer, but he quit the profession, because he considered that its forms, in some respects, were contrary to the dictates of conscience. "Giving color," that is, the introduction of "feigned matter" in a plea, he objected to as being little better than downright lying. He retired into the country, and lived upon his landed estate until his death.

His son grew up under the influence of Puritanism, which before and after the death of Queen Elizabeth, and she died only six years before his birth, was rising to great power in both English politics and religion. And Puritanism was founded upon the Bible; the most diversified and interesting book, it has been said, in the world.

Its translation into English in the time of Elizabeth, unlocked a treasure house for the great body of the English people. While scholars, the gentry and the Court were reading the Greek and Roman classics, as well as Spenser, Marlowe and Shakespeare, the unlearned masses were imbibing with enthusiasm, with unabating fervour the noble literature of the Bible; the literature of religion. The effect was marvellous; it was well-nigh miraculous. Biblical stories, the words of psalmist, prophet, and evangelist,

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NOTE.—This article is the substance of a lecture recently delivered by Mr. Flanders before the students of the Law Department of the University of Pennsylvania. It is now published through the kind permission of the lecturer.

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stirred the people like the notes of a trumpet. As an English historian has said, England became the people of a book.

And that book revolutionized their thoughts. It changed their character, habits, and even their demeanor, which now became solemn, formal, and precise. It affected also, their speech, scripture words and phrases, more or less, pervading it. They gave scripture names to their children, and brought them up under a system of rigid discipline. They denounced sports, the theatre, dancing, and amusements generally, as being not only idle and frivolous in themselves, but as evidence of a corrupt nature.

Matthew Hale's father was a Puritan, but he lost both father and mother before he was five years old. His uncle and guardian, who was also a Puritan, placed him under the charge of a Vicar of the Church of England, who was noted and satirized for his Puritan sympathies and convictions. This uncle intended his nephew for the ministry, and his education was conducted with that end in view.

At seventeen, he was tall, strong and vigorous, and at that age, was entered at Oxford, as a student. He pursued his studies there with diligence, was regular in his attendance at chapel and prayer meetings, and observed the strict decorum and habits that characterized the persons who were called Puritans. And by Puritans, I mean those people who, at that time, were members of the established Church of England, but who, nevertheless, sought to reform it, both as to doctrine and ritual. They wanted purity of life, and simplicity of worship.

And in this sense Hale was a Puritan.

At length, however, a change came over him; a company of strolling players appeared at Oxford, and young Hale, yielding to temptation, went to see a play. And like so many students, before and since his time, he was fascinated. This first view of the world changed all his habits,

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and apparently his character. He neglected his studies, abandoned prayer meetings, and became a devotee of the theatre, of sports, and amusements of all kinds. He was an expert in fencing, and in dress, a pronounced fop. He now gave up all idea of the ministry and determined to enter the service of the Prince of Orange, as a soldier.

At this stage of his downward progress, he was called to London with reference to a law suit which involved the title to a part of his patrimonial estate. At this time he had a curious notion of the profession of the law, perhaps derived from his father, who, as I have said, had withdrawn from it, because of its supposed alliance with falsities.

At any rate, he regarded lawyers as a barbarous sort of people, whose calling was unfit for a gentleman. He held them in utter abhorrence. But his property, in part, was in jeopardy, and he had to consult one of this despised class, and fortunately, he fell into the hands of Sergeant Glanville, afterwards Sir John Glanville, who was of great distinction at the bar, and in religion a puritan.

Such was the impression made upon young Hale by Sergeant Glanville, and such his influence, that he abandoned the thought of soldiership, and determined to become a lawyer himself. His Puritan principles too, revived, and henceforth were his guide and armor. He cast anchor now, and it held fixed and fast. About this time he made a vow, that while he lived he would never see a play, nor drink a health. And he never did.

Leaving Oxford, where he had sown his "wild oats" and had his fling, he entered Lincoln's Inn, at the age of nineteen and gave himself, with ardor, to the study of the Law. For two years, he read sixteen hours a day, and afterwards eight hours.

Chief Justice Taney read law with something of the same devotion as Hale, but in his old age, describing his student days, he thought he had made a mistake.

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I will read you what he says about those days: "I associated only with students and studied closely. I have for weeks together read law twelve hours in the twenty-four. But I am convinced that this was mistaken diligence, and that I should have profited more if I had read law four or five hours, and spent some more hours, in thinking it over, and considering the principle it established, and the cases to which it might be applied. And I am satisfied, also, that it would have been much better for me, if I had occasionally mixed in the society of ladies, and of gentlemen older than the students." He thought if he had done so his mind would have been refreshed for renewed study, and that he would have learned from them many things which law books do not teach.

Chief Justice Hale far exceeded Chief Justice Taney in the strenuosity of his reading. He read more hours in the twenty-four, and not only abjured society, but would not even read the news of the day—I suppose because such reading was too distracting, and turned his mind aside from his purpose, namely, to gain mental discipline, and solid acquirements. He read and re-read all the year books, text books and reports. He read the Roman law and was of opinion that no one could understand law as a science until he had drunk deep at that fountain. He read Aristotle and Calvin. He studied theology, philosophy, not only metaphysic philosophy, but natural philosophy, mathematics, medicine, anatomy and history.

When he was called to the Bar in his 28th year, Lord Campbell says his acquirements were so extensive that they would have furnished a stock in trade for all Westminster Hall. From the outset he was in full practice. The Bar were awaiting him. He was their consulting counsel; in fact, the Bar were his clients.

He was not an orator. It was neither eloquence, nor manner, nor voice, that gave him prominence in the courts.

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It was his deep mind and profound learning which informed and instructed them; and his exalted character which inspired their confidence.

In a few years he stood on the highest rung of the legal ladder. He was beyond all competition, the foremost advocate in Westminster Hall. He was besides, counsel for the accused in many important State trials. He advised the Earl of Strafford when he was impeached (1640) for treason; three years later (1643) he defended Archbishop Laud for the same high crime. The great argument, in his favor, was prepared by Hale, and great it was admitted to be even by the most bitter of the Archbishop's enemies.

Laud was not in fact, guilty of any specific act of treason, but it was urged on behalf of the prosecution, that he had committed a great number of offences, and that in the aggregate they amounted to treason. The figurative, but conclusive, reply of his counsel was, that two hundred black rabbits did not make a black horse!

A witty writer puts the case in this way: The Archbishop, or the church he represented, had cut off a good many Puritan ears for non-conformity, and the Puritans retaliated by cutting off his head! Both Strafford and Laud perished on the scaffold. So did the Duke of Hamilton, Lord MacGuire, the Presbyterian clergyman, Love, and others, whom Hale likewise defended on the same deadly charge of treason. But their fate was not due to any lack of ability or effort on the part of their counsel.

In the storm and strife of political and religious passions, advocacy, however well-grounded, and however, on other occasions, effective, can seldom stay the force of a tempest, or avert its consequences. The voice of history, I think, approves the execution of Strafford. In a great crisis in the history of England, he was a dangerous foe to liberty, and a promoter of measures that threatened to convert the monarchy into an unbridled tyranny.

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As to Laud, his real offence, was intolerance. He meant to bring about a re-union of the Church of England, with the Church of Rome. Nine-tenths of the English people were mortally opposed to the scheme. The Crown was in its favor; the Parliament, the organ of the people, was profoundly against it.

In the ensuing war between the Crown and the Parliament, on the religious and political issues involved, both Crown and Church were overthrown. And the King and the Archbishop were both beheaded.

A considerable and a growing part of the Church of England, at the present time, regards the Archbishop as a "Holy Martyr," and now hold solemn services on the anniversary of his death, commemorative of his virtues and his sacrifice. Historians of the School of Macauley, on the other hand, write of him as if he was a fussy old bigot, who deserved his fate.

Hale held lofty views as to the standard of duty a lawyer should observe in the practice of his profession. He scorned the notion that the law should be a mere money making trade; and he considered it a great dishonor, as great as a man is capable of, for a lawyer to speak on what he knows or believes to be the wrong side, for a little money.

In this he differed with Dr. Johnson, whose views on the question, I apprehend, have satisfied the consciences of most lawyers. "A lawyer" he said, "has no business with the justice or injustice of the cause he undertakes, unless his client asks his opinion, and then he is bound to give it honestly. The justice or injustice of the cause is to be decided by the judge. Consider, Sir: What is the purpose of courts of justice? It is, that every man may have his cause fairly tried, by men appointed to try causes. A lawyer is not to tell what he knows to be a lie; he is not to produce what he knows to be a false deed; but he is not to

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usurp the province of the jury and of the judge, and determine what shall be the effect of evidence—what shall be the result of legal argument. As it rarely happens that a man is fit to plead his own cause, lawyers are a class of the community, who, by study and experience, have acquired the art and power of arranging evidence, and of applying to the points at issue what the law has settled. A lawyer is to do for his client all that his client might fairly do for himself, if he could. If, by a superiority of attention, of knowledge and skill and a better method of communication, he has the advantage of his adversary, it is an advantage to which he is entitled. There must, also, be some advantage, on one side or other; and it is better that advantage should be had by talents than by chance. If lawyers were to undertake no causes till they were sure they were just, a man might be precluded altogether from a trial of his claim, though were it judicially examined, it might be found a very just claim."

Dr. Johnson's views, as I have said, are the views that have generally satisfied the profession. The lawyer who does not misquote the law, nor consciously misinterpret it, and who does not misrepresent or pervert the testimony, is assumed to be within his ethical rights when he urges his client's contention, with such logic, and with such eloquence as he can command, no matter what his private opinion may be as to the real merits of the cause.

