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OBEDIENCE TO LAW IS LIBERTY.

We are living in a time of universal unrest, of social, moral and industrial disorder and upheaval.

The lines of thought, conclusion and conduct, based upon long accepted principles, are being abandoned by men of every condition for new and untried theories, and the theories of today are tomorrow discarded for newer fads and more startling fallacies.

The spirit of personal license and class objectives rather than personal liberty regulated by law, are being contended for, and this is breeding every where a dangerous individualism, which is rapidly lessening in the minds of men that respect for Government and that reverence for justice and its equal administration, which are, and must continue to be, the animating spirit and directing force of our people, if indeed the inheritance from the makers of our Republic, of "liberty with order and independence with respect for law" is to be saved to us and transmitted to coming generations.

From a level perhaps of false security we have viewed the growth in other countries of socialism developing into revolution and revolution degenerating into anarchy, and in our over confidence in the strength and incorruptibility of American citizenship have thought that such evils could not find place or footing in a Nation born of hatred to oppression and love of liberty.

But the shock and sequences of the world's war have taught us that some of the evils, social and governmental fallacies, and unsound principles that are today convulsing Europe, have found entry into our own land, and have been fostered here and that the trend to socialism, radical and ruinous, and in spots a trend to anarchy and bolshevism, are dangerously apparent, and are assuming such form and following as to create in the minds of thoughtful men apprehension, if not alarm.

These are manifesting themselves in general unrest, in abnormal view and expression, in restiveness to regulation under law, in opposition to uniform direction, and in the demands of group combinations,
associations and unions for special privileges, rather than for equal legislation for all the people.

The spirit of resistance to control, the lessening in the minds of men of respect for law and its even application, are plainly observable, and are leading up to conditions of difficulty and danger.

How these may be prudently considered, correctly measured and certainly overcome is the problem which today confronts the American people, and calls for the exercise of sense, prudence and patriotism.

In searching for a cure it is useful and even necessary to locate the cause.

How could the evils, bred under the autocratic government of Europe, and fed and nourished by the oppressive conditions of such Governments, be transplanted to and find a foothold in free America?

In seeking a solution of this problem you might consider as possibly contributing causes the following:

First.—Lax and insufficient restraint upon immigration;

Second.—The too easy and hurried admission of immigrants, ignorant and un-American, to citizenship, and

Third.—The absence in our own school systems, public and private, of that basic and thorough instruction in the principles and institutions of our Government, which is the essential foundation of love of country and good American citizenship.

Let us briefly review the history of immigration to America.

When the freedom of the American Colonies was secured through Revolution, and our Government, resting upon the Constitution of the United States was established, a vast territory, unpeopled and unexplored, stretched westward to the Pacific Ocean. This unmeasured, and seemingly unmeasurable area, rich in the elements of all products useful to man, and teeming with the possibilities that lay in the fertility of soil, the regions of forests and mineral deposit, could not be opened up or peopled or made useful by the natural growth in the population from the original States.

The freedom achieved by the Colonists and expressed in the institutions of the United States established for the perpetuation of that freedom, together with the fame of the untold riches of this undeveloped territory of the new Republic, naturally attracted immigrants from every country of Europe.

Their coming was helpful to our people and to the progress of our country—it was needed, and therefore, encouraged.
In the difficulties, dangers and hardships of early settlement, these foreigners, aided and protected by the Government, slowly but surely established themselves, and in that establishment became a part and parcel of our people, saturated with American thought and ideals and love of country, and the mixture of this foreign element aided in the growth, the development and strength of the Nation, and brought about, in comparatively a few years, what has been termed the winning of the West.

The marvelous fertility and mineral wealth of this new territory, dreamed of before, was made certainly known. Individual effort could not meet the opportunities and requirements of the time, and combinations of men and corporations were formed to carry progress forward more rapidly to levels of greater growth to the Nation and of greater gain and profit to the people.

This peaceful conquest of the West above referred to is, I am sure, well known to you all, for it is, and has been, the marvel and admiration of the world, and the theme of discussion, fiction and historical review.

In time its utmost recesses were explored, its waterways utilized and soil cultivated; its forests felled and homes established, farm operations begun and the wilderness became a garden.

The brain and brawn, the patient toil and courage of the pioneer, blazed the way for the tide of immigration, which has created States, founded cities, and with the aid of modern inventions has welded together the east and west, the north and south, into a nation, the greatest, the richest and most powerful on earth.

To build up the great systems of railroad, to harness the rivers, to lay bare the hidden treasures of the mountains, required labor in quantities larger than could be supplied from our own people or from immigration usefully limited and safeguarded, and the selfish interest of capital desired, and sought, cheap labor.

The element of discord in Europe, hostile to, and perhaps oppressed by, their own governments, were encouraged to come to America, and they came, bringing all of their ignorance and all of their hostility to government and law as they knew them. They came in numbers and were hurried into factories, railroad construction and mining operations.

Little or no attempt was made to educate them or to give them even primary instruction in the principles and institutions of our Government created to preserve to all men life and liberty and the pursuit of happiness.
This influx of undesirable immigrants was due to the greed of capital, and to lax legislation, and the failure on the part of the employer to educate and to Americanize this element, coupled with the failure of the Government to insist upon such education and instruction as a prerequisite to citizenship, must be reckoned among the causes of disturbing and distracting conditions that now confront us.

The class of immigrants described came from oppression, which had bred in them a hatred of all government and law. Before having been educated sufficiently to know the difference between the government and laws which had imbittered them and the humane and liberty protecting institutions of America, they were admitted into full citizenship—taken in their ignorance and prejudices and clothed with rights they did not understand and duties they could not intelligently fulfil.

How much of this was due to private greed and how much to public indifference and inefficient legislation is hard to determine, but certain it is that these several factors, in some degree, entered into the formation and development of the thought and expression, and even assertion, of those un-American doctrines and purposes which now disturb our social, political and economic welfare.

Throughout the country groups of men, ignorant of Americanism, ignorant of the American Constitution, ignorant of American institutions and laws, prejudiced because of oppression and of harsh and illiberal conditions of employment, formed themselves into centres of discontent. With the passing of years, these grew in numbers and became the headquarters of the malcontented, as well for the ignorant and unformed citizens already here, as for the incoming stream of undesirable immigrants. These centres became interlocked by organization, and were sources of socialistic and un-American teachings, purposes and propaganda.

Prior to the World War, evidences of organized effort to disturb political and industrial conditions were apparent in the attitude and operations of the International World Workers, and other like organizations, in the application, in shops and mines and manufacturing plants, of the principles of sabotage, in socialistic and anarchistic meetings and utterances. But during the war, and since, these manifestations have increased and become more serious because of the great increase in the army of malcontents, and because of their more active and more dangerous aims and policies. They are poisoning the minds of employees and thus getting a foothold in the councils of organized
labor in an effort to incite disregard of the rights of the public and to disturb even the operations of the Government.

This statement finds confirmation in the disordered conditions which today, and during the last several months, have brought hardship and distress to the public and interruption to Governmental functions, on account of the activities and demands of organized labor throughout the width and breadth of these United States.

From the beginning of time in some degree, in some form, has been waged a conflict between the employer and employees, between capital and labor. This conflict through the ages, with the accumulation of wealth and the growth in population, has become more and more intense and intolerant.

Until within the last half a century labor was throughout the country on the defensive against the aggression of capital, and capital was oftentimes pitiless in its treatment of labor.

The grinding policy of obtaining the maximum of labor for the minimum in wage, and keeping men ignorant in order to secure cheap labor, was a fixed policy of many of the captains of industry and industrial corporations. This evil became recognized, and as a result laws were passed to curb the greed and oppression of capital and to secure to labor its fair and just rights.

To obtain recognition and protection in his rights an employe could not, single-handed, contend against the might of the employer, and labor became organized in order that it might contend on a more equal footing with capital, and thus originated the principle or doctrine of collective bargaining.

The enactment of laws in restraint of trust combinations and monopolies, and other laws in recognition of, and protection to, the working man, and the force, influence and strength which came to him through organization, brought to labor in America a betterment in condition and position, which was gradually reflected in higher wage, better working conditions and a more certain consideration of the rights of labor.

The transition from the old to this new order, however, was not altogether easy of accomplishment, and in spots might be found on the side of capital the old spirit of intolerance, which begot resistance to the demands of labor, and on the part of labor unreasonable demands, to be secured through laws providing special privileges, or even without law, insisted on through the operation of force.
This tendency was encouraged by organized labor in foreign countries and by the centres of discontent above referred to, as created and existing in this country.

The right to combine was construed to be a right to combine for any purpose that labor might propose, however disturbing to the general public; and if need be the enforcement of this purpose through walkouts, strikes and other coercive methods, whether directed against purely personal operation or against quasi public service, or even the operations of the Government.

When such methods are directed against the operation of coal mines upon which the comfort and health of the entire people depend, or against railroads which are necessary to the life of the people and the Government, or to police regulation or any other Governmental Department, it becomes illegal and revolutionary.

That such methods have been, and are now being, applied, and that these methods are measurably due to the causes I have indicated, are vividly pictured in the disturbing conditions that now afflict this country, and which, if not arrested, may lead to disaster.

This condition is not ascribable to the rank and file of American labor, but to the seeds of socialism and revolution grown on foreign soil brought into this country, and insidiously planted in the minds of the labor leaders of radical view and disorder at a time of general unrest and disturbance, and this to the detriment of American labor, as well as to American institutions. But there are causes that underlie the turbulent conditions of our time other than labor agitation and aggression, and which, perhaps, are more responsible for the dangers that threaten, and these, if analyzed, might be found to constitute in part at least, a reason for the radical aim and direction of organized labor.

Capital, to advance its selfish interests, has too often denied to labor its fair recognition, just treatment or living wage; and to maintain its supremacy has too often, and in too many ways, evaded law and disregarded the rights of the people, and prospered on the ruin and wreckage which has marked its accomplishment.

The greed of the producer; the profiteering of land owners and landlords, and of vendors of every commodity that enters into the support and comfortable living of the people, injudicious legislation and lax enforcement of law against wrongs and wrong-doers on the side of capital, as well as on the side of labor, must be taken as
causes contributing to the spirit of unrest which has entered into civic direction, business operation and domestic relation, and is leading our people of every walk of life to radical view, intemperate expression and disjointed effort and action.

