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VIRGINIA LAW REVIEW

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THE EXTENT OF THE CROSS-EXAMINATION TO WHICH AN ACCUSED MAY BE SUBJECTED WHEN HE OFFERS HIMSELF AS A WITNESS IN HIS OWN BEHALF.

AT FIRST impression this question would not seem to be of sufficient importance to be made the subject of an article for the VIRGINIA LAW REVIEW, but in looking into it carefully, it will be found that it has been given a prominent place in great numbers of opinions, by state and Federal courts, as well as in works on evidence. For example, Professor Wigmore, in his great work on *Evidence*,[1] devotes 115 pages to a discussion, in its various aspects, of the "Privilege against Self-Crimination," and in this treatise the student may find a complete history of the origin and growth of the principle that protects witnesses in all cases, as well as persons accused of crime, from being compelled to give incriminating evidence against themselves.

Doubtless the reason for the importance that has been assigned to it is found in the fact that in the Constitution of the United States, as well as in virtually all of the state constitutions,[2] there will be found a provision in substance that the accused shall not be compelled to give evidence against himself, and this clause appears in the earliest constitution adopted by the states, thus:

In the first Constitution of Virginia, adopted by a convention that met at Williamsburg, on May 6, 1776, it was declared,[3] that a person accused of crime was entitled to certain rights and priv-

[1] 4 WIGMORE, EVIDENCE, 3069, *et seq.*

[2] In 2 CHAMBERLAYNE, THE MODERN LAW OF EVIDENCE, it is said in a note to § 1543b that the constitutions of Georgia, Iowa, and New Jersey are the only exceptions.

[3] Va. Const. 1776, § 8.

ileges for his protection, among them that he could not be "compelled to give evidence against himself."

In the first Constitution adopted by Massachusetts in 1780, it was provided,[4] that no person held to answer "for any crime or offense" could be "compelled to accuse or furnish evidence against himself."

In the first Constitution of Maryland, adopted on November 11, 1776, it was provided:[5]

> "That no man ought to be compelled to give evidence against himself in a common court of law, or any other court."

In the first Constitution of New Hampshire, adopted in 1784, it was provided,[6] that no person accused of crime shall be:

> "Compelled to accuse or furnish evidence against himself."

In the Constitution adopted by the State of Pennsylvania, on September 28, 1776, it was provided,[7] that the accused could not be "compelled to give evidence against himself."

In the Constitution of North Carolina, adopted on November 12, 1776, it was provided,[8] that the accused "shall not be compelled to give evidence against himself."

Similar provisions were made in the first constitutions of other states, but the ones mentioned are sufficient to illustrate the great importance that was attached to this privilege by the inhabitants of this country, when the original states first attempted to set up their own form of government.

And in the Fifth Amendment to the Constitution of the United States, adopted in 1791, it was provided,[9] that no person:

> "Shall be compelled in any criminal case to be a witness against himself."

So that the protecting hand of the fundamental law of the several states, as well as the United States, is thrown around every person put on his trial, charged with crime, and he is saved from being compelled, against his will, or over his objection, to give,

[4] Mass. Const. 1780, § 12.
[5] Md. Const. 1776, § 20.
[6] N. H. Const. 1784, § 15.
[7] Pa. Const. 1776, § 9.
[8] N. C. Const. 1776, § 7.
[9] U. S. Const., Amend. V, § 5.

in the course of the trial, any evidence that might secure, or have a tendency to secure, his conviction for the offense he is charged with.

The reason why the early fathers put these protecting clauses in these organic laws, is to be found in the practice that had prevailed in England, where, long before the setting up of state governments in these United States, or the establishment of the Federal government, persons accused of crime, and especially political crime, were often compelled, by cruel punishments, to give such evidence against themselves as would bring about their conviction.

In the case of *Brown* v. *Walker*,[10] Mr. Justice Brown, in delivering the opinion of the court, took occasion to make some observations on the state of the English law, when, many years ago, it allowed the interrogation of accused persons, and, in noticing the reasons why the English courts abolished this practice, said:

> "While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts, in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American, jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the states, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim which in England was a mere rule of evidence became clothed in this country with the impregnability of a constitutional enactment."

[10] 161 U. S. 591, 40 L. Ed. 819.

It will be observed that these constitutional provisions do not forbid or prohibit an accused from giving evidence against himself. They only provide that he cannot be *compelled* to do so, and so an accused may voluntarily elect to waive the privilege given him not to testify and take the witness stand in his own behalf.

In view, however, of the common law rule that formerly prevailed in the United States, that a person who had a direct and certain interest in a civil suit, or a party to a civil action or a criminal proceeding, was disqualified from testifying in his own behalf, it was found necessary, or at least thought advisable, to remove this disqualification by statute, and accordingly, in practically all the states, the disability of a mere witness, on account of interest, has been removed, and a party to a civil proceeding may now, subject to some exceptions, growing out of the death or disability of the adverse party, that I will not stop to notice, give evidence in his own behalf, and likewise in criminal cases, but, as only the statutes removing the disqualification in criminal cases are here pertinent, they alone will be noticed.

In the Federal courts the competency of a witness in a criminal prosecution or proceeding to testify in his own behalf, was authorized by Congress in what is now section 1465 of the Compiled Statutes of the United States, providing that:

> "In the trial of all indictments, informations, complaints and other proceedings against persons charged with the commission of crimes, offenses and misdemeanors, in the United State courts, Territorial courts, and courts-martial, and courts of inquiry, * * * the person so charged shall, at his own request but not otherwise, be a competent witness. And his failure to make such a request shall not create any presumption against him."

In section 1467 it is further provided that:

> "No testimony given by a witness before either House, or before any committee of either House or Congress, shall be used as evidence in any criminal proceeding against him in any court, except in a prosecution for perjury, committed in giving such testimony. But an official paper or record produced by him is not within the said privilege."

In Kentucky a defendant in a criminal prosecution was not

permitted to testify in his own behalf until 1886, when it was enacted:

> "That in all criminal and penal prosecutions now pending or hereafter instituted in any of the courts of this Commonwealth the defendant on trial, on his own request, shall be allowed to testify in his own behalf, but his failure to do so shall not be commented upon, or be allowed to create any presumption against him or her. * * * The defendant requesting that he be allowed to testify shall not be allowed to testify in chief after any other witness has testified for the defense."

I have not had opportunity to examine the statutes of the other states, treating of this subject, but it may be presumed that generally they merely remove the disability of a defendant to testify in his own behalf, although in some of the states the enabling statutes contain certain qualifications.

In view of the constitutional prohibition, of course, no valid statute could be enacted that would deprive the accused of the right to remain silent, or the right to decline to testify, but when he has waived this protection and voluntarily offers himself as a witness, there would seem to be no objection to regulating, by statute, the extent to which he might be subjected to cross-examination, or the limits that might be imposed on a cross-examination. Generally speaking, however, the allowable extent of a cross-examination, and the limitations that may be placed on it, have been determined by the courts without statutory direction.

As a result of the number of opinions by different courts, that have considered the subject, it is only reasonable and natural that there should be found some diversity of opinion in the decisions, as to the limits within which the cross-examination of the defendant, in a criminal prosecution, should be confined, when he offers himself as a witness in his own behalf. But in the reasonable bounds of this article, it would not be possible to set forth, in detail, the views of the forty-eight different state courts, and so it will be confined to a few decisions that illustrate the current of authority.

Before taking up the views of the state courts of last resort, it seems appropriate to notice the ruling of the Supreme Court of the United States on this question.

In *Fitzpatrick* v. *United States*,[11] Fitzpatrick, Brooks and Corbett were charged with the murder of Samuel Roberts. On the separate trial of Fitzpatrick, he took the witness stand in his own behalf, and was asked by his counsel only one question, and that related to his whereabouts upon the night of the murder. In his answer to this question, he denied any connection with the crime. On his cross-examination by the government he was asked, over objection, a number of questions, and made answers that tended to show that he had a part in the murder. In considering the admissibility of this evidence on cross-examination, the court said:

> "Where an accused party waives his constitutional privilege of silence, takes the stand in his own behalf and makes his own statement, it is clear that the prosecution has a right to cross-examine upon such statement with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the alleged crime. While no inference of guilt can be drawn from his refusal to avail himself of the privilege of testifying, he has no right to set forth to the jury all the facts which tend in his favor without laying himself open to a cross-examination upon those facts. The witness having sworn to an alibi, it was perfectly competent for the government to cross-examine him as to every fact which had a bearing upon his whereabouts upon the night of the murder, and as to what he did and the persons with whom he associated that night. Indeed, we know of no reason why an accused person who takes the stand as a witness should not be subject to cross-examination as other witnesses are.
>
> "While the court would probably have no power of compelling an answer to any question, a refusal to answer a proper question put upon cross-examination has been held to be a proper subject of comment to the jury."

In *Sawyer* v. *United States*,[12] the defendant voluntarily testified in his own behalf, and on his cross-examination he was inquired of touching matters in regard to which nothing had been said by the witness in his examination in chief.

In considering the admissibility of the evidence introduced in this cross-examination, the court, after quoting with approval the Fitzpatrick case, said:

> "It has been held in this court that a prisoner who takes the stand in his own behalf waives his constitutional privilege of silence, and that the prosecution has the right to cross-examine him upon his evidence in chief with the same latitude as would be exercised in the case of an ordinary witness, as to the circumstances connecting him with the crime."

In *Powers* v. *United States*,[13] the court again laid down the rule that:

> "There is some difference of opinion expressed in the authorities, but the rule recognized in this court is that a defendant who voluntarily takes the stand in his own behalf, thereby waiving his privilege, may be subjected to a cross-examination concerning his statement. 'Assuming the position of a witness, he is entitled to all its rights and protection, and is subject to all its criticisms and burdens'; and may be fully cross-examined as to the testimony voluntarily given. * * *
>
> "If the witness himself elects to waive his privilege, as he may doubtless do, since the privilege is for his protection, and not for that of other parties, and discloses his criminal connections, he is not permitted to stop, but must go on and make a full disclosure."

In this connection it may be noticed that the Supreme Court of the United States, in *Ex parte Spies*,[14] a case taken to the Supreme Court on a writ of error from the Supreme Court of Illinois, said that when the defendant voluntarily offered himself as a witness in his behalf:

> "He became bound to submit to a proper cross-examination under the law and practice in the jurisdiction where he was being tried. * * * Whether a cross-examination must be confined to matters pertinent to the testimony in chief, or may be extended to the matters in issue, is certainly a question of State law, as administered in the courts of the State, and not of Federal law."

The rule laid down by the Supreme Court of the United States is generally followed by the state courts, except where the mat-

[11] 178 U. S. 304, 44 L. Ed. 1078.
[12] 202 U. S. 150, 50 L. Ed. 972.
[13] 223 U. S. 303, 56 L. Ed. 448.
[14] 123 U. S. 131, 31 L. Ed. 80.

ter is regulated by statute. Thus, in Kentucky, the Court of Appeals said, in *Burdette* v. *Commonwealth*: [15]

"It has been settled by this court that when a defendant in a criminal prosecution voluntarily becomes a witness in his own behalf, he is to be treated in the same way as any other witness, and his testimony subjected to the same test by cross-examination, impeachment or otherwise, as is the testimony of another called as a witness."

In *Saylor* v. *Commonwealth*,[16] the court again said, in considering the effect of the privilege of an accused not to be compelled to give evidence against himself, that:

"Under the bill of rights he cannot be compelled 'to give evidence against himself,' but when he becomes a witness for himself in a criminal prosecution he waives that right so far as the charge under investigation is concerned."

In *State* v. *Witham*,[17] the court said:

"If the person accused of crime takes the benefit of his own swearing, he takes the risk. * * * When the accused volunteers to testify in his own behalf at all, upon the issue, whether the alleged crime has been committed or not, he volunteers to testify in full. His oath in such case requires it. If he waives the constitutional privilege at all, he waives it all. He cannot retire under shelter when danger comes. The door opened by him is shut against retreat."

In *People* v. *DuPounce*,[18] the court, in considering the extent to which a defendant, in a criminal case, may be cross-examined, said that:

"The overwhelming weight of authority supports the proposition, contended for by the people, that he thereby waives his constitutional right to refuse to answer any question material to the case, which would, in the case of any other witness, be legitimate cross-examination."

In *State* v. *Ober*,[19] the court, in considering the question at hand, said:

"The respondent, by electing to testify in his own favor, waived his constitutional privilege. If he refuses to testify at all, the statute protects him from adverse comment or inference; but, if he avails himself of the statute, he waives the constitutional protection in his favor, and subjects himself to the peril of being examined as to any and every matter pertinent to the issue."

[15] 93 Ky. 76.
[16] 97 Ky. 184.
[17] 72 Me. 531.
[18] 133 Mich. 1, 103 Am. St. Rep. 435.
[19] 52 N. H. 459, 13 Am. Rep. 88.

And further quoted with approval the opinion of Chief Justice Church, in *Connor* v. *People*,[20] in which he said:

"That, by consenting to be a witness in his own behalf, under the Statute, the accused subjected himself to the same rules, and was called upon to submit to the same tests, which could by law be applied to the other witnesses; in other words, if he availed himself of the privilege of the act, he assumed the burdens necessarily incident to the position. The prohibition in the constitution is against compelling an accused person to become a witness against himself. If he consents to become a witness in the case voluntarily, and without any compulsion, it would seem to follow that he occupies, for the time being, the position of a witness, with all its rights and privileges, and subject to all its duties and obligations. If he gives evidence which bears against himself, it results from his voluntary act of becoming a witness, and not from compulsion."

The foregoing authorities sufficiently illustrate the rule that when the defendant takes the witness stand in his own behalf it is allowable to subject him to the same character of cross-examination that any other witness might be subjected to, and this cross-examination need not be confined to matters that were brought out in the examination in chief, but may extend to other relevant and pertinent facts and circumstances.

However, in some states, it appears that statutes on the subject of the cross-examination of a defendant have been enacted, and the limits to which the cross-examination may go are fixed and defined by these statutes,[21] for example, the California statute provides that when the accused offers:

"Himself as a witness, he may be cross-examined by the counsel for the People as to all matters about which he was examined in chief."

[20] 50 N. Y. 240.
[21] Citations to some of these statutes may be found in the note to State *v.* Tice (N. Y.), 15 L. R. A. 669.

The Missouri statute provides that the accused:

"Shall be liable to cross-examination as to any matter referred to in his examination in chief."

The Oregon statute provides that the:

"Accused when offering his testimony as a witness in his own behalf, shall be deemed to have given to the prosecution a right to cross-examination upon all facts to which he has testified, tending to his conviction or acquittal."

It further appears from the note,[22] that in other states there are differently worded statutes, relating to the cross-examination of a defendant, but in states where there are no statutes on the subject, the prevailing rule is that the defendant may, as shown in the above referred to cases, be cross-examined with the same latitude as any other witness.

The question of the right to inquire of the defendant, in his cross-examination, as to the commission of other prior crimes or offenses, or his arrest therefor, is the subject of extensive notes to the cases of *Morrison* v. *Texas,*[23] and *Marshall* v. *Alabama,*[24] and the general rule is that it is not permissible upon cross-examination to ask the accused as to prior arrests or prior convictions for other offenses, distinct from and unrelated to the one under investigation, although in some jurisdictions this course of cross-examination is allowable for the purpose of affecting the credibility of the defendant as a witness, and impeaching his moral character.[25]

In short, whether the defendant can be subjected to a cross-examination of this nature, depends on the rule prevailing in the state where the trial is had, and if it is allowable to ask any witness a question of this nature it will be permissible to ask a defendant such a question, because the defendant, when he offers himself as a witness, occupies the same attitude as any other witness, and may be subjected to the same character of cross-examination.

[22] *Supra,* note 21.
[23] 6 A. L. R. 1607.
[24] 25 A. L. R. 338.
[25] Cases illustrating this practice may be found in State *v.* Werner, 144 La. 380; VanCleave *v.* State, 150 Ind. 273; State *v.* Thomas, 98 N. C. 634;

There should, however, be kept in mind, in applying the rule that only the same latitude will be allowed in the cross-examination of the defendant that is allowed in the cross-examination of other witnesses, the further rule that when the defendant offers himself as a witness, he may be examined as to other crimes than the one under investigation, if the other crimes committed by him are so related to, or connected with, the one for which he is on trial that they may be treated as relevant to it.

For example, a defendant who is being tried for murder, may be inquired of concerning a robbery, or burglary, that he was guilty of, in connection with the murder, and so a defendant who is being tried for embezzlement, or counterfeiting, or falsifying records, may be inquired of concerning other counterfeiting, or embezzlements or falsification of records that have a tendency to show a course of conduct or habit on his part similar to the act for which he is being tried.[26]

The reason for this distinction between the privilege of an ordinary witness in a criminal case, and the defendant, is found in the fact that the ordinary witness is not on trial, he could be compelled to testify, he has waived no privilege in offering himself as a witness, and therefore brings himself directly within the rule everywhere obtaining, that an ordinary witness can refuse to answer any question that would incriminate him.

In the note to *Evans* v. *O'Connor,*[27] the accurate and learned Judge Freeman, recognized as the most capable and correct annotator the profession has produced, said, in pointing out the difference in the position of a defendant and an ordinary witness, that:

"'The general rule may be stated to be that where a defendant takes the stand as a witness in his own behalf he waives his right to refuse to answer questions which tend to incriminate him concerning all matters which were touched upon in his direct examination, and upon all other matters which are so related to his direct examination as to come within the proper limits of cross-examination. In other words, the defendant loses his character as a party, becomes a mere witness, and may be examined as fully as any other witness. If he makes any statement respecting the transac-

[26] UNDERHILL, CRIMINAL EVIDENCE, 107.
[27] 75 Am. St. Rep. 316, at 332.

tion, he may be required to state all: *Samuel* v. *People,* 164 Ill. 379; *Coburn* v. *Odell;* 30 N. H. 540, and cases previously cited. He may be examined and must answer concerning all matters which are relevant to the case, whether testified to on the direct examination or not; * * *

"An ordinary witness occupies the same position as a defendant in a criminal case. Such a witness is not bound to testify concerning any fact which may tend to criminate him. But if he voluntarily answers in part, he waives his privilege, and may be fully cross-examined; * * * The only difference between the two is this, that an ordinary witness has a right to stop when he is first questioned in respect to facts which tend to criminate him, while a defendant in a criminal case knows in advance that such questions are to be put to him, and that he is to testify as to his guilt or innocence, and he waives his constitutional protection in advance. * * * There seems to be this difference between a defendant witness and an ordinary witness in testifying concerning collateral offenses. In the case of a defendant witness, as we have seen, he may be required to testify on cross-examination as to any facts relevant and material to the main issue in the case, even though such testimony tends to show that he is guilty of another crime. As to such testimony, material and relevant to the main issue in the case, he has waived his privilege by taking the stand in his own behalf.

"With an ordinary witness this is not the case, the principal case shows. An ordinary witness does not, by taking the stand, agree to testify as to everything pertinent to the issue, and he has not in the slightest degree waived his privilege of refusing to testify, however material to the issues in the case they may be. And a waiver of his privilege as to one criminating act constitutes no waiver of his privilege as to other unconnected acts, even though the latter may be material to the issue. Such is the rule of the principal case and it is clearly correct: * * *

"While examination as to collateral crimes is as a rule proper to affect credibility, the witness may, nevertheless, claim his privilege if his answer will tend to criminate him. A defendant witness does not place himself in any worse position than any other witness by testifying in his own behalf, and any ordinary witness would clearly have the right to refuse to answer criminating questions. Of course, as to the particular crime for which he is on trial, he has waived his privilege by becoming a witness, but this waiver does not extend to other and collateral crimes, unless, as we have seen, they are relevant to the crime with which he is charged."

The chief dissenter from the general rule laid down in the authorities cited, is the distinguished jurist and law writer, Judge Cooley, who says in his well known and highly esteemed work on *Constitutional Limitations,*[28] in speaking of the limitation on the right to cross-examine a defendant in a criminal prosecution, and the statutes permitting him to testify, that:

"These statutes, however, cannot be so construed as to authorize compulsory process against an accused to compel him to disclose more than he chooses; they do not so far change the old system as to establish an inquisitorial process for obtaining evidence; they confer a privilege, which the defendant may use at his option. If he does not choose to avail himself of it, unfavorable inferences are not to be drawn to his prejudice from that circumstance; and if he does testify, he is at liberty to stop at any point he chooses, and it must be left to the jury to give a statement, which he declines to make a full one, such weight as, under the circumstances, they think it entitled to; otherwise the statute must have set aside and overruled the constitutional maxim which protects an accused party against being compelled to testify against himself, and the statutory privilege becomes a snare and a danger."