I suppose, in the practical affairs of life, it is our duty to steer clear of any laxity, or any lowering of the moral standard, on the one hand, and any over scrupulousness of conscience on the other.

In cases of conscience, however, we are apt to let gain or loss, convenience, or inconvenience, determine the question whether we are too scrupulous or otherwise. You know, one of the most distressing differences between the Puritans and the Established Church, was on the subject of

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Sunday. Archbishop Laud, and the High Church clergy, believed and taught, that the early Church, in instituting the Christian Sunday, did not intend to clog its enjoyment, by the requirements and observances of the Jewish Sabbath. The Puritans, on the other hand, demanded that the Lord's day, should be strictly kept, in accordance with Jewish precedent, and Jewish law. Moreover, Parliament had forbidden Sunday pastimes by statute. Archbishop Laud nevertheless ordered every clergyman of the Church to read from the pulpit a declaration in favor of Sunday pastimes, as not only lawful, but desirable.

Here was a pressing question of conscience. If the Puritan clergy disobeyed the Archbishop's order they would be deprived of their churches, and their stipends. Large numbers did so, and suffered accordingly. It is related of one Puritan minister that he read the Archbishop's declaration, having already read the Ten Commandments as part of the service, and then added, "You have heard read, good people, both the commandment of God, and the commandment of man. Obey which you please." I think John Bunyan would have put the matter differently, and have asked his congregation the peremptory question, which he tells us in the Pilgrim's Progress, our Lord addressed to himself, "Wilt thou leave thy sins, and go to Heaven, or have thy sins, and go to Hell?"

When the contest between the major part of the English people, on the one hand, and the Crown and Episcopacy, on the other, with respect to the political and religious questions at issue, was nearing the point when arms alone could determine the result, Hale's position was most embarrassing.

All his biographers concur, that at this time he was "the most learned, the most able, the most honorable man to be found in the profession of the law." All parties were anxious to secure his services. Parliament, after an interval

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of eleven years, had been convoked, and he was solicited by his old friends to stand for a seat. He declined, and announced his purpose in the pending struggle, to remain neutral. Lord Campbell declares that neutrality, at such a time, and on the part of such a man, was selfish and cowardly.

What was the explanation of Hale's attitude at this momentous crisis?

It was this. While he was in favor of liberty and the Constitution, and opposed to Star Chamber and High Commission methods of government; he was, nevertheless, a royalist at heart, and feared the overthrow of the throne. For ages the principle of King, Lords and Commons was the fundamental basis of the State. He would curb and limit the royal authority, but he would not destroy the authority itself. Again, while he did not believe that Episcopacy existed *juri divino,* nor that Episcopal ordination was indispensable, nevertheless, he preferred the continuance of a modified form of Episcopal government. As in the case of the Throne, so in the case of the Church, he feared that in the coming conflict its entire fabric might fall.

When what he feared had occurred, when both Church and Monarchy had been overthrown, when Presbyterianism and the Commonwealth had been established he nevertheless acquiesced. He entered Parliament under the Protectorate of Cromwell as member for Oxford, and was a member of the assembly which framed the Presbyterian faith.

In 1654 Cromwell created him a judge of the Court of Common Pleas. In the administration of this high office, he gained, not only judicial eminence, but it has been said, the affections of all honest men as well. When Cromwell died and his son Richard succeeded him as Lord Protector, he offered to renew Hale's commission, but Hale declined. He obviously foresaw, what most men likewise foresaw, that the reign of the Commonwealth in the weak hands of Richard Cromwell could not last. It was foredoomed.

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In the so-called Convention Parliament (1660), sitting for Gloucestershire, his native county, Hale introduced a bill to enable the Presbyterians to become a part of the old Church System, which was now being re-established, but his scheme of comprehension failed. He was at all times desirous to bring about a reunion of the more moderate dissenters with the Church, but it was not feasible, in his time, and has not yet been accomplished.

Hale was in favor of recalling Charles II, but under conditions that would safeguard as he thought, the public weal. Parliament, however, trusting to delusive promises on the part of Charles, recalled him, and practically gave him a free hand.

In the first part of his recall (1660), he made Hale Lord Chief Baron of the Exchequer, and subsequently, conferred on him the honor of Knighthood.

Hale gained great distinction as Chief Baron, and his administration of the law, during the eleven years he held that high office, secured the confidence and affection of all classes of his countrymen. He is said to have shown "a certain tenderness towards the dissenters," and endeavored to mitigate, so far as he could, the severity of the laws against them.

Later critics have censured him for his attitude towards witchcraft. He presided at the trial of two old women who were prosecuted for that alleged crime. Hale did not particularly on that occasion, analyze the testimony, but in his charge he told the jury, "he made no manner of doubt at all of the existence of witches, as proven by the Scriptures, general consent, and acts of Parliament."

The old women were convicted and executed, but protesting their innocence even on the scaffold—dying the victims of a prevailing and misguided belief, which mankind, in a later and better day, abandoned and delivered to the winds.

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In 1671 Hale was created Lord Chief Justice of the King's Bench, and, as in his prior judicatories he had won renown as a great judicial magistrate, so in this, his last judicial office, he confirmed and established that renown on an imperishable foundation.

On the twentieth of February, 1676, in the sixty-seventh year of his age, he resigned his high office in consequence of ill-health, and descended into the shades of private life. He did not live long enough to lament the loss of his former activities, or to enjoy the repose of retirement. He died at Christmas, in the same year of his resignation.

"He lived and he died," says Richard Baxter, "with the most universal love, honor and praise that ever did any English subject in this age, or any that just history doth acquaint us with."

He was interred in the churchyard at Alderney, in his native County of Gloucester, and his ancestral estate, through the passing generations and centuries, has continued in possession of his posterity, and is now held by one of his lineal descendants.

Henry Flanders.

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NOTES.

THE RIGHT OF ACTION FOR MONEY HAD AND RECEIVED ON A FORGED CHECK.

It has long been recognized that, where a bank pays a check upon a forged indorsement, the bank is the loser; neither the drawer nor the payee is prejudiced by the act. And this rule is in no way altered by the fact that the bank making the payment is not the drawee of the check, but merely discounts it, and afterwards collects from the drawee. "As the non-drawee bank is under no obligation whatever to pay, it does so at its peril; this is a well-known rule."[1] The interesting

[1] 2 Bolles, Banks and Banking (1907), p. 730.

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question arises when the attempt is made to fasten the loss upon the bank which dealt with the forger: is the only action that of the drawee bank to recover the money which it has paid, or has the payee of the check a remedy, either upon the instrument or collateral to it, directly against the collector bank?

The general rule may be stated to be, that in the absence of some form of acceptance by the bank, there is no action *upon the check* against it, in the name of the holder of the instrument.[2] A New York case[3] has allowed recovery under such circumstances, where the payee, before bringing suit, procured an assignment of all the rights of the drawer, but this goes rather upon the principle of assignment of a chose in action than upon any remedy under the law merchant. Another form of action was, however, suggested by the Supreme Court of the United States in the opinion in *Bank* v. *Millard*, 10 Wall. 152. *"It may be,"* reads the dictum, "if it could be shown that the bank had charged the check on its books against the drawer, and settled with him on that basis, that the plaintiff could recover on the count for money had and received, on the grounds that the rule *ex aequo et bono* would be applicable, as the bank, having assented to the order, and communicated its assent to the paymaster (the drawer) would be considered as holding the money thus appropriated to the plaintiff's use, and, therefore, under an implied promise to pay it on demand."

The quasi-contractual action here suggested has been brought in a great many cases,[4] with successful results, and it seems to be now a well-settled rule of law, that recovery will be allowed upon this form of pleading wherever it appears that the defendant may charge the payment made to the forger, to the drawee bank.[5] "If a negotiable instrument having a forged indorsement comes to the hands of a bank and is collected by it, the proceeds are held for the rightful owners of the paper, and may be recovered by them, although the bank gave value

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[2] *Bank of the Republic* v. *Millard*, 10 Wall. 152 (1869); *First National Bank of Washington* v. *Whitman*, 94 U. S. 343 (1876); *Saylor* v. *Bushong*, 100 Pa. 23 (1882).

[3] *Adler* v. *Broadway Bank of Brooklyn*, 30 N. Y. Misc. 382 (1900).

[4] *Buckley* v. *Bank of Jersey City*, 35 N. J. Law 400 (1872); *Farmer* v. *Bank*, 100 Tenn. 187 (1897); *Bobbett* v. *Pinckett*, 34 L. T. Rep. 851 (1876); *Shaffer* v. *McKee*, 19 Ohio 526 (1869); *Talbot* v. *Bank of Rochester*, 1 Hill. 295 (1841).

[5] *Clark* v. *Warren Savings Bank*, 31 Pa. Superior Ct. 647 (1906).

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for the paper, or has paid over the proceeds to the party depositing the instrument for collection."[6]

The question came before the Supreme Court of Pennsylvania in the case of *Tibby Brothers Glass Co.* v. *Farmers' and Mechanics' Bank of Sharpsburg*, 220 Pa. 1. The plaintiff, who had an account with the defendant, had been in the habit of indorsing checks for deposit, though not for cashing, with a rubber stamp. A bookkeeper of plaintiff indorsed several checks drawn to plaintiff's order by customers on other banks, and defendant paid him cash for them, and collected them in due course from the drawee banks. Plaintiff, upon discovering the forgery, procured the checks from their customers, and brought assumpsit for money had and received to their use, against defendant, presenting the cancelled checks as evidence. The Court denied relief, Judge Mestrezat basing his opinion upon the grounds, first, that under the law of Pennsylvania, plaintiff would have no right of action against the drawee banks, and second, because the drawee banks can recover from the defendant the money paid it by them on the forged checks; hence it cannot be held to have been "received by defendant to the use of plaintiff."