To bring to capital and to labor a fuller knowledge of their rights under law; a clearer realization of the duties and obligations of each to the other, and of both to the public; to remove the poison of prejudice and distrust and establish a condition of mutual respect and confidence, would go far to stem the tide of radical thought, utterance and action now running at its flood, and to make more certain the realization of the great promise of the future, which lies in the loyalty and devotion of our people to their Government and its laws.

Unfortunately the abnormal tendencies referred to have found a reflex in many of our educational institutions, public and private, where insidious rationalism is supplanting religion, and long approved principles of education, rooted in morality, are being abandoned for modern philosophies, new and experimental cults, dangerous materialism and teachings, inconsistent with the education, welfare and direction of the people, who, from the dawn of Independence and on through their struggles to preserve to men the blessings of liberty, have placed hope and reliance in God, "The Great Governor of the World."

A government created to secure to its people those "certain inalienable rights" asserted in the Declaration of its Independence to be God-given, will protect its people in the enjoyment of those rights, and will perpetuate its institutions only so long as its laws are in consonance with the principles of Divine law. To awaken the people to a recognition of this great truth should be the purpose and effort of the teachers of the youth of our nation.

Government by law depends upon the moral as well as the mental integrity of its citizenship, and safe citizenship depends in large measure upon the sane, sound and American direction of our schools, colleges and universities.

The general welfare is being lost sight of in the seeking of personal benefits and group advantage. The rights of the individual or group must be protected as predetermined, even if the rights of his neighbor are destroyed.

Only laws that give special privilege and immunity are respected. Control by law, which is government, based upon even justice in provision and uniform application, is no longer in harmony with the principles and the doctrines of the much talked of "New Freedom."
We may not, we should not, endeavor to shut our eyes to the conditions that so cloud the present and darken the future, nor permit ourselves to be longer lulled into a false sense of security, for we are confronted by, and are living in the midst of, danger.

Very recently, in an address before the Bar Association of New York, Mr. Elihu Root, able lawyer and useful statesman, a man whose insight, foresight, wisdom and knowledge of public affairs is recognized everywhere—by all people without regard to party division—drew a vivid and serious picture of the conditions of unrest, disorder and danger that now exist, and after a careful analysis of their causes and tendencies, declared it to be his judgment that the only thing between our government and disaster was the rule of law, and that the application of that saving quantity rested largely with the American lawyer, and to this conclusion I subscribe most heartily.

Though danger does exist, and though its signs of manifestation are plainly visible, I am confident in the belief that the good common sense of the people will assert itself and lead our citizens of every class to heed the voice of patriotism which calls to every American to save and perpetuate a Government created that all men might be free, and in their pursuit of happiness live under the rule of even-handed justice, administered through laws equal, and equally applied to all, fearlessly and without favor to any.

To make the rule of law a barrier to danger and a protection requires the speedy and certain re-establishment of law and its administration in the respect and confidence of the people, and to this end the Bar of America, which includes the Bench, for judges are, and must be, selected from the Bar, with the aid of the legislatures, for the National and State Legislatures are usually in large degree made up from the profession, to this high end and aim, I say the lawyers of America should now in the spirit of wholehearted service dedicate their abilities and their influence and effort.

In our country's every emergency and need, the stress and strain of appeal, of direction and safe accomplishment, has been borne by the American lawyer.

When the voice of the Colonists was first raised in protest and defiance of British oppression, it was Patrick Henry, and the lawyers of that day, who aroused, rallied and solidified the people into that armed resistance which through years of heroic struggle lead to final victory and independence.
In the formation of our Government; in the making of the Constitution; in the bringing about of its ratification and adoption; in the establishment of the new republic, its institutions, works and co-ordinated branches, the American lawyers were the efficient force in counsel and direction.

Through its formative period and on with its growth and wonderful development, in times of peace and in times of war, the destinies of the United States have been in large part measured, moulded and directed by great and patriotic leaders who were lawyers, and whose illustrious names adorn the Honor Roll of American citizenship.

When the issue of slavery threatened to destroy our Union of States and our union in purpose and effort to make all men free and to secure to them their rights and liberty under the law, it was the wisdom and courage and the genius of Abraham Lincoln, lawyer and patriot, that met and overcame the forces of secession and saved to our people and to the world a government which is the light that is leading the nations of the earth to overthrow the government of Kings for the government of the people.

And so on, through the years, in every emergency in governmental direction, whether the stress was from within or from without, domestic condition or foreign relation, the profession of the law has made generous and honorable contribution to our country's need. And now, when we have just finished a victorious war against autocracy and the enslavement of men, a world war that has added new glory to American armies, we are confronted by the difficulties and dangers that I have, but very imperfectly, pictured to you this evening—difficulties and dangers greater, perhaps than those of war, because more subtle, more hidden and illusive—foreign in origin and concealed in direction.

Unrest, agitation and promotion of selfish interests are leading our people to disregard law, to ignore the rights of the public and resent authority and control.

To overcome the influences at work, to reach the reason and sense of mankind, disturbed by agitation and mislead by false argument and propaganda; to teach them that license leads to lawlessness, lawlessness to revolution, and revolution to ruin; that restraint under laws made by and for, the people is liberty; to bring the people back to respect for law and government is the need of our country in its
present crisis—a need that should, as in the difficult times of the past, call to the patriotism and effort of the lawyer.

More care in the enactment of the laws, more certainty and dispatch in the administration of laws, more thoroughness in preparation, and a higher integrity in the conduct of the lawyer in his part in the administration of justice—the subordination on the part of lawmaker and law-administrator, on bench and at the bar, of personal or political ambition, advantage and gain to patriotic effort and intent, and the more certain recognition of the welfare and equal direction of the people—would go far to quiet the elements of feverish disturbance and discontent and to restore in the minds of men a respect for this government of the people and for its laws, wisely enacted and fairly applied, for equal protection to all in life, liberty and property, as guaranteed by the Constitution of the United States.

The cure of existing evils and protection from existing dangers may require more than a reformation in the enactment and administration of justice. It may require on the part of the Government prompt and summary apprehension and punishment of leaders in un-American agitation and disorder. If this contingency arises it affords to lawyers an opportunity for public and patriotic service, which should not be ignored, but which should be embraced as a professional duty.

By personal and direct service, and by a refusal to lend their abilities in aid of any man or group of men, who living and acting beyond the law, are seeking to hinder the government in its operations, disturbing its agencies or attempting to weaken it in the respect of the people, should be the approved and certain course of action on the part of every lawyer who loves his country.

The duties and obligations of the lawyer are, and have always been, numerous and important, and to the American lawyer these duties have increased and multiplied in proportion to the growth and development of the country. They have in certain periods, because of peculiar conditions, become almost excessive, but never too excessive or burdensome to the honorable members of the profession.

The profession of the law is a profession which imposes upon its members varied and important duties, and demands of them service to the public of the highest order, and never, perhaps, have those duties been more important, and that service more certainly needed, than now. Those duties faithfully fulfilled and that service honorably dis-
charged beget high professional standing and useful citizenship, which should be the ambition and goal of every lawyer.

This service and those duties will be the subject of consideration and discussion in the course that is to follow, and I would urge upon you that a full realization on your part of the greatness, the importance and dignity of the profession for which you are preparing, will be a stimulus and aid to your efforts to measure and appreciate the service you must render and the duties you must perform and the high standards of integrity you must possess and maintain if you expect to become worthy ministers in the temple of justice.

Law, which is the foundation of liberty, deserves the respect and obedience of all men and the reverence of all lawyers. In the words of a lawyer of an older day:

"It is something which has stood the test of long experience—a body of digested rules and processes bequeathed to us by all the ages of the past. The inspired wisdom of the primal east, the robust genius of Athens and Rome, the keener modern sense of righteousness are in it. The law comes down to us a mighty and continuous stream of wisdom and experience accumulated, ancestral, widening and deepening and washing itself clearer as it runs on, the agent of civilization, the builder of a thousand cities. To have lived through ages of unceasing trial, with the passions, interests and affairs of men, to have lived through the drums and trappings of the conquest, through revolution and reform, and all the changing cycles of opinion, to have attended the progress of the race, and gathered unto itself the approbation of civilized humanity, is to have proven that it carries with it some spark of immortality."

May this just tribute to the law awaken in you a desire and determination, by professional practice, precept and example, to teach the great truth that in the Rule of Law lies the people's hope.

*Georgetown Law School.*

George E. Hamilton.
WILLIAM WIRT.

Although generally remembered only as the author of the famous passage beginning, "Who is Blennerhassett," delivered by him at the Burr trial, William Wirt has a more solid claim both upon the memory and the gratitude of his country. For twelve years he served as Attorney-General of the United States—a period far surpassing that of any of his predecessors or successors. He found the Attorney-General of the United States a mere casual adviser of the President—a cabinet officer by toleration on occasions when legal advice was required. When he left office the Attorney-General was not only considered by everyone a cabinet officer in the strictest sense of the word but due to his brilliant and conscientious performance of its duties that position had been invested with the dignity and importance it has ever since retained.