It must be admitted that any rule or principle in constitutional law, announced by Judge Cooley, is entitled to weighty consideration, but fortunately for the correct administration of justice, the pronouncement of Cooley that the defendant, when he offers himself as a witness, is at liberty to stop at any point he chooses, and refuse to answer pertinent and relevant questions that might incriminate him, has not been approved by the courts.

With great respect for Judge Cooley's opinion, it is difficult to understand how he could reach the conclusion that a defendant who voluntarily elects to waive the immunity and protection afforded him, and takes the witness stand in his own behalf, should be permitted to testify to such facts as would tend to establish his innocence of the crime charged, and be privileged to refuse to answer pertinent and relevant questions relating to, or connected with the testimony he had given, or that might prove his guilt.

[28] COOLEY, CONSTITUTIONAL LIMITATIONS (6th Ed.), 384.

A rule like this would seem to be a travesty on justice. It would give the defendant an unfair and unreasonable advantage that he should not have. It would extend far beyond its purpose and intention, the constitutional immunity afforded, and would serve to aid the defendant to escape the punishment that his conduct might deserve.

The Constitutional safeguard was designed to protect the defendant, so long as he chooses to shelter under it, not to aid him when he voluntarily elects to withdraw from its security. He cannot surrender such part of his privilege as suits his interest, and hold to the remainder. He must keep all or lose all.

In the light of the authorities, and according to sound principles, it seems to me clear that when the defendant voluntarily elects to take the witness stand in his own behalf, for the purpose of giving, and does give, evidence that might exonerate him, the prosecution should not be confined to matter testified to in chief, but should have the right, in cross-examination, when not limited by a statute, to ask and compel him to answer every pertinent and relevant question that might show his guilt of the crime charged, however incriminating his answers may be; and the cross-examination should further be allowed to extend to an inquiry into the commission of other crimes committed by the defendant, so related to or connected with the crime under investigation as to be a part of it, or that show motive for its commission, or that are necessary to establish his guilty knowledge. Outside of this, however, the cross-examination should be subject to the limitations imposed on the cross-examination of other witnesses, in the jurisdiction where the case is being tried.

John D. Carroll.

FRANKFORT, KY.

THE LAWYER AS AN OFFICER OF THE COURT.

THE lawyer is both theoretically and actually an officer of the court. This has been recognized in principle throughout the history of the profession. In ancient Rome the *advocatus,* when called upon by the *prætor* to assist in the cause of a client, was solemnly admonished "to avoid artifice and circumlocution." [1]

The principle was recognized also among practically all of the European nations of the Middle Ages. In 1221 Frederick the Second, of Germany, prescribed the following oath for advocates: [2]

> "We will that the advocates to be appointed, as well in our court as before the justices and bailiffs of the provinces, before entering upon their offices, shall take their corporal oath on the Gospels, that the parties whose cause they have undertaken they will, with all good faith and truth, without any tergiversation, succour; nor will they allege anything against their sound conscience; nor will they undertake desperate causes; and, should they have been induced, by misrepresentation and the colouring of the party to undertake a cause which, in the progress of the suit, shall appear to them, in fact or law, unjust, they will forthwith abandon it. Liberty is not to be granted to the abandoned party to have recourse to another advocate. They shall also swear that, in the progress of the suit, they will not require an additional fee, nor on the part of the suit enter into any compact; which oath it shall not be sufficient for them to swear to once only, but they shall renew it every year before the officer of justice. And if any advocate shall attempt to contravene the aforesaid form of oath in any cause, great or small, he shall be removed from his office, with the brand of perpetual infamy, and pay three pounds of the purest gold into our treasury."

Among the French, the office of advocate appears to have existed from a very early date. The body of laws enacted in 802,

[1] JOSIAH H. BENTON, LAWYER'S OATH AND OFFICE, 19.

[2] OATHS; THEIR ORIGIN, NATURE, AND HISTORY. By James Endell Tyler. (B. D. London: 1835, p. 300.) Also, BENTON, LAWYER'S OATH AND OFFICE, 19.

generally known as the *Capitularies of Charlemagne,* clearly recognizes the profession of lawyers, and contains a provision to the effect that "nobody should be admitted therein but men, mild, pacific, fearing God, and loving justice, upon pain of elimination." [3]

An ordinance promulgated February 13, 1327, by Phillippe de Valois, Regent of France, provided that:

> "No advocate shall be permitted to plead if he has not taken the oath, and if his name be not inscribed on the roll of advocates."

In 1344 additional regulations, relating to the duties of advocates, were enacted by the Parliament of Paris as follows: [4]

> "Those advocates who are retained shall not be allowed to continue their practice unless they bind themselves by oath to the following effect: to fulfill their duties with fidelity and exactitude; not to take charge of any causes which they know to be unjust; that they will abstain from false citations; that they will not seek to procure a postponement of their causes by subterfuge, or malicious pretexts; that whatever may be the importance of a cause, they will not receive more than thirty livres for their fee, or any other kind of gratuity over and above that sum, with liberty, however, to take less; that they will lower their fees according to the importance of the cause and the circumstances of the parties; and that they will make no treaty or arrangement with their clients depending on the event of the trial."

One of the most striking regulations relating to advocates in former times is found in the Code of Christian V., of Denmark and Norway, 1683, which provides as follows: [5]

[3] BENTON, LAWYER'S OATH AND OFFICE, 13.

[4] ROBERT JONES, A HISTORY OF THE FRENCH BAR, ANCIENT AND MODERN, 100, 103. Other interesting regulations of advocacy among the French are the following: A decree of the Council of Rouen, in 1231, concerning the oath of advocates; an ordinance promulgated, in 1274, by Philip the Bold, relating to the functions and fees of attorneys; and an edict of Francis I., 1536, dealing with the official character and duties of advocates, and the shortening of trials. A specially interesting regulation is to be found among the reform-canons adopted by the bishops of the province of Tours in a council held at Chateau-Gontier, in 1231. Among other things, it was provided, "Nor shall they (advocates) bother the Judge with objections, believing that they will give in to them. They shall sustain the honor of the court, nor perpetrate in court a falsehood." BENTON, LAWYER'S OATH AND OFFICE, 15-21.

[5] THE DANISH LAWS: OR THE CODE OF CHRISTIAN THE FIFTH, FAITHFULLY TRANSLATED FOR THE USE OF THE ENGLISH INHABITANTS OF THE DANISH SETTLEMENTS IN AMERICA (London, 1756), 58, 59.

> "Lawyers who are allowed to plead Causes, shall be Men of Probity, Character, and known Repute.
>
> "In Cities shall be appointed such a Number of Lawyers as are really requisite.
>
> "No one shall be admitted as a Lawyer to act, who does not take an oath before the Mayor and Aldermen, that he will undertake no Cause he knows to be bad, or iniquitous; that he will avoid all Fraud in pleading, bringing Evidence, and the like: That he will abstain from all Cavils, Querks and Chicanery; and never seek by Absence, Delays, or superfluous Exceptions, to procrastinate a Suit: That he will use all possible Brevity in transcribing Processes, Deeds, Sentences, etc. That he will never encourage Discord, or be the least Hindrance to Reconciliation: That he will exact no exorbitant Fees from the Poor, or others: And that he will act honestly, and to the best of his Power, for all his Clients. Of this Oath the Judges shall admonish the Lawyers in dubious Cases, and if they think proper, require a Renewal of it in the Court: And moreover, command them to abstain from all Manner of Scurrility, and Abuse, in their Pleadings, especially where the process does not concern the Fame of the Defendant.
>
> "A Lawyer defective in this his Duty shall be discarded, rendered incapable of ever after pleading, and moreover punished in Proportion to his Offense."

In England, while much concerning the origin of the profession is obscure, lawyers were recognized as an established order as early as the reign of Edward I (1272-1307), and their duties and conduct regulated by the Statute Primer Westminster (1275).[6] At that time, as now in England, the profession consisted of two branches, then known, respectively, as pleaders or counters, corresponding to the modern English barrister; and attorneys, corresponding to the present day solicitor.[7] It should be noted, also, in this connection, that the earliest regularly licensed advocates in England were known as serjeants-at-law. Serjeant-at-law was formerly the highest rank to which an English advocate could attain, and although the class itself has ceased

[6] 3 Edward I, St. I West. c. 29.

[7] For origin and early history of advocacy in England, see 9 VA. LAW REV. 28-34. For distinction between barristers and solicitors, under the present English practice, see ROBBINS, AMERICAN ADVOCACY, ch. 1.

to exist, having been superseded by the King's Counsel, its fundamental characteristics remain to the present time.

> "The first persons regularly licensed to appear in the King's Courts were 'serjeants,' although their full official title seems to have been *Servientes Domini Regis ad legem,* that is, 'Servants at law of our Lord the King.' Unlike all prior advocates they were part of the court itself; were regularly appointed by royal patent; were admitted only upon taking an oath; had a monopoly of all practice, and were directly amenable to the King as parts of his judicial system. The fundamental ideas involved in the creation of this class have never been abandoned, and notwithstanding the class itself by the name of 'serjeants' has ceased to exist, they are still the distinguishing characteristics of the bar of all counties where the common law prevails." [8]

The earliest authentic forms of lawyers' oaths in England are those of the Serjeant-at-law and of the King's Serjeant, and are found in an ancient Roll of Oaths compiled probably during the reign of Queen Elizabeth.[9] These ancient oaths show with great exactness the nature of the advocate's duties, and are as follows:

> *"King's Serjeant:* Ye shall Swear, That well and truly ye shall serve the King and his People, as one of his Serjeants of the Law, and truly council the King in His matters when ye shall be called, and duly and truly minister the King's matters, after the Course of the Law, to your Cunning: Ye shall take no wages nor Fee of any Man for any matter when the King is Party against the King; ye shall as duly and hastily speed such matters as any man shall have to do against the King in the Law, as ye may lawfully do without Delay or tarrying of the Party of his lawful process in that that belongeth to you: Ye shall be attendant to the King's matters when ye shall be called thereto: as God you help, and by the contents of this Book." [10]
>
> *"Serjeant at Law:* Ye shall Swear, That well and truly ye shall serve the King's People as one of the Serjeants at the Law, and ye shall truly council them that ye be retained with after your Cunning: And ye shall not defer, tract or delay their Causes willingly, for Covetous of Money, or other Thing that may turn you to Profit: and ye shall give due attendance accordingly: as God you help, and by the Contents of this Book." [11]

[8] WARVELLE, LEGAL ETHICS, 28.

[9] BENTON, LAWYER'S OATH AND OFFICE, 25.

[10] BENTON, LAWYER'S OATH AND OFFICE, 26; COSTIGAN, CASES ON LEGAL ETHICS, 64.

No form of oath for attorneys is recorded in the ancient Roll of Oaths. It seems certain, however, that attorneys were sworn as early as 1402, for, by statute enacted in that year,[12] it was provided that they should be admitted to practice only upon an examination by the justices and upon the taking of an official oath.

The earliest form of Attorney's Oath on record is found in the *Red Book of the Exchequer,* a book of precedents in the Court of Exchequer and dating back to a very early period.[13] The Attorney's Oath, as recorded in the Red Book is as follows:[14]

> *"The Oath of Attorneys in the Office of Pleas:* You shall doe noe Falshood nor consent to anie to be done in the office of Pleas of this Courte wherein you are admitted an Attorney. And if you shall knowe of anie to be done you shall give Knowledge thereof to the Lord Chiefe Baron or other his Brethren that it may be reformed you shall Delay noe Man for Lucre Gaine or Malice you shall increase noe Fee but you shall be contented with the old Fee accustomed. And further you shall use your selfe in the Office of Attorney in the said office of Pleas in this Courte according to your best Learninge and Discrecion. So helpe you God."

From what has been said, and from the forms of oaths quoted, it will be observed that the office of advocate has, from time immemorial, especially in England,[15] been considered one of both dignity and importance.

[11] BENTON, LAWYER'S OATH AND OFFICE, 26; COSTIGAN, CASES ON LEGAL ETHICS, 64. See also, COKE, SECOND INSTITUTE (Ed. 1817), 212-214.

[12] St. 4 Hen. IV, c. 18.

[13] BENTON, LAWYER'S OATH AND OFFICE, 27, 28.

[14] BENTON, LAWYER'S OATH AND OFFICE, 28; COSTIGAN, CASES ON LEGAL ETHICS, 64. A later volume, entitled THE BOOK OF OATHS, published in 1649 and reprinted in 1689, contains the earliest form of oath of the King's Counsel, which conforms substantially to those of the Serjeant-at-law and of the King's Serjeant. THE BOOK OF OATHS contains also the early oaths of Attorney General and Solicitor General. BENTON, LAWYER'S OATH AND OFFICE, 30, 31.

[15] It seems somewhat strange, at first glance, that the modern English barrister is not an officer of the court, and that no oath is required. This is due, however, to the fact that barristers are "called" to the Bar by the Inns of

In the United States, the lawyer has, almost from the beginning, been regarded as an officer of the court, and as such admitted to the Bar only upon the taking of an official oath. It is true that during the early Colonial period the growth of the profession was slow, owing to circumstances then existing,[16] but with the adoption of the common law, as the established law of the land, the ancient English conception of the office of advocate naturally followed, and it is upon this high conception that the characteristics and ideals of the American Bar have been founded.[17]

The principle that the lawyer is an officer of the court does not mean, of course, that a lawyer is a public official exercising a public trust.[18] It does mean, however, in a very important sense, that he is a quasi-officer of the State upon whom rests in part the responsibility for the administration of justice. The fundamental idea underlying the lawyer's profession has been well expressed by Hoke, C. J., in a recent North Carolina case[19] in which he says:

> "An attorney at law is a sworn officer of the court to aid in the administration of justice. He is sought as counsellor, and his advice sought in the most important and intimate relations of life. There is doubt if any profession affords an equal opportunity for fixing the standards and directing the civic conduct of his fellows. It is of supreme importance, therefore, that one who aspires to this high position should be of upright character and should hold, and deserve to hold, the confidence of the community where he lives and works."

Court and are subject to their supervision. If, in fact, a barrister, should be found guilty of unbecoming conduct, he would be reported by the court to his Inn for investigation and action. On the other hand, solicitors are officers of the court, and are required to take an official oath before being admitted to the practice. COSTIGAN, CASES ON LEGAL ETHICS, 61, 65; ROBBINS, AMERICAN ADVOCACY, 7.

[16] See Introduction to WARREN, HISTORY OF THE AMERICAN BAR.

[17] The oath recommended by the American Bar Association may be found in Article III of the Canons of Ethics.

[18] "The 'office' to which an attorney is thus appointed, however, is not an office in the sense of a public trust for the transaction of public business but is a special license or franchise to exercise certain privileges which otherwise the grantee would not be permitted to exercise. The advocate is, therefore, an officer *sui generis* of the court and subject to the rules imposed by the court in regulation of the practice therein." ROBBINS, AMERICAN ADVOCACY, 13. Thus an attorney, who practices his profession and serves as County Judge, is not holding two offices in violation of the Constitution. Bland County Judge Case, 33 Gratt. (Va.) 443.

[19] In re Application of Dillingham, 188 N. C. 162.

Referring to the office of advocate, Mr. J. H. Benton, in his excellent treatise, entitled *The Lawyer's Oath and Office,* makes use of the following striking language:[20]

> "Why is any oath required for admission to the practice of the law? No oath is required by law for admission to practice in any other profession, even where qualifications to practice are prescribed or ascertained by examinations required by law, as in the case of physicians. But an official oath has always been required for admission to the practice of the law. Why is it required? What is its significance, and what obligation does it impose?
>
> "The significance of the lawyer's oath is that it stamps the lawyer as an officer of the State, with rights, powers and duties as important as those of the Judges themselves. * * * A lawyer is not the servant of his client. He is not the servant of the Court. He is an officer of the Court, with all the rights and responsibilities which the character of the office gives and imposes."

From the fact that the lawyer is an officer of the court it follows that, by virtue of his office, the lawyer has certain important rights. While the right to practice law is not "property," nor is it a "contract," within the constitutional meaning of those terms, it is a right of which the lawyer may not be deprived except upon good cause shown and after proper judicial proceedings.[21] This was settled by the United States Supreme Court in the celebrated case of *Ex parte Garland,*[22] decided in 1866. Speaking for the court in this case, Mr. Justice Field says:

> "The attorney and counsellor being, by solemn judicial act of the court clothed with his office, does not hold it as a matter of grace. The right which it confers upon him to appear for suitors, and to argue causes, is something more than a mere indulgence, revocable at the pleasure of the court, or at the command of the legislature. It is a right of which he can only be deprived by the judgment of the court for moral or professional delinquency. * * * They hold their office during good behaviour, and can only be

[20] BENTON, LAWYER'S OATH AND OFFICE, 1, 2.

[21] 6 C. J. 568.

[22] 4 Wall. 333.

deprived of it for misconduct ascertained and declared by the judgment of the court after opportunity to be heard has been afforded."

Another important result of the principle that the lawyer is an officer of the court is that the power of admitting applicants to the practice of law is judicial in its nature, and hence is vested in the courts. But notwithstanding the general jurisdiction of the courts over the subject, the legislature may, in the exercise of its police power, prescribe reasonable rules and regulations for admission to the Bar which will be followed by the courts.[23] That is to say, the legislature may prescribe the qualifications of the applicant, but the court before which he is examined must determine whether or not he possesses them, that being a judicial and not a legislative function.[24]

In the case of *In re Cooper*,[25] Selden, J., in speaking of this subject very aptly says:

"Attorneys and counsellors are not only officers of the Court, but officers whose duties relate almost exclusively to proceedings of a judicial nature, and hence their appointment may with propriety be entrusted to the courts, and the latter in performing this duty may very justly be considered as engaged in the exercise of their proper judicial functions." [26]

[23] 6 C. J. 572. In a number of states, the examination of applicants is conducted by a board of examiners, and the oath administered by the courts.

[24] In re Applicants for License, 143 N. C. 1, at 31.

[25] 22 N. Y. 67.

[26] Good moral character is universally required as a condition precedent to admission to the Bar. Certificates of good character are, therefore, in the absence of statutory provision to the contrary, only *prima facie* and not conclusive evidence. 6 C. J. 573.

In speaking of this important matter, Brown, J., of the N. C. Supreme Court, uses the following striking language: "The public policy of our State has always been to admit no person to the practice of the law unless he possessed an upright moral character. The possession of this by an attorney is more important, if anything, to the public and to the proper administration of justice than legal learning. Legal learning may be acquired in after years, but if the applicant passes the threshold of the bar with a bad moral character the chances are that his character will remain bad, and that he will become a disgrace instead of an ornament to his great calling—a curse instead of a benefit to his community—a Quirk, a Gammon or a Snap, instead of a Davis, a Smith or a Ruffin." In re Applicants for License, 143 N. C. 1, at 21.

"It is not enough," says the Supreme Court of Connecticut, "for an attorney that he be honest. He must be that and more. He must be believed to be honest. It is absolutely essential to the usefulness of an attorney that he be entitled to the confidence of the community wherein he practices." County Bar *v.* Taylor, 60 Conn. 11.

Upon similar principles, disbarment is also a judicial proceeding, and the power to suspend or disbar, therefore, rests in the courts. It is well settled that courts authorized to admit attorneys to the Bar have inherent jurisdiction to suspend or disbar them for sufficient cause, and such jurisdiction is not dependent upon constitutional provision or statutory enactment.[27]

It is true that the legislature may by statute prescribe the causes for which an attorney may be disbarred, but the generally accepted view is that such statutes "merely regulate the power to disbar instead of creating it," and that they do not prohibit the courts from disbarring attorneys for causes other than those specified in the statute.[28]

The power of the courts in the matter of suspension and disbarment has been admirably summarized by the Supreme Court of Washington in *In re Lambuth*,[29] in the following words:

"But the power to strike from the rolls is inherent in the court itself. No statute or rule is necessary to authorize the punishment in any proper cases. Statutes and rules may regulate the power but they do not create it. It is necessary for the protection of the court, the proper administration of justice, the dignity and purity of the profession, and for the public good and for the protection of clients. Attorneys may forfeit their professional franchise by abusing it, and the power to exact the forfeiture is lodged in the courts which have authority to admit attorneys to practice. Such power is indispensable to protect the court, the administration of justice, and themselves; and attorneys themselves are vitally concerned in preventing the vocation from being sullied by the conduct of unworthy members."