The interesting feature about this decision is, that in *Seventh National Bank* v. *Cook*, 73 Pa. 483 (1873) the Court had allowed recovery in this action, where the transaction was confined to one bank—that is, A drew the check on the X bank to the order of B; C, B's clerk, forged B's name and drew the money from the bank, which thereupon charged the check to A. B procured the check from A and recovered against the bank.

The decisions in these two cases, arising under almost precisely similar facts, would seem to point out the test in each instance as to whether or not the quasi-contractual action may be maintained by the holder of the check. If the drawer submits to a charging of the wrongful payment against his account, the remedy reverts to the holder, and the rule of *Bank* v. *Cook* would be followed; whereas, if as in the Tibby case, there is no assurance that defendant will not be proceeded against by the drawees or the drawer as the circumstances may permit, and on the other hand every assurance that some such action will be brought, the holder will be denied relief,

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[6] 1 Morse, Banks and Banking, S. 248.
[7] *First National Bank* v. *Whitman*, 94 U. S. 343 (1876).

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and sent back to his action on the original contract against the drawer, his customer or debtor.

This last remedy is always open to him, for it has been universally held that none of the transactions with respect to the forged paper amounts to a "payment" in the technical sense of the term.

The Right of a Third Party to Sue on a Contract.

The right of a third party to sue on a contract, made for his benefit but to which he was not a party, has been recognized so often and by so many jurisdictions, that it seems there must be some consistent principle on which to base it. The concensus of opinion of the textwriters, however, treats it as an anomaly. Certain well recognized transactions must be distinguished. Whenever property is delivered to one man with an obligation attached to the specific property conveyed or delivered, in favor of a third person, there is no difficulty in giving the latter a right to bring an action in his own name. The facts might show, either that the legal title was conveyed with an equitable obligation attached in favor of a *cestui que trust*, or that the legal title passed direct to the third party, by the transaction, and that the promisor became a bailee to deliver —as, for example, delivery of goods to a carrier in fulfillment of a contract to sell. In both of the above cases there is an obligation attached to the specific property conveyed. The right of action in the beneficiary is not based upon contract, but upon a property right. The same transaction creates a contract right in the promisee and a property right in the beneficiary. In the case of *Harrington* v. *Green*, 107 N. Y. Supp. 403 (Nov., 1907), the defendant received a check from the *promisee* for $372—$82.44 of which was for the plaintiff. No reasons were given to sustain the recovery allowed. Nor did the facts show whether the defendant was to pay the plaintiff out of the proceeds of the check. If such was the case, the defendant was clearly a trustee of an undivided moiety for the plaintiff.

The difficulty arises when the promisor receives property, with no obligations attached to the specific *res*, but upon a promise to pay out of general assets, a sum certain to a third party. The latter may or may not be the sole beneficiary—premiums are paid by an insured to an insurance company, which promises to pay a sum certain to a named beneficiary. A mortgagor conveys land to B, who promises to pay the debt

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of the mortgage to the mortgagee. A corporation deposits money in a bank to meet the coupons on its bonds, and the bank promises to pay the coupon holders. A parent gives property—real or personal—*intervivos* or by will—to a son upon his promise to pay certain sums to the daughter. A retiring partner assigns his interest to the remaining partners, who promise to pay the debts of the partnership. A debtor conveys his business to B, who promises to pay the creditors—in none of the above cases has the beneficiary any property right in the specific *res* conveyed, because in every case the promise is to pay out of general assets. Nor can there be any recovery based upon the doctrine of consideration and special promise, because the consideration does not move from the plaintiff. There is neither an assignment of a chose in action, nor a novation. Yet the increasingly large number of decisions permitting the beneficiary to recover[1] show, that whatever may be the apparent technical difficulties, justice requires some remedy to be given to the beneficiary. "Fair expectations should not be disappointed."[2] An exhaustive search of the early common law authorities show, that formerly, such a transaction gave rise to a debt.[3] There is a *quid pro quo* and a promise to pay a sum certain. A contract between the plaintiff and the defendant was not necessary to sustain an action of debt.[4] The action of debt has been said to be obsolete. It seems that its usefulness is still required.

But there is no principle of the common law on which to base an action by the beneficiary, where there has been no *quid pro quo*, but only a special promise.

Two fathers, whose children have intermarried, promise to each other to pay to the son a marriage portion. The son attempts to enforce the promises in his own name.[5] He has suffered no detriment, nor is there a debt. A doctrine permitting a recovery in such a case, is an anomaly. If the line is to be drawn somewhere, this seems to be the place.

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[1] The decisions for and against recovery are exhaustively treated in an article by Mr. Samuel Williston, entitled "Contracts for the Benefit of Third Persons," in XV Harvard Law Review, 767, 1902.

[2] "Law: Its Origin, Growth and Function," by James C. Carter, at bottom of page 18.

[3] See articles by Mr. Crawford D. Hening, entitled "The Limitations of the Action of Assumpsit as Affecting the Right of Action of the Beneficiary," in American Law Register, Vol. 52, p. 779; Vol. 53, p. 112, and Vol. 56, p. 73.

[4] *Starkey* v. *Mill*, Styles 296 (1651).

[5] *Tweddle* v. *Atkinson*, 1 B. & S. 393 (1861).

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Section 724 Revised Statutes of the United States Authorizing Production Before Trial.

This section 724 was originally enacted September 24, 1789. The meaning of the words "books or writings * * * which contain evidence pertinent to the issue in cases and under circumstances where they might be compelled to produce the same by ordinary rules of proceeding in chancery," seems to be easily ascertainable by referring to the practice of the English High Court of Chancery upon a bill in equity for discovery of an adversary's documents in aid of an action at law.

It was a matter of common knowledge among English and American lawyers in 1789 that after an action at law was begun either plaintiff or defendant could by an auxiliary bill in chancery obtain production in advance of trial of such of the opponent's documents as tended to prove "the case" at law of the party filing the bill. Such of the documents as were not privileged were ordered to be produced by the defendant and lodged with one of "the six clerks" of chancery, with leave to the plaintiff to make copies. The answer and the documents as above produced were subsequently used in the trial at law. Chancery commonly stayed the proceedings at law by injunction until the proper discovery of documents was obtained.[1]

Production and inspection of documents in advance of the trial at law, being the familiar practice in chancery when the above statute of 1789 was enacted, the manifest intention of Congress was to economize the time of litigants at law by dispensing with the tedious and useless formality of filing an auxiliary bill in equity for discovery of documents before the Circuit Judge in his capacity of chancellor and then, after thus obtaining production and inspection of the documents, of requiring the answer and documents to be transported to the law side of the Circuit Court and there to be read in evidence.

When Congress enacted the words of the Judiciary Act of 1789: "Sec. 15. *And be it further enacted,* That all the said courts of the United States shall have power in the trial of actions at law on motions, &c.," we must assume that this body was familiar with the chancery practice of granting production *before* trial in the case of actions at law. If therefore the Congress was aware of that practice and did

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[1] *Smith* v. *Duke of Beaufort*, 1 Hare 507 (1842); ——— v. *The Corporation of Exeter*, 2 Vesey, Sr. 620 (1755); Langdell on Eq. Pr. (2nd Ed.) 242; *Reynolds* v. *Burgess Co.*, 71 N. H. 332.

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not wish to adopt it we should expect that words expressly limiting the right of production to the actual date of the trial would have been substituted for the above very general language which may refer quite as readily to the entire procedure of a common law action as to the particular day of trial.

In contrast to the strong current of judicial authority interpreting this section so as to allow production before trial, a contrary view has been entertained by certain judges—by Curtis, J., in *Iasigi* v. *Brown*, 1 Curtis 402 (1853); by Clifford, J., in *Merchants' National Bank* v. *State National Bank*, 3 Clifford 201 (1868); by *Green, D. J.*, in *U. S.* v. *National Lead Co.*, 75 Fed. 94 (1896). These decisions are based upon the following reasons: Judge Curtis was impressed by the argument that "it would occupy time unnecessarily, and it might be very difficult to decide before hand, whether a paper was pertinent to the issue, and whether it was so connected with the case, that a Court of Equity would compel its production." To this reasoning the reply would appear sufficient that the Federal Court can only act after a hearing upon notice and after receiving such evidence in the form of affidavits and counter-affidavits as give the like information respecting the relevancy of the documents sought as chancery has always required and acted upon when a motion for production of documents was based upon the answer. Judge Clifford's interpretation makes much account of the provision that the penalty of disobedience is not immediate attachment for contempt, as in the case of disobedience to an order for production of documents, but is a non-suit or a default. It would seem, however, perfectly consistent with the main purpose of the statute, *viz.*, to require production of documents "under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery," that the documents could be ordered to be produced *before* the trial and, if the order is disobeyed, the statutory punishment of default or non-suit could be imposed *at* the trial. The reasoning of Green, D. J., seems to rest upon a mistaken idea of the phraseology of the act, as the Judge cites the act as containing the words, *"On the trial of any action."* But the words in reality are *"in the trial."*

In *accord* with the recent decision of *Shaefer* v. *Int. Power Co.*, 157 Fed. 896 (Circuit Court So. Dist. of New York), see *post* p. 354, and supporting the interpretation of Sec. 724 advocated in this note see: *Cent. Nat. Bank* v. *Tayloe*, 2 Crach. C. C. 427; *Jacques* v. *Collins*, 2 Blatchf. 23; *Gregory* v. *Chicago R. Co.*, 10 Fed. R. 529; *Lucher* v. *Phoenix Assur. Co.*, 67 Fed. 18;

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Boede Co. v. *Bancroft and Son*, 98 Fed. 115. One of the fundamental reasons for permitting discovery in chancery was economy of time in preparing for and trying issues of fact. To give production only at the trial under Sec. 724 would defeat this fundamental object of giving production. See *Lord Montague* v. *Dudman*, 2 Ves. Sen. 398; *Brereton* v. *Gamul*, 2 Atk. 240; *Earl of Glengall* v. *Fraser*, 2 Hare 99.