This most beloved of American advocates was born near Bladensburg, Maryland, on November 8, 1772. While he was yet a mere child, his father died, leaving a fairly adequate provision for the needs of his family. As a boy, the future Attorney-General was somewhat delicate and undersized and very timid both of speech and action; his mother, however, who seems to have been a woman of excellent judgment and decision, did not on that account tie him to her apron strings, as the popular phrase runs, but commenced sending him, at the early age of eight, to the various boarding schools the vicinity afforded. Despite his shy and retiring disposition he displayed no little aptitude in his studies and as indicative of his future career we have his own word for it that before eleven he had drawn up his first legal paper (the constitution of a moot court which he organized), written his first essay (a philippic directed against an unpopular usher) and wooed and won his first love. The constitution of the moot court was destined to have an influence on his future for owing to it he was received at the age of fifteen into the family of Benjamin Edwards, a man of importance and affluence, as tutor to his son, a future senator from Illinois, and two youthful cousins. When he left the congenial roof of the Edwards', he commenced the study of law at Montgomery Court House. At the end of a year, however, he moved to Virginia where, by what he called a "manœuvre," he evaded the residence requirement of twelve months, and in a little less than sixteen months from the
commencement of his legal novitiate, became a full-fledged attorney with a practice but little less than his knowledge of the law. His library harmonized splendidly with both, consisting of a set of Blackstone, a copy of Tristam Shandy and two volumes of Cervantes' immortal masterpiece. However, little by little he acquired some practice and more experience. By untiring effort he overcame his timidity and an indistinctness of utterance that at times amounted almost to a stammer. It was not long before he rushed into extremes in the other direction. His practice at this time lay in Culpepper, Albemarle and Fluvanna counties, and, at a period when circuit riders generally were not distinguished for temperance, Wirt's fellow practitioners were no exception. He soon acquired their convivial habits and became the most popular and incidentally the most notorious of them all. His wit, his geniality, his generosity and his excesses were the common talk of the community. It is related as showing how far he had overcome his former diffidence and difficulty of speech that on one occasion, on a wager with an outsider, he held a group of his friends spellbound with his vivacity and erudition during an entire night, pausing in his steady flow of conversation only long enough to take snuff, until finally going to the window he pulled up the shade and pointed out to his astonished intimates the first indications of "rosy fingered dawn." In 1795 Wirt married the daughter of Dr. Gilmer and upon the latter's death not long afterwards he became the owner of a very handsome estate called Rose Hill. Here for several years Wirt lived the easy and carefree existence of a comfortable Virginia planter. The surrounding country was rich in great names and genius; and Wirt soon became well acquainted with the leaders of the Republican party, Jefferson in particular forming for him an attachment that was to be influential in laying the foundation of his fortunes.

This tranquil, but also ambitious stifling, existence was not destined to be of long duration for in a little more than five years after their marriage his wife died, and Wirt sought surcease of sorrow in the distractions of Richmond society. His popularity among the lawyers and politicians was instrumental in having him selected as Clerk of the House of Delegates. The associations entailed by his new office soon brought about a relapse into earlier habits. He practically abandoned the practice of law and, as he himself said afterwards, he was dissipating his health, his time, his money and his reputation.
In 1800, however, he enjoyed a taste of fame. At Jefferson's suggestion he was retained as one of the counsel for the defense in the celebrated Callender trial—a trial which attracted the attention of the nation. Callender was a pamphleteer of some ability and no scruples—a man who distilled venom for hire. That biting phrase "literary prostitute" has never had a fairer target. But he had been indicted under the odious Alien and Sedition acts which had incited the legislatures of Virginia and Kentucky to threaten disunion and which sealed beyond hope or repair the doom of the great Federalist party. For the nonce, therefore, as a martyr in the cause of the most cherished republican principles, the freedom of the press, Callender was a popular hero. Nevertheless, he was destined to have short shrift, for his trial was had before that most partisan of judges and stoutest of Federalists, Samuel Chase, who had avowed beforehand his intention of punishing with no light hand the author of the "Prospect Before Us" and was commonly accused of having instructed the sheriff to be careful not to call "any of these creatures called republicans" on the grand jury. With such a judge presiding even the imposing array of the prisoner's counsel, Edmund Randolph, Hay, Nicholas and Wirt, had little chance of success. From the outset they were contradicted, bullied and reprimanded by his honor in a manner that might well have provoked the envy of Jeffreys. Wirt himself, in the midst of his argument, was ordered to his seat by the irate justice and later on was almost committed for contempt. All in all it was an exhibition only paralleled in this country for its brazen disregard of accustomed legal forms by the trial of Susan B. Anthony in the federal court for the Northern District of New Cork. Its climax was sudden and dramatic. Despairing of a respectful hearing, the prisoner's counsel, after a particularly disgraceful tirade, calmly and silently tied up their papers, bowed to court and withdrew, leaving Chase a free hand with regard to the prisoner, who, naturally, was found guilty and imprisoned. When Jefferson assumed the high station to which United States v. Callender had no small influence in elevating him, he pardoned Callender who lost little time in displaying his gratitude by turning his scurrilous and mercenary pen against his benefactor. The last chapter of this fateful trial was not written until five years later when it formed the chief basis of Samuel Chase's impeachment.

The division of Virginia into three chancery districts and the consequent appointment of two new chancellors opened to Wirt an
avenue of escape from the dangerous situation which was threatening to destroy his future career. To his great surprise he was appointed to one of the vacancies. "It descended upon me, unsolicited, unthought of, with the benevolence of a guardian angel," such is Wirt's fervid description of the happy event. It was also around this time that he married again. It has been aptly remarked that his second marriage was the hegira of Wirt's life, for from that time on he steadily mounted the ladder of success and sobriety. His second wife was a woman of strong mind and character and if she married Wirt to reform him, as is often supposed to be the custom of women, she proved far more successful than a great many of her sisters in similar ventures. The story is told that her father was vehemently opposed to Wirt's suit and went in person early one morning to express his disapproval. It chanced that for Wirt there had been "revelry by night" and his prospective father-in-law is said to have discovered him declaiming Falstaff's narrative of the encounter with men in buckram with a tin basin for a helmet, a sheet iron blower for a shield and a poker for a sword. As may be surmised the incident did not make Wirt's path the rosier; but, as already narrated, he finally carried his point. His first important act after his marriage was to resign his chancellorship, which, while very honorable, was not sufficiently lucrative. Indeed from this time on the idea that stands out most prominently in his correspondence is that he must make a competence for his family. Thus changed was Φω loving Wirt, as his comrades of other days had dubbed him. In pursuit of this resolve he moved to Norfolk where he tells us was located one of the most flourishing banks in the Union. For awhile he was tempted to remove to Kentucky. But he abandoned this project on being informed that while it was true that fees were large there, yet money was scarce and lawyers were usually paid in live stock, the rank of the various attorneys being fixed in popular estimation by the size of the herds they drove upon their return home from a circuit.

This period of his life witnessed the partial fulfillment of Wirt's most cherished personal ambition, the achievement of a literary reputation. The law was to Wirt an agreeable method of livelihood. But literature he considered as "the one avenue to any certain and durable fame" and panted for it as the hart for the gushing waters. In 1803 appeared his "Letters of a British Spy." They were supposed to be the observations of a British traveler on Virginia life and customs and
enjoyed no small popularity. Today, however, they are shrouded in oblivion except to the historian of the time who finds in them a great deal of matter both valuable and interesting. Still later a volume of scattered essays was published under the title "The Rainbow" and in 1811 he joined in a series of widely read papers called "The Old Bachelor." One of Wirt's contributions "The Blind Preacher" realized more than an evanescent popularity, being reprinted in England and translated into several languages in addition to being until recently one of the inevitable reader selections. Encouraged by the favorable receptions of these children of his pen, Wirt undertook a life of Patrick Henry. Here, however, he encountered difficulties in abundance. Although Henry had been dead but a few years he found it was no easy task to gather material and a far more serious one to separate fact from fable in that he did obtain. He expressed his surprise and annoyance to one of his correspondents in the following delightful vein: "This same business of stating facts with rigid precision not one jot more or less of the truth—what the deuce has a lawyer to do with the truth? To tell you one truth, however, I find that it is an entirely new business to me, and I am proportionately awkward at it; after I have gotten the facts accurately they are then to be narrated happily; and the style of narrative, fettered by a scrupulous regard to real facts, is to me the most difficult in the world. It is like attempting to run, tied up in a bag. My pen wants to career and frolic it away. But it must not be. I must move like Sterne's mule over the plains of Languedoc 'as slow as foot can fall,' and that, too, without one vintage frolic with Nanette on the green, or even the relief of a mulberry tree to stop and take a pinch of snuff at."

When, in 1818, the life of Henry appeared it was almost a pretentious failure. However, as far as literature is concerned it is as the author of the Life of Henry that Wirt is chiefly remembered today. The writer cannot help believing that Wirt really did possess literary gifts of no mean merit. There is piquancy and ease about his correspondence that almost invariably charms the reader. One is inclined to think that in his letters Wirt employed his natural style and that, unhappily for his pet ambition and his literary fame, on "show occasions" he refused to allow "Nannette" to have her way but instead forced a pleasing and even admirable style to conform to the false taste of the day which generally ran either to pompousness or over sentimentality.
In 1806, Wirt moved from Norfolk, where he had established a high reputation, to Richmond. He celebrated his arrival in the capital by his brilliant and successful defense of a certain Swinney accused of poisoning his uncle, the illustrious Chancellor Wythe. The very next year beheld the Burr trial which fixed beyond doubt or cavil Wirt’s eminence both as a lawyer and as an orator. A description of that forever memorable forensic and political battle has been attempted by the author elsewhere. But we may be permitted to add that however opinions may differ as to the results and the details of the trial, it must be conceded by all that the individual triumph of the occasion belonged to Wirt.

The famous and beautiful passage beginning “Who is Blennerhasset” has made the name of Wirt familiar to practically every schoolboy and its vivid, but in the main incorrect, picture of Burr and Blennerhasset has been more potent in consigning the former’s memory to obloquy than even the death of Hamilton. The literary paradise; however, that Wirt painted in language so graphic and yet so idyllic was the more the ideal he himself longed for than the one Blennerhasset possessed; and it is, no doubt, the fact that in this passage the orator laid bare his own soul and aspirations that has imparted to it its effectiveness and lasting appeal.

Needless to say after the Burr trial Wirt’s professional path was one easy and pleasant to tread. Indeed it was not long before he was the recognized head of the Virginia bar. He now began to practise before the Supreme Court of the United States. In his very first case before that tribunal he was opposed to the mighty Pinkney and, though he had welcomed the conflict, writing, “the blood more stirs to rouse the lion than to hunt the hare,” nevertheless, his effort failed to come up to his expectations. But soon afterwards, having occasion to appear in a prize case before the same court, by a brilliant argument he fully retrieved his former failure.

With the advent, in 1817, of the Monroe administration there began the most illustrious chapter of Wirt’s career, for, accepting the President’s flattering and pressing offer, he entered the Cabinet as Attorney-General. The period covered by his service in that post is the most splendid and important in our judicial annals.