Perhaps the most important result of the principle that the lawyer is an officer of the court is that the advocate is subject to certain peculiar duties and responsibilities. It is not possible, within the scope of this article, to discuss these duties and respon-

[27] 6 C. J. 580.

[28] 6 C. J. 584. In some jurisdictions it is held that a statute prescribing the causes for disbarment impliedly deprives the courts of the power to disbar for causes other than those specified. In re Ebbs, 150 N. C. 44.

[29] 18 Wash. 478, 51 Pac. 1071.

sibilities in all of their details, and, for that reason, only the general principles underlying each will be mentioned. For convenience of treatment the duties of lawyers may be grouped under four general heads, namely, (1) duties to the State or the public, (2) duties to the court, (3) duties to his profession and fellow members of the Bar, (4) duties to his client.[30]

Viewed from the standpoint of the relation that the Profession of Law has to the public, its importance can scarcely be overestimated. By virtue of his office, the lawyer bears an intimate relationship to the State, for to him the State intrusts in a large measure the enforcement of its laws. To uphold the Constitution and the Law must, therefore, be his constant care.[31]

Legislation and jurisprudence, "the right and left hands of government," are in the nature of the case largely in the hands of the legal profession, and it is within these two great fields that the profession finds its broadest opportunities for usefulness and service. Legislation is the enactment of law and is, says Judge Sharswood, "the noblest work in which the intellectual powers of man can be engaged, as it resembles most nearly the work of the Deity. It is employed as well in determining what is right or wrong in itself—the due proportion of injuries and their remedies or punishments—as in enforcing what is useful and expedient. How wide the scope of such a work." [32]

In the field of jurisprudence we find the influence of the legal profession even more strongly felt than in that of legislation, for it is here that the Law receives its practical application to specific cases as they arise in the courts. Speaking of this phase of the subject, Judge Sharswood continues: [33]

> "With jurisprudence lawyers have most, nay, all to do. The opinion of the Bar will make itself heard and respected on the Bench. With sound views, their influence for good in this respect may well be said to be incalculable. It is indeed the noblest faculty of the profession to counsel the ignorant, defend the weak and oppressed, and to stand forth on all occasions as the bulwark of private rights against the assaults of power, even under the guise of law; but it has still other functions. It is its office to diffuse sound principles among the people, that they may intelligently exercise the controlling power placed in their hands, in the choice of their representatives in the legislature and of judges, in deciding, as they are often called upon to do, upon the most important changes in the Constitution, and above all, in the formation of that public opinion which may be said in these times, almost without a figure, to be the *ultimate sovereign*."

[30] WARVELLE, LEGAL ETHICS, 21; ROBBINS, AMERICAN ADVOCACY, 253.

[31] In most states an applicant is required to take an oath to support the Constitution of the United States and of the state in which he is licensed to practice.

[32] SHARSWOOD, LEGAL ETHICS, 53.

[33] SHARSWOOD, LEGAL ETHICS, 54.

The duties of the lawyer to the court spring directly from the relation that he sustains to the court as an officer in the administration of justice. The law is not a mere private calling, but is a profession which has the distinction of being an integral part of the State's judicial system. As an officer of the court the lawyer is, therefore, bound to uphold the dignity and integrity of the court; to exercise at all times respect for the court in both words and actions; to present all matters relating to his client's case openly, being careful to avoid any attempt to exert private influence upon either the judge or the jury; and to be frank and candid in all dealings with the court, "using no deceit, imposition or evasion," as by misreciting witnesses or misquoting precedents. "It must always be understood," says Mr. Christian Doerfler, in an address before the Milwaukee County Bar Association, in December, 1911, "that the profession of law is instituted among men for the purpose of aiding the administration of justice. A proper administration of justice does not mean that a lawyer should succeed in winning a lawsuit. It means that he should properly bring to the attention of the court everything by way of fact and law that is available and legitimate for the purpose of properly presenting his client's case. * * * His duty as far as his client is concerned is simply to legitimately present his side of the case. His duty as far as the public is concerned and as far as he is an officer of the court is to aid and assist in the administration of justice."

In this connection, the timely words of Mr. Warvelle may also well be remembered: [34]

> "But the lawyer is not alone a gentleman; he is a sworn minister of justice. His office imposes high moral duties and grave responsibilities, and he is held to a strict fulfillment

[34] WARVELLE, LEGAL ETHICS, 40.

> of all that these matters imply. Interests of vast magnitude are intrusted to him; confidence is imposed in him; life, liberty and property are committed to his care. He must be equal to the responsibilities which they create, and if he betrays his trust, neglects his duties, practises deceit, or panders to vice, then the most severe penalty should be inflicted and his name stricken from the roll."

That the lawyer owes a high duty to his profession and to his fellow members of the Bar is an obvious truth. His profession should be his pride, and to preserve its honor pure and unsullied should be among his chief concerns. "Nothing should be higher in the estimation of the advocate," declares Mr. Alexander H. Robbins, "next after those sacred relations of home and country than his profession. She should be to him the 'fairest of ten thousand' among the institutions of the earth. He must stand for her in all places and resent any attack on her honor—as he would if the same attack were to be made against his own fair name and reputation. He should enthrone her in the sacred places of his heart, and to her he should offer the incense of constant devotion. For she is a jealous mistress." [35]

Again, it is to be borne in mind that the judges are selected from the ranks of lawyers. The purity of the Bench depends upon the purity of the Bar.

> "The very fact, then, that one of the co-ordinate departments of the government is administered by men selected only from one profession gives to that profession a certain preeminence which calls for a high standard of morals as well as intellectual attainments. The integrity of the judiciary is the safeguard of the nation, but the character of the judges is practically but the character of the lawyers. Like begets like. A degraded Bar will inevitably produce a degraded Bench, and just as certainly may we expect to find the highest excellence in a judiciary drawn from the ranks of an enlightened, learned and moral Bar." [36]

The relations between members of the Bar should obviously be those of mutual respect, good will and esteem. The maintenance of these relations depends upon the exercise of the utmost good faith and the due observance of the customary courtesies of the

[35] ROBBINS, AMERICAN ADVOCACY, 278.
[36] WARVELLE, LEGAL ETHICS, 35.

profession. All agreements and engagements between counsel should, therefore, be punctually and scrupulously kept. The good opinion of one's associates of the Bar is an asset that cannot be valued too highly, and this good opinion can be gained and held only by "real learning, by the strictest integrity and honor, by a courteous demeanor, and by attention, accuracy and punctuality in the transaction of business." [37]

Duties to the client are justly ranked among those that are primary and fundamental. The relation between attorney and client is one of special trust and confidence. It is doubtful if there is any profession or calling that bears as intimate a relation to the every day affairs of men as that of the lawyer. "No profession," says Mr. Robbins, "not even that of the doctor or preacher, is as intimate in its relationship with people as that of the lawyer. To the doctor the patient discloses his physical ailments and symptoms, to the preacher the communicant broaches as a general rule only those things that commend him in the eye of heaven, or those sins of his own for which he is in fear of eternal punishment, but to his lawyer he unburdens his whole life, his business secrets and difficulties, his family relationships and quarrels and the skeletons in his closet. To him he often commits the duty of saving his life, of protecting his good name, of safe-guarding his property, or regaining for him his liberty. Under such solemn and sacred responsibilities, the profession feels that it owes to the people who thus extend to its members such unparalleled confidence the duty of maintaining the honor and integrity of that profession on a moral plane higher than that of the merchant, trader or mechanic." [38]

From a strictly legal standpoint, the attorney owes to his client the duty of exercising reasonable care, skill and diligence—that is, that care, skill and diligence that are usually exercised by lawyers. He is not held to the highest possible degree of care, but rather to that of the average practitioner. In other words, his liability to his client is measured in terms of negligence. [39]

Such is the advocate's legal liability, but his moral responsibility is broader in scope. "Entire devotion to the interest of the

[37] SHARSWOOD, LEGAL ETHICS, 76.
[38] ROBBINS, AMERICAN ADVOCACY, 251.
[39] 6 C. J. 682.

client, warm zeal in the maintenance and defense of his rights, and the exertion of his utmost learning and ability—these are the higher points, which can only satisfy the truly conscientious practitioner." [40]

It is not to be understood from this statement, however, that the high duty of an advocate to his client is to be exercised at the expense of truth. For high as is the obligation of the advocate to his client, the obligation to truth is higher. The lawyer is an officer in the administration of justice, and he is not expected, even in the interest of a client, to disregard the fundamental principle upon which justice is based. "Truth," therefore, "in all its simplicity—to the Court, to the client, and adversary—should indeed be the polar star of the lawyer." [41]

It has been the endeavor of the writer to set forth in this article, in as brief a manner as possible, the nature of the lawyer's profession, together with some of the duties, obligations and responsibilities incident thereto. Advocacy has ever been regarded as an honorable calling—and justly so. Fidelity is its chief characteristic, justice to its object, truth its underlying principle, and service its ideal. The Canons of Ethics of the American Bar Association, declaring the lawyer's duty in its last analysis, may well be quoted in conclusion: [42]

[40] SHARSWOOD, LEGAL ETHICS, 79. Lord Brougham is credited with having made the following interesting but extravagant statement: "There are many whom it may be needful to remind that an advocate—by the sacred duty of his connection with his client—knows, in the discharge of that office, but one person in the world—that client and none other. To serve that client by all expedient means, to protect that client at all hazards and costs to all others (even the party already injured), and, amongst others, to himself, is the highest and most unquestioned of his duties. And he must not regard the alarm, the suffering, the torment, the destruction, which he may bring upon any other, nay, separating even the duties of a patriot from those of an advocate, he must go on, reckless of the consequences, if his fate should unhappily be to involve his country in confusion for his client." This statement of Lord Brougham is, of course, extreme, and cannot be approved. Even the high duty of an advocate to his client could hardly be said to demand an utter disregard of the "suffering, torment and destruction" that might be brought upon others, and assuredly it does not demand a disregard of the welfare of one's country. "Besides this," as Mr. Robbins very aptly comments, "an advocate who casts destruction broadcast may involve his client in the general ruin." ROBBINS, AMERICAN ADVOCACY, 271, 272.

[41] SHARSWOOD, LEGAL ETHICS, 167.

[42] Canons of Ethics of the American Bar Association, Art. II, § 32.

"No client, corporate or individual, however powerful, nor any cause civil or political, however important, is entitled to receive, nor should any lawyer render, any service or advice involving disloyalty to the law whose ministers we are, or disrespect of the judicial office, which we are bound to uphold, or corruption of any person or persons exercising a public office or private trust, or deception or betrayal of the public. When rendering any such improper service or advice, the lawyer invites and merits stern and just condemnation. Correspondingly, he advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent. But, above all, a lawyer will find his highest honor in a deserved reputation for fidelity to private trust and to public duty, as an honest man and as a patriotic and loyal citizen."

E. W. Timberlake, Jr.

WAKE FOREST, N. C.

A DECADE OF THE FEDERAL TRADE COMMISSION.

PART IV.

AS HAS been shown, the declared purpose of the new legislation which brought into existence the Federal Trade Commission, was (see Part I, page 27) to clarify the meaning of the Sherman Law, by specific definition "of the many hurtful restraints of trade * * * up to the limits of what experience has disclosed" and then to forbid them "in such terms as will practically eliminate uncertainty"; and to furnish to "the business men of the country * * * something more than that the menace of legal process in these matters be made explicit and intelligible," by establishing an administrative body or commission to which business men could resort for "advice, definite guidance and information"—a commission which "the opinion of the country would instantly approve"—a commission not "empowered to make terms with monopoly," but to serve "only as an indispensable instrument of information and publicity, as a clearing house for the facts by which both the public mind and the managers of great business undertakings should be guided, and as an instrumentality for doing justice to business where the processes of the courts or the natural forces of correction outside the courts are inadequate to adjust the remedy to the wrong in a way that will meet all the equities and circumstances of the case."

This was indeed an ambitious program, for it undertook to lay the spectre of an uninformed public belief,—a belief not supported by expert professional opinion,—that the Sherman Law needed clarification of meaning; and then undertook to clarify it by a method theretofore untried in the history of jurisprudence, namely by legislative definition and proscription of every act which judicial records had disclosed as constituting "hurtful restraint of trade." The effort and the result may well be characterized in the language of the fable, as *"mons labitur et nascitur ridiculus mus,"* for the legislative definition and proscription when enacted proved to comprise a schedule so meagre,

incomplete and inadequate, as, in the light of a full decade of experience under the new legislation, to exhibit the Federal Trade Commission, the creature of this program, as a futile body wholly incapable of performing the great tasks for which it was created.

The definitions have proven inadequate—in short, a lamentable failure; "the menace of legal process in these matters" has in no sense been "made explicit and intelligible"—on the contrary, such menace has been appreciably magnified, and unnecessarily, uselessly and hurtfully magnified, without any substantial progress towards the promised goal that it be "made explicit and intelligible."

The projected purpose that the Commission should constitute a tribunal to which "the business men of the country" could resort for "advice, definite guidance and information" was ruthlessly ignored in the new legislation.[38]

[38] The Commission, in a few relatively unimportant instances and by demonstrable departure from its statutory powers, has commendably sought to make good this glaring omission in the new legislation. See opinion rendered July 31, 1924, by the Federal Trade Commission in response to questions propounded by the Silver Producers Committee to the Secretary of Commerce in regard to the proposed formation of an association under the Export Trade Act (Webb-Pomerene Act) and in regard to the rights and powers of such an association. The opinion states that "as the administration of this (the Webb-Pomerene) Act is lodged with the Federal Trade Commission, the Committee's communication was referred here by the Secretary of Commerce on December 13, 1923." Thus, after a delay of more than six monhts, an opinion was rendered from which two of the five commissioners dissented, thereby making the opinion that of a bare majority. Clearly, in this instance, "the menace of legal process in these matters" has not been "made explicit and intelligible" when two of the five members of the Commission found it necessary to dissent. By a similar and well-meant departure from its statutory powers, the Commission has further sought to remedy the defect above noted by the establishment of a procedure which it has designated "Trade-Practice Submittals.". In the Annual Report of the Commission for the Fiscal Year ending June 30, 1924, (page 65), this procedure is thus described:

"From time to time the commission is approached by groups of business men representing an entire industry and seeking assistance in the elimination from their industry of practices found to be unfair and harmful but which the industry is unable by itself to eliminate. Upon request of a substantial portion of a given industry, the commission has lent its assistance in these situations and has called the industry together in gatherings which have been termed 'Trade-Practice Submittals.' Submittals have been held in the following industries: Ink, celluloid, knit goods, paper, oil, used typewriters,

It is but logical and natural, therefore, that, so far from "the opinion of the country instantly approving" (paraphrase ours) the Commission, there has been no evidence of any approval whatever; but, on the contrary, emphatic and wide-spread disapproval.[39]

creamery, hosiery, guaranty against decline, macaroni, silverware, gold knives, watchcases, subscription book publishers and music publishers, and band instruments. A pamphlet on Submittals has been prepared.

"At these submittals the objectionable practices are frankly discussed and resolutions usually adopted by the industry looking to their elimination. These resolutions are considered by an industry as binding upon it and are received by the commission as informative as to conditions in the particular industry and the views of the trade thereon in the event the commission is called upon to proceed to complaint upon any practice condemned by an industry."

The usefulness of this procedure is obvious and the Commission is entitled to commendation for establishing it, especially since the new legislation contains no provision authorizing such procedure. The attention of the interested reader is, however, called to Page 68 of the Annual Report setting forth the understanding reached, after such a submittal, by The Subscription Book Publishers' Association; and at Page 70, by the Band Instrument Manufacturers. The former understanding was unconditionally approved by the Commission (p. 70); and the latter (p. 73) with the qualification that, as to some of the subjects comprised in the understanding (presumably because they related to the subjects of prices, rebates, discounts, etc.—subjects of admitted delicacy if not, indeed, of positive illegality under the Sherman Law, when agreed upon by competitors), "the Commission receives and takes note of the same as representing the views and opinions of the industry." In the same spirit of commendation as is expressed above, the suggestion is ventured that the beneficent attitude thus displayed by the Commission towards trade associations, might advantageously furnish the basis of a changed position of our government with reference to trade associations (involving, perhaps, an amendment of the substantive features of our anti-trust laws upon lines indicated by Mr. Taft), whereby the detrimental effect upon such associations resulting from the decisions of the Supreme Court in the Hardwood Lumber case and the Linseed Oil case, may be corrected. This suggested field of inquiry is, however, too broad, and its relevancy to the subject here under discussion, too indirect, to permit its fuller consideration here.

Fairness to the Commission and, in the writer's opinion, the importance of the suggestion as to trade associations, must suffice as justification for a digression requiring such a lengthy foot-note.

[39] In the *New York Evening Post*, December 19, 1924, Clinton W. Gilbert, its Washington correspondent, writing of the activity which led to the enactment of the new legislation said: "It was a movement which stood for little business against big business, which distrusted economic power organized on a national scale and sought to curb it by legislation. The law under which the Federal Trade Commission was appointed * * * was

Except in so far as the Federal Trade Commission has been given the power theretofore possessed, and competently performed, by the Bureau of Corporations of the Department of Commerce, namely, the power of mere investigation, the promise or expectation that the Federal Trade Commission would serve "as an indispensable instrument of information and publicity, as a clearing house for the facts by which both the public mind and the managers of great business undertakings should be guided and as an instrumentality for doing justice," etc., has proven wholly illusory. In so far as relates to the power given to the Commission as a quasi-judicial tribunal—and this has proven to be the field in which the Commission has been most active—the assertion is ventured that the substantial and responsible body of the business men of the country, entirely apart from those connected with great aggregations of capital, regard the activities of the Commission with emphatic and openly expressed disapproval.[40]

We pass now to a consideration of cases which have been adjudicated by the Federal Trade Commission, an undertaking made difficult in the necessarily limited scope of a discussion such as this, because of the very large number of cases which have been disposed of by the Commission. In the period beginning with the creation of the Commission and ending with February, 1923, the Commission issued under the title "Federal Trade Commission Decisions," five substantial volumes each approximately of six hundred pages. A sixth volume, presumably extending to the early part of 1924, is now about to be published. In addition, there are the further decisions rendered in the period of about one year which has since elapsed.

In consequence, it will be necessary for the present purpose to select a few typical cases. Before doing so it seems pertinent to point out that relatively a large number of the matters considered and passed upon by the Commission relate to subjects

the furthest extension of that movement * * * The whole movement * * * is bankrupt. Its laws have accomplished little."

[40] A number of important national trade associations, comprising hundreds of separate business concerns, united in opposing the order made by the Commission against the Mennen Co., and joined, as *amici curiae*, in the appeal from that order, which was reversed upon such appeal. See Mennen Co. *v.* Federal Trade Commission, 288 Fed. 774, *certiorari* denied, 262 U. S. 759.

quite alien to the purposes for which the new legislation was projected and enacted—purposes which concededly related solely to the then "existing anti-trust law" (see Part I, Page 27)—namely, subjects such as the misbranding, or otherwise deceptive or untruthful description, of various kinds of merchandise. In so doing, the Commission has relied on section 5 of the Federal Trade Commission Act which forbids "unfair methods of competition."

Unquestionably, no such purpose, relatively trivial in comparison with the vastly more important objects and functions of the Sherman Law—"one of the most important statutes ever passed in this country" [41]—as bringing within the scope of the new legislation and thereby subjecting to the jurisdiction and process of an important Federal tribunal, the unrelated subjects of misbranding or deceptive description of merchandise, was included in the program laid before Congress by the President of the United States, nor in the Senate report accompanying the bill which later became the Federal Trade Commission Act.[42] Illustrations of cases of the kind mentioned, follow.

[41] WILLIAM H. TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT.

[42] Senator Cummins, chairman of the committee which reported the bill, said (51 Cong. Rec. 11455):

"Unfair competition must usually proceed to great lengths and be destructive of competition before it can be seized and denounced by the anti-trust law. In other cases it must be associated with, coupled with, other vicious and unlawful practices in order to bring the person or the corporation guilty of the practice within the scope of the anti-trust law. The purpose of this bill in this section and in other sections, which I hope will be added to it, is to seize the offender before his ravages have gone to the length necessary in order to bring him within the law that we already have.