"Volenti Non Fit Injuria" as Applied to Persons Riding in Exposed Places on Street Railway Cars.

The cases relating to the rights of persons occupying exposed places on street railway cars, while generally placed on the ground of contributory negligence, are more properly to be referred to the doctrine of voluntary assumption of risk. Contributory negligence involves the idea of misconduct, a failure to measure up to the standard of care of the average man. Voluntary assumption of risk may exist, although the risk would be incurred by the man of average carefulness.[1] Thus, the average man would stand on the rear platform of a car, although in so doing he may well be held to take the risks of certain dangers that are necessarily incident to that position, such as injuries caused by the normal swaying of the car. Adopting therefore the principle of "*volenti non fit injuria*" in this class of cases we should expect in general to find that a plaintiff is not barred because of his exposed position on a car unless (1) he has voluntarily taken such position, and (2) the injury which he has suffered is one that is peculiarly incidental to that position.

The necessity of transportation has in general been held sufficient to render the taking of the exposed position not voluntary. Thus, it is universally held that a passenger may occupy the platform or runningboard (of an open car) when the inside of the car is crowded;[2] and in the latter case the company owes him a duty of protection from the negligence of their servants,

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[1] For a full discussion of the doctrine of voluntary assumption of risk, see article by Francis H. Bohlen, Esq., 20 Harvard Law Review, p. 14.

[2] For reference to Pennsylvania cases, see P. & L. Dig. of Decis. Col. 22515.

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for example, from a collision with another car, or from collision with a wagon standing in the street which was seen by the motorman,[3] but not from collisions with wagons where there was no negligence on the part of the motorman.[4]

The urgency of transportation, however, is not sufficient to prevent the occupation being voluntary when the place is so dangerous that injury must almost necessarily result; thus, where a person standing on the bumper of a car was struck in a rear-end collision,[5] or where a person took his position outside the guard-rail of an open summer car and was struck by a crowd of persons occupying a similar position on a car going in the other direction.[6]

The cases that present greater difficulty and in which there is some divergence of authority are those where a passenger occupies the platform of a car when there is sitting or standing room inside. According to the current of authority such a person is not barred from recovery,[7] although the intimation is that if there were a rule of the company prohibiting persons riding on the platform, notice of which was brought home to the passenger, the result would be otherwise.[8] This result seems in harmony with the principles governing the doctrine of assumption of risk. It would seem that the doctrine should prevent recovery when the injury results from the mere normal swaying of the cars, or even from negligence of persons getting on and off the cars. The Pennsylvania cases, however, have developed a rule which is contrary to the general current of authority. It is held that to ride on the platform of an electric car is negligence *per se*, which bars recovery for an injury received through the negligence of the company.[9] Several reasons may be assigned for this conclusion. (1) The courts of this State have distinguished between the case of persons riding on the platform of a horse car and that of persons riding on the platform of an electric car;[10] this distinction seems

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[3] *Bumbear* v. *United Traction Co.*, 198 Pa. 198.
[4] See *infra*, report of the recent case.
[5] *Bard* v. *Pa. Traction Co.*, 176 Pa. 97. (There being no evidence that he was seen by the motorman of the following car.)
[6] *Harding* v. *Phila. Rapid Transit Co.*, 217 Pa. 69.
[7] *Dolan* v. *Ry.*, 87 N. Y. 63; *Upham* v. *Detroit Ry.*, 85 Mich. 12.
[8] *North Chicago Ry.* v. *Brown*, 179 Ill. 126.
[9] *Thayne* v. *Traction Co.*, 191 Pa. 251.
[10] See language of Chief Justice Mitchell in the last cited case, and *Ry.* v. *Boudron*, 92 Pa. 475.

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anomalous. (2) It is an unconscious application of a tendency that exists in the Pennsylvania courts in negligence cases to lay down artificial standards of care,[11] and to select some physical fact as conclusively indicative of absence of care.[12] (3) It is submitted that the result reached by the courts of this State results in part from a misunderstanding of the doctrine of voluntary assumption in risk. The real question under the doctrine of voluntary assumption of risk is, what is the danger that is normally to be anticipated from the position taken up. Manifestly a man in standing on the back platform of a car does not take "upon himself the risk of his position from *any cause.*"

Certainly, no court would hold that where a car fell through a bridge whose defective condition was due to the negligence of the trolley company, and all persons on board were overwhelmed in the common disaster, that the plaintiff could not recover because he was standing on the platform. So, in lesser degree, while a person in taking his position on the platform may be held to assume the risk of injuries due to the swaying and jolting of the car, and the crowding of passengers, he should not, it is submitted, be held to take the risk of a rear-end collision.

In the recent case of *Hyde* v. *Seattle Electric Co.* (93 Pac. 903) the plaintiff descended to the step of an open summer car when less than a block from home. A wagon which was proceeding parallel to the car suddenly swerved aside and injured the plaintiff. The decision in favor of the defendant seems in accord with the principles developed above, for conceding the plaintiff was rightfully on the runningboard of the car, there was no evidence of negligence on the part of the company. Thus, the case is distinguished from the case cited above when a wagon was standing in the street and where the collision could have been averted by care on the part of the motorman.[3]

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[11] *I. e.*, not the standard of the average man, but a standard imposed by the court.

[12] Cf. necessity of "stopping" in level crossing accidents; also that the stopping of a car is a prerequisite to recovery in case of an injury sustained by a person leaving a car. The reason for this tendency is to require evidence which is easy of ascertainment by witnesses.

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Whether in Estimating the Reasonableness of Rates Prescribed for Passenger Traffic the Court Should Take into Consideration the Earnings Derived from Passenger Traffic Only, or Should Take into Consideration the Earnings from Both Freight and Passenger Traffic.

The Supreme Court of Pennsylvania, in declaring unconstitutional an act of the Legislature fixing two cents as the maximum fare per mile for transportation of passengers on railroads in that State, so far as it relates to the plaintiff company, holds that a carrier is entitled to earn a net income not less than the legal rate of interest, plus a sum sufficient to pay fixed charges, operating expenses, cost of maintaining the plant, and providing for a sinking fund for the payment of debts, besides a fair profit to the owners; and that in determining whether passenger rates are unreasonable or unjust, the passenger traffic of the road should be considered separate and distinct from the freight traffic.[1] There are strong dissenting opinions, which take the view that the earnings from all the branches of the business should be considered as a basis of fixing a rate for passenger traffic which would conform to the test of reasonableness above laid down.

It is well settled that a State may regulate the rates of a business affected with a public use;[2] and this may be done either through the medium of the Legislature or of a commission.[3] Such regulation, however, is subject to review by the courts, and whether the rates are so unreasonable as to operate to deprive the carrier of its property without due process of law, becomes a judicial question ultimately, although it may be primarily a legislative question.[4]

The test of reasonableness applied by the United States Supreme Court has been whether or not the rate permits a fair return on all the property of the carrier used for the convenience of the public,[5] and while the cases have arisen chiefly upon

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[1] *P. R. R. Co.* v. *Phil. County*, 68 Atl. Rep. 676 (1908).

[2] *Munn v. Ill.*, 94 U. S. 113 (1876); *At. Coast Line* v. *N. C. Corp. Com.*, 206 U. S. 1 (1906).

[3] *R. R. Com. Cas.*, 116 U. S. 307 (1886); *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. at 393 (1893); *M. & St. L. R. R. Co.* v. *Minn.*, 186 U. S. 257 (1902).

[4] *M., St. P. & Chicago Ry. Co.* v. *Minn.*, 134 U. S. 418 (1890).

[5] *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362 (1893); *Smyth* v. *Ames*, 169 U. S. 466 (1897).

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questions involving freight rates,[6] still the most positive declarations of the Supreme Court upon the subject have been in cases which involved passenger as well as freight rates.[7] The same test has been adopted by the Interstate Commerce Commission.[8]

It has been held, also, that a carrier is not justified in charging an unduly high rate over a particular line which is a part of a great system, merely because that particular line fails to pay expenses,[9] and the right of a State to compel a railroad company to run a particular train for the convenience of the public, even though it entailed a pecuniary loss upon the company, has been sustained by the Supreme Court of the United States.[10]

On the other hand, the Supreme Court has held that in determining the reasonableness of a State regulation of intrastate traffic, all consideration of interstate traffic should be excluded, and that the intrastate rate should be so fixed as to afford a fair return to the carrier upon the capital invested in that branch of its business regardless of the income from interstate traffic.[11] The bald question of separating the freight and passenger rates and the right of the carrier to secure a fair return upon each without regard to the return upon the other, seems, however, not to have been as yet presented to the Supreme Court for adjudication. The attitude of that court toward the question cannot be anticipated with certainty, but the cases cited incline, upon principle, toward the minority view in the principal case.