1 In the sketch of Luther Martin published in the issue of Case and Comment.
2 Jones v. Shore’s Executor, 1 Wheaton 462.
3 The Firtuna, 2 Wheaton 161.
his associates were then engaged in the exposition of those bold and robust national principles that not only infused the blood of a nation into the veins of a Union but which, by discovering in the federal constitution a vitality and an elasticity capable of successfully coping with changed conditions and novel demands, prolonged its life beyond the single generation its most optimistic formulators predicted for it down to the present day and far beyond in increasing vigor and efficacy and to the happiness and welfare of the people it has governed and protected. It was Wirt's good fortune to figure in each of the four cases, with the exception of Marbury vs. Madison, which are commonly regarded as the most momentous of Marshall's decisions. With Pinkney and Webster he resisted in McCulloch v. Maryland the effort of the state of Maryland to tax the United States Banks, laying a special emphasis on the proposition that Marshall in his opinion summed up in his sweeping and celebrated dictum "the power to tax involves the power to destroy." In the Dartmouth College case Wirt opposed Webster and lost; but had he lived until the decision of the Charles River Bridge case he would have had the consolation of seeing the Supreme Court itself, to Webster's chagrin, shrink from pushing Marshall's decision to what Mr. Justice Holmes would term its "dryly logical extreme." Wirt also participated, though not conspicuously, in Cohens v. Virginia which determined finally and solidly that the appellate jurisdiction conferred on the Supreme Court by the constitution is not confined to the inferior federal courts but extends likewise in a proper case, to the decision of the highest judicial tribunal of a state. The far-reaching case of Gibbons v. Ogden, which involved the right of the state of New York to give to Robert Fulton the exclusive navigation by fire and steam of all waters in the state, beheld Wirt and Webster once more united. It has sometimes been said that the principle on which Marshall rested his opinion, the encroachment of the assailed legislation on the commerce clause of the federal constitution, was not touched upon by Wirt in his argument but was pressed upon the Court by Webster alone—an assertion entirely unsubstantiated by the outline of Wirt's argument in 9 Wheaton. The writer has elsewhere recorded his conviction that Webster's over enthusiastic eulogists have unjustly exalted their idol, so far as this case is concerned, both at the expense of his colleague and of his opponents.4

4 Sketch of Thomas Addis Emmet in November, 1917, issue of Case and Comment.
WIRT.

Wirt appears to have made no small preparations for this case. Thus we find him writing to Judge Carr concerning it: "Tomorrow week will come on the great steamboat question, from New York, Emmet and Oakley on the one side, Webster and myself on the other. Come down and hear it. Emmet's whole soul is in the cause, and he will stretch all his great powers. Oakley is said to be one of the first logicians of the age as much a Phocion as Emmet is a Themistocles. Webster is as ambitious as Caesar. It will be a combat worth witnessing." Wirt's argument was certainly one of the finest, both from a legal and oratorical standpoint, that he ever made.

That part of Marshall's famous opinion which decides that commerce includes navigation followed closely Wirt's reasoning on the same point while great admiration was generally expressed for the effective and elegant manner in which he turned against Emmet, "the interesting and eloquent exile," a quotation from Virgil that the latter had employed.

The volume of 12 Wheaton beholds Wirt engaged on the successful side in two cases of great constitutional import. He was one of the distinguished group of counsel that in Ogden v. Saunders maintained the right of the states to establish bankruptcy and insolvency laws when not in conflict with the laws of Congress passed on the same subject. It is interesting to note that this case also witnessed Webster's first defeat and Marshall's first dissent on a constitutional point. In the case of Brown v. the State of Maryland, celebrated for containing the germ of the original package doctrine, the power of the state of Maryland to require a license fee from all importers of goods by the bale or package and from all persons selling the same by wholesale was denied as repugnant to the commerce clause and as amounting to the levying of a duty on imports without the consent of Congress. In this case Wirt and Meredith were opposed by Taney and Reverdy Johnson, those two illustrious sons of Maryland who were destined to carry on, without any dimunition in splendor, its glorious professional tradition.

As a member of the Cabinet, Wirt's personal conduct was always admirable and irreproachable and that, too, amid difficulties of no mean description. For Monroe's cabinet, though exceptionally strong in ability, was no less distinguished for the vaunting ambition of most of its individual members. The time was coming when a successor to the throne would be selected and for the first time in many years
there was no heir apparent. And so Crawford from the Treasury and Adams from the State Department and Calhoun from the Department of War each hoped and spun their webs of intrigue to capture the glittering prize. With such conditions prevailing, jealousy and inharmony were inevitable and the seeds of dissension and hate sown during those years of plot and counterplot left a mighty and lasting impress on the destiny of the nation, for it was directly due to them that in after years Crawford betrayed the secrets of the Cabinet deliberations with regard to Jackson’s Florida escapade, blasting in consequence Calhoun’s almost certain prospects of succeeding the hero of New Orleans and turning his vigorous and indomitable intellect to the consummation of John Randolph’s dream, the marriage of states’ rights and slavery. Wirt, like Monroe, preserved a strict neutrality towards the rivals but that did not prevent Adams from retaining him in his post when, after the memorable contest in the House of Representatives, he secured the election over Jackson. In the very early days of the Adams administration, however, it became evident both to the President and his advisers that re-election was impossible; and so, in 1829, after twelve years of faithful and glorious service, Wirt vacated the Attorney-Generalship. He retired not to Richmond but to the more flourishing city of Baltimore, for during his terms as Attorney-General he had built up an extensive practice in that city and vicinity. In the year of his retirement he appeared in Boston at the trial of Administrators of Tuthill Hubbart v. Brooks. Webster was his adversary and once more gained the laurel wreath of victory. But Wirt’s defeat was a glorious one as is plain from Everett’s glowing description of the combat: “never has a more magnificent forensic display been witnessed in our courts than in the arguments of the illustrious rivals on this occasion. The most arid details of account and abstrusest doctrines of equity were clothed by them with living interest.”

With the advent of the Cherokees cases, Wirt again came into public prominence. Harassed and persecuted beyond endurance by the state of Georgia, the unfortunate Cherokees procured Wirt to bring an original suit in the Supreme Court to enjoin the enforcement of certain particularly oppressive statutes of the state. Original jurisdiction was invoked on the ground that the Cherokees were a foreign nation. Wirt was at first inclined to the opinion that this position was untenable. His doubts, however, were dispelled by Chancellor Kent who
informed him that the Supreme Court would unquestionably assume jurisdiction. The result, nevertheless, vindicated Wirt's fears for the Supreme Court reluctantly divided against its jurisdiction. With regard to the arguments of Wirt and Sergeant in this cause Justice Story wrote: "Both of the speeches were very able, and Mr. Wirt's, in particular, was uncommonly eloquent, forcible and finished." Resentful even of this abortive attempt to curb its barbarity, Georgia soon afterwards passed a severe statute aimed against certain missionaries who were laboring among the Cherokees. These men were arrested and imprisoned. A *habeas corpus* proceeding was brought; and Wirt and Sergeant argued in favor of the writ when the case came before the Supreme Court on a writ of error from the Georgia Courts. The release of the prisoners was ordered but Georgia treated the entire proceedings with supreme contempt, "John Marshall has made his decision—now let him enforce it," is the sardonic challenge supposed to have been voiced by Jackson, who sympathized with the state in the matter, upon being informed of the turn which the affair had assumed. This humiliating experience of Marshall and the later and still more bitter one of Taney, in an hour when passions ran far higher, strikingly illustrates the impotence of the judicial department of the government when those who should be the first to defer to its decrees disregard them. The executive wields the sword and the legislature controls the purse and in them each possesses a keen edged and effective weapon with which to enforce their authority. But the judiciary has only respect to rely on and when that is absent its commands are little more than "sounding brass and tinkling cymbals."

This clash with Jackson naturally did little towards drawing Wirt to his support. In the former's campaign for re-election Wirt opposed him as the nominee of what had been correctly styled "one of the strangest parties that ever rose above the surface of American politics." The abduction of William Morgan and his supposed death at the hands of members of the Masonic order, whose secrets he had publicly threatened to betray, had created such public excitement that the anti-Masonic party, whose platform was opposition to all secret societies, was called into existence. In the absence at the time of any regular opposition to the Democratic party, as Jefferson's Republican party now began to be universally called, the anti-Masonic party developed great strength, enlisting the support of such men as ex-President Adams and William H. Seward and polling in 1830 almost 130,000
votes in the New York gubernatorial election. It was this meteoric political organization that offered to place Wirt in nomination for the Presidency. He candidly stated that in his youth he had joined the Masons, although he had not attended a lodge for thirty years, and affirmed his belief that Morgan's murder was merely the unauthorized act of individual members. Nevertheless, the tender was withdrawn and Wirt accepted, hoping that the opposition to Jackson would concentrate on him. In this, however, he was doomed to disappointment for Clay remained the idol of the newly formed Whig party; and when the votes were counted Wirt received only the electoral vote of Vermont.

The death not long after this event of his youngest and favorite daughter dealt Wirt a blow from which he never recovered. Despondency enervated his constitution so that when in February, 1830, illness overtook him he sank rapidly until on the eighteenth, "God's finger touched him, and he slept." The news of his death was everywhere received with the keenest regret, for the wider arena in which he had performed his later and best exploits had only served to widen the popularity which he had acquired among the circuit riders of Virginia in his early days. He was indeed a lovable character having no taint of envy or malice or egotism. The man was even greater than the advocate. No member of the American bar has ever been held in dearer esteem than Wirt. His earlier popularity, it is true, was largely attained in a manner impossible of sanction. His later popularity, however, rested on no such questionable basis, since, after his second marriage, Wirt had become deeply religious. Nobility of character and sweetness of disposition achieved it wholly. His funeral well attested the universal regard in which he was held. Congress paid him the almost unprecedented honor of adjourning in order that its members might attend his last rites and his remains were attended to the grave by the President, the Vice-President, the members of the Supreme Court and the Cabinet and a large proportion of Congress and the diplomatic corps. Political differences were forgotten in the presence of a sterner reality. At the memorial proceedings held in his honor the bar of the Supreme Court was addressed by Webster and the Attorney-General; and the great Chief Justice himself soon to feel the grasp of the grim reaper, remarked in replying: "We too, gentlemen, have sustained a loss it will be difficult, if not impossible, to repair. In performing the arduous duties assigned to us, we have been long
aided by the diligent search and lucid reasoning of him whose loss we unite with you in deploring: We, too, gentlemen, in common with you, have lost the estimable friend in the powerful advocate."