"We knew little of these things in 1890. The commerce of the United States has largely developed in the last twenty-five years. The modern methods of carrying on business have been discovered and put into operation in the last quarter of a century; and as we have gone on under the anti-trust law and under the decisions of the courts in their effort to enforce that law, we have observed certain forms of industrial activity which ought to be prohibited whether in and of themselves they restrain trade or commerce or not. We have discovered that tendency is evil; we have discovered that the end which is inevitably reached through these methods is an end which is destructive of fair commerce between the States. It is these considerations which, in my judgment, have made it wise, if not necessary, to supplement the anti-trust law by additional legislation, not in antagonism to the anti-trust law, but in harmony with the anti-trust law, to more effectively put into the industrial life of America the principle of the anti-trust law, which is fair, reasonable competition, independence to the individual, and disassociation among the corporations. * * *"

In *Federal Trade Commission v. Simons, Hatch & Whitten Co.*[43] the complaint made by the Commission was to the effect that the respondent had wrongly labelled hosiery, containing no genuine silk, as "fiber silk," and hosiery composed entirely of cotton, as "silk lisle"; and in *Federal Trade Commission* v. *Thompson*,[44] that the respondent had wrongly labelled hosiery composed of cotton and of an animal or vegetable fiber, but containing no genuine silk, as "Ladies Silk Boot Hose" and "Ladies Art Silk Hose." The same volume from which these cases are cited contains a great many similar cases either of misbranding or of other similar acts of deception. While, of course, there can be no question of the immorality of these practices, it would seem obvious, as has been indicated, that they do not rise to the importance of justifying attention on the part of a great Federal tribunal, but might well be left to the attention of State or other local prosecuting officials. It has been a matter of widespread comment that in recent years such a great volume of work has been cast upon Federal departments, bureaus and tribunals, that not only is there danger that the Federal machinery provided for the proper maintenance of the government will break down under the burden or prove unequal to the performance of its duties,—but also that the tendency to extend to greater limits the already wide jurisdiction and powers of the Federal government, will weaken by disuse the energy and initiative of State and local tribunals. A more substantial objection, however, and one which is more pertinent to the subject now under discussion, to the exercise by the Federal Trade Commission of this feature of its work—a feature to which it has given a vast amount of attention—is that it does not involve any question properly arising under the Anti-trust laws, inasmuch as it does not involve any question of monopoly or restraint of trade. As has been pointed out, such procedure was not comprised within the program submitted by the President of the United States to Congress when he recommended the legislation which culminated in the new legislation; nor within the contemplation of Congress when it en-

[43] 5 Fed. Trade Comm. Dec. 183.

acted the new legislation. Certain it is, that these questions have no bearing upon the principal object sought to be attained by the new legislation, namely, a clarification of the Sherman Law. In short, it seems too clear for discussion that this feature of the Commission's work is unimportant and negligible as bearing upon the difficult and important subject of our Anti-trust laws. They add nothing to the clarification of those laws, because they have no bearing upon them whatever. They seem to be an artificial outgrowth of the new legislation of relative unimportance, and which might better be relegated to State and local jurisdictions. Accordingly, and we think with full propriety, no further discussion of this branch of the Commission's work will be presented here.

Another branch of the work which the Commission has undertaken does, in fact, properly fall within the true scope of the new legislation. It has, however, been strongly contended that in the prosecution of this branch of its work by the Commission it has accomplished more harm than good. Reference is here made to a number of cases instituted by the Commission upon the general subject of price maintenance or similar questions of prices and discounts arising with respect to individual business concerns. In these cases, the Commission has brought complaints against individual business concerns, which are not parts of any combination or other aggregation of capital, and which contain none of the elements or possibilities of monopoly. Types of these cases are *National Biscuit Co.* v. *Fed. Trade Commission,*[45] and *Mennen Co.* v. *Fed. Trade Commission.*[45a]

In the National Biscuit Company case the Federal Trade Commission attacked a sales policy of giving a graduated quantity discount to the owner of chain stores on total purchases of all of the stores of the chain, and refusing to allow owners of single stores to pool their purchases for the purpose of computing the discount. The Commission, after a lengthy and costly investigation—costly both to the Commission and to the respondent company—issued an order requiring the respondent to discontinue such practice. Upon a review of this order by the Circuit Court of Appeals, Second Circuit, the order was declared to have

[45] 299 Fed. 733, *certiorari* denied, 45 Sup. Ct. 95, 69 L. Ed. 39.

been improvidently granted and was reversed. The complaint was based upon section 5 of the Federal Trade Commission Act and upon section 2 of the Clayton Act.

In the course of its opinion, the court said:

> "The gravamen of the offense or the unfair method is the granting of discounts to purchasers of quantities as above referred to. The Commission does not find that the respondents have a monopoly nor that they intend by unlawful means to obtain one. It is not charged or found that the petitioners (respondents) have an agreement or understanding of any kind as to the creation of a monopoly or, indeed, the maintenance of a sales policy for such a purpose. The law does not make mere size of business an offense or the existence of unexerted power an offense. It requires overt acts and trusts to its prohibition of them and its power to repress or punish them. It does not compel competition nor require all that is possible."

The court then proceeded to negative the application of section 5 of the Federal Trade Commission Act and likewise of section 2 of the Clayton Act and said:

> "It was never intended by Congress that the Trade Commission would have the duty and power to judge what is too fast a pace for merchants to proceed in business and to compel them to slow up. To do so, would be to destroy all competition except that which is easy * * *. 'The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain. And to this end it is essential that those who adventure their time, skill and capital should have large freedom of action in the conduct of their own affairs,' said the Supreme Court in *Federal Trade Commission* v. *Sinclair Refining Co.,* 261 U. S. 463.
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> "Effective competition requires that merchants have freedom of action in conducting their own affairs. To be successful may increase or render insuperable the difficulties that rivals must face, but it does not constitute reprehensible or fraudulent methods (*Federal Trade Commission* v. *Curtis Pub. Co.,* 260 U. S. 568).
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> * * * * * * * * * *
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> "In its complaint the Commission charged that the practices were all to the prejudice of the public. * * * The practice of discounts is not an unfair method of competition un-

> der the statute unless it is prejudicial to the public. * * * We conclude that the sales policy of the petitioners as to their discount plan as well as the refusal to sell co-operative or pooling buyers, is fair in all respects as to all its competitors and customers. This policy obviously does not affect the public interest nor deprive it of anything it desires. It is a practice which is recognized by manufacturers of bakery products and is inoffensive to good business morals. It was error to direct the petitioners to sell to individual grocers who pooled their orders of purchase or who bought on a co-operative basis."

We have thus quoted somewhat at length from the opinion of the Circuit Court of Appeals in order to establish the contention that the proceeding thus brought ought never to have been brought. We say this not merely because the event proved that the complaint did not have proper legal basis, but also because the expressions quoted from the opinion of reversal show that the Commission was unnecessarily seeking to disrupt a business policy which the court found did not "affect the public interest nor deprive it of anything it desired" and that it was a practice "recognized by manufacturers" and "inoffensive to good business morals." In short, it was a proceeding involving a meddlesome interference in the conduct of a private business having none of the attributes of monopoly, and one which cannot be claimed to have fallen within the program laid before Congress by the President of the United States, and was clearly not within the spirit or the letter of the new legislation, for, as to the latter statement, the opinion of reversal by the Circuit Court of Appeals is full warrant.

It is to be observed that substantially the same complaint was made by the Commission against the Loose-Wiles Biscuit Company, a manufacturing concern engaged in the same kind of business as the National Biscuit Company, and that this complaint was disposed of adversely to the Commission by the Circuit Court of Appeals in the same opinion which disposed of the National Biscuit Company case. This fact is pointed out as indicating the hurtful character of the work of this nature which has been conducted by the Federal Trade Commission inasmuch as these proceedings (and they are but typical of many others) must necessarily have involved a great amount of money ex-

penditure on the part of the government and of these companies, and in addition, a vast amount of labor in the preparation and conduct both of the prosecution and of the defense, and all to no useful end; and, which is more important, threatened disruption or demoralization to useful business enterprises.

With respect to the Mennen case above mentioned, the conditions tending to show that the Federal Trade Commission exerted the power given to it by the new legislation in an unnecessary and hurtful manner, are even more obvious. In that case the Commission charged that the Mennen Company had violated section 5 of the Federal Trade Commission Act and section 2 of the Clayton Act; and in support of such charge it alleged that the respondent had adopted a plan for the allowance of trade discounts in the marketing of its products, in pursuance of which it had allowed a more favorable rate of discount to wholesalers than to retailers; and, further, that it had refused to give the wholesalers' rate of discount to groups of retailers who, acting through corporations organized by such retailers for that purpose, had pooled their orders so that they amounted in quantity to wholesale purchases. In other words, the Mennen Company, deeming it to its best business advantage to make its sales customarily through wholesalers, because of the obvious difficulty if not impossibility of marketing its product through retailers, sought to give to its wholesale customers the advantage or protection of a more favorable price than to retailers, even when the latter, acting unitedly and pooling their orders, were able to place orders in wholesale quantities. It is difficult to understand why the Federal Trade Commission should have sought to interfere with this wholesome and time-honored practice. It did however interfere by issuing a complaint against the Mennen Company, with the result that, after a long and costly investigation, the Commission issued an order directing the discontinuance of this practice; but with the further result that the Commission's order was, in turn, unanimously reversed by the Circuit Court of Appeals, Second Circuit.

In the interval between the issuance of this order and its subsequent reversal, the manufacturing industries of this country and the vast body of its wholesalers were thrown into consternation at the prospect that, if the order of the Commission should

be sustained by the Circuit Court of Appeals, it would involve the serious impairment of the manufacturing and wholesale industries of the country, for it would have resulted in compelling all manufacturers to give to retailers, when purchasing like quantities as wholesalers, the same prices as wholesalers. A superficial consideration of this phase of the matter would lead to the belief that this new condition would inure to the benefit of consumers by reducing the prices of commodities. But this view is merely superficial, for the final result would have been the demoralization of a great part of the manufacturing industries of this country and the demoralization or actual extermination of a vast number of wholesalers, with the final result that the cost of commodities to the consumer would have been increased through the added difficulties and expense of distribution which the new system would have entailed.

In its opinion of reversal the Circuit Court of Appeals summarily negatived the contention of the Commission that the practice complained of involved a violation of section 2 of the Clayton Act, the section forbidding price discriminations, by showing that this section was designed by Congress for a totally different situation. It likewise disposed of the Commission's contention that section 5 of the Federal Trade Commission Act was violated, by showing that such section had no application whatever. The court cited the language used in *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat Co.*,[46] that "We have not yet reached the stage where the selection of a trader's customers is made for him by the government"; and further said:

> "In accordance with these opinions we have no doubt that the Mennen Company had the right to refuse to sell to retailers at all, and if it chose to sell to them that it had the right to fix the price at which it would sell to them, and that it was under no obligation to sell to them at the same price it sold to the wholesalers. * * * There is nothing unfair in declining to sell to retailers on the same scale of prices that it sold to wholesalers even though the retailers bought or sought to buy the same quantity the wholesalers bought."

Limitations of space prevent a fuller discussion of this case and of the National Biscuit Company case. The interested

[46] 227 Fed. 46, 49.

reader will, it is believed, find a study of these cases and of other cases decided by the Commission of which these cases are typical, useful, as raising a question of serious doubt as to what public advantage could ever have existed for the institution of these troublesome and costly proceedings, having in mind the disturbance which their prosecution caused to the plain business interests of this country, and having in mind, also, the slight basis existing in the new legislation for their institution—a basis not merely slight, but as the orders of reversal showed, entirely lacking.

A peculiarly striking example of the exertion of its powers by the Federal Trade Commission in a costly, burdensome and, as the event proved, futile manner is to be found in the series of cases known as the "Gasoline Pump Cases." [47] In each of these cases, the order which had been made by the Commission against the respective company named was reversed; and upon a review, under *certiorari,* by the Supreme Court, these reversals were affirmed.[48] These proceedings were brought to compel the discontinuance of the practice, universally known throughout the country, whereby corporations selling gasoline, furnish to dealers "curb filling stations" or outfits commonly seen on the roadside whereby automobiles can speedily obtain supplies of gasoline. The following is quoted from the opinion of the court [49] as showing the nature of these cases:

> "The testimony discloses a practice which has been widely pursued in the eastern part of the United States by corporations refining and marketing gasoline. It consists of what is practically a loan, or technically a lease without rental, by a wholesaler to a retailer, of equipment for the temporary storage, measurement, and delivery of gasoline to the consuming public. The practice extends mainly to the retailer whose place of business is referred to as a 'curb filling station.' The leased equipment is known as a 'curb pump

[47] The application of these cases, in support of the contention here advanced that the new legislation has proved largely, if not wholly, futile, is so pertinent that the citations are here set forth in full: Standard Oil Co., Texas Co. *v.* Fed. Trade Comm., 273 Fed. 478; Canfield Oil Co. (and five other companies) *v.* Fed. Trade Comm., 274 Fed. 571; Sinclair Refining Co. *v.* Fed. Trade Comm., 276 Fed. 686; Standard Oil Co., Gulf Refining Co., Maloney Oil and Mfg. Co. *v.* Fed. Trade Comm., 282 Fed. 81.

[48] 261 U. S. 465, 43 Sup. Ct. 450, 67 L. Ed. 749.

[49] 282 Fed. 81, 82.

outfit' and comprises a sunken tank for the storage of gasoline and a pump of familiar design by which gasoline is drawn from the tank and delivered to motor vehicles."

The contract under which this equipment is furnished to the retailer provides [50] that he is "not required to pay any license fee, rental or other things for the use of the equipment; nor is he restricted in his business to the equipment covered by the contract. On the contrary, he may use other equipment leased by competing wholesalers or purchased by himself. Nor does the contract expressly tie him to the wholesaler's products. He may freely deal in gasoline or other petroleum products purchased from competing wholesalers. He may not, however, use the equipment of the contract for storing and handling a competitor's gasoline." It is the feature involved in the last quoted sentence upon which the Commission's complaint was mainly based as being a violation of section 3 of the Clayton Act, which forbids "tieing contracts"; although, strange as it may seem, the Commission appears to have regarded the leasing of these outfits to the retailers as being also an unfair method of competition in violation of section 5 of the Federal Trade Commission Act.

Space forbids a full analysis of this unnecessary and unwarranted exercise of its supposed powers by the Commission. A system which has proved so convenient to the general public and is so widely regarded with favor, surely ought not to have been the subject of attack by a governmental tribunal—an attack which, as in the instances above mentioned, involved the expenditure of large sums of money and of valuable time both on the part of the government and on the part of the companies against whom the complaints were made;—an attack moreover, which the action of the Circuit Court of Appeals in reversing the orders of the Commission, proved to have been futile and unwarranted. Brief extracts from the opinion of reversal [51] must suffice. The court said:

"The next contention of the petitioners * * * is to the effect that the evidence fails to show that the public has been injured. With this we agree. * * * we do not find

[50] *Ibid.*

[51] *Ibid.*, pp. 81, 85.

that the practice has increased the cost of distribution or has enhanced the price of gasoline to the public. On the contrary, it has decreased the cost of distribution. * * * Clearly, the public has found an advantage in the practice, both in the matter of convenience and in the certainty of getting the precise make of gasoline advertised on the globe of the pump. On the other hand, if the orders of the Commission commanding the petitioners to cease and desist from the practice and thereafter to lease outfits to retailers only on remunerative rentals, stand, the inevitable result will be that the number of curb filling stations will be reduced, thereby lessening the convenience to the public; or the rental charged the retailer for the outfit will be covered by fixing wholesale prices so as to allow him a larger profit. In the readjustment the public doubtless will undergo its usual experience of paying higher prices."

In the light of this condemnation of the Commission's effort and in the light of the incalculable inconvenience and loss which the success of such effort would have brought to the vast number of automobile-users in this country, it is difficult to understand what could have been the advantage which the Commission sought to attain. Can it be doubted that this, at least, was not an instance in which "the opinion of the country would instantly approve of such a Commission"? (See Part I, page 28.)

In *John Bene & Sons, Inc.* v. *Federal Trade Commission,*[52] the Commission issued an order forbidding the petitioner from circulating misleading statements concerning the product of a named competitor—an offense adequately cognizable under the libel laws of the several States.

The Circuit Court of Appeals, Second Circuit, unanimously reversed the order, holding that "there being no proof of a public interest herein, or of its being to the interest of the public that this proceeding *should have been begun* or the order complained of made, said order must be reversed." (Italics ours.) The entire opinion is illuminating as illustrating the contention that the Commission exerted its powers in a manner not tending to promote the public welfare and not consonant with the ambitious program upon which the new legislation was based.

This extract from the opinion must suffice:

"The Trade Commission, like many other modern adminis-

[52] 295 Fed. 729.

> trative legal experiments, is called upon simultaneously to enact the roles of complainant, jury, judge and counsel. This multiple impersonation is difficult, and the maintenance of fairness not easy, but we regard the methods pursued in showing Proper's (the competitor's) diminution in sales as lacking in every evidential or testimonial element of value; and opposed to that sense of fairness which is almost instinctive."

In the light of this severe stricture by one of the highest courts in the land—imposed, it must be noted, not upon a private litigant, but upon a governmental tribunal—will it be said that "the opinion of the country would instantly approve of such a Commission"? And can any sound reason be given why such a futile proceeding should ever have been begun?

As illustrating the contention that, as shown in the cases cited, the Commission has often exerted its powers to no useful purpose, and with the result of imposing great expense and the loss of much valuable, and otherwise useful, time and labor both upon the government, the courts and private business concerns, the following is quoted from the opinion of Circuit Judge Denison in *L. B. Silver* v. *Federal Trade Commission*:[53]

> "In the present case, thousands of pages of testimony have been taken; thousands of dollars of expense incurred, for the Government and for the respondents, and the time and attention of the Commission and of the Circuit Court of Appeals consumed to the total extent of many days—all over questions of porcine genealogy and eugenics.
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> "In another recent case, before the Commission and another Circuit Court of Appeals, a similar amount of effort was expended concerning the truthfulness of advertising claims to merit in a medicinal condiment for live stock—the order to desist prohibiting, among other things the use of a fictitious testimonial. *Guarantee Veterinary Co.* v. *Fed. Trade Comm.*, 285 Fed. 853. I do not believe that the Federal Trade Commission was created for any such purpose, or that the time and efforts of the Federal courts should be devoted to such situations."

Attention is called to the statement contained at the beginning of the above quotation, as being a judicial pronouncement of criticism from a high source, made, again, not against a private

[53] 289 Fed. 985.

litigant, but against an important governmental tribunal; and as strongly tending to bear out the contention which has been repeatedly advanced in the present discussion to the effect that the Federal Trade Commission has wrongly and hurtfully asserted the power given to it by the new legislation.

The attention of the interested reader is particularly called to the remainder of Judge Denison's opinion,[54] which contains a most exhaustive and painstaking study of the history and scope of the new legislation, with special reference to section 5 of the Federal Trade Commission Act. It is believed that the exposition thus presented supports the contention here advanced that in the numerous cases brought by the Commission with respect to misbranding, misrepresentation and other like deceptive acts, the Commission has gone beyond the true scope and purpose of the new legislation. Limitations of space permit the quotation of only the following extracts:[55]

> "A study of the Congressional Record convinces me that the Federal Trade Commission Act was wholly collateral to the Sherman and other anti-trust acts, and that the 'unfair methods of competition,' intended to be reached by section 5, are only such methods as tend toward that monopoly or restraint of competition which the anti-trust acts prohibit. The act was the ultimate result of House Bill 15613, in the Second Session of the 63d Congress, introduced by Mr. Covington on April 13, 1914, and it was the often declared partial fulfillment of the general anti-trust program adopted by both parties in the previous political campaign, and specifically laid before Congress for its attention by the address of President Wilson on the subjects of trusts and monopolies, made January 20, 1914. Several other bills of more or less similar purport were introduced and referred, as this one was, to the committee on interstate and foreign commerce, or, as others were, to the judiciary committee. The committee reports and congressional debates, which from this beginning led up to the act as finally passed, cover nearly a thousand printed pages. They have all been read, with reasonably careful attention. Absolute inerrancy of review and inference cannot be claimed, but with reasonable certainty it may be said that the theory that the Commission was being endowed with powers and duties which went beyond the

[54] *Ibid.*, at 993.