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[6] *M., St. P. & Chicago Ry. Co.* v. *Minn.*, 134 U. S. 418 (1890); *C. & N. W. R. R. Co.* v. *Dey*, 35 Fed. Rep. 866 (1888); *Ames* v. *U. Pac. Ry. Co.*, 64 Fed. Rep. 165 (1894); *No. Dakota Rate Cas.*, 91 Fed. Rep. 47 (1898).

[7] *C. M., etc., Ry. Co.* v. *Tompkins*, 176 U. S. 180 (1899); *Ga. R. R., etc., Co.* v. *Smith*, 128 U. S. 174 (1888); *Reagan* v. *Farmers' L. & T. Co.*, 154 U. S. 362 (1893); *Smyth* v. *Ames*, 169 U. S. 466 (1897).

[8] *Brabham* v. *Atl. Coast Line*, 11 Interst. Com. Rep. 464 (1905); *Arts* v. *Seaboard Air Line Ry. Co.*, 11 Interst. Com. Rep. 458 (1905).

[9] *Interst. Com. Com.* v. *R. R. Co.*, 118 Fed. Rep. 613 (1902).

[10] *At. Coast Line* v. *N. C. Corp. Com.*, 206 U. S., 1 (1906).

[11] *Smyth* v. *Ames*, 169 U. S. 466 (1897); *No. Dakota Rate Cas.*, 91 Fed. Rep. 47 (1898).

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RECENT CASES.

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In Musical Compositions: Perforated Rolls

Perforated rolls, which, when used in connection with mechanical piano players, reproduce in sound copyrighted musical compositions, do not infringe the copyright in such compositions. *White-Smith Music Pub. Co.* v. *Apollo Co.*, U. S. Adv. Sheets, March 16, 1908, p. 319.

Justice Day said: "These perforated rolls are parts of a machine, which, when duly applied and properly operated in connection with the mechanism to which they are adapted, produce musical tones in harmonious production. But we cannot think they are copies within the copyright act." *Kennedy* v. *McTammany*, 33 Fed. 584.

In a similar case relative to phonograph discs, the Court said: "It is not pretended that the marks upon the wax cylinders can be made out by the eye or that they can be utilized in any other way than as parts of the mechanism of the phonograph." *Stern* v. *Rosey*, 17 App. Div. (D. C.) 562.

The question came squarely before the English court in *Bosey* v. *Wright* (1899) 1 Ch. 836, and it was there held that the perforated rolls did not infringe the English Copyright Act protecting sheet music. The Court based their decision upon the ground that "the rolls are intended merely for causation and not for indication of the music."

Justice Holmes, in concurring specially, pointed out the evident injustice of the decision, made necessary by the statute. He said, "One would expect the protection to be coextensive, not only with the invention, which, though free to all, only one had the ability to achieve, but with the possibility of reproducing the results which gives to the invention its meaning and worth. On principle anything that mechanically reproduces that collocation of sounds ought to be held a copy, or if the statute be too narrow, ought to be made so by further act, except so far as some extraneous consideration of policy may oppose."

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CRIMINAL LAW.

False Pretence: Value

Defendant by his false representations that certain land was worth $11,000, induced the prosecutor to pay him that sum in a sale of the land. The land, it was alleged, was worth only $330. Defendant was indicted for false pretence, and at the trial evidence was given that he knew the land was not worth $11,000. *Held,* when a statement as to value is made as an existing fact, and when the speaker knows it to be false and intends it to be an inducement to the other party, it becomes a false representation of a material fact. And whether it was intended as an expression of opinion or as a fact, is to be determined by the jury. Supreme Court of Ohio, 83 N. E. 802.

The same rule was applied in the recent case of *Crandall* v. *Parks*, 93 Pac. 1018, which was an action to rescind a contract on the ground of fraud.

GUARANTY.

Notice of Acceptance.

A executed a guaranty upon an order for goods from B, which contained a condition that the order should not be a binding contract until approved by B. The order and guaranty were delivered to B's agent. B approved the order and shipped the goods, but no notice of the acceptance of the guaranty was given to A. B sues A on the guaranty. Judgment was given for A on the ground that notice of the acceptance of the guaranty is necessary to bind the guarantor. *Smith Co.* v. *Thesmann*, 93 Pac. 977 (Oklahoma).

This follows the rule laid down by the Supreme Court of the United States in *Davis Co.* v. *Richards*, 115 U. S. 524, that mere performance of the offer of guaranty does not complete the contract.

In *Bishop* v. *Eaton*, 161 Mass. 500, it is said that acting on the guaranty completes the contract, but the acceptor must notify the guarantor within a reasonable time after the performance. This duty, however, is performed by the mailing of the letter giving notice, though it never reaches the guarantor. But see *Lennox* v. *Murphy*, 171 Mass. 370.

This rule of notice, which seems to be limited to cases of guaranties, has been adversely criticised. See Hare on Contracts, 320.

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HOMICIDE.

Trial: Instructions: Requests

The following charge was requested by the defendant and refused by the Court: "The Court charges the jury that one of the ingredients of murder in the second degree is willfulness and malice aforethought, and unless the jury believe beyond all reasonable doubt that the deceased came to his death by blows inflicted upon him by the defendant intentionally and with malice aforethought they cannot find him guilty of murder in the second degree." *Held*, the trial Court did not err in refusing the charge; "that it was misleading, for the use of the word 'aforethought' as applied to murder in the second degree." *Smith* v. *State*, 45 South. Rep. 626.

An authority in support of the conclusion in the principal case is *Wilson* v. *State*, 128 Ala. 17, in which it was said: "A term giving rise to views so divergent would probably have confused the jury and misled them to believe that premeditation was a necessary ingredient of murder in the second degree, whereas malice which may arise on the instant and without deliberation, when concurring with an intention to kill, may constitute that offense."

Both authority and principle seem to be contra to this decision, however. "The word 'aforethought' does not necessarily require either deliberation or premeditation." Bishop on Criminal Law. "To bring a killing within the provision 'deliberate and premeditated,' it must be such as would be murder at the common law, otherwise expressed it must be of 'malice aforethought;' added to which, it must be 'deliberate and premeditated.'" *Smith* v. *S.*, 68 Ala. 424. "The malice which is an essential element in the offense of murder, has always been described as malice aforethought." *Ethridge* v. *State*, 141 Ala. 29; *Fields* v. *State*, 52 Ala. 348.

PRINCIPAL AND SURETY.

Departure From Contract Obtained by Fraud of Principal

In a building contract, it was specified that no instalment should exceed seventy-five per cent. of the cost of materials delivered for the work. The contractor fraudulently substituted materials inferior to those named in the contract, and by collusion with the engineer of the one for whom he was building, instalments were made exceeding seventy-five per cent. of the cost of materials actually furnished but not ex-

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PRINCIPAL AND SURETY (Continued).

ceeding seventy-five per cent. of the materials pretended to be furnished. *Held*, that the claim of the contractor's surety to be discharged on the ground that the creditor had failed to maintain the reserve stipulated for by the contract until the work was completed, was not sound. *Van Buren County* v. *American Surety Co.*, 115 N. W. 24. It is generally held that where, by the terms of the contract, the principal is to be paid in instalments, and he is paid faster than the contract provides, a surety for the completion of the work to be performed by the principal is discharged. *Calvert* v. *Dock Co.*, 2 Keen 638. One court has held, where the principal by fraud obtained money not due from the creditor, that the surety is discharged, *Goodin* v. *Ohio*, 18 Ohio Rep. 6; but the better rule seems to be that under such circumstances the surety is not discharged even though the negligence of the creditor's agent made the principal's fraud easier of accomplishment. *Ryan* v. *U. S.*, 22 U. S. Supr. Ct. Rep. (L. Ed.) 172.

PAYMENT.

Pre-Existing Debt: Promissory Note: Presumption

Where a debtor executes his note, governed by the law merchant, for a pre-existing debt, such note is only a *prima facie* presumption of payment of the debt; but where this presumption of payment deprives the party accepting it of collateral security or some other substantial benefit, such circumstance rebuts the presumption of payment. This rule is the same where the debtor, at the instance of the creditor, executes his note to a third person. *Beach* v. *Huntsman*, 83 N. E. (Ind.) 1033.

This rule of law that the giving of a promissory note by a debtor to the creditor or to a third person, at the request of the creditor, is *prima facie* payment of the pre-existing debt obtains in the jurisdiction of Massachusetts, Maine, Vermont, Indiana and Louisiana. *Paddock* v. *Simmons*, 186 Mass. 152; *Krider* v. *Knox*, 48 Me. 551; *Dickenson* v. *King*, 28 Vt. 378; *Hunt* v. *Boyd*, 2 La. 109.

In all jurisdictions, except as above, a promissory note given by the debtor to the creditor or to a third person at his request does not raise a presumption of payment of the pre-existing debt, but is governed by the agreement of the parties. *Owen* v. *Morse*, 7 T. R. 66; *Price* v. *Price*, 16 M. & W. 240;

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PAYMENT (Continued).

Sweet v. *Jones*, 2 R. I. 292; *Mooring* v. *Mobile*, 27 Ala. 256; *Bank* v. *Daniels*, 12 Pet. 32; *Phila.* v. *Stewart*, 195 Pa. 314.

But, unless otherwise agreed, it does raise a presumption of conditional payment which merges the debt in the note and suspends all right of action on the debt during the running of the note. *Ward* v. *Evans*, 2 L. Raymond 928; 2 Ames Bills and Notes 571; *Kilpatrick* v. *Association*, 119 Pa. 36; *Humelstown* v. *Knerr*, 25 Pa. Sup. 467.