Wirt was not a black letter lawyer. Cases he used sparingly. He preferred to rely on reason and principle and on his own powers of persuasion and argument rather than on those of some obscure judicial authority. One of his strongest points was a genius of anticipation whereby he very frequently took beforehand the full force and sting out of an adversary's argument. In presenting his case in its strongest and most pleasing form he was not deemed inferior to any advocate of his day. As an orator he is entitled to fully as high a rank as a lawyer. In the judgment of many of his contemporaries he excelled either Pinkney or Webster in the art of elocution. The classics were to him a source of never ending delight and instruction and he regarded the Roman Senate of Cicero's day as the quintessence of human wisdom and eloquence. In the day of giants he ranked with the mightiest of the sons of Anak. He who eagerly threw down the gage of battle to Pinkney and Webster and sustained with dignity and honor the shock of the ensuing conflict, need not fear that carping criticism may filch his well deserved honors.

*Oklahoma Bar.*

BOOK REVIEWS.

The compilation of cases on evidence, arranged and edited by Professor E. W. Hinton, and published by the West Publishing Company, for use by law students, reflects the deep learning and discriminating legal mind of its author. This work is admirably adapted to use in the strict "Case System," which frowns upon the dispensing of "ready made predigested principles," and is supposed to require the student to work his own way through the bewildering mass of legal knowledge, and separate the precious from the worthless, and then refine and shape it to the needs of modern society, so that the finished product will be those immortal principles of law, founded upon eternal justice, which stand forth like the great mountain peaks between liberty and tyranny.

Generations have come and gone, rulers have held sway and been dethroned, nations have flourished and perished, but through all, the development of the law has progressed, and its principles have stood the test of all ages, conditions and forms of government, and are now as well known and axiomatic as the simple rules of mathematics, but their application to changing conditions arising from progressive society frequently baffles the greatest jurists.

Under the combined text and case book system the student is taught from text books and lectures, what these principles are, their origin, development, and the reason for their existence. He finds pleasure in familiarizing himself in this way with that which others have acquired by drudging through confused and often poorly stated, sophistically reason, and frequently contradictory decisions extending from the distant past to modern times. These great principles, however, can be applied to the ever varying complexities of modern civilization, only by one who has carefully studied the struggles of legal sages, as disclosed by reported judicial decisions. Therefore the student, under this system after completing his text and lecture course, and having learned the multiplication tables of the law, is required to read and analyze cases in which the great jurists have applied these principles to the everyday affairs of life in the actual administration of justice. The prior comprehensive knowledge of principles permits this branch to be pursued by the student with such facility, that commencing as it does, at a relatively early stage of his study, to examine leading cases
illustrative of the whole body of the law, and emerge from his student
days with a well rounded legal education.

Under the strict case system the student is supposed to begin by
reading the decisions in which these principles were first considered,
and thus commence at the fountain head of jurisprudence, as it were,
and then follow the thought through subsequent cases until the axiom
is finally evolved.

It is perfectly apparent that a student will become confused in the
bewildering mazes of ancient, mediaeval and modern decisions, if he
undertakes his explorations without a competent guide. The text and
case books are the student’s guides, and direct the courses considered
most attractive and fruitful by their respective authors. The student
cannot be expected to, and ordinarily does not, traverse paths un-
marked by his guide, and therefore his education, under the strict
case system, may be left incomplete, for Professor Hinton truly says,
that the “compiler finds himself embarrassed by the vast amount of
material. Time and space preclude any attempt to treat the various
topics exhaustively. It has been found impracticable to do more than
select the more important problems arising under the various rules.”

Professor Hinton, in the main, has collected the earliest and the
latest cases dealing with the various principles, with some citations to
intermediate ones. His work, however, is such a long step towards
perfecting the case system, as to give hope, even to the most pessi-
mistic, that it may some day supplant all other systems and be recog-
nized as both scientific and practical.

Howard Boyd.
PREPARATION FOR A LAW COURSE.

Oftimes the law student, more often the practicing lawyer is approached by an embryonic law student with the query, "What course or courses shall I pursue to best fit me for study of the law." On its face the question is a simple and innocent one, yet its answer may involve, often does involve, far-reaching and tremendous results. Hence it is a something to which the law student or the lawyer, as the case may be, should respond only after calm judicial reflection for he cannot be too chary in the matter.

At the outset it may safely be stated as, what we are pleased to call, our major premise, that the best general preparation for the study
of the law is a liberal arts college course leading to what some of our crass modernists are wont to designate as the "old-fashioned" A. B. This major proposition after being debated and redoubled for years is not often gainsaid today, save by those few of whom we have spoken above, and those others who have not had such training. The latter class base their contention on the fact that many of our most successful lawyers and jurists are men who have not had such training. In reply to this it might be urged that if those who uphold this stand will take the time and trouble to make a scientific induction it may be said without fear of contradiction, that the number of such men is not sufficiently large to overcome the *prima facie* presumption that they have been successful despite the fact that they did not avail themselves of a college course. It is, indeed, true that there are such men, but question such men, and it will almost invariably result in the response "How much more I could have accomplished had I had such training." There is still another class of men who are opposed to such preparation for the law, but as their objection is ordinarily the result of what someone has so admirably termed the "antagonism of resentment," they are deserving of no more than a casual reference.

If there is one thing more essential to a lawyer than another, it is ability to distinguish, ability to understand and appreciate the point of law laid down in a particular case as contradistinguished from a very similar point of law laid down in a very similar case, ability to distinguish whether or no one case or a similar one is authority for his particular state of facts. The question naturally arises, what particular course or subject in the above outlined general college course is most likely to result in such ability. The answer is plain and unequivocal, it is Logic or more generally Philosophy, the latter embracing not only Minor and Major Logic but Ontology, Epistemology and the remaining treatises so essential to a complete course in Philosophy. Philosophy has often been defined as "That science which examines into the ultimate causes and reasons of things in as far as they are attainable by the natural powers of the human mind." This would seem to be an exhaustive definition, but it is not. Philosophy is more than the foregoing at first glance indicates, it is that science of sciences which makes for the analytic mind, the mind which can reduce a proposition even to its component matter and form, meanwhile plucking the fruits as it goes, and eschewing the undesirable. It is that science which permits the lawyer preeminently, carrying the philo-
sophical terms into the law, to *Distinguo minorem* and then *nego* the conclusion. In fact, it is often said that every pleading is in form a syllogism, the law in the case being the major premise, the facts being the minor premise and the law as applied to these facts being the conclusion.

The young man soon to embark on the course of law, can make no mistake then in fortifying himself therefore by a thorough going classical college course, majoring in such course in the subject of philosophy, and the law student or lawyer need have no qualms of conscience in giving advice to this effect.

T. Austin Gavin.
NOTES AND COMMENTS.

DAMAGES—AVOIDABLE CONSEQUENCES—MEDICAL ATTENTION.

It is the law with relation to the computation of damages, that when a person is injured either in body or property by the tortious act or omission of another, or by the unwarranted breach of contract, that the person thus injured should adopt all reasonable means of protecting himself and his interests, acting under the circumstances as an ordinarily prudent man would.\(^1\)\(^2\) As a result of this rule, the duty rests upon one who has sustained physical injury by the wrongful act of another, to take ordinary and reasonable precautions for proper medical attention with a view to the prevention of aggravation of his injury.\(^2\) Having used ordinary and reasonable care in the selection of a competent physician, the question has frequently arisen as to whether or not the injured person is to be held responsible for additional damage caused by incompetent or careless treatment by the physician.

The proper answer to the question in the foregoing paragraph is outlined in a recent decision of the Supreme Court of Oklahoma\(^3\) in which it was stated that, "The rule appears to be well settled that where a party has used reasonable care in selecting a physician or surgeon, but, owing to unskilful treatment, the injury has been increased, the party causing the original injury will be held liable in damages for the latter." In cases involving this question, the principal issue is the reasonable care and bona fides of the person injured in selecting a competent surgeon. When it has been established that there has been no delinquency in this duty, the additional damage caused by the malpractice of the physician selected, is regarded as a proximate and natural result of the original injury.\(^4\) The reason of the rule lies in the fact that aggravation of physical injury by unskilled medical attention is a result which reasonably ought to have been anticipated by the wrong doer, and as this is so it would appear clearly that the error in treatment must relate specifically to the injury caused by him. If the doctor, mistaking the injured persons for another patient with a different ailment, performed an operation which was entirely un-

\(^{1}\) Lawrence et al v. Porter et al 63 Fed. 62 (1894).
\(^{2}\) Lyons v. Erie R. R. Co., 57 N. Y. 489
\(^{3}\) Smith v. Missouri, Kansas & Texas Ry. Co., 185 Pac. 70, Nov., 1919 (Okla.)
\(^{4}\) Hooyman v. Reeve, 170 N. W. 282 Jan., 1919 (Wisc.)
connected with the injury caused by the party being sued, and which was not directed at the cure of that injury, it could not be said either in reason or justice that the tort feasor in such a case should be held to have anticipated the mistake in identity by the physician and its consequences. He could not be held for damages arising out of the unnecessary operations.\(^5\)

There has been advanced in argument the proposition that the injured party is required to obtain the highest medical skill available to attempt a cure and lessen the damage resulting from physical injury. The law, however, places no such requirement upon the victim of the tort, and his duty is performed if he but exercises reasonable care in making the selection of his surgeon, to the end that he might select one possessing ordinary skill and experience.\(^6\)\(^7\)

H. R. J.

**Presumption as to Death from Absence.**

The common law rule that in the case of an absent person of whom no tidings are received the presumption of the continuance of life ceases at the end of seven years, after which he is presumed to be dead, obtains in the United States with the addition, in most states, of the limitation that the person whose death is thus presumed must be shown to have been away from his home and perhaps out of the state.\(^1\)

There seems to be a difference in the authorities in this country on the question whether the person is presumed to be alive till the end of the seven years, or whether there is no presumption as to the date of his death, but anyone relying on his death having occurred at a certain date must prove that fact. The presumption of law that a person is dead when he has been absent from his domicile for seven years without being heard from relates only to the fact of death, and the time of death, whenever it is material, must be a subject of distinct proof.\(^2\)

It has been held in Kansas that the unexplained absence of an insured person for more than twelve years, without showing that anything

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\(^{\text{5}}\) Purchase v. Seelye, 121 N. E. 413 Dec., 1918 (Mass.)
\(^{\text{6}}\) Selleck v. City of Janesville, 80 N. W. 944 June June, 1898 (Wisc.)
\(^{\text{7}}\) Chicago City Ry. Co. v. Saxby 72 N. E. 755 (1904), (III.)
\(^{\text{1}}\) Stinchfield v. Emerson, 52 Me. 465; Crawford v. Elliott, 1 Houst (Del.), 465;
has been heard from him since his disappearance, or that any effort has been made to ascertain his whereabouts, was not sufficient to prove his death. There is a presumption that a person not heard from by his acquaintances or any members of his family for more than seven years is dead. While a person unheard of for a time is presumed to be alive until expiration of seven years, the absence, coupled with other circumstances may be sufficient to prove death at a much earlier time.