[55] *Ibid.*

scope of the underlying purpose of the anti-trust acts was never accepted by either house of Congress. * * * (p. 996). There was universal agreement, frequently expressed, that the bill was not intended to reach private controversies between rival traders. * * * (p. 998). This review leads me to the conclusion with which this discussion opened, viz. that the jurisdiction of the Commission is limited to those situations indicating at least substantial tendency to restraint of trade or monopoly. * * * (p. 999). Justice Day said (257 U. S. p. 453, 42 Sup. Ct. 154, 66 L. Ed. 307, 19 A. L. R. 882) that the Trade Commission Act 'was intended to supplement previous anti-trust legislation.' * * * (p. 1000). With an exception yet to be noted, this recital covers all the judicial decisions under this act which were found up to date. Save for the Sears-Roebuck and Guaranty Veterinary Co. Cases, they are all at least consistent with the conclusion that there is no unfair competition under section 5 unless there is a tendency to monopoly. The exception, not yet noticed, is the Winstead Hosiery Case. When this was before the Second C. C. A. (272 Fed. 957), there was no occasion to consider whether the statute went beyond undue restriction of competition, since the court concluded that the defendant's acts were not unfair. It was without doubt assumed by the court that the statute did have a broader scope, else the court never would have reached the question which it considered and decided. So far as the report indicates, the contention that section 5 reached only such unfair competition as tended to monopoly was in no way brought to the attention of the court."

We have thus quoted at some length from the exhaustive and scholarly study of this subject made by Judge Denison in order to base thereon the contention that the argument thus advanced tends strongly to show, if it does not indeed demonstrate, that the whole class of cases of the nature of misbranding or other like deception, which have been prosecuted by the Federal Trade Commission, have been so prosecuted without due warrant under the two statutes upon which the Commission's powers are solely based, that is to say, the new legislation here under discussion. If Judge Denison's contention is correct, it follows that in a branch of the Commission's work which has, perhaps, been as extensive, troublesome and costly as any other branch of its work, its activities were unauthorized.

We believe that we have shown by a consideration of adjudicated cases arising under the new legislation that it has done nothing towards the clarification of the meaning of the Sherman Law; that, instead of eliminating uncertainty, it has increased the uncertainty which had existed, and contributed additional confusion and perplexity to the problems of the plain business men of the country; that, instead of establishing a tribunal which the opinion of the country would instantly approve, it has done precisely the reverse; and, finally, that in place of furnishing such a tribunal to serve "as an instrumentality for doing justice to business" it has, to a substantial extent, furnished a tribunal which has wrought injustice and injury.

All this is but the natural result of an effort, assuredly well-meant, to satisfy an ill-informed public opinion, inflamed by political controversy, by the expedient of tampering, by means of the new legislation, with the Sherman Law, which Mr. Taft properly described as "one of the most important statutes ever passed in this country"—a statute which, after passing through a period of admitted uncertainty, had reached a stage of reasonable efficiency and clarity when the new legislation was projected.

The new legislation attempted a task impossible of achievement. A decade of experience under it shows that it has lamentably failed. It is, perhaps, not to be wondered at, that the Commission, realizing the impotency of the two laws upon which its usefulness depended, has, in numerous instances and doubtless with good purpose, undertaken tasks beyond the authorization of its basic laws and has met with the inevitable result of such an effort—futility and failure.

It is a matter for regret that the wise counsels of Mr. Taft, given when the new legislation was under consideration by Congress, were not heeded.

In the concluding part of this discussion, a comparison will be made between the laws, procedure and policy of this country in the field which has here been under consideration, and those which prevail in other countries.

(To be concluded)

Felix H. Levy.

NEW YORK CITY.

STERILIZATION OF DEFECTIVES.

WHAT are the limits of the police power of an American state over the liberty of persons within its jurisdiction to reproduce their kind?

This question is suggested by recent court decisions passing upon statutes of some of the states moving in the light of modern advanced eugenical science with the aid of enlightened medical practice to lessen the transmission of certain hereditable mental defects admittedly harmful both to the afflicted individual and to society.

If it be established that crime, insanity, epilepsy or feeble-mindedness transmitted under ascertained laws of heredity will be increased from unrestricted procreation by the criminal, insane, epileptic and feebleminded, what power has the State to protect these against themselves and itself against such certain multiplication of the defective and socially inadequate?

That the State has the power, exercised by every state, to take and keep in custody both for their own good and for the welfare of society persons so afflicted is well settled, nor is it to be doubted that when thus held in custodial care such persons may by segregation be prevented from procreating.

Is this the sole remedy available to organized society? Must such persons languish for life in custody and must the government bear the perpetual burden of thus maintaining them if it would protect itself against the multiplication of their kind, and must this be so even when through a simple surgical operation not appreciably dangerous and involving the removal of no sound organs from the body such persons might be discharged from custody and become self supporting to the great advantage both of themselves and of society? May one liberty be thus restored through the deprivation of another liberty?

Within the past two decades some sixteen of the states have endeavored by statute to deal with this problem.

The State of Washington by statute,[1] provided for the operation of vasectomy for the prevention of procreation as a part of

[1] Rem. and Bal. Code, § 2287.

the punishment that might be imposed in certain cases. The Constitution of Washington,[2] contained a prohibition against the infliction of cruel punishments. In *Feilin's Case*,[3] decided by the Washington Supreme Court, Sept. 3, 1912, it was said:

> "Guided by the rule that, in the matter of penalties for criminal offenses, the courts will not disturb the discretion of the legislature save in extreme cases, we cannot hold that vasectomy is such a cruel punishment as cannot be inflicted upon appellant for the horrible and brutal crime of which he has been convicted."

In New Jersey the Board of Examiners created by "an act to authorize and provide for the sterilization of feeble minded (including idiots, imbeciles and morons), epileptics, rapists, certain criminals and other defectives," [4] ordered that the operation of salpingectomy be performed on an epileptic inmate of a state charitable institution as the most effective operation for the prevention of procreation. In the case of *Smith* v. *Board of Examiners of Feeble Minded*,[5] the court held that the statute in question was based on a classification that bore no reasonable relation to the object of such police regulation, and hence denied to the individuals so selected (inmates of state institutions) the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The court said:[6]

> "Prosecutrix falls within the classification of the statute in that she is an inmate of the State Village for Epileptics, a state charitable institution, 'the objects of which,' as stated in the act creating it, are 'to secure the humane, curative, scientific and economical care and treatment of epilepsy,' 4 Comp. Stat. p. 4961. The prosecutrix has been an inmate of this charity since 1902, and for the five years last past she has had no attack of the disease. From this statement of the facts it is clear that the order with which we have to deal threatens possibly the life, and certainly the liberty, of the prosecutrix in a manner forbidden by both the state and federal constitution, unless such order is a valid exercise of

[2] Art. I, § 14.
[3] 70 Wash. 65, 126 Pac. 75, 32 Ann. Cas. 512.
[4] N. J. P. L., 1911, 353.
[5] (N. J.), 88 Atl. 963, 32 Ann. Cas. 515.
[6] *Ibid.*, pp. 516-517.

the police power. The question thus presented is therefore not one of those constitutional questions that are primarily addressed to the legislature, but a purely legal question as to the due exercise of the police power, which is always a matter for determination by the courts. This power, stated as broadly as the argument in support of the order requires, is the exercise by the legislature of a state of its inherent sovereignty to enact and enforce whatever regulations are in its judgment demanded for the welfare of society at large in order to secure or to guard its order, safety, health, or morals. The general limitation of such power to which the prosecutrix must appeal is that under our system of government the artificial enhancement of the public welfare by the forcible suppression of the constitutional rights of the individual is inadmissible. Somewhere between these two fundamental propositions the exercise of the police power in the present case must fall, and its assignment to the former rather than to the latter involves consequences of the greatest magnitude.

"Evidently the large and underlying question is, how far is government constitutionally justified in the theoretical betterment of society by means of the surgical sterilization of certain of its unoffending, but undesirable, members?

* * * * * * * * *

"For not only will society at large be just as injuriously affected by the procreation of epileptics who are not confined in such institutions as it will be by the procreation of those who are so confined, but the former vastly outnumber the latter, and are, in the nature of things, vastly more exposed to the temptation and opportunity of procreation, which indeed in cases of those confined in a presumably well conducted public institution, is reduced practically to nil. The particular vice, therefore, of the present classification is not so much that it creates a subclassification, based upon no reasonable basis, as that, having thereby arbitrarily created two classes, it applies the statutory remedy to that one of those classes to which it has the least, and in no event a sole, application, and to which indeed upon the presumption of the proper management of our public institutions it has no application at all. When we consider that such statutory scheme necessarily involves a suppression of personal liberty and a possible menace to the life of the individual who must submit to it, it is not asking too much that an artificial regulation of society that involves these constitutional rights of some of its members shall be accomplished, if at all, by a statute that does not deny to the persons injuriously affected the equal protection of the laws guaranteed by the Federal Constitution."

The foregoing may, perhaps, be accurately termed both the earliest and the two leading cases upon the subject.

It will be observed that while the motive of the Washington statute was punitive, it was also eugenical in its operation. The New Jersey statute was purely eugenical. Other statutes suggest a therapeutic motive—the welfare of the patient, though in operation they would be eugenical also.

Similar legislation has run a varied course both with the law making authorities and in the courts.

The governors of Pennsylvania,[7] Oregon,[8] Vermont,[9] and Nebraska [10] have vetoed sterilization bills passed by their respective states. Of these states, however, Nebraska and Oregon finally succeeded in securing sterilization statutes.

In *Rudolph Davis* v. *William H. Berry et al.*,[11] the Iowa statute was held invalid as a bill of attainder, providing for a cruel and unusual punishment and having no provision for due process of law. This case went to the United States Supreme Court but was not there decided upon the merits because pending the appeal the statute involved was superseded by the enactment of a substantially different statute upon the same subject.[12]

No other case involving a like statute appears to have reached the Supreme Court.

In *Haynes* v. *Williams*,[13] the Michigan statute was held unconstitutional as not affording those affected by it the equal protection of the laws.

The Supreme Court of Indiana, May 11, 1921, in *Smith* v. *Williams*,[14] held the Indiana statute invalid, saying:

"In the instant case the prisoner has no opportunity to cross examine the experts who decide that this operation should be performed upon him. He has no chance to bring ex-

[7] Pennypacker, 1905; Sproul, 1921.
[8] Chamberlin, 1909.
[9] Fletcher, 1913.
[10] Davis, 1913.
[11] 216 Fed. 419.
[12] Berry *v.* Davis, 242 U. S. 468.
[13] (Mich.), 166 N. W. 938.
[14] (Ind.), 131 N. E. 2.

> perts to show that it should not be performed; nor has he a chance to controvert the scientific question that he is of a class designated in the statute. And wholly aside from the proposition of cruel and unusual punishment, and infliction of pains and penalties by the legislative body through an administrative board, it is very plain that this act is in violation of the Fourteenth Amendment of the Federal Constitution in that it denies appellee due process."

It will be observed from the foregoing cases, which are fairly typical of the limited number of court decisions upon the subject, that none of them holds that the State is without the power in question provided it be exercised through a statute that both affords due process of law and operates alike upon all individuals of the class affected, but those courts which follow the New Jersey case hold that limiting the operation of such a statute to inmates of State custodial institutions denies such inmates the equal protection of the laws and renders the statute unconstitutional and void *in toto*.

The Virginia Statute.

Most recent of the states to enact a statute of the character under discussion is Virginia, where an act to provide for the sexual sterilization of inmates of State institutions in certain cases passed both houses of the Legislature without dissent and was approved by the Governor, March 20, 1924.[15]

Drawn in the light of the experience of other states the Virginia statute reflects a diligent effort to avoid the defects that have brought disapproval from the courts of some similar enactments.

This statute provides for a hearing after notice before a Hospital Board, the appointment of guardians in proper cases, gives the right of representation by counsel with an appeal of right to the Circuit Court, with a further right of appeal to the Supreme Court of Appeals, and contains other provisions which altogether appear to meet the requirements of due process of law.

The operation of the statute, however, is limited as its title indicates to inmates of State Institutions, the body of the act making it applicable to "any such patient confined in such institution afflicted with hereditary forms of insanity that are recurrent, idiocy, imbecility, feeble-mindedness or epilepsy."

[15] Acts of Assembly, 1924, 569, Pollard's Code Bien., 1924, 475.

Sterilization under the Virginia statute shall not be ordered in any case unless the Special Board of the institution after the notice and hearing above referred to shall find upon the evidence adduced "that the said inmate is insane, idiotic, imbecile, feeble minded or epileptic, and by the laws of heredity is the probably potential parent of socially inadequate offspring likewise afflicted, that the said inmate may be sexually sterilized without detriment to his or her general health, and that the welfare of the inmate and of society will be promoted by such sterilization."

Thus it will be seen that while this statute has a eugenical motive, sterilization can in no case be ordered under its authority unless it shall have been first judicially ascertained that the welfare of the inmate also will be promoted thereby.

When it is considered that those who are subject to commitment to these institutions constitute classes well defined by the statutes [16] and thus become because of mental defectiveness wards of the State, and being because of mental defects themselves incapable of deciding what is best for themselves, can it be said that it involves an unreasonable classification to provide for them tribunals judicially to determine what in the respect indicated will promote their welfare and having so found to order their sterilization—an adjudication which the Virginia statute requires further to be supported by the finding that the action proposed will also promote the public welfare.

The field here is a broad one involving what were formerly at least regarded as elemental personal rights. To exhaust this field has not been attempted.

If this article shall stimulate consideration and discussion of the questions suggested it will have served its purpose.

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[16] Va. Code, §§ 1066-1077.

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CAN THE CONSTITUTION BE TAUGHT IN THE COMMON SCHOOLS?

"There was also a beaver who paced on the deck,
Or sat making lace at the bow,
And had often, the Bellman said, saved them from wreck,
Though none of the crew could tell how."
—Lewis Carroll, in *The Hunting of the Snark.*

This article is not designed as a technical discussion of a legal principle, but may, because of that fact, have a wider interest; and since lawyers, especially when assembled at Bar Association meetings, recognize the duty of actively assisting in bringing home to the average man and woman a knowledge and appreciation of our system of government, some suggestions as to how this may be done do not seem to be out of place.

It is safe to say that if our people as a whole realized the beneficence of our form of government, the peculiar protection it affords the individual in the exercise of his natural rights, the stimulus it has given to individual initiative and energy, we would have not only a completely loyal, but a contented and happy people.

"Safety first" has an appeal to the instinct of self-preservation, and in a rather materialistic and selfish age the average man is likely, when the Constitution is under discussion, to ask: "What is there in it for me?"

This inquiry must be answered, even though it is not prompted by the highest ideals of civic duty. It cannot be answered by oratorical eulogies or by general conclusions as to the value of the Constitution. These leave the uneducated cold, if not irritated. They grow tired of hearing the Constitution thus referred to, and the result is very much as given in the above jingle,—one of the best specimens of what has been aptly described as "Carroll's Classical Nonsense."

There is, of course, no doubt that the education of the citizen should commence in his school days, but it is difficult, if not impossible, to hold the attention of the young to a dry and involved study of the constitutions, State and Federal, and their respective domains. Unfortunately, almost every treatise on the subject is involved; generally intended for lawyers and always for students far beyond the high school, while text books for use in the common schools contain a mass of detail describing local, State and Federal governmental activities assumed to be adapted to the youthful mentality. The student, therefore, if attracted at all, concentrates upon matters of mere routine, and the opportunity for impressing upon his plastic mind the great principles of natural, individual rights, upon which our government rests, is lost. The practical problem is whether it is possible to state and illustrate these principles in so attractive and interesting a manner that a pupil in the common schools will understand and remember them.

It would soon seem that this could be done if mere routine were ignored so far as possible, and stress placed upon those provisions of the organic law which actually are of vital interest to everyone and around which revolve the romance of history and the progress of humanity.

For instance, a most interesting study could be made of the origin of the written secret ballot, for while it is true that voting by ballot had been attempted at different times, the principle of the written secret ballot in its entirety was first established in this country and gradually improved and modified by legislation until we have it as it is in the present day. The sanctity of the ballot, the superiority of the American system and the great part it plays in the maintenance of free elections could be thus inculcated.

The subject of religious liberty would, of course, require delicate handling, since, in showing the crimes committed in the name of religion in the past, care would necessarily be taken to avoid criticism of any particular church; but it should be possible to establish broadly the fact that where religion and politics were permitted to intermix, religious persecution inevitably resulted, no matter what form of belief was professed by the faction controlling the government. Thus, the necessity for a complete separation of church and state could be demonstrated without injuring the sensibilities of any individual; a proper understanding of the first and fourteenth amendments would result, and liberty of conscience be so fully respected that no one would dare appeal to religious prejudices in political campaigns.

The abolition of imprisonment for debt could be made fascinat-

ing. The writings of Dickens and Thackeray, showing the miseries which resulted from the old system, could be made use of. It is even possible that young people could in this way be induced to read standard works of such authors, instead of poisoning their minds with books on sex problems and trash which go under the name of literature. As against the former system of imprisonment for debt, we have our humane exemption laws, and it would be strange if the young mind, after making the comparison, would not receive a favorable impression of the American Government.

How valuable the writ of *Habeas Corpus* seems when read in connection with the *Lettre de Cachet;* the provision for public and jury trials as against Star Chamber proceedings and Bills of Attainder; and what absorbing interest would attach to the provision that no one could be compelled to testify against himself, by comparing it with the torture formerly forming a part of the regular legal procedure.

Modern instances could be cited to show these guarantees of individual freedom to be still necessary; thus, it is only a few weeks since the United States Supreme Court, because of the conduct of the police in securing a confession, set aside a conviction of murder.

The Bill of Rights, when read in the light of history, becomes such a living, vital thing, appealing to everyone of us, that it would seem almost criminal that its glory should be lost in a mass of details relating to town or county government or the method of nominating candidates for office.

All this would naturally lead to a study of the judiciary and the proper functions of our courts, and, first, the necessity for an independent judiciary could be made evident by a short study of the crimes committed in the name of justice by judges holding office at the will of the appointing power.

In those states where the judges are elected for limited terms, lawyers are always anxious to see a good judge kept in office, and the only logical appeal which can be made to the electorate must be based upon the necessity for an independent judiciary. To appreciate this appeal, the electorate should know what that means.

The student having been thus brought to a realization of the value of the Constitution to him as an individual would naturally desire its perpetuation; the admonitions to guard it given by great Americans, from Washington down, would appeal to him, and here, again, history will show that scant attention has often been given to mere paper declarations of human rights where there was no tribunal with power to enforce them, and thus the duty of our courts, now so sharply attacked, to set aside legislative and official acts contravening the organic law would be understood and acquiesced in. Interest in this phase of the question could be stimulated by reference to the cases in which this has been done, preference to be given to those,—and they are many,—having a very human appeal.

Civics taught in this way would include history and literature, and could not fail to broaden the mind of the student and inculcate real Americanism. It would teach him to revere our government and to respect its authority. If it is true that in this mechanical age leadership and respect for law and authority are disappearing, should not an attempt be made to show the youth of the land that ours is a "government of laws and not of men," and that "tinkering" with the Constitution is a dangerous pastime and so, perchance, increase their respect for legitimate authority and save them from the sentimentality of idealists, upon the one hand, and vicious propagandists, upon the other?

THOMAS D. O'BRIEN.

St. Paul, Minn.

NOTES

SALES—RIGHT OF THE BUYER TO RESCIND THE CONTRACT FOR A DEFECT IN THE QUALITY OF THE GOODS DELIVERED.—The question of the right of a buyer of goods to repudiate the contract because of the defective quality of goods delivered has been a constant bone of contention in the courts. Any discussion of the question must necessarily be divided into two divisions, namely: (1) With respect to those sales in which the title to all the subject matter passes at one time; (2) With respect to those sales in which the title to the subject matter passes at different intervals, *i. e.,* those contracts usually designated as "instalment" contracts.

Before proceeding it might be well to point out that it is generally of no practical importance, in this country at least, whether the statement in regard to quality is to be considered as a warranty or a condition.[1] Though text-writers and judges often make the distinction, it is in most cases productive of confusion rather than clearness.

I.

The first class of contracts, embracing the great majority of sales, will receive only brief treatment. There have been two clearly defined lines of authority in this country. The English Rule probably prevailed in a majority of our states before the enactment of the Uniform Sales Act. That doctrine makes a distinction between executed and executory contracts. If the contract is executed there can be no rescission under any circumstances, and the buyer must be content with obtaining damages in an independent action or recoupment when sued for the purchase price. If the contract is executory, the buyer may accept the goods and sue for the breach of warranty or he may reject the goods. Under the other doctrine, known as the Massachusetts Rule,[2] the buyer is allowed to rescind in either case if he so chooses, and the question whether title has passed is of no importance. Of course, the buyer may elect to retain the goods and sue upon the warranty or obtain recoupment when sued for the

[1] New York, prior to the enactment of the Uniform Sales Act, had a doctrine at variance with the two well settled lines of American authority which seemed to require a distinction between technical conditions and warranties. See article by Professor Burdick, 1 Col. Law Rev. 71.