SALES.

Fraudulent Conveyance: Retention of Possession by Vendor

A purchased an automobile from C, giving a note and extinguishing an old debt in payment. He allowed it to remain in C's possession, and permitted C to use the same in consideration of its storage in C's garage. Subsequently, C mortgaged the machine to B, who took possession of it. In an action of replevin A was permitted to recover, and it was held that whether the retention of possession by the vendor was fraudulent upon the subsequent mortgagee was a question for the jury. *Wilson* v. *Walrath*, 115 No. West. 203 (Minn).

Whether retention of possession by the vendor after a sale is fraudulent upon a subsequent innocent vendee for value, appears to have been first dealt with in Twyne's Case, 5 Eng. Rul. Cas. 21, interpreting St. 13 Eliz. C. 5 and St. 27 Eliz. C. 7. It was there ruled in point of law to be fraudulent. The English court, after considerable shifting, has finally determined it to be merely presumptive of fraud, which may be rebutted. *Cookson* v. *Swire*, 9 App. Cas. 653.

The American cases have, either under statute or common law, taken three views: First in following the early English view, *Stephen* v. *Gifford*, 137 Pa. 219; secondly, holding it a presumption of law which may be rebutted, *Hobbs* v. *Bibb*, 2 Stew. 54; thirdly, that the retention is only *prima facie* evidence of fraud, and is a question for the jury. The majority of States, together with the Federal courts, have adopted the third view, *Mohton* v. *Robinson*, 40 Mich. 200; *Warner* v. *Norton*, 20 How. 460. The principal case which is an interpretation of a State statute, is in accord with this majority view which represents the modern tendency.

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WATER COURSES.

A canal company, under a franchise from the State, constructed a cross-canal, which drained a lowland in an artificial course. B built upon the land relying upon the new flowage. After forty years A, who was then owner of the canal, obstructed the cross-canal thus throwing back the water to its original drainage, and thereby flooding B's land. *Held*, that A could not be restrained from obstructing the cross-canal and establishing the original flow. *Lake Drummond Canal and Water Co.* v. *Durnham, et al.*, 60 So. East. Rep. 650 (N. Co.).

Removal of Artificial Constructions

The question whether one may return to its true course a stream, which has been controlled by an artificial device for the prescriptive period, has frequently come before the courts. Almost uniformly the answer has been in the negative. The reasons assigned are: First, the one against whom the right to divert has been acquired, has himself gained a prescriptive right to insist that the new course be maintained, *Mathewson* v. *Hoffman*, 77 Mich., 420; secondly, it is a species of dedication to the public use, *Ford* v. *Whitlack*, 27 Vt. 265; and thirdly, where a change has been made which presents the appearance of permanency, the doctrine of estoppel will prevent a stream being reverted to its ancient course to the injury of one who has been induced to act upon such appearances, *Smith* v. *Musgrove*, 32 Mo. App. 241.

The objection to the first reason is that the user of him against whom the right to divert has been acquired, cannot be called adverse; to the second that dedication must be to the public, while here it is simply to the individuals who happen to be within the radius of the change in flow. Farnham on Water and Waters, p. 2331.

The third reason, while perhaps the best, admits of much judicial discretion in determining what change exhibits sufficient permanency. In the present case a user of forty years was held only temporary. It might very well, with more justice and accordance with authority, have been held contra. *Withers* v. *Purchase*, 60 L. T. N. S. 819; *Belknap* v. *Trimble*, 3 Paige 577.

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BOOK REVIEWS.

REPORTS OF THE AMERICAN BAR ASSOCIATION. Volume XXXII. A Reprint of an Essay on Professional Ethics. By Hon. George Sharswood. Philadelphia. T. & J. W. Johnson Company. 1907. Pp. 193.

No more striking mark of appreciation of intrinsic worth of a legal treatise can be conceived of than its republication by the American Bar Association fifty-four years after the date of its original appearance, and when, in addition to this unique tribute is added the further fact that this republication is made with the clear purpose of stimulating in the bar of this country a true realization of the high standard of ethics which the profession must maintain in public and in private life, it is indeed more than a renewed recognition of the value of the book, it is rather a worthy memorial of the influence for good of one of the noblest leaders of the legal profession. In honoring Chief Justice Sharswood by the reprinting of his well-known work on "Professional Ethics," the American Bar Association has taken a wise method of advancing the work of its committee on a code relating to that subject. No member of the association can read the vigorous work of Justice Sharswood without feeling a quickened determination to aid in preventing the practice of the law from becoming a mere branch of commerce. No one can study the discriminating discussion of the relations between the attorney, the court and the client without again realizing the manifold and delicate obligations which rest upon every counsellor. Consider for a moment the scrupulous nicety which the author (p. 111) displays in analyzing the duty of a lawyer in preparing an affidavit. Examine the earnest plea he makes (p. 69) for a strict upholding of the relative responsibilities of the court and the jury. Compare these thoughts with the every day practice in these matters and the need and the value of the republication of this legal classic are at once apparent.

R. D. J.

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FEDERAL USURPATION. By Franklin Pierce, of the New York Bar. New York: D. Appleton & Co. 1908. Pp. xx, 437.

Mr. Pierce has written a vigorous, readable volume embodying the views of those opposed to the alleged centralization of power in the national government. He does not profess to have written a law book, but in his preface says: "This book is a plea for the sacredness of the Constitution of the United States." His thesis is that the Constitution is virtually being amended by the usurpation of power by the President, by manipulation through the judicial interpretations of the Supreme Court and by the undemocratic system of government by committees in vogue in Congress.

In the chapter on "Executive Usurpation," Mr. Pierce cites numerous executive statements and acts to show the growth of the power of the President, concluding the chapter with a strong arraignment of President Roosevelt. The chapter on "Congressional Usurpation" and the "United States Supreme Court" are replete with facts and citations which apparently substantiate Mr. Pierce's charge, that the States are being deprived of their constitutional rights by this insidious system of usurpation rather than by the method of amending the Constitution provided by that instrument itself. The author quite despairs of present conditions, and in the last chapter of his book, entitled, "How to Restore the Democratic Republic," suggests a convention for the amendment of the National Constitution. He says, "This Constitution is the most undemocratic instrument to be found in any country in the world to-day." His book, although somewhat radical, is forcibly suggestive and well written.

R. W. B.

NEGLIGENCE IN LAW. By Thomas Beven, of the Inner Temple. Third edition, two volumes. London: Stevens and Haynes. Toronto: Canadian Law Book Co. Philadelphia: Cromarty Law Book Co. 1908. Pp. cciv, 1-726, 727-1505.

This edition of Mr. Beven's work is not as valuable for the American practitioner as the previous edition, owing to the fact, which he fully explains in the preface, that an attempt to present the law of the United States side by side with that of England is impossible of success and inexpedient. The

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reason for Mr. Beven's decision in this respect comes from his conclusion that "though of the same parentage as ours, American law has in late years been developing along divergent lines, and accepts principles widely applicable that are to us not only novel but fundamentally unsound." Specific instances are cited, one the case of *Lawrence* v. *Fox*, 20 N. Y. 268, concerning which, Mr. Beven says: "this case decides, that a telegraph company is responsible not only to the sender of a message, but also the addressee; that persons not parties to a contract may, nevertheless, sue for damages for its breach," while in England the contradictory principle is well settled.

Two characteristics of Mr. Beven's method of treatment make these volumes of universal interest: first, his searching inquiry into the validity of the decisions of the courts; and second, the notes in which the author traces the history of many of the principles of the law of negligence, and also shows how and when changes have been made in them. Relative to his keen analysis and criticism of decisions, the author says: "It may be as Lord Coke tell us, that the whole common law of England resides in the breasts of the judges; but in welling from the sanctity of its source it is apt to flow into distractingly cross-currents and to tinge itself with strong individual traces of the particular channel through which it is drawn. To find the true pure stream is a little difficult without the assistance of those methods which purge error in the realms of science or philosophy." For the notes tracing the history of principles and theories, Mr. Beven apologizes, but for the practitioner intent upon the understanding and application of a particular principle to certain concrete facts, these historical notes are of great value.

It is not often that the *style* of the writer of a good usable law book attracts attention, but Mr. Beven's clear vigorous English has lost none of its charm in this edition of his text. One must, aside from the greatness of Mr. Beven's work as a treatise on the law of negligence, characterize it as *attractive*, in beauty of diction, keenness of logic, clearness in the statement of principles, and in the scientific classification of the subject matter of the text.

R. W. B.

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MINING, MINERAL AND GEOLOGICAL LAW. A treatise on the law of the United States involving Geology, Mineralogy and allied sciences, as mining, real estate, public land, United States customs and other litigation. Also the acquisition and maintenance of mining rights in the public domain and obtaining patents for mineral land under the United States mining laws. By Charles H. Shamel, M. S., LL. B., A. M., Ph. D. 1907. London and New York: Hill Publishing Co. Pp. xxx, 627.

The law is the only profession whose practitioner may be called upon at any time to show himself familiar with the principles and details of any art, science or business whatsoever. To make it at all possible for the lawyer to do this, text books have been written upon a number of the arts and sciences in their legal aspects. The most familiar of these are the works on medical jurisprudence. The present work is a treatise on those aspects of geology which may be of use to the lawyer when considering mining questions, and to the mine owner when considering legal questions.

Adequate works of this two-faced kind are as rare as are men eminent in two professions, but the present book is thoroughly adequate.