Where a person leaves home with the expectation of returning within a short time and remains away for seven years, his absence is unexplained, no intelligence is received from him, and his whereabouts cannot be ascertained through diligent search made in the vicinity of his home and at such places as he would be likely to go, a presumption that he is dead arises, unless there are other facts rebutting such presumption. In order that the presumption that a person once shown to have been alive continues to live may be overcome by the presumption of death arising from seven years' unexplained absence, there must be a lack of information concerning the absentee on the part of those likely to hear from him after diligent inquiry.

It seems that the burden of proof, where the issue is the life or death of a person once shown to have been living, is on the party who asserts the death; but when the seven years have elapsed, without knowledge concerning the person, the presumption of life ceases and the burden of proof is on the other party. However, this presumption of death from long absence is not an absolute rule of law, where the circumstances of disappearance permit a different inference. This presumption would not arise where the supposed decedent has been heard from and there is a reliable information that he was alive within four years.

In the recent Pennsylvania case, Groner v. Supreme Tent of Knights of Maccabees of the World, (108 Atlantic Reporter 437) the plaintiff, Mrs. Groner, sued to recover $2,000 insurance on the life of her husband. The defendant beneficial association claimed there was no

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1 Mackie v. Grand Lodge A. O. U. W. of Kansas, 164 P. 263
2 St. Martin v. Hendershott, 82 Or. 58.
3 Western Grain & Sugar Products Co. v. Pillsbury, 173 Cal. 135
8 Spilton v. Spilton, 64 A. 96.
sufficient proof of death. The plaintiff depended upon evidence of facts justifying the presumption of her husband's death after seven years' unexplained absence.

It seems that the decedent left his home in a small town in Pennsylvania with the intention of going to Bartlesville, Okla., to work at his trade of machinist. The shop in which Groner was working failed and he was next heard of from another town in California. The last note or word of any kind received from him was about two years after his departure from his original home in Pennsylvania. The evidence further tended to show that Groner had no permanent place of abode in the west, but seemed to go from one place to another. The plaintiff used every possible means of communication in an endeavor to ascertain the whereabouts of her husband; she had the mayor of the town write officials in the several places where Groner had last been heard from; and, finally, she had advertised in several trade journals of general circulation, offering a reward for information as to her husband's whereabouts, but all to no avail.

The Supreme Court of Pennsylvania, in affirming the decision of the lower court in favor of the plaintiff, held that the evidence in this case was ample to sustain the verdict rendered. The English rule "that in the case of an absent person, of whom no tidings are received, the presumption of the continuance of life ceases at the end of seven years," obtains in Pennsylvania.

E. R. W.

Referendum—Effect Upon the Ratification of the Eighteenth Amendment.

One of the many Constitutional questions which the Supreme Court of the United States will have to determine in passing upon the validity of the "Eighteenth Amendment," which provides for national prohibition, is the manner of its adoption. In those states where referendum has become an integral part of the governmental functions it is urged that it is necessary that the act of the legislative body in ratifying the amendment must be referred to the people of the state for a direct vote upon the issue before it may be judicially proclaimed that the state in question has ratified the amendment. Therefore, it necessarily follows that the words "ratification" and "legislaure" must be explained in light of their use in the Fifth Article of the Constitution
and the Eighteenth Amendment. A number of the state courts have interpreted "legislatures" in its strict sense as meaning strictly a law making body, and as such all their acts, being laws, are subject to a referendum by the people.

The Supreme Court of Washington, in passing upon a writ of mandamus to compel the submission of the joint resolution of the state legislature ratifying the Eighteenth Amendment for a direct vote by the people, has declared that under the Constitutional Amendment Seven, Article Two, Section One of the State Constitution, which provides for referendum of "acts," "bills" or "laws," that the joint resolution of the state legislature ratifying the Constitutional Amendment for national prohibition is subject to the referendum, the Amendment to the United States Constitution being a law within the meaning of the Seventh Amendment of the State Constitution.¹

The court further announced that Congress has no concern of the manner in which the people of the several states pass upon proposed amendments to the Federal Constitution, as that right is properly one within the Constitutional reservations to the states as provided by Article Ten of the United States Constitution, and as further limited by Article Nine.

This right being reserved to the states, it follows that it is within their power to express their legislative will by a popular vote, under the referendum clause of the state constitution, upon the Eighteenth Amendment. It is also contended that the Supreme Court of the United States has held that the question whether referendum is repugnant to Section Four of Article Four of the Constitution in denying to the states a republican form of government is of a political character and exclusively committed to Congress, and as such is beyond the jurisdiction of the courts.² Therefore, to hold that a state cannot exercise its referendum power in such a case would amount to a reversal of the Supreme Court in its previous decisions.

The court also renounces the view that by the insertion of the word "convention" in Article Five that the Constitutional Convention sought to modify the meaning of "legislatures," and had in mind a representative body, and not legislative authority when passing upon amendments.

Justice J. Parker in his dissenting opinion strongly urges the su-

¹ State v. Howell, 181 Pac. 920 (May 24, 1919).
²Pacific Telephone & Telegraph Co. v. Oregon, 223 U. S. 118 (1912).
premacy of the Federal sovereignty over state sovereigns. He points to Section Two, Article Six, which declares: "This Constitution, and the laws of the United States which shall be made in pursuance thereof; * * * shall be the supreme law of the land." He also holds that the act of ratification by the legislature is not law-making legislation for the state, but is simply the casting of the vote of the state and its people in the manner prescribed by the Federal Constitution and the direction of Congress made in pursuance thereof. Even though such an act of the state legislature is conceded to be legislation, the theory is advanced, that it is an act of participation in purely national legislation, and is neither state legislation, nor an act of participation in state legislation.

That the state legislatures have no externational authority with respect to their law making power is shown by reports of the Constitutional Convention debates: "The power of a state legislature to participate in amending the federal constitution exists only by virtue of a special grant in that constitution. It is a power which it could not assume under any nation of a general right to legislate, for that right is confined within the state limits and to enactment of ordinary laws." 3

The Supreme Court of Ohio in the case of Hawe v. Smith.4 has also held that the act of the Ohio Legislature in ratifying the proposed national prohibition amendment is subject to a referendum by the electors of Ohio. The court points to Section 1 and la of Article 2 of an amendment to the Ohio state constitution, which specifically provides that the act of the legislative body in ratifying a Federal Amendment is subject to the referendum. That the referendum has been conclusively determined to be a part of the legislative machinery of the state is argued from the decision of the Supreme Court of the United States in Davis v. Ohio.5 In that case it was held that where the referendum had been adopted as a part of the state legislative functions, the power as thus constituted should be held, and treated to be the state legislative power for purpose of creating congressional districts by law. However, it should be noted that the legislative power granted to the states, both by Article Four and by the redistricting act of Congress of 1911, was only a federal grant for

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3 Jameson, Constitutional Conventions (4th Ed.), Section 583.
4 126 N. E. 400 (September 30, 1919).
5 241 U. S. 565 (June 12, 1916).
a special purpose. On the other hand, it is advanced by the court that the powers conferred in the different parts of the Federal Constitution upon state legislatures are manifestly dual in their nature, and that the power conferred by Article Four, as well as by Article Five, is legislative, and therefore subject to the referendum.

The Supreme Judicial Court of Maine in an answer to questions propounded by the Governor of the State as to the ratification of the Eighteenth Amendment and the necessity of submitting by referendum the ratification resolve of the Legislature to the voters of the state that there were only two ways of ratification: First, by the Legislatures of three-fourths of the several states, or, second, by constitutional conventions held in three-fourths thereof. Congress having the power under the fifth article of the constitution had prescribed that the Eighteenth Amendment should be ratified by the state legislatures, and this manner of adoption must be followed. That the state legislatures in ratifying the amendment, as Congress, in proposing it, was not, within the strict legal sense, acting in the discharge of legislative duties and functions as a lawmaking body, but acted in behalf of the people as a ratifying body, under the power expressly conferred upon it by Article Five.

The District Court of the Northern Division of California in the case of Ex parte Dillion in a review of all the recent decisions of the state courts on the question renounced the opinions of the Supreme Courts of Washington and Ohio and held that the correct rule is announced by the Supreme Judicial Court of Maine. The court also held that amendments should be ratified by the representatives of the people, either in legislature, or in convention, and not by the people themselves, and that this was manifestly the intention of the framers of the constitution. That the term "legislature" was not used throughout the constitution as a legislative body is apparent upon its face. When the legislature of a state is referred to simply as a lawmaking body, the term may be construed to embrace the entire lawmaking machinery of the state including a vote of the people where authorized by the local constitution, as in Davis v. Ohio. But, when the legislature is named as a mere agency to discharge some duty of a non-legislative character, such as the election of a United States Senator,

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* In re. Opinion of the Justices 107 Atl. 673 (Aug. 28, 1919.)
7 Missing.
8 Supra paragraph No. 5.
or the ratification of a proposed amendment to the constitution, the legislative body alone in its representative capacity may act.