[2] See article by Professor Williston, 16 Harv. Law Rev. 465, and cases there cited.

purchase price. It is the latter rule that was adopted by the Uniform Sales Act, enacted in twenty-seven jurisdictions.[3]

II.

The principles involved in a contract for the sale of goods the title to all of which will pass at one time are comparatively clear, and the question whether there can be rescission in a given case depends upon the view prevailing in the jurisdiction in which the case arises. However, the situation in regard to instalment contracts presents more difficulties. As said by one court: [4]

> "Upon this question there is a wilderness of authority through many, many years, and conflicting."

This statement is true only to a limited extent, as much apparent conflict is explained when proper distinctions are made. Though it would be difficult to make a general statement covering all cases, the doctrine—or doctrines—which the courts apply to particular circumstances are clearly discernible.

The English Rule on the question refuses the right to rescind unless the breach in regard to any one instalment is such as to show an intention on the part of the party in default not to be bound by the contract.[5] As said by Coleridge, C. J., in *Freeth* v. *Burr*: [6]

> "* * * the true question is whether the acts and conduct of the party evince an intention no longer to be bound by the contract."

Thus each instalment is virtually treated as a separate contract and the breach of one instalment is no ground for a refusal to accept subsequent instalments except insofar as it constitutes an anticipatory breach of the whole contract. Such seems to be the English Rule as applicable to all cases.[7]

After a study of the American cases it would be hard to state a general rule as governing the decisions.[8] This is due not so much to a difference in the outcome of the actual cases as to a failure of the

[3] For the relative merits of the two doctrines, examine the articles in the controversy between Professors Williston and Burdick. 16 Harv. Law Rev. 465; 4 Col. Law Rev. 264.

[4] Ellison, Son & Co. *v.* Grocery Co. (1911), 69 W. Va. 380, 71 S. E. 391, 38 L. R. A. (N. S.) 539, 543.

[5] Jonassohn *v.* Young (1863), 4 B. & S. 296, 32 L. J. Q. B. 385, 122 Eng. Rep. R. 470; Simpson *v.* Crippin (1872), 8 L. R. Q. B. 14; Mersey Steel and Iron Co. *v.* Naylor (1884), 51 L. J. Q. B. 576, 5 B. & C. 269, 9 App. Cas. 434; BENJAMIN, SALES, § 908.

[6] (1874), 9 L. R. C. P. 208, 213.

[7] For a criticism of this doctrine, see King Philip Mills *v.* Slater (1878), 12 R. I. 82, 34 Am. Rep. 603.

[8] In a note to BENJAMIN, SALES, § 909, Mr. Corbin states the American doctrine to be as follows: "In the American cases the rule is to look to the intent and where it cannot be supposed to have been the intent of the parties in making the contract that one must continue performing while the other is in default, the contract may be abandoned by the aggrieved party." It is submitted that the operation of such a rule is not apparent in the cases. Also, it would seem that such a rule would give the right of rescission in all bilateral contracts unless otherwise stipulated.

courts to base their decisions on the same reasoning in cases of similar facts, and the fact that language too broad in scope is often applied to specific cases. However, if attention is paid to the actual facts in the cases and proper distinctions made, a great deal of ostensible conflict disappears.

It seems to be fairly well settled by the weight of authority, at least of the late cases, that the buyer may rescind the whole contract if the *first or earlier instalments* [9] are defective in quality [10] and the buyer promptly notifies the seller of his refusal further to perform.[11] But, though such is clearly the trend of the later cases, there is respectable authority to the contrary. These cases seem to adopt the English Rule and hold that a branch of one instalment is not a ground for rescission of the whole contract unless it amounts to a renunciation of the entire obligation.[12]

The doctrine allowing rescission in the absence of any intent to abandon the entire contract appears to be the better.[13] It is seldom that a defect in the quality of the goods delivered is the result of an intent to abandon the contract, nor does it necessarily evince an inability to deliver subsequent instalments according to the agreement; thus, the application of the contrary rule practically prohibits rescission for this type of breach. Such a result as is in many cases highly inequitable. Following are the words of Potter, J., delivering the opinion in *King Philip Mills* v. *Slater*: [14]

> "To hold that the purchaser must receive such lots as are of the right quality, and that for the periods when they are not so he must supply himself elsewhere, and sue for his damages, or claim to deduct them, would introduce confusion into business. It would in most cases entirely frustrate the object of the contract."

Next for consideration is that class of cases in which the buyer has knowingly accepted defective instalments, gone on with performance of the contract, and then later refused to accept further instalments because of the inferiority of some or all of the goods previously delivered. Though practically all of these cases expressly or impliedly admit the buyer's right to rescind for a defect in the

[9] In practically all of the cases allowing the right of rescission, the defect in quality has existed in the first or second instalment and the buyer immediately repudiated the contract. In all cases in which the buyer has attempted to rescind after a substantial part of the contract has been performed he has been precluded from doing so because of his *knowledge* of the defective character of goods previously accepted. Whether the courts would allow the buyer to rescind the contract and refuse to accept further instalments for a defect in the quality of one of the later instalments, the previous ones having been up to standard, is doubtful.

[10] Enterprise Mfg. Co. *v.* Oppenheim (1911), 114 Md. 368, 79 Atl. 1007, 38 L. R. A. (N. S.) 548; Newton *v.* Bayless Fruit Co. (1913) 155 Ky. 440, 159 S. W. 968.

[11] For collection of cases concerning the notice required, see note to 8 L. R. A. (N. S.) 1110.

[12] Blackburn *v.* Reilly (1885), 47 N. J. Law 290, 54 Am. Rep. 159, 1 Atl. 27; Worthington *v.* Given (1898), 119 Ala. 44, 24 So. 739, 43 L. R. A. 382.

[13] WILLISTON, SALES, § 467d.

[14] *Supra*, note 7, 12 R. I. 82, 85.

quality of the earlier deliveries if the right is at once exercised, they deny for various reasons that the buyer can take advantage of the previous breach at the time he attempts to do so.[15] The only conflict to be found in these cases is the reasoning upon which the right to rescind is denied.

It is often hard to determine the precise reason in a given case. *Scott* v. *Kittaning Coal Co.*,[16] is a typical example. In that case the contract was for the delivery of 50,000 tons of coal in monthly instalments of not more than 6,000 tons. After accepting and using several instalments, the buyer refused to accept more for the reason of the inferiority of some previously delivered. In allowing the seller to recover for breach of contract, Trunkey, J., stated the reasoning of the court as follows:

> "True, a fraudulent delivery of one article for another authorizes rescission of an entire contract, perhaps would of a severable one, but not after the goods had been accepted, paid for, and consumed."

Some cases seem to deduce the decision from the fact that the contract is entire or severable as the case may be.[17] In *Harding, Whitman & Co.* v. *York Mills* [18] it was said:

> "They could, of course, refuse to accept inferior yarn, and compel the plaintiffs to furnish that which was up to the standard, and they would also be liable to damages if this was not done. But the contract was entire, and could not be abrogated after there had been a partial, even though a defective performance, of which the defendants knowingly accepted the benefit."

In *Ellison, Son & Co.* v. *Grocery Co.*,[19] the contract was held to be severable but the same decision was reached.

Other cases, without regard to whether the contract is entire or severable, hold that by accepting further performance under the contract, after knowledge of the defective instalments, the buyer has waived his right to rescind,[20] or that he is estopped to do so.[21]

A late case has based the decision on purely equitable considerations, without discussing the technicalities involved. In that case [22] Waddill, J., in delivering the opinion of the court, said:

> "The defendant, after thus ordering the flour under its contract, and continously for some months receiving the same thereunder, ought not in good faith and fair dealing, having partly performed the contract, to be permitted to rescind the same at its option, because of the alleged defect in the quality of some of the flour furnished."

These cases denying the right of rescission after the buyer has knowingly accepted defective instalments are undoubtedly sound. Any other rule would allow the buyer to select his own time and watch the rise and fall of the market before exercising his right of rescission. Furthermore, the equitable considerations involved seem to be a sufficient basis for the ruling. Whether the fact that the contract is severable, or entire, and the seller cannot be put in *statu quo*, or waiver, or estoppel, is the reason given for the decision in a specific case, the fact that the contrary rule would be inequitable is an underlying motive. But, by accepting inferior instalments of goods the buyer is not ordinarily deemed to have given his assent to receive subsequent instalments of similar inferior goods.[23] However, continued acceptance of instalments, all containing the same defect, might have another effect.[24]

The Uniform Sales Act makes the following provision in regard to a breach of an instalment contract: [25]

> "Where there is a contract to sell goods to be delivered by stated instalments which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery or pay for one or more instalments, it depends in each case on the terms of the contract and the circumstances of the case, whether the breach of contract is so material as to justify the injured party in refusing to proceed further and suing for damages for breach of the entire contract, or whether the breach is severable, giving

[15] The failure to distinguish these cases from those in which there has been no acceptance of instalments with knowledge of their defective nature has caused much confusion. Due to broad statements sometimes found in the opinions, they have been cited as authority for the general proposition that there can be no rescission of an instalment contract for a defect in the quality of any one instalment. The actual decisions sustain no such rule.

[16] (1879), 89 Pa. 231, 33 Am. Rep. 753. Also see Cahen *v.* Platt (1877), 69 N. Y. 348, 25 Am. Rep. 203.

[17] The mere fact that a contract provides for the delivery of goods in instalments does not make it severable. It is a question of the intention of the parties. Shinn *v.* Bodine (1869), 60 Pa. 182, 100 Am. Dec. 560. On the question whether the distinction between entire and severable contracts is material in such a case, it has been said: "The doctrine of severableness, (if I may be allowed to coin a word) in contracts, is an invention of the courts * * * to enable one who has partially performed * * * to sustain an action * * *. But this equitable doctrine should not be invoked by one who has failed to perform, for the purpose of defeating the other's right to rescind * * *. As against such a party the contract should be treated, and enforced, as entire." Butler, J., in Norrington *v.* Wright (1881), 5 Fed. 768, 771, affirmed 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366.

[18] (1905), 142 Fed. 228.

[19] *Supra*, note 4.

[20] Guernsey *v.* West Coast Lumber Co. (1890), 87 Cal. 249, 25 Pac. 414; Clark *v.* Wheeling Steel Works (1893), 53 Fed. 494; Thomas-Huycke-Martin Co. *v.* Gray (1910), 94 Ark. 9, 125 S. W. 659, 140 Am. St. Rep. 93.

[21] McDonald *v.* Kansas City Bolt Co. (1906), 79 C. C. A. 298, 149 Fed. 360, 8 L. R. A. (N. S.) 1110.

[22] Baer Grocer Co. *v.* Barber Milling Co. (1915), 223 Fed. 969, 972.

[23] Barnette Sawmill Co. *v.* Fort Harrison Lumber Co. (1910), 126 La. 75, 52 So. 222; Consolidated Nat. Bank *v.* Giroux (1916), 18 Ariz. 253, 158 Pac. 451; WILLISTON, CONTRACTS, § 741.

[24] "It is obvious that if such a contract required numerous deliveries, the continued acceptance without objection of instalments, all defective in the same particular, would justify belief that such instalments might properly be given and would be accepted in the future." WILLISTON, CONTRACTS, § 741.

[25] Sec. 45 (2).

rise to a claim for compensation, but not to a right to treat the whole contract as broken."

It will be noted that the provisions of the Statute are confined to cases in which there is a contract to sell by *stated* instalments which are to be separately paid for, and does not apply to contracts which make no express provision for delivery in instalments or separate payment. Even as to the type of contracts designated in the Statute, no provision is made for the case in which a party, though at one time having an excuse for non-performance, has proceeded with the contract. These situations so omitted will be determined by the common law. Concerning those cases covered, the Statute seems to have adopted a rule which might be termed the offspring of common law rules prevailing before its enactment. It is less stringent than the English Rule but more so than that of most of the jurisdictions of this country.[26]

W. L. B.

[26] For an interpretation of this section, see Helgar *v.* Warner's Features (1918), 222 N. Y. 449, 119 N. E. 113; WILLISTON, SALES, § 465b.

RECENT DECISIONS

DEATH BY WRONGFUL ACT—ACTION BY SOLE BENEFICIARY AS ADMINISTRATOR NOT BARRED BY HIS CONTRIBUTORY NEGLIGENCE.—The plaintiff's wife was killed in an automobile accident in a car driven by the plaintiff. The negligence of the plaintiff directly contributed to her death. As sole next of kin and the only beneficiary he brought an action for her death. *Held,* action not barred. *Van Clik* v. *Hackensack Water Co.* (N. J. 1924), 126 Atl. 634.

It would appear to be the generally accepted rule, that negligence on the part of the beneficiary, which directly contributes to the death will bar an action by him under the death statutes. *Kokesh* v. *Price* (1917), 136 Minn. 304, 161 N. W. 715; *Flagstaff* v. *Gomez* (Ariz. 1921), 202 Pac. 401, 23 A. L. R. 661; *Matoon* v. *Dane County* (1922), 177 Wis. 649, 189 N. W. 154. This doctrine is more frequently invoked in the case of a parent suing for the wrongful death of his minor child, but is equally applicable to a case between husband and wife. *Kokesh* v. *Price, supra; Hazel* v. *Hoopeston-Danville Motor Bus Co.* (1923), 310 Ill. 38, 141 N. E. 392, 30 A. L. R. 491. And this is of course irrespective of the doctrine of imputed negligence, which has been repudiated in most jurisdictions as to parent and child. *Chicago, etc., R. Co.* v. *Wilcox* (1891), 138 Ill. 370, 127 N. E. 899, 21 L. R. A. and note; *Knoxville R., etc., Co.* v. *Vangil'der* (1923), 132 Tenn. 487, 178 S. W. 1117. The reason for the rule that contributory negligence of the beneficiary bars his recovery is based on the maxim that no one should profit by his own wrongdoing. *Atlanta, etc., R. Co.* v. *Gravitt* (1894), 93 Ga. 369, 20 S. E. 550, 44 Am. St. Rep. 145, 26 L. R. A. 553.

On the other hand a few cases hold that the contributory negligence of the beneficiary, although he be the sole heir or next of kin, does not bar the action. *Wymore* v. *Mahaska County* (1889), 78 Iowa 396, 43 N. W. 264, 16 Am. St. Rep. 449, 6 L. R. A. 545; *MacKay* v. *Syracuse Rapid Transit Co.* (1913), 208 N. Y. 359, 101 N. E. 885. It is fairly well settled that where the negligence of one of several beneficiaries contributed to the death, the right of the remaining beneficiaries to recover is not thereby prejudiced. *Cleveland, etc., R. Co.* v. *Bossert* (1909), 44 Ind. App. 245, 87 N. E. 158; *Kokesh* v. *Price, supra.* Some cases however, deny such a contention. *Ploof* v. *Burlington Traction Co.* (1898), 70 Vt. 509, 41 Atl. 1017, 43 L. R. A. 108; *Hazel* v. *Hoopeston-Danville Motor Bus Co., supra.*

The reason for such a diversity of holdings as to whether the action can be maintained seems to lie in the fact that there are two types of death statutes. Under statutes which provide for an action by an administrator, the amount recovered has in some cases been regarded as part of the general estate of the deceased and on that ground, contributory negligence has been held not to bar the action. *Wymore* v. *Mahaska County, supra; Nashville Lumber Co.* v. *Busbee* (1911), 100 Ark. 76, 139 S. W. 301, 38 L. R. A. (N. S.) 754 and note. In jurisdictions where the action is brought by an administrator, not for the benefit of the estate generally, but for the benefit of the

next of kin, the weight of authority is to the effect that the action will be barred by the contributory negligence of a sole beneficiary. *Dickenson* v. *Stuart Colliery Co.* (1912), 71 W. Va. 325, 76 S. E. 654, 43 L. R. A. (N. S.) 335; *Ploof* v. *Burlington Traction Co., supra.* Some cases such as the instant one, hold that it will not bar. *Consolidated Traction Co.* v. *Hone* (1896), 59 N. J. Law 275, 35 Atl. 899; *MacKay* v. *Syracuse Rapid Transit Co., supra.*

The Virginia court considers that the primary object of the statute is to compensate the family of the deceased, and was not in the interest of the general estate, and hence where the sole beneficiary is guilty of contributory negligence his right of action is barred. *Richmond, etc., R. Co.* v. *Martin* (1903), 102 Va. 201, 45 S. E. 894, overruling *Norfolk, etc., R. Co.* v. *Groseclose's Adm'r* (1891), 88 Va. 267, 13 S. E. 454, 29 Am. St. Rep. 718.

ELECTRICITY—ELECTRIC CURRENT HELD "MATERIAL FURNISHED" ENTITLING FURNISHER TO PRIORITY.—A Vermont statute allows a preference to creditors in receivership proceedings for materials furnished which are absolutely necessary to the operation of the business. Electric current was held to be "material furnished" within the statute. *Westinghouse Electric Mfg. Co.* v. *Barre & Montpelier T. & P. Co.* (Vt. 1924), 126 Atl. 594.

Under a statute providing that "there may be ownership of all inanimate things which are capable of appropriation or of manual delivery," electricity is personal property and subject to barter and sale. *Terrace Water Co.* v. *San Antonio Light, etc., Co.* (1905), 1 Cal. App. 511, 82 Pac. 562. The sale of electric current and delivery from the vendor's wire to the vendee's wire terminates the former's ownership at the point where two wires meet. *Ficheisen* v. *Wheeling Electric Co.* (1910), 67 W. Va. 355, 67 S. E. 788, 27 L. R. A. (N. S.) 893.

The collection and distribution of electricity for purposes of power and light is not "manufacturing" within the sense of the statute. *Frederick Electric Light & Power Co.* v. *Frederick City* (1897), 84 Md. 599, 36 Atl. 362, 36 L. R. A. 130; *Williams* v. *Warren* (1903), 72 N. H. 305, 56 Atl. 463, 64 L. R. A. 33, and note. By reason of the restricted sense of the term "manufacturing corporation," a company producing electric power is not exempted from taxation. *Commonwealth* v. *Northern Electric Light & Power Co.* (1891), 145 Pa. 105, 22 Atl. 839, 14 L. R. A. 107. A company generating and supplying electric current for light and power is a "manufacturing corporation" under the statute. *Beggs* v. *Edison Electric Illuminating Co.* (1891), 96 Ala. 295, 11 So. 381, 38 Am. St. Rep. 94; *People ex rel. Brush Electric Illuminating Co.* v. *Wemple* (1892), 129 N. Y. 543, 29 N. E. 808, 14 L. R. A. 708; *Kentucky Electric Co.* v. *Buechel* (1912), 146 Ky. 660, 143 S. W. 58, 28 Ann. Cas. 714, 38 L. R. A. (N. S.) 907. See note, 64 L. R. A. 33.

It is doubtful if electricity would be considered a subject of larceny at common law. But it was held to be the subject of larceny under a statute making it larceny to "take another's personal property without the owner's consent." 36 C. J. 738, citing *United States* v. *Carlos,* 21 Philippine 553.

Cases involving the question of "materiality" of electricity are rare, but, from the facts that the law generally deals with things in the language of the people rather than that of science, and that the court, in this case, was concerned with the practical or commercial conception of electric current, there seem to be no grounds for attacking the decision.

FOREIGN CORPORATIONS—SERVICE OF PROCESS UPON DISTRICT REPRESENTATIVE INVALID.—The plaintiff, a domestic corporation, was the distributor for the defendant, an automobile manufacturing corporation of Indiana. Automobiles were sold by the defendant to the plaintiff by means of closed bills of lading with drafts attached with "order notifying" directions. The plaintiff filed a petition for an accounting and damages against the defendant. Process was served on the district superintendent of the defendant, who did not sell cars for the defendant within the state, but merely watched over and and made reports concerning the distributors. The defendant entered a plea to the jurisdiction. *Held,* no jurisdiction. *Southeastern Distributing Co.* v. *Nordyke & Marmon Co.* (Ga. 1924), 125 S. E. 171.