The main portion of the book is occupied with the discussion of the various theories of vein formation and to this end all the latest authorities are cited. As is pointed out, the proper theory of the formation of ore deposits is very important in many litigations. The law peculiar to mining rights is then set out.

About a third of the volume is occupied by an appendix which includes the United States mining laws and land office regulations, State and Territorial mining laws, a bibliography and an elaborate table of rock classification and geological formations. The State statutes given are only those of the Western mining States, and are limited to those laws concerning property rights in mines and mining claims. The police statutes are omitted. The full bibliography is one of the features of this work, which is all too seldom met with in books of this class.

This work ought at once to become standard in its department.

S. B. S.

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THE GROUNDS AND RUDIMENTS OF LAW. By W. T. Hughes. Vol. I. Chicago: Usonia Book Co. 1908. Pp. xix, 356.

Mr. Hughes has professedly undertaken to condense a vast amount of legal learning within the scope of this small book. "The Grounds and Rudiments of Law," as outlined by him, are largely maxims found in "Broom's Maxim's." Mr. Hughes' attitude toward the law and his grandiloquent use of English throughout the book is shown in the opening sentences of his preface: "Bacon and Paul must ever remain two of Justitia's greatest sons! Wrapped in individualistic solitude they stand above all." There are chapters entitled "The Fountains of the Law," "Renaissance of the Civil Law," and "Estoppel." The book is practically valueless for the practitioner, owing to the florid style of the author and his utter lack of solidity and continuity of treatment of the subject matter. The book as a whole discusses subjects that do not present practical difficulties to the lawyer or student, and the author's burdened seriousness is distinctly amusing as expressed in such sentences as on page 7 of the chapter entitled "Fountains of Law," where he says: "The unshackled savage of America was appalled at the national holocaust in Peru submerged in rapine and in blood."

R. W. B.

DATUM POSTS OF JURISPRUDENCE. By W. T. Hughes. Chicago: Usonia Publishing Co. 1907. Pp. xiv, 250.

A "Datum Post," according to Mr. Hughes, is "a point from which a reckoning is made." In this little volume, the author undertakes to condense and arrange for practical use 416 leading cases, and the various maxims and principles of law illustrated thereby. The chief characteristic of the work is the attempt to condense without sacrificing clearness. The author has succeeded in this remarkably well, but it seems doubtful whether either the practitioner or the careful student would be satisfied with the condensed statement of the author if the original cases are available. The grandiloquent style of the author, so evident in his later work "The Grounds and Rudiments of Law" is not apparent in this work, except in the preface. If a condensed from of a number of "Leading Cases" is needed, Mr. Hughes's book furnishes it.

R. W. B.

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A Treatise on Electric Law, Comprising the Law Governing all Electric Corporations, Uses and Appliances, Also all Relative Public and Private Rights. Second Edition. By Joseph A. Joyce and Howard C. Joyce. Two Volumes. New York: Banks Law Publishing Co. 1907. Pp. cxc, 1774.

The modern tendency to produce legal treatises dealing with a branch of the law included within empirical rather than analytical boundaries is well illustrated by Joyce on Electrical Law. From a legal standpoint there is no real reason, for example, why cases dealing with the rights and duties of electric light corporations should be grouped together merely because they furnish illumination by means of filaments or carbons heated by the passage of an electric current. However there is a real basis of convenience in bringing together within two volumes a discussion of every case in which persons or corporations dealing in or utilizing electricity are concerned, because it is of course true that the resulting problems represent a special class when considered from the purely business standpoint.

The authors have been unusually successful. The earlier edition has been thoroughly gone over and brought down to date by the introduction of much new material. So recent has been the revision that an extended section has been included dealing with the question of wireless telegraphy. The work also includes a very careful examination of the questions arising under the Post Roads Acts and of the Interstate Commerce clause of the Federal Constitution (Chapter IV.) and of the corporate powers of telegraph, telephone and electric light companies (Chapter XIII). The vexed question as to whether and under what circumstances an electric light telegraph or telephone line constitutes an additional burden on the highway for which an abutting owner may claim compensation (See Sec. 296, sq.) is adequately treated. In connection with this discussion it is curious that the latest Pennsylvania Supreme Court case, Brown vs. Radnor Electric, &c., Co., 208 Pa. 453 (1904) has not been noted, while a country court case has been referred to in some detail (Sec. 331a).

In the first part of the second volume there is a painstaking discussion of the intricate legal problems presented by induced and interfering currents.

The discussion of such questions as injuries to passengers on electric cars, the abuse of authority by street railway employees, &c., could have profitably been omitted as these

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subjects are adequately covered by existing works and the mere fact that an electric current is the motive power by which the car is propelled, does not bring these cases within any proper meaning of Electric Law. On the other hand if a chapter had been added on the elementary technique of Applied Electricity it would have been of great assistance to the busy practitioner, who in cases involving the preparation or interpretation of every-day electric contracts is bewildered as to the meaning of the most ordinary terms and in the examination of witnesses in suits involving the overloading of motors, &c., is hopelessly perplexed by the words of even "one syllable" in electrical nomenclature.

R. D. J.

LEGAL ESSAYS. By James Bradley Thayer, LL.D. Edited by Ezra Ripley Thayer. Boston: Boston Cook Company. 1908. Pp. xvi, 402.

This collection of Legal Essays, of the late Professor Thayer, will be of universal interest to the legal profession. It contains a number of papers prepared by Professor Thayer for delivery on special occasions and hitherto unpublished, together with others published from time to time in the Harvard Law Review, and elsewhere. Ezra Ripley Thayer, who has collected his father's essays for publication, states in the preface that no changes have been made in the original except the occasional correction of a clerical error. The editor has prefaced such essay with a short account of the occasion of its original publication or delivery. "The Origin and Scope of the American Doctrine of Constitutional Law" is an address given before the Congress on Jurisprudence and Law Reform, at the World's Fair, at Chicago, on August 9, 1893. Professor Thayer discussed before this Congress the power of the American Judiciary to declare legislative Acts unconstitutional. The essay on "Advisory Opinions" or opinions in which the Judiciary advises the Legislative branch of the government, was written at the request of Chief Justice Bradley, of Rhode Island. The history of this practice in the United States is outlined and the legal quality of such opinions discussed.

This book of essays is more than a set of legal discussions. It shows the human side of Professor Thayer, in the addresses and essays he prepared and delivered before non-professional audiences. In the essay entitled, "The People Without Law,"

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Professor Thayer's deep interest in the welfare of the American Indians is shown. He made many addresses on this subject, giving his time freely for years, insisting that it was the duty of the Government to bring the Indians under the protection and control of the ordinary laws of the land. In this essay, originally published in the "Atlantic Monthly," Professor Thayer discussed in a style even more delightful than that used in his professional work, the legal and political history of our relations with the Indians, setting forth his own idea of a constructive governmental policy toward them. Another essay of a non-professional character, and at the same time combining the legal acumen of Professor Thayer with his ability to clarify a subject for a non-professional audience is "Our New Possessions," which was read before a small dining club, of which Professor Thayer was a member.

Bedingfield's Case—"Declarations as a Part of the Res Gesta"—is the most extensive essay in this volume. It was published in the "American Law Review" in 1880 and 1881, and has been cited as authority by many of the higher courts in the United States. One of the most delightful essays of this volume is that entitled, "Trial by Jury of Things Supernatural." This too was first read before the dining club referred to above. It was published in the "Atlantic Monthly" for April, 1890, but is of special interest at this time, owing to the recent criminal cases involving various methods of mental and spiritual healing.

R. W. B.

REPORT OF THE NINETEENTH ANNUAL MEETING OF THE VIRGINIA STATE BAR ASSOCIATION. Edited by John B. Minor. Richmond Press. 1907. Pp. 300.

Added to the committee reports and other proceedings usual at meetings of Bar Associations, are several interesting articles. The one of the widest bearing is by Hon. John R. Dos Passos, on "The Results and Responsibilities of our Representative Democracy," in which the author discusses the necessity of restricting immigration and suggests the desirability of separating citizenship and the right to vote. The vital part of the article is a protest against the extension of the power of the Federal Government to deal with such commercial questions as the creation and control over corporations. Another article of current interest is on "The Eleventh Amendment," by Allen Caperton Braxton.

R. D. J.

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LEADING ARTICLES FROM RECENT LEGAL PERIODICALS.

DOMICIL.

Is the* Renvoi *a part of the Common Law? **Edward H. Abbot, Jr.**

The question to be decided is one which arises under the somewhat complicated state of affairs which is stated as follows: "Suppose that A dies leaving movables in England, that according to English law his last domicil was French, and that according to French law his last domicil was English. Assuming that England will apply the law of A's domicil at the time of A's death, by what law will England distribute these movables?" "If the common law reject the *renvoi* (a noun coined from a French verb *renvoyer* to describe a doctrine which has excited much controversy in the civil law), England will consider irrelevant the French conclusion as to A's domicil, and will apply the French Statute of Distributions immediately. If, however, the common law include the *renvoi*, England will accept the French conclusion as to A's domicil and permit France to send back the case to English law for farther determination." The author contends that the *renvoi* (advocated by Westlake) if logically carried out, involves a perpetual deadlock. The English cases show a conflict of authority; the American cases follow the earlier English cases which were adverse to the *renvoi*. The discussion gives a very clear and interesting review of an important point in private international law.—*Law Quarterly Review*, Vol. 24, No. 94. Pp. 133-146. April, 1908.

HISTORY.