F. E. H.

**INJURY SUSTAINED WHILE VIOLATING LAW.**

In White v. Levam, decided in 1918 by the Supreme Court of Vermont (108 A. 504) it appeared that plaintiff and defendant went hunting on Sunday; that they separated and defendant mistook plaintiff's grey hat for a squirrel and shot and injured plaintiff in head and chest. Hunting game on Sunday was expressly prohibited by statute. The court held that the shooting was an unlawful act, voluntarily done by defendant, and that he was answerable for the injury which happened to plaintiff either by carelessness or accident, and that the defense of contributory negligence would not be interposed.

This case is well supported by the modern authorities, though in conflict with many of the early New England decisions which prohibited a recovery where injury resulted to one while engaged in an act on Sunday, which act was a violation of the Sunday laws. From the maxim that the law will not permit one to take advantage of his own wrong, it follows that one cannot recover for an injury to which his wrong has contributed. The question in these cases is what constitutes such a contribution as will bar recovery, and this can only be answered by a determination whether the violation of the Sunday law is a cause of the injury or a mere condition. The mere fact that one who sustains an injury by the negligent act of another may have been at the time of such injury, acting in disobedience of the Sunday laws of this state, will not prevent a recovery from the party whose wrongful or negligent act was the proximate cause of the injury.¹ So the plaintiff may now recover for injuries received while unlawfully working on Sunday; the Supreme Court of Rhode Island holding that a recovery may be had for negligently causing the death of a person while at work on Sunday, contrary to law, the Sunday labor not being the proximate cause.² So where one is injured by reason of a defect in the highway, it is no defense that he was at the time driving at an unlawful speed, provided the latter fact did not contribute to the injury.³ The New York court has held that in an action for personal

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¹ Louisville Ry. Co. v. Frawley, 9 N. E. 594 (Ind.).
³ Broschart v. Tuttle, 21 Atl. 925 (Conn.).
injuries, the fact that the parties at the time of the injury were unlaw-
fully playing a game on Sunday, cannot be taken into consideration in
defense or in mitigation of damages. The question was much con-
sidered by the Supreme Court of Iowa in a case similar to the one
under discussion. The doctrine of the Massachusetts cases was repu-
diated and the defendant held liable. The court said: "Men go hunt-
ing on every day and no one reasonably anticipated that, as a result,
one will negligently shoot the other. As we have already indicated,
the result was not to be expected from the act of going hunting on the
Sabbath day. It was a result which, under other like circumstances,
would be as likely to happen on any other day. We are unable to
discover, on principle, any sound reason for holding that plaintiff
should be deprived of the usual remedy given him by law for the
injury sustained by the negligent act of another, because he and the
other person were both violating the law, when it is clear that the
violation of the law has no causative connection with the injury com-
plained of, and plaintiff in no way contributed to the injury of which
he complains."

G. E. H. Jr.

PAYMENT OF SALARY TO DE FACTO MUNICIPAL OFFICER MUST BE
MADE IN GOOD FAITH TO PREVENT RECOVERY BY OFFICER DE JURE.

There comes rather frequently before the Courts of this country the
question as to who is entitled to the salary attached to a public office
as between the de facto and the de jure holder of the office. Recently
the Kansas City (Missouri) Court of Appeals, on February 16, 1920,
had to decide such a question in the case of Luth v. Kansas City.1 The
facts are summarized by the Court as follows: "It appears that one
Folk was the incumbent of the office of chief clerk in the water com-
misioner's office and that under the city charter the plaintiff Luth,
was appointed in his place, and Folk refused, in part, to surrender, and
the plaintiff was finally adjudged to be the rightful claimant; that no
payments of salary were made to either for several months, when the
city paid it to Folk, notwithstanding the pendency of the injunction in
the Supreme Court. The plaintiff afterwards brought this action for

1 Etchberry v. Leiville, 2 Hilton 40 (N. Y.).
2 Gross v. Miller, 61 N. W. 385 (Iowa).
3 218 S. W. 901.
the salary accruing during the period he was deprived of the office; the city having paid it to Folk."

The Court relying on a considerable array of cases found authority for the defendant city to pay the salary to Folk, but adds that there are many cases which uphold the contrary of the proposition. Citing two leading Missouri cases\(^2\) the doctrine in that State is held to be "that a salary is attached to and depends upon the legal title to the office, and that the de jure claimant is entitled to the salary even though he has not occupied the office or performed the duties thereof." The proposition here stated is not precisely the question at issue in the Luth case. Here it must be determined whether "if the de facto officer has been paid the salary, can the de jure officer compel the municipality to pay again to him." As appears in the decision some courts answer in the negative basing their reply on the ground that, since there is no contractual right with the public to a salary, it is but good policy to protect the public from a second payment, and also upon the necessity that public official functions be performed by someone whether he be the rightful one or otherwise. The Kansas City Court of Appeals in the case under consideration,\(^3\) however, follows the lead of other courts which "qualify the rule by the statement that the payment to the de facto officer must be made in good faith." In the Walbridge case\(^4\) the following is quoted from a leading text on the subject: "If payment of the salary or other compensation be made by the government in good faith to the officer de facto while he is still in possession of the office, the government cannot be compelled to pay it a second time to the officer de jure when he has recovered the office, at least where the officer de facto held by color of title. "The case last mentioned is quoted approvingly by the Court in Gracey v. City of St. Louis\(^5\) which contains the following: "Here plaintiff was not "removed" as that term is understood in the law. What was done was not legally done, and therefore had no legal effect. Another was assigned his duties and that other was paid by the city. That was the city's affair, if it chose to take such a course with its attending consequences. Plaintiff remained in office, and the point is controlled by the general proposition of law that his right to the salary during his term, until

\(^{1}\) State ex rel. v. Walbridge 153 Mo. 194; State ex rel. v. Gordon 245 Mo. 12.
\(^{2}\) Luth v. Kansas City 218 S. W. 901.
\(^{3}\) 153 Mo. 194.
\(^{4}\) Public Office and Officers, Mechem Sect. 332.
\(^{5}\) Gracey v. City of St. Louis 213 Mo. 384 (1908).
legally removed, was independent of his actual performance of any
duties whatever.”

With such prefatory remarks does the Court in the Luth case pro-
ceed to take up the question as to whether the city “acted in good faith
when it paid the salary to Folk, the de facto clerk?” “Undoubtedly it
did not, “says Ellison, P. J., who rendered the decision. His reasoning
follows: It is enough to condemn the city that, knowing the question
which of the two claimants was the legal one was then pending in
the Supreme Court, it undertook, on the 11th of May, 1912, to have the
appeal dismissed, and succeeded in doing so; but that the court on the
21st of May had its attention called to the probable injustice and rein-
stated the case. Plaintiff notified the city on May 16th that he would
file a motion in the Supreme Court to set aside the dismissal and his
motion was, indeed, filed on May 21st, and the court shortly thereafter
decided that plaintiff was the legal claimant. We find that, with this
action of the city’s and the plaintiff’s objections to it, on the next day
after the plaintiff filed his application in the Supreme Court, paid Folk
the back salary of $1,185 in a lump sum. The work for this money
had already been performed; the city, as stated, withholding the salary
from both. In the language of Lamm, J., in Gracey v. St. Louis, the
conduct of the city in paying the wrongful claimant “was the city’s
affair, if it chose to take such course with its attending consequences,“
and the rightful claimant was there held entitled to the salary, notwith-
standing the payment to the de facto officer.” Calling attention to a
statement in an earlier case:7 “The legal right to the office carried
with it the right to the salary. The right of a public officer to the
salary is a right created by law—is incident to the office and not the
creature of contract, nor dependent upon the fact or value of services
actually rendered, the Court goes on to ask “does it not follow that,
when the city has notice of the rival claims to the office by the de
jure and the de facto officers, especially when the legitimacy of the
claims is pending in litigation, it cannot pay the de facto claimant and
thereby escape payment to the de jure officer. The question comes back
to the qualifying element of good faith, which we have already dis-
cussed, and found to be required by our courts. What right has the
city to become the partisan of the wrongful claimant by paying him
what is not his, and then set up such conduct as a bar to the action
of the rightful claimant for that which is his?“

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7 Id.
Support is found in leading cases from other jurisdictions—a New York case decided that if the city pays the de facto officer after notice that he has been decided to be the wrongful claimant to the office, it cannot defend against the de jure officer’s claim for the salary. The New York court heeded the rule of good faith in making the payment which the Missouri court recognized, and there cannot be seen any difference in the paying after notice of the decision and the attempting (as in the Luth case) to forestall the decision by paying just previous to its rendition. A case which came before the Supreme Court of Maine is also cited with approval and lest an important point be slighted by an attempt to paraphrase or condense we shall quote it as it was quoted by the presiding judge in the Luth case. “But it is contended by the learned counsel for the defendant that, admitting the foregoing propositions (as to the rights of the two classes of offenders) to be well founded, still Decelle was exercising the duties of the office in fact, under color of title upon which the defendant might well act, before his legal right was decided, and be legally protected in paying the salary to him. We think this contention, when tested by the facts of the case and well established legal principles, is unsupported by logic or sound reason. The city had full notice of the plaintiff’s claim as the legal officer, and that the title to the office was in litigation. It must be held that it knew that the legal title to the office would draw with it the salary. May it assume to determine the question of legal right between the parties before decided by the court, pay to the one having no legal title, and then successfully set up its action in defense of the claim of the one having the legal right? May A., who holds a fund claimed by B., and by C., with full notice of the claim of each, elect to determine between them, and pay to B., who has a prima facie right, and set up the payment as a defense to the claim of C., who has the legal title? It is perfectly well settled that he cannot. If he elects, it is at his peril. He is not required to do so. He may await an action at law, and then bring both claimants into court by bill of interpleader to litigate their title, or he may bring the bill at once without waiting for the commencement of an action at law. Here the city was in no peril. It might have refused to pay to either till the title to the office was determined, or by bill of interpleader, it might have brought the parties into court to litigate their title to the salary. It is

*Jones v. City of Buffalo 178 N. Y. 45.
*Andrews v. Portland, 79 Me. 484.
well settled that an office, which has attached to it emoluments, has a pecuniary value, although primarily it is an agency for public purposes, and that the right to the emoluments follow the legal title to the office. * * * The officer cannot be deprived of his office without due process of law. Can it be that, while the action of the mayor and the aldermen of Portland, in the attempted removal of the plaintiff, was illegal and void as affecting his title to his office, it deprives him of his salary, all that was of pecuniary value to him? Such a contention has no support in well established legal principles.”