There is no more settled principle in the law today than that a court has no jurisdiction over a foreign corporation in an *in personam* action or suit, unless the corporation actually carries on business within its borders, or unless the corporation voluntarily appears. *International Harvester Co.* v. *Kentucky* (1914), 234 U. S. 579, 34 Sup. Ct. 944, 58 L. Ed. 1479; *Toledo R., etc., Co.* v. *Hill* (1917), 244 U. S. 49, 37 Sup. Ct. 591, 61 L. Ed. 982; *Vicksburg, etc., R. Co.* v. *DeBow* (1919), 148 Ga. 738, 98 S. E. 381. This means that the corporation must be doing that class of business which will make it present in the state. *Philadelphia, etc., R. Co.* v. *McKibbin* (1917), 243 U. S. 264, 37 Sup. Ct. 280, 61 L. Ed. 710; *Jones* v. *Illinois Cent. R. Co.* (1919), 188 Iowa 850, 175 N. W. 316. If the corporation actually sells in the state through its agents within the state, it is, of course, amenable to jurisdiction. *Cone* v. *Tuscaloosa Mfg. Co.* (1896), 76 Fed. 891; *Spokane, etc., Ass'n* v. *Clere Clothing Co.* (1915), 84 Wash. 616, 147 Pac. 414. But the rule is different if it sells to a local distributing dealer who in turn sells to customers. Here there is no relation of principal and agent, but of seller and buyer. *Wood* v. *Colt Co.* (1907), 102 Minn. 386, 114 N. W. 243; *Harrel* v. *Peters Cartridge Co.* (1913), 36 Okla. 684, 129 Pac. 872, 44 L. R. A. (N. S.) 1094. In order to give the courts jurisdiction it is not essential that the foreign corporation transact a substantial part of its ordinary business in the state but only that the business so carried on be a part of the business for which it was organized. *Pomeroy* v. *Hocking Valley R. Co.* (1916), 218 N. Y. 530, 113 N. E. 504. But where the corporation is not thus actually present the mere presence of its officers or agents within its borders, does not give the courts of the state jurisdiction. *Southern Sawmill Co.* v. *American, etc., Lumber Co.* (1905), 115 La. 237, 38 So. 977, 112 Am. St. Rep. 267; *Riverside, etc., Cotton Mills Co.* v. *Menefee* (1915), 237 U. S. 189, 35 Sup. Ct. 579, 49 L. Ed. 910.

Where the foreign corporation, a manufacturer of automobiles, sold the cars to dealers, within the state, the foreign corporation only having district representatives within the state, this does not constitute doing business within the state. *Holzer* v. *Dodge* (1922), 233 N. Y. 216, 135 N. E. 268. This case is on all fours with the instant case, and their holdings seem eminently sound. Mere advertising or mere solicitation does not constitute doing business. *Peoples Tobacco Co.* v. *American Tobacco Co.* (1918), 246 U. S. 79, 38 Sup. Ct. 233, 62 L. Ed. 587; *Pembleton* v. *Illinois, etc., Ass'n*

(1919), 289 Ill. 99, 124 N. E. 355. Where a steamship company with an agent in the state sold prepaid orders for tickets, this does not constitute doing business so as to confer jurisdiction for services of process. *Chase Bag Co.* v. *Munson S. S. Line* (1924), 295 Fed. 990.

INDICTMENT AND INFORMATION—EXCEPTIONS IN STATUTE WHICH INDICTMENT MUST NEGATIVE.—An information was filed against the defendant for alleged violation of the Prohibition Act. A statute of the state provided that, "every information shall set forth the offense with reasonable certainty, substantially as required in an indictment." The defendant was convicted and brought error, contending that the information did not charge an offense against the laws of the state because it did not negative certain exceptions in the statute defining the offense. *Held,* information invalid. *People* v. *Martin* (1924), 145 N. E. 395.

The general rule is that where the statute defining an offense contains an exception which is a material and essential part of the definition of the offense, such exception must be negatived in the indictment or information charging the offense. *Parker* v. *Territory* (1899), 9 Okla. 109, 59 Pac. 9; *Binhoff* v. *State* (1907), 49 Ore. 419, 90 Pac. 586; *State* v. *Renkard* (1910), 150 Mo. App. 570, 131 S. W. 168. But it is only necessary to negative an exception in the statute when that exception is such as to render the negative of it an essential part of the definition of the offense. *United States* v. *Cook* (1872), 17 Wall. 168; *Shelp* v. *United States* (1897), 26 C. C. A. 570, 81 Fed. 694; *Sofield* v. *State* (1901), 61 Neb. 600, 85 N. W. 840. Where the exception in a statute is merely a matter of defense it need not be negatived. *Tigner* v. *State* (1903), 119 Ga. 114, 45 S. E. 1001; *Sturgeon* v. *State* (1916), 17 Ariz. 513, 154 Pac. 1050.

Some courts have held that the exception must be negatived only when contained in the sentence or paragraph which defines the offense, or the enacting clause of the statute. *Commonwealth* v. *Louisville & N. R. Co.* (1910) 140 Ky. 21, 130 S. W. 798; *State* v. *Reilly* (1915), 88 N. J. Law 104, 95 Atl. 1005. However, the term "enacting clause" has been held to mean all parts of the statute which define the offense. *State* v. *Rosasco* (1922), 103 Ore. 343, 205 Pac. 290. Other courts have followed the rule that the position of the exception with reference to the enacting clause of the statute is immaterial. *State* v. *Carruth* (1911), 85 Vt. 271, 81 Atl. 922; *Collins* v. *City of Radford* (1922), 134 Va. 518, 113 S. E. 735. The latter rule is in accord with the weight of authority.

NEGLIGENCE—NO LIABILITY UPON CONTRACTOR FOR INJURIES CAUSED BY FAULTY CONSTRUCTION WHEN ARCHITECT'S PLANS HAVE BEEN FOLLOWED.—Defendant contractors constructed a building with a canopy for the United States government. The plans and specifications of the government's architect were followed throughout. On account of a weakness in construction, the canopy collapsed and killed plaintiff's husband. She sued for damages. *Held,* no recovery. *Ryan* v. *Feeney and Sheehan Bldg.* Co. (N. Y. 1924), 145 N. E. 321.

Negligence is a recognized ground of legal liability. *McDonald* v. *Snelling* (1867), 14 Allen (Mass.) 290, 92 Am. Dec. 768; *Nolan* v. *New York, etc., R. Co.* (1898), 70 Conn. 159, 39 Atl. 115, 43 L. R. A. 305. It is defined

as "The omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." Alderson, B., in *Blyth* v. *Birmingham Water Works Co.* (1856), 11 Exch. 784; WHARTON, NEGLIGENCE, § 1.

But it is only the *lack* of such care or diligence as the law demands which constitutes actionable negligence. *Dygert* v. *Bradley* (1832), 8 Wend. (N. Y.) 469; *Harvey* v. *Dunlop* (1843), Hill and Den. Supp. (N. Y.) 193; SHEARMAN AND REDFIELD, NEGLIGENCE, § 6. Negligence is alleged when it is charged that the defendant "knew" or "ought to have known" that his conduct would result in injury to the victim. *Ziehm* v. *Vale* (1918), 98 Ohio St. 306, 120 N. E. 702, 1 A. L. R. 1381. It follows that one who erects a building or does other work according to the plans and specifications of an expert, such as an architect, or of a commission, such as a Public Service Commission, is not liable for injuries resulting from a defect or an inadequacy in the plans or specifications. *Thornton* v. *Dow* (1910), 60 Wash. 622, 111 Pac. 899, 32 L. R. A. (N. S.) 698; *Hardie* v. *Boland* (1912), 205 N. Y. 336, 98 N. E. 661. Unless the defects can be recognized by one of ordinary ability along the lines of building, the contractor is not liable. *Daegling* v. *Gilmore* (1868), 49 Ill. 248.

It seems that the correct rule is that a builder or contractor is justified in relying upon the plans and specifications which he has contracted to follow, unless they are so apparently defective that a builder of ordinary prudence would be put upon notice that the work is dangerous and likely to cause injury.

MUNICIPAL CORPORATIONS—LIABILITY FOR NONFEASANCE OF POLICE IN EXERCISE OF GOVERNMENTAL FUNCTIONS.—The owner who had been refused assistance by the city marshall, in attempting to protect his property from the second attempt of a mob, to enter his place of business, was killed. In an action for damages by the mother of the deceased against the town for the death of her son, *Held,* No recovery. *Rush* v. *Town of Farmville* (La. 1924), 101 So. 243.

It is a general rule that the governmental agencies of the state are not liable in an action of tort. *Hubbard* v. *City of Wichita* (1916), 98 Kan. 498, 159 Pac. 399, L. R. A. 1917A, 399. Thus for the exercise of, or on the failure to exercise its governmental powers, a city cannot be held liable for injuries caused thereby. *Mayne* v. *Curtis* (1920), 73 Ind. App. 640, 126 N. E. 699. The city is not liable for its police failing to enforce traffic regulations and knowingly permitting a child to cross a dangerous street, resulting in the death of the child. *Means* v. *City of Barnesville* (1922), 28 Ga. App. 671, 112 S. E. 739. Nor can police officers whose duties are of a public nature, be regarded in any sense as agents or servants. *Tzatzken* v. *City of Detroit* (Mich. 1924), 198 N. W. 214. In the appointment and maintenance of its police officers the city exercises a governmental function, and hence is not liable for their unlawful or negligent acts in the discharge of their duties. *Wilcox* v. *Rochester* (1907), 190 N. Y. 137, 82 N. E. 1119, 17 L. R. A. (N. S). 741; *Sehy* v. *Salt Lake City* (1912), 41 Utah 535, 126 Pac. 691, 42 L. R. A. (N. S.) 915; *Lamont* v. *Slavanaugh* (1915), 129 Minn. 331, 152 N. W. 720, L. R. A. 1915E, 460.

The protection of life by a municipality is a governmental duty and a city is not liable for failure in its performance. *Gianfortone* v. *City of New Orleans* (1894), 61 Fed. 64, 24 L. R. A. 592. It seems that the instant case is clearly within the reason of the rule.

It is submitted that on principle the instant case is sound. The protection of life and property, being one of the primary purposes of government, is clearly a governmental function. Hence nonfeasance or misfeasance, in the performance of a governmental function, is not actionable.

NEGOTIABLE NOTES—ALTERATION—RECOVERY OF PAYMENT MADE TO HOLDER IN DUE COURSE WHERE DRAWER AND DRAWEE ARE ONE.—A check was drawn by the United States government upon the Treasurer of the United States, and was "raised" after delivery to payee. It came by negotiation into the possession of the defendant bank, and was duly presented to the Treasurer at Washington, who paid it without notice of the forgery. The United States now brings suit to recover payment made to defendant, as arising out of a mistake of fact. *Held,* recovery denied. *United States* v. *Nat. Exch. Bank of Baltimore* (1924), 1 Fed. (2nd) 888.

It is a general principle of law that money paid upon a mistake of fact may be recovered. 30 Cyc. 1316; 2 DANIEL, NEGOTIATIABLE INSTRUMENTS (6th Ed.), § 1369. In *Price* v. *Neal* (Eng. 1672), 3 Burr. 1354, the doctrine was laid down that, both parties being equally innocent, a drawee paying or accepting a draft in ignorance of fact that signature of drawer was forged cannot recover the payment made to a *bona fide* holder for value. This rule has been generally adopted by American authorities. *United States* v. *Bank of New York* (1914), 134 C. C. A. 579, 219 Fed. 648, L. R. A. 1915D, 797; *Leather Manufacturer's Bank* v. *Morgan* (1886), 117 U. S. 96, 109, 6 Sup. Ct. 657, 29 L. Ed. 811; *South Boston Trust Co.* v. *Levin* (Mass. 1924), 143 N. E. 816; *Contra: First Nat. Bank of Lisbon* v. *Bank of Wyndmere* (1906) 15 N. D. 299, 108 N. W. 546, 125 Am. St. Rep. 588, 10 L. R. A. (N. S.) 49, and note. For discussion see Ames, *The Doctrine of Price* v. *Neal,* 4 Harv. Law Rev. 297. Also, see 2 DANIEL, NEGOTIABLE INSTRUMENTS (6th Ed.), § 1655a; and note, 12 A. L. R. 1089. Other jurisdictions have adopted the rule of *Price* v. *Neal* by force of the Negotiable Instruments Law. *Minnehaha Nat. Bank of Sioux Falls* v. *Pence* (1920), 42 S. D. 525, 176 N. W. 37; 2 DANIEL, NEGOTIABLE INSTRUMENTS (6th Ed.), § 1868. But where indorsement is to drawee from *payee,* however, drawee may recover. *Birmingham Nat. Bank* v. *Bradley* (1894), 103 Ala. 109, 15 So. 440, 49 Am. St. Rep. 17; 2 DANIEL, NEGOTIABLE INSTRUMENTS (6th Ed.), § 1367.

A different rule prevails, however, where there has been a subsequent alteration of a valid instrument, or an indorsement forged thereto. Here the drawee may recover. *White* v. *Continental Nat. Bank* (1876), 64 N. Y. 316, 21 Am. Rep. 612; *Citizens Bank of Winfield* v. *Commercial Sav. Bank of Guin* (1923), 209 Ala. 280, 96 So. 324; 2 DANIEL, NEGOTIABLE INSTRUMENTS (6th Ed.), § 1661; see also note: 12 Harv. Law Rev. 344. It has been ably argued that section 62 of the Negotiable Instrument Law has changed this; with eminent authority, however, to the contrary. See BRANNON, NEGOTIABLE INSTRUMENTS LAW, 225; Ames, *The Doctrine of Price* v. *Neal, supra,* 306, 307; note, 22 Col. Law Rev. 260. See *contra: South Boston Trust Co.* v. *Levin, supra.*

Where drawer and drawee are the same, *a fortiori* under the doctrine of *Price* v. *Neal* a payment cannot be recovered from a holder in due course where drawee pays bill or note to which his own signature has been forged. *Johnston* v. *Commercial Bank* (1885), 27 W. Va. 343, 55 Am. Rep. 315; 3 R. C. L. 1294. And where such a drawee pays a bill which has been materially altered, he may not recover. The rules applicable to an initial forgery prevail. *Bank of the United States* v. *Bank of Georgia, infra;* 2 DANIEL, NEGOTIABLE INSTRUMENTS (6th Ed.), § 1688.

Although where the parties are equally innocent, the drawee may not recover (*Price* v. *Neal, supra*), yet the loss will be placed upon one actually negligent. *Swan-Edwards Co.* v. *Union Savings Bank* (1917), 17 Ga. App. 572, 87 S. E. 825. For a lengthy discussion, see PARSONS MORSE, BANKS AND BANKING (3rd Ed.), §§ 463-466. Also note: 12 A. L. R. 1097. The drawee has the means of knowing the drawer's signature, however, and a failure to use these means is negligence which bars his recovery. *Price* v. *Neal, supra.* Nor may the drawee recover where the indorser is merely a collecting agent. Here both parties are negligent. *Commercial & Savings Bank* v. *Citizens' Nat. Bank* (1918), 68 Ind. App. 417, 120 N. E. 670.

In application of these rules, it has been held that where a bank received its own notes in payment of a debt, which notes were later discovered to have been altered, the bank could not recover. *Bank of United States* v. *Bank of Georgia* (1825), 10 Wheat. 333, 6 L. Ed. 334. And also, where the Treasury Department at Washington paid a forged draft drawn upon it, it was not allowed to recover the payment from the holder in due course. *United States* v. *Chase Nat. Bank* (1920), 252 U. S. 485, 40 Sup. Ct. 361, 64 L. Ed. 675, 10 A. L. R. 1401, and note. See also *United States* v. *Bank of New York, supra;* note, 31 Harv. Law Rev. 304. To be binding, however, the payment must be made by the Treasurer of the United States, nor will payment by an assistant treasurer suffice, without ratification. *Cooke* v. *United States* (1875), 91 U. S. 389, 23 L. Ed. 237.

Where the United States government elects to become a party to commercial paper, it is bound by the same rules as an individual. *United States* v. *Bank of New York, supra; Cooke* v. *United States, supra.* See also notes: 19 Harv. Law Rev. 126; 10 A. L. R. 1406.

The instant case seems sound.

SALES—RESTAURANT KEEPER LIABLE FOR DAMAGES RESULTING FROM SERVICE OF UNFIT FOOD.—The plaintiff brought an action to recover from the defendant, a restaurant keeper, for loss and damages sustained as a result of eating spoiled and unwholesome fish served to her in the defendant's restaurant, in which she was a customer. The recovery was sought on the breach of an implied warranty of fitness for consumption. *Held,* defendant liable. *Temple* v. *Keeler* (N. Y. 1924), 144 N. E. 635.

In some jurisdictions the service of food for immediate consumption on the premises, is a sale and carries with it an implied warranty of fitness for consumption. *Barrington* v. *Hotel Astor* (1918), 184 App. Div. 317, 171 N. Y. S. 840; *Muller* v. *Childs Co.* (1918), 185 App. Div. 881, 171 N. Y. S. 541. The service of food is a sale within the meaning of the Uniform Sales Act. *Friend* v. *Childs Co.* (1918), 231 Mass. 65, 120 N. E. 407. And the keeper of a public place is bound to know whether food served is fit for

consumption, while the customer has little or no opportunity to examine it. *Doyle* v. *Fuerst & Kraemer, Ltd.* (1911), 129 La. 838, 56 So. 906. Hence a restaurant keeper is liable for damage suffered by a customer as a result of eating pie, improperly prepared. *Leahy* v. *Essex Co.* (1914), 164 App. Div. 903, 148 N. Y. S. 1063. But other courts hold that one serving food on the premises is not liable as an insurer of the wholesomeness of the food nor upon an implied warranty of fitness. *Sheffer* v. *Willoughby* (1896), 163 Ill. 518, 45 N. E. 253, 34 L. R. A. 464, 54 Am. St. Rep. 483; *Valeri* v. *Pullman Co.* (1914), 218 Fed. 519. For there is no transfer of general property in food served for immediate consumption, such as to constitute a sale and thus create an implied warranty of fitness. *Merrill* v. *Hodson* (1914), 88 Conn. 314, 91 Atl. 533, L. R. A. 1915B, 481, Ann. Cas. 1916D, 917. So there was no implied warranty of fitness of oysters served on a dining car. *Travis* v. *Louisville & Nashville R. Co.* (1913), 183 Ala. 415, 62 So. 851. And in a similar case where defendant served canned asparagus. *Bigelow* v. *Maine C. R. Co.* (1912), 110 Me. 105, 85 Atl. 179, 43 L. R. A. (N. S.) 627.

Numerically the weight of authority in the United States sustains the view that a restaurant keeper is not liable in the absence of negligence. However the instant case seems sound on principle. An excellent review of the authorities on this point may be found in 5 A. L. R. 1115.

SPECIFIC PERFORMANCE—COURTS WILL NOT GRANT SPECIFIC PERFORMANCE OF AN ARBITRATION AGREEMENT PRECLUDING RESORT TO THE COURTS.—A building contract contained a clause providing for the arbitration of all disputes arising out of delay in the completion of the building and in defective construction. The delay and defects occurred, but the plaintiff refused arbitration and brought an action for damages. The defendant set up as a defense his right to specific performance of the arbitration clause. Upon the question whether or not specific performance would be granted, it was *Held,* it would not be granted. *Myevre* v. *Liberty, etc., Co.* (La. 1924), 100 So. 694.

There are decisions to the effect that a court will not grant specific performance of an unexecuted agreement which provides for the arbitration of all disputes which might arise in the execution of the contract, on the ground that it is an attempt to oust the jurisdiction of the courts. *Williams* v. *Branning Mfg. Co.* (1911), 154 N. C. 205, 70 S. E. 290. But in a partially performed contract where the parties cannot be placed in *statu quo* and gross injustice might result to one party by permitting the other to take advantage of his own wrong in refusing to appoint appraisers, the general rule is that equity will enforce the arbitration clause. *Castle Creek Water Co.* v. *Aspen* (1906), 146 Fed. 8, 8 Ann. Cas. 660. Likewise, a clause, provision, or covenant in a contract which does not interfere with the judicial determination of the general question of a breach of the contract or the liability of one party to it to pay the other an amount which may be due by its terms, but simply provides that, as a preliminary to any suit or action the extent or amount of damages recoverable shall be first ascertained and determined by the arbitrament of third persons, is held binding, and is enforced by the courts. *Hood* v. *Hartshorn* (1868), 100 Mass. 117, 1 Am. Rep. 89. So also, equity will enforce an arbitration clause where it is a mere incident of the contract and not of the essence thereof. *Town of Bristol* v. *Bristol, etc., Waterworks* (1896), 19 R. I. 413, 34 Atl. 359, 32 L. R. A. 740; *Martin* v. *Vansant* (1917), 99 Wash. 106, 168 Pac. 990, Ann. Cas. 1918D, 1147; *Houston* v. *Barnett* (1918), 90 Ore. 94, 175 Pac. 619.