The Middle Temple Library. **C. E. A. Bedwell, Sub-Librarian to the Hon. Society of the Middle Temple.**

A short but interesting historical review of the foundation and subsequent growth of the library, and its various buildings. The new buildings were opened for use in 1861, so that there are no historical associations connected with the present building.—*Law Magazine and Review*, 33. Pp. 274-282. May, 1908.

America and the Middle Temple. **C. E. A. Bedwell.**

It is interesting to find the sub-librarian of the Middle Temple Library interesting himself in the historical connection between that

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library and this country. He has found much of value to set down, not the least interesting fact being that five of the signers of the Declaration of Independence were members of the Middle Temple—Edward Rutledge, Thomas Heyward, Thomas Lynch, Arthur Middleton and Thomas McKean. John Dickinson, Arthur Lee, William Livingston and Peyton Randolph were also members. Mr. Bedwell seems justified in his claim that "the legal knowledge acquired in the Inn, made a considerable contribution to the establishment of sound government," and it is not uninteresting to find a certain note of pride in the statement of an Englishman that his society "may lay claim to have aided in equipping it (the United States) for an independent life upon its attainment of a separate existence."—*Green Bag*, 20. Pp. 182-187. April, 1908.

The Law of the Universities. James Williams.

This is a short sketch of the early laws, with a few more modern instances, of the English Universities of Cambridge and Oxford. The earliest university statute is said to be that of 1252. The new statutes of Oxford were published in 1882, of Cambridge in 1883, although some of the minor colleges of the foundation are still unaffected by any recent legislation.—*Law Magazine and Review*, 33. Pp. 264-273. May, 1908.

The House of Lords. C. R. A. Howden.

The House of Lords as a political question has become a very live factor in English thought, and this article is given with the thought that under the circumstances "it may be useful to be reminded of its constitution and history." The political side of the question is avoided, and the article begins with an examination of the constitution of the Witenagemote, its powers and duties. The changes made in this old parliament by the Norman conquest, are then noted in this portion of the article, which is to be continued.—*The Juridical Review*, 20. Pp. 16-31. April, 1908.

ADOPTION.

An Example of Legal Make-Believe. P. J. Hamilton-Grierson.

The legal fictions by which the various countries have "made-believe" that the adoptive child was the real child of the parents are here examined, and the author has succeeded, as he expresses the hope of doing, in making "a not uninteresting chapter in the history of the human mind—the chapter regarding make-believe."—*Juridical Review*, 20. Pp. 32-46. April, 1908.

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BIOGRAPHY.

The Legal Career of Senator Knox. Henry M. Hoyt.
Green Bag, 20. Pp. 161-169. April, 1908.

Charles W. Fairbanks as a Lawyer. Hon. John C. Chaney.
Green Bag, 20. Pp. 221-223. May, 1908.

Judson Harmon. Hon. H. D. Peck.
Green Bag, 20. Pp. 239-243. May, 1908.

Each one of the persons selected for these biographies has become of interest to the country, since they have all been—if they are not still—often mentioned among the "Presidential possibilities" of the coming years. It is pleasing to learn as we read these biographies, that they are all so eminently adapted to fill the highest position in the gift of the nation. We do not learn that they have ever made any mistakes, have had any failures, or even misfortunes. It might even seem that the uniform smoothness and success which they have hitherto met might have in a measure unfitted them for the often stormy life, the deep mental and moral struggles, which a conscientious executive in Washington must encounter.

CONTRACTS IN RESTRAINT OF TRADE.

The Sherman Law and Contracts in Restrain of Trade. Paul Edgar Lesh. (2 Hen. V.)

Mr. Lesh begins with the citation of a case from the Year Books, which, if not the first case of the kind, as he claims, since there are cases even as far back as Edward II, which might be cited in support of his contentions, is a very good one, and confirms the recently aroused feeling among many persons, that the Year Books, after all, are very interesting reading. Mr. Lesh does not remain in the atmosphere of the Year Books for a very long time, and we are soon led to an examination of the United States Statutes upon the point; the Sherman "anti-trust" Act of 1890 and its amendments. After an examination of the decisions under this act and the amendments, Mr. Lesh comes to the following conclusions: "(a) Any interference, however reasonable, with the natural play of competition is a restraint of trade; (b) the element of restraint must enter *directly* into a contract to bring it within the purview of the act; (2) The statute makes such a contract illegal and void; gives rise to a right in the government to prosecute criminally the contractors, to enjoin the carrying out of the contract, and, in proper case, to seize the property involved; and gives to an individual injured a right of action for three-fold damages."—*Green Bag*, 20. Pp. 188-197. April, 1908.

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BOOKS RECEIVED.

(Under this heading will be noted a list of publications received for review each month. Reviews will be published as soon as possible and as nearly as possible in the order in which they are received. All books and communications in regard thereto should be addressed to the Book Review Editor, University of Pennsylvania Law Review, Thirty-fourth and Chestnut Streets, Philadelphia.)

REPORT OF THE BOARD OF STATUTORY CONSOLIDATION OF THE STATE OF NEW YORK. Six volumes and a general report. Albany: Published by the Committee through J. B. Lyon & Co. 1907.

ANNUAL REPORT OF THE AMERICAN BAR ASSOCIATION. Volume XXXI. Baltimore: Lord Baltimore Press. 1907.

INCORPORATION AND ORGANIZATION OF CORPORATIONS. By *T. G. Frost, LL. D., Ph. D.* Third Edition. Boston: Little, Brown & Co. 1908.

THE LAW OF THE FEDERAL AND STATE CONSTITUTIONS OF THE UNITED STATES. By *F. J. Stimson.* Boston: Boston Book Company. 1908.

THE LAW GOVERNING INDICTMENTS. By *H. C. Joyce.* Albany: Matthew Bender & Co. 1908.

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LAW DEPARTMENT NEWS

FOR MAY.

On June 16, Alumni Day, the special feature in the Law Department will be the presentation to the University of the English and American legal engravings. Three collections will be presented: The Erskine Hazard Dickson Memorial Collection, presented by the Sharswood Law Club in memory of Erskine Hazard Dickson, of the Class of 1894 Law; the George M. Wharton Memorial Collection, presented by Mrs. Thomas McKean, and the James T. Mitchell Collection, presented by some friends of the Chief Justice of Pennsylvania.

The two first collections mentioned contain nearly 200 separate pieces, and combined form the most interesting and complete collection of English legal engravings possessed by any public institution in this country.

The James T. Mitchell Collection is an excellent collection of American legal engravings.

The exercises will take place in Price Hall of the Law Building at 2.30, the principal address being made by Mr. Henry Flanders, Lecturer on Legal Biography in the Auxiliary Teaching Force of the Law Department.

There will also be on exhibition in the Biddle Law Library, a collection of works on South American Law, collected by Dr. Leo S. Rowe and presented to the University by some friends of the Law Department, as well as the collection of Chilian law, presented by the University of Chili to the University of Pennsylvania.

Commencement exercises will be held on Wednesday, June 17, 1908, in the Academy of Music, Philadelphia. Dr. Edgar F. Smith, Vice-Provost of the University of Pennsylvania, will address the students.

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Members of the Society of the Alumni of the Department of Law of the University of Pennsylvania Resident Outside of Philadelphia and Their Addresses.

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H. C. Todd (1885), People's Savings Bank Bldg., Pittsburg.
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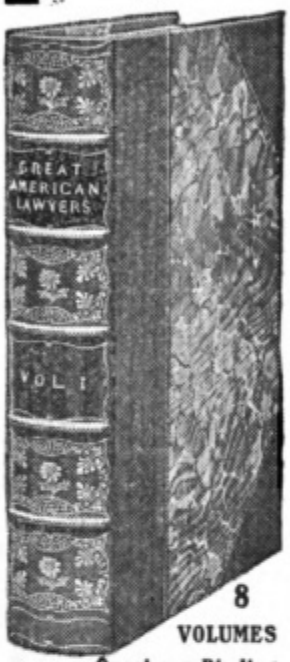

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166. A railroad is an instrument of commerce and its business is commerce itself; and it is not subject to state regulation in respect to its foreign and interstate business. Western U. Teleg. Co. v. Texas, 105 U. S. 460, 26:1067.

Cited in Moran v. New Orleans, 112 U. S. 73, 28 L. ed. 655, 5 Sup. Ct. Rep. 38; Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 565, 30 L. ed. 247, 1 Inters. Com. Rep. 34, 7 Sup. Ct. Rep. 4; Louisville, N. O. & T. R. Co. v. Mississippi, 133 U. S. 592, 23 L. ed. 786, 2 Inters. Com. Rep. 803, 10 Sup. Ct. Rep. 348; United States v. Trans-Missouri Freight Asso. 166 U. S. 312, 41 L. ed. 1018, 17 Sup. Ct. Rep. 540; Lake Shore & M. S. R. Co. v. Ohio, 173 U. S. 316, 43 L. ed. 714, 19 Sup. Ct. Rep. 465; United States v. Boston & A. R. Co. 15 Fed. 211; Mobile & O. R. Co. v. Sessions, 28 Fed. 593; Bagg v. Wilmington, C. & A. R. Co. 109 N. C. 282, 14 L.R.A. 597, 3 Inters. Com. Rep. 804, 26 Am. St. Rep. 569, 14 S. E. 79; Hardy v. Atchison, T. & S. F. R. Co. 33 Kan. 713, 5 Pac. 6; Com. v. Smith, 92 Ky. 44, 17 S. W. 187; Gulf, C. & S. F. R. Co. v. Dwyer, 75 Tex. 579, 7 L.R.A. 479, 16 Am. St. Rep. 926, 12 S. W. 1001.

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