It is submitted that the instant case is unsound since the agreement does not seem to oust the jurisdiction of the courts. However, it is a very close question.

The Virginia decisions are few, and in all cases the arbitration clause was held to be an essential part of the contract. Specific performance was denied. *Corbin* v. *Adams* (1881), 76 Va. 58; *Rison* v. *Moon* (1895), 91 Va. 384, 22 S. E. 165.

VIRGINIA SECTION

WHAT IS THE MEANING OF THE WORD "ABSOLUTE" IN SECTION 6562 OF THE VA. CODE OF 1919?—Does section 6562 of the Code of 1919 give the widow absolute title in the property listed in section 6552, where the deceased husband has already made valid testamentary disposition thereof?

It is well settled that a citizen owning property has full power to dispose thereof by will or otherwise, unless restricted by law. There are certain restrictions in favor of creditors' and other claims, but there is nothing in the Code to restrict his disposal of his "Homestead" *while living*. He can, if he wishes, give his family Bible to his worst enemy upon his death bed, and his wife could not complain.

Under this section, read in connection with section 6552, upon the husband's death, his wife's title to certain listed articles, becomes "absolute." But it is clear that there is no article to which her title can become absolute if he has already made disposition thereof. A will, being a disposition of property, it would seem that a valid will would defeat her title under the act.

There is one difficulty in the way of this easy solution of the problem, and that is that title to the property bequeathed passes at the instant of death under the will, to the beneficiary, and under the statute to the wife. Which title will prevail? And if the property vests in the wife, is it not a restriction upon testator's power of disposition?

Several Circuit Courts, have to the writer's knowledge, held that the title to the property passes to the widow under the statute and not to the beneficiary under the will. This holding is based on the ground that the title is declared by the act to vest in the widow absolutely, that there is no qualification possible of the word "absolute," and that therefore the act defeats the will. It is the opinion of the writer, advanced with due deference that his reasoning is faulty, and results in a conclusion at odds with the obvious intent of the legislature.

The whole spirit of the Homestead Law is against it. It is intended to protect the widow against creditors and various *enumerated* charges (*expressio unius exclusio alterius*), and the possibility or necessity of protecting her against the overflowing bounty of a benevolent testator never occurred to the legislature. Had it occurred to them to do so, they would have put this restriction where it belongs, in the Wills Act, and in the Statute of Distributions.

The only difference between section 6552, which gives her the *absolute* title, and the other sections of the Homestead Law, is that in the other sections she is given the use of the property, whereas by

this act, in this property she is given the "absolute title" and may dispose thereof at will. It is submitted that this is the true meaning of the word "absolute." It does not mean absolute against all the world, as the courts have held, but it means in effect this. "You may hold the property against the creditors of your husband, against funeral and administration costs, and against these claimants to the property you may hold title thereto *absolutely*, as opposed to the mere use allowed under the other sections of the act." Nowhere does it say that she can hold the property against a legatee, and it is believed that it was not the intent of the legislature that such an interpretation be put upon the act. Or in other words—the *nature* of the title, once vested, is described by this word. The *manner* of its vesting was never intended to be affected thereby. It is a *contingent* absolute title—not a title vesting automatically upon the husband's death. It is true that the Court of Appeals has held that she could hold the property against her husband's heirs, but on this point there is conflict, and to so hold seems to stretch the act very far.

> "The power of alienation is an incident of the ownership of the property independent of the homestead law and the directions and prohibitions of the constitutional or statutory homestead provisions as to the alienation are mere restrictions upon this antecedent power. Hence where there is neither constitutional nor statutory prohibition as incident to the right of ownership, the owner of the homestead may sell or encumber it either in whole or in part." [1]

It would seem to follow therefore that the statutory restrictions upon a man's right to dispose of his property must be explicit, otherwise the power remains. To say that this word "absolute" in the Homestead Act restrains a man from making a will as to that property, would seem a restriction on his testamentary power of disposition, and not in the least an explicit one. On the contrary, it is as backhanded and concealed a restriction as there well could be.

The point has never been squarely before the Court of Appeals. In one case however [2] the court glanced at the possibility of such a case arising and indicated that if the legislature *should* attempt to create such an *absolute* estate as the one under consideration, the statute *might* be unconstitutional. In another case,[3] apparently without any argument having been submitted on the point, even as it arose in the case the court said:

> "* * * the plain language of section 3653 (Code 1919, section 6562) exempts to the widow in every case, whether the estate be solvent or not, the articles enumerated in section 3650 (Code 1919, section 6552)." (Parentheses ours.)

It should be noted however that there had been no testamentary disposition of the articles sought to be exempted in this case, and so as to the particular point we consider the case is not authority.

[1] 29 C. J. 883.
[2] Murphy *v.* Richmond (1910), 111 Va. 459, 69 S. E. 442.
[3] Riggan's Adm'rs *v.* Riggan (1896), 93 Va. 79, 24 S. E. 920.

Enough perhaps has been said to show that doubts surround the use of this word "absolute," and the difficulty encountered in fathoming the legislative intent. Two Circuit Courts at least have held that this word defeats an attempted testamentary disposition of the property of the husband. If this was the intention of the legislature they have amended the act on distributions by one word in the Homestead Act. If it is not, at their next session they should clarify their meaning. This is all the more important as the amounts involved are so small, that important as they may be to the unfortunate litigants, they will probably never reach the Court of Appeals for a final determination of the point involved.

NELSON FELL.

Warrenton, Va.

ADOPTED CHILDREN AS "ISSUE" UNDER THE ACT OF 1924 RELATING TO DOWER.—The Virginia statutory provisions relating to dower were carried into section 5117 of the Code of 1919 in almost the precise form they had maintained since the foundation of the Commonwealth. In this form they were substantially declaratory of the common law, modified, of course, so as to permit the wife rights in equitable estates of the husband. This section was, however, amended and enlarged by the legislature at its session of 1922 [1] and 1924 [2] so as to secure to the wife in addition to her life estate in one-third of the real property of which her husband had been lawfully seised during the coverture, dower in the remaining two-thirds in the event of the husband dying wholly intestate or partially intestate, subject in the former case to the claims of his creditors and in the latter to the claims of both creditors and devisees, provided in both cases that the husband die without issue.

There arises under the present statute the question as to the effect of adopted children upon the wife's right of dower. Should the term "issue" be held to include such children and there be no child of the husband other than an adopted one, the widow, by the terms of the statute, would be dowable in but one-third of the husband's realty (other requisites of dower existing), whereas should they be held excluded by that term, she would be dowable in the remaining two-thirds, subject to the claims of the husband's creditors or to those of both creditors and devisees in the cases or whole or partial intestacy respectively, as provided. An interesting matter of statutory construction is thus presented.

The status of adopted children is one of very ancient origin, existing in Biblical times,[3] and developed to a high degree by the Greeks and Romans. Provisions for the adoption of children were incorporated in the Code of Justinian [4] and subsequently took their place

[1] Acts of Assembly, 1922, p. 860.
[2] Acts of Assembly, 1924, p. 460.
[3] Romans, 8:15, 9:4.
[4] SANDARS, JUSTINIAN (Am. Ed.), 103, *et seq.*

in the jurisprudence of all countries in which the civil law was enforced.[5]

The status of the adopted child was, however, unknown to the common law,[6] and in common law jurisdictions it is one of comparatively recent legislative origin. It was initially engrafted upon our jurisprudence through the medium of special enactments, and subsequently by general statutes believed at present to be in force in each of the United States. To determine the incidents of that status therefore, the intent or the legislature must in all cases govern, and when not clearly expressed in the adoption statutes, those statutes are to be construed in the light of the civil law as an aid to interpretation.[7]

In Virginia, however, there is no necessity of resort to such extrinsic aid. The statute of this state is clear and explicit insofar as it sets forth the incidents of the status it creates. It provides that: [8]

> "* * * such child shall from and after the entry of the interlocutory order, herein provided for, be to all intents and purposes, the child and heir at law of the person so adopting him or her, unless and until such order is subsequently revoked, entitled to all the rights and privileges and subject to all the obligations of a child of such person begotten in lawful wedlock * * *."

What then is the effect of adoption upon the rights of the wife under the present dower statute? Although the decisions of one state in matters of statutory construction are in no way binding upon the courts of another,[9] the judicial attempts to reconcile similar statutes of adoption with those of dower and descents in numbers of the several jurisdictions, renders instructive the conclusions of their courts.

Adoption statutes may be divided into two classes: (1) Those requiring the wife's consent to adoption and (2) those in which such consent is unnecessary.[10] Clearly where her consent is unnecessary and where, in addition, it has not been given, her property rights, even though inchoate as in the case of dower, should not be affected by the *ex parte* act of the husband in adopting a child.[11] Yet it would seem that where the child had been adopted by the husband prior to the coverture, the wife cannot complain that her rights

[5] Vidal *v.* Commagere (1858), 13 La. Ann. 516.
[6] Vidal *v.* Commagere, *supra*, note 5; Markover *v.* Krauss (1892), 132 Ind. 294, 31 N. E. 1047, 17 L. R. A. 806; Villier *v.* Watson (1916), 168 Ky. 631, 182 S. W. 869; State *v.* Yturria (1918), 109 Tex. 280, 204 S. W. 315.
[7] Vidal *v.* Commagere, *supra*, note 5; Humphries *v.* Davis (1884), 100 Ind. 274, 50 Am. Rep. 788; Batchelder *v.* Walworth (1912), 85 Vt. 322, 82 Atl. 7, 37 L. R. A. (N. S.) 849, Ann. Cas. 1914C, 1223; Clark *v.* Clark (1913), 76 N. H. 551, 85 Atl. 758.
[8] Acts of Assembly, 1922, p. 841.
[9] Morse *v.* Osborne (1910), 75 N. H. 487, 77 Atl. 403, 30 L. R. A. (N. S.) 914, Ann. Cas. 1912A, 324.
[10] Atchison *v.* Atchison's Ex'rs (1890), 89 Ky. 488, 12 S. W. 942, 11 Ky. Law Rep. 705.
[11] Stanley *v.* Chandler (1881), 53 Vt. 619; McCann *v.* Daly (1912), 168 Ill. App. 287. But see Power *v.* Hafley (1887), 85 Ky. 671, 4 S. W. 683.

were subsequently affected thereby.[12] And when the child was adopted during a prior coverture, it has been held entitled to all rights and privileges against a subsequent wife of the adopting parent as if a child of the prior marriage.[13]

The cases under general statutes of adoption as distinguished from those construing special legislative enactments have very universally held that adopted children are included under the term "issue."[14] It has even been held that children adopted during a prior coverture fell within the statutory expression, "children by a former wife."[15]

This decision, weakened by the dissenting opinions of two of the five justices, illustrates the extent to which the courts proceed in attempting to reconcile the adoption statutes with the phraseology of the statutes of dower and of descents. The vigorous dissenting opinions in this last case were, however, subsequently followed by the New Hampshire court, in which jurisdiction, it would seem, "issue by the wife" was the language of the statute.[16] The latter case has been cited as holding that the term "issue" in a statute does not include adopted children.[17] If it so decides, as is doubtful, it is directly opposed to the great weight of authority.

However, as has been stated, the holdings of other courts have little weight in this jurisdiction upon a matter of purely statutory construction. In view of the total lack of imperative authority argument on principle only may properly be advanced.

Let it be conceded that the term "issue" as used in the Virginia dower statute does *not* include adopted children. Let it be then assumed that in a given case there be no child born of the marriage. Then should a child be adopted during the coverture, the wife would nevertheless upon death of the husband take, in addition to her one-third dower in the remaining two-thirds of the husband's real property subject, in the case of total intestacy, to the claims of his creditors alone, and in the case of partial intestacy to the claims of both creditors and devisees, there being, *ex hypothese,* no issue. Yet if there had been a child of the wife by the husband born alive during the coverture, or had there been a child of the husband born during a former marriage, the widow might claim but one-third, the child succeeding to the residue under the statute of descents.

[12] Appeal of Rowan, (1890), 132 Pa. St. 299, 19 Atl. 82; Atchison *v.* Atchison's Ex'rs, *supra,* note 10; Lee *v.* Bermingham (1916), 199 Ill. App. 497. But see Isenhour *v.* Isenhour (1876), 52 Ind. 328.

[13] Moran *v.* Moran (1899), 151 Mo. 558, 52 S. W. 378; *In re* Moran (1899), 151 Mo. 555, 52 S. W. 377.

[14] Drain *v.* Violett (1867), 2 Bush Ky., 155; Newman's Estate (1888), 75 Col. 213, 16 Pac. 887, 7 Am. St. Rep. 146; Atchison *v.* Atchison's Ex'rs, *supra,* note 10; Buckley *v.* Frazier (1891), 153 Mass. 566, 27 N. E. 768; Batchelder *v.* Walworth, *supra,* note 7. The peculiar wording of the Texas adoption statutes has led to opinions in that state in conflict with the views herein expressed. See State *v.* Yturria, *supra,* note 6; Harle *v.* Harle (1918), 109 Tex. 214, 204 S. W. 317.

[15] Markover *v.* Krauss, *supra,* note 6.

[16] Morse *v.* Osborne, *supra,* note 9.

[17] Harle *v.* Harle, *supra,* note 14.

Therefore, if the hypothesis be valid, that the word "issue" does not include adopted children, there is obvious, a pronounced discrimination between adopted children and children of the marriage, or of a former marriage.

Let this conclusion be read in the light of the adoption act, which provides "that such (adopted) child shall * * * be to all intents and purposes the child and heir at law of the person so adopting him or her * * * entitled to all the rights and privileges * * * of a child of such person begotten in lawful wedlock * * *."[18] There could then be revealed no greater repugnancy between the two statutes.

[18] Acts of Assembly, 1922, p. 841.

In matters of statutory construction there is the inescapable presumption that the various sections of a code were intended to harmonize rather than to conflict. In order to reconcile the Virginia statute of adoption with that of dower, it is essential that the term "issue" as used in the latter be so construed as to include adopted children. And this scope, it is submitted, is to be necessarily and properly given to that word.

L. R. C., JR.

BOOK REVIEWS

BLACK ON BANKRUPTCY. By Henry Campbell Black. (St. Paul: West Publishing Company, 1924, pp. xv, 905.)

This is a Hornbook with the usual advertised merits of its type, but, in the opinion of the reviewer, deserving a more unfavorable review than the average Hornbook. In common with entirely too many modern textbooks, this one gives the impression of having been rather hastily compiled, to rely for its sale more upon its timeliness, perhaps, than upon its intrinsic value.

While one cannot fairly expect in a Hornbook the reasoned consistency of a Bishop, a Wigmore or a Minor, Mr. Black's work presents some inconsistencies which seem quite unpardonable. For instance, one might reasonably be surprised and disappointed to find a black-letter statement on page 100 that "where partners are separately in bankruptcy, but not the firm, their discharge will not release them from firm debts," and certainly one is entitled to a distinct shock when he finds on page 728, in equally prominent black-letter, that "one adjudged bankrupt may, by proper proceedings, obtain a discharge not only from his individual debts, but also from those of a firm in which he is a member." Considering the fact that each partner is liable *in solido* for the firm debts, that such debts are both provable and allowable against his individual estate, though subject to the priority of his individual creditors, and that they are not by section 17 excepted from the operation of a discharge, one might agree with the latter statement. Surely there can be no justification for both, where they appear in categorical form, in different parts of the book, and without even a cross-reference to suggest a contrary view.

On the same page (728) where the author corrects, without cross-reference, the earlier mis-statement as to the effect of an individual discharge on the partnership debts of the bankrupt, he is guilty of another serious error in stating that "the discharge of the firm, where the partners are not severally adjudicated bankrupt, does not release them personally from the partnership debts." The statement of such a doctrine would seem to indicate a failure properly to understand the reasoning of the Supreme Court in *Francis* v. *McNeal,* 228 U. S. 695, and to ignore the pertinent logic of Mr. Justice Holmes' observation that "it would be a third incongruity to grant a discharge in such a case from the debt considered as joint, but to leave the same persons liable for it considered as several."

In a volume published in 1924, and purporting to carry citations brought down to the close of the year 1923, one might fairly expect to find cited to that date all the later decisions by which the Supreme Court of the United States has settled many important problems on which the lower courts had been in conflict. Yet, to give but one example, the reviewer sought in vain for any trace of *Williams* v. *United States Fidelity & Guaranty Co.* (1915), 236 U. S. 549, in the author's treatment of the effect of the discharge of a bankrupt principal upon the claim of his surety for indemnity, where the contract, to secure which the surety bond was given, was broken prior to the petition in bankruptcy, but where the surety did not pay the consequent damage until after the petition. The Williams case may be cited somewhere in Black on Bankruptcy, but there is no table of cases, and a diligent use of the index furnished failed to lead the reviewer to the case sought.

In spite of its deficiencies, Black on Bankruptcy may furnish a valuable "jumping off place" to one undertaking to run down a point in bankruptcy. It covers a lot of ground, carries a complete appendix including the General Orders and Forms, and cites a great many cases, perhaps too many, when one considers the fact that many of the earlier citations might well be dispensed with by the substitution of a later and more authoritative list.

GEO. B. EAGER, JR.

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THE LAW:—BUSINESS OR PROFESSION? Revised Edition. By Julius Henry Cohen. (New York: G. A. Jennings Company, 1924, pp. xviii, 513.)

Although in the eight years that have succeeded the first publication of this well-known and interesting book, it has acquired a large circle of readers in the profession, and though the author has made no material changes in this, the second edition, it would seem that as a consequence of the importance of the subject more than a mere notice should be given Mr. Cohen's able work.

Most of us have a firm confidence in our intuitive ability to distinguish between what is ethically right and what is ethically wrong, and so are disinclined to seek support in the popular manuals of morality. Yet it is doubtful—to say the least—whether in close cases our consciences may not frequently need reinforcement from reason and authority. The line separating the false from the true is often vague and meandering, only too generally the customs of the local Bar may be lax and always self-interest is powerful and not easy to be withstood. In such circumstances a man may well require help if he would keep to the narrow path. This help, both moral and dialectical, may be found in the book under review, and it would seem the reviewer's duty, as a member of the Bar, to inform as many of his fellow practitioners as he can where such help is to be found.

Nor is *The Law—Business or Profession?* of interest to the Bar alone. The lawyer, as Mr. Cohen demonstrates, has another and a higher duty than that so tritely expressed by the term service, *i. e.,* service to his client. On the contrary, the lawyer is before everything else a public servant, he is a sworn officer of the court and thus subject to a twofold responsibility. In the interest, therefore, of a speedy and equitable administration of the law, the Bar must be under the control of an educated public opinion. Of such education the reviewer knows of no handier source than is the book now before him. The layman will not find in it the uncouth learning of Coke nor the austere elegance of Blackstone. The authors' style is on the contrary easy, familiar—the censorious might say too familiar, non-technical, and in short admirably adapted to lay comprehension. In this book the untrained reader will find matter entertaining as well as instructive. The reviewer has, therefore, no hesitation in recommending a careful perusal of its contents

to all those public spirited citizens who desire to be well informed in matters of general import.

A brief summary of what Mr. Cohen has included in his little book will not here be out of place. After a preliminary explanation of what is involved in that supreme penalty for professional misconduct, disbarment, by which the author gives pungency to the whole business, he goes on to describe the Bars of various nations, both past and present. He shows that in many of them, such as those of France and England, the standards both for administration and for behavior after administration, are much higher than they are in the United States, this circumstance being caused by the greater pervasiveness of the guild idea in those countries. This account is followed by a short history of the growth of the various American bar associations, with particular reference to the work in the City of New York. We are then given an illuminating discussion and exposure of the evils of advertising by lawyers, of fee splitting with non-professional collection and bankruptcy agencies. A matter here included and of particular interest to Virginia lawyers is the author's story of the campaigns in New York and Missouri against the practice of law by and for incorporated trust companies who advertise their legal facilities. This main part of the book is followed by a postscript detailing the progress of the Bar from the ethical point of view since the first edition in 1916, and by lengthy appendices setting forth the answers of the New York Committee on Professional Ethics, the canons of the different associations and an exhaustive brief on what constitutes the practice of the law in the eyes of the law. The whole book being covered by a complete index, is available for reference purposes.

Needless to say, the author, as might have been expected of a lawyer, has fully supported his thesis with citations. These are not only to be reported cases and recognized authorities, but as well to the current literature pertaining to the general subject.

At one time the book under review was somewhat imperatively urged as parallel reading on the class in legal ethics at the University of Virginia. It would seem well for this practice to be continued not only at the University, but also at the other schools of law throughout the country.

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