M. B. C.

Bailment—Restaurant Proprietor Not Liable for Loss of Coat Handed to Waiter and Hung Near By.

The older definition of the term “bailment” make delivery the essential element.1 Such a full delivery of the subject matter must be made to the bailee as will entitle him to exclude for the time of the bailment the possession of the owner, as will make him liable as its sole custodian to the latter in the event of his neglect or fault in discharging his trust with respect to the subject matter, and as to require a redelivery of it by him to the owner or other person entitled to receive it after the trusts of the bailment have been discharged. Where the delivery can be constructive only, there must be an intention to transfer the possession.2 In a number of instances properly referring to this branch of the law, there is no strict delivery, as in the case of a finder, or an attaching officer, or a person selling goods and retaining possession for the new owner. While the bailment imports delivery, the rights and duties are based rather on “possession;” and a bailment has been held to consist in the “holding” of a chattel by some party under an obligation to return or deliver it over after some special purpose is accomplished.3

In the case of Wentworth v. Riggs,2 the plaintiff entered defendant’s restaurant, which consisted of a large room, along the walls of which, as well as around columns in the room, between the tables, were hooks for hanging wraps. Plaintiff removed his overcoat, hung it upon a hook about two feet from the table at which he had seated himself; and while he was eating his meal, the coat was removed. In giving

judgment for the plaintiff, the Appellate term of the Supreme Court held: "That the coat laid off by the plaintiff at defendant's request, was actually delivered to the temporary custody and exclusive possession of the defendant, and the defendant was therefore liable for loss."

On appeal from the Appellate Term, the dissenting opinion of that court, holding that there was no bailment, and that, in the absence of proof of negligence, defendant was not liable for the loss, was adopted by the Supreme Court, judgment reversed with costs and complaint dismissed.

In a very recent New York Supreme Court case, this rule was held to extend to a situation where the plaintiff entered defendant's restaurant, was escorted to a table by a waiter who helped him take off his overcoat, and then took his hat and overcoat and hung them upon a hook on a post near by. When the plaintiff finished his meal, and started to leave, he asked for his coat and hat, and the waiter brought the hat; but the coat was missing and never was found. In reversing the judgment of the lower court, which found in favor of the plaintiff, the controlling consideration was the fact "that the plaintiff, had he at any time so desired, was at perfect liberty to take down his coat for any purpose, or to take out anything there might have been in a pocket of the coat." Therefore, there was not such a full delivery of the subject matter as excluded for any time the possession of the owner; and no bailment. If he had wished to deposit the coat in the exclusive possession of the defendant, he should have availed himself of the accommodations which the defendant provided for that purpose in maintaining a checking stand. The act of the waiter in assisting him to take off his coat, and then hanging it upon a nearby hook was held to be one of mere courtesy, and in no way amounting to such an instument of the plaintiff's property to the defendant's care as would constitute a bailment.

J. W. H.

LIBEL AND THE LIABILITY OF PUBLISHERS.

Great as are the rights enjoyed by virtue of the liberty of the press guaranteed by the Federal and State Constitutions, they are not para-

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2 Apfel v. Whyte's, Inc., 180 N. Y. S. 712.
mount to the right of a citizen to be secure in his reputation, and this fact has been brought out libel suits against newspaper publishers.

Anything of a permanent nature—as distinguished from spoken words—which reflects upon the character of another and is published without lawful justification or excuse, is a libel, regardless of what the intention may have been. The written words need not, however, be of a defamatory character, imputing crime, fraud, or dishonesty, for it is sufficient if they hold a person up to ridicule or contempt.

Libels which have a tendency to injure a man in his office, profession, calling, or trade constitute one of the various classes into which libels have been divided, and a study of the subject shows that this class has furnished no small portion of the litigated cases. To impute to anyone holding office that he has been guilty of improper conduct in that office, or that he is incompetent, is libelous; nor is it necessary that the person libeled should at the time still hold that office, for it is actionable to impute past misconduct when in office. The words must, however, have reference to the person libeled in his office.

Malice as an element of libel need not be predicated upon actual ill will, a distinction being drawn between malice in fact and malice in law. The latter is inferred from the doing of an act intentionally without legal justification or excuse, or with wanton disregard of the rights of others. Such malice may be inferred from the falsity of the defamatory matter. It is not necessary, therefore, in establishing a libel, to show affirmatively that the defendant was actuated through malice, since the falsity of the statement, being an essential element of the offense, will, if proved, furnish proof of the malice; that is, malice will be presumed, and this presumption is conclusive.

As regards the damages recoverable in an action for libel, it may be stated, as a general rule, that proof that the libelous words apply to the plaintiff, and that his reputation has thereby been injured, entitles him to compensatory damages. If, in addition, the plaintiff can prove an intent on the part of the defendant to injure him, he may be awarded punitive damages. In the recent case of Corrigan v. Bobbs-Merrill Co. et al., 126 N. E. (N. C.) 260, the New York Court of

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Appeals held that in order to recover punitive damages from the publisher of a novel in which the plaintiff, a magistrate, was libeled, the plaintiff was bound to satisfy the jury that the defendant (1) was animated by conscious ill will toward him, or (2) did not publish the particular chapter in good faith and in the honest belief that it was fiction, but was indifferent as to whether the libelous matter would injure some real party actually referred to by the author. "Indifference as to the rights of others," says the Court, "such as might be found from the fact of publishing scurrilous comment without reasonable investigation, is the equivalent of the intentional violation of such rights."

With reference to newspaper comment upon the actions of public officers, the weight of authority seems to support the view that in their averments of fact newspapers must adhere closely to the truth, though lack of truth in their criticisms would not, of course, be actionable.

In Corrigan v. Bobbs-Merrill Co., supra, a New York City magistrate sought to recover punitive damages for libelous matter concerning him contained in an ostensibly fictitious novel, of which the defendant company was the publisher. The matter was plainly libelous and implied an intent on the part of the author to maliciously vilify the plaintiff. The defendant pleaded among other things that it published a supposedly fictitious narrative in good faith. The plaintiff endeavored to charge the defendant with knowledge of the libel through the knowledge of its agents. Evidence was admitted, and excepted to by the defendant, showing that the manager of the defendant's dramatic department assisted the author on the manuscript and galley proofs of the novel, during week-end visits at the latter's home. There was also evidence connecting with the author, the defendant's literary editor, and the chief manuscript reader, who was familiar with the manuscript.

The case was brought to the Court of Appeals of New York by the defendant on an appeal from the judgment of the Supreme Court, Appellate Division, modifying by reducing the verdict and, as modified, affirming the judgment of the lower court for the plaintiff. The question before the Court of Appeals was whether or not the plain-
tiff had properly proved his case. *Held*, that the plaintiff was clearly entitled to compensatory damages; that the knowledge of its chief manuscript reader was imputable to the defendant; but that the knowledge of its dramatic manager was not so imputable, since his knowledge was not acquired within the scope of his authority. It was also held that the evidence on this last point was improperly submitted to the jury. The nature of such evidence was, of course, to aggravate the damages, and inasmuch as the Court was not free to assume that the effect of the admission of this evidence was counteracted by the fact that in the Appellate Division the verdict was substantially reduced, the judgment was reversed and a new trial granted.

E. F. B.
RECENT CASES.

Street Railroads—Driving on Trolley Tracks Outside of Traveled Path Not Negligent as a Matter of Law.

The plaintiffs were driving an open wagon after dark from Framingham to Boston and on account of the extreme depth of snow in the road turned into and drove along the tracks of the defendant company. The wagon was run into from behind by one of the defendant's cars, the plaintiffs injured and their property damaged. The tracks were situated along the side of the road and outside of the regular traveled path.

The evidence showed that a lighted lantern was attached to the rear of the wagon and that the motorman had turned out the headlight of the trolley car upon approaching an automobile and when he turned on the light again, saw the wagon for the first time, but was too close to it to avert the collision. No whistle or gong was sounded until about a half a second before the accident.

Held, that in view of the depth of snow it was not negligent as a matter of law for the plaintiffs to drive along the tracks even though they were outside of the regular traveled path, they not knowing a car was coming and not hearing any warning signal, as they were entitled to rely upon the assumption that a motorman would use ordinary care to avert a collision.

The court further held that it was a matter for the jury to find that a street railway motorman, if the headlight on his car was not lighted, was negligent in driving his car at the particular rate of speed without ringing the gong or sounding the whistle particularly when vehicles might be expected to be on the car tracks to avoid the deep snow. (Hermann Bros. Glass Co. v. Middlesex & Boston Ry. Co., Supreme Judicial Court of Massachusetts, March 1, 1920, 126 N. E. 283.)

Carriers—Limitation of Liability—Interstate Commerce—Intent—Wilful or Wanton Negligence—Gratuitous Passenger.

Plaintiff, an employe of the defendant road, found it necessary to make a hurried trip to a point in an adjoining state. In order to save time, he chose the shortest route, which would have taken him from
RECENT CASES.

A, the starting point, to B, over defendant's line, from B to C, over another road, and from C to X, the destination outside the first state, over defendant's line. He had an annual pass between A and B, which line was wholly within the state, and was to obtain a trip pass at C for the interstate journey from C to X. The annual pass contained a stipulation releasing the carrier from liability for negligence, which stipulation, under the public policy of the state, was void. The train running from A to B, on which plaintiff was a passenger, came to a stop at a station and the second section of the train ran past two block signals indicating danger ahead, and collided with the rear car of the first section, in which plaintiff was riding, causing him serious injury.

Held, that the pass on which plaintiff was traveling at time of the injury, was a written contract for an intrastate passage only, that his intention to travel beyond the borders of the state did not change the terms of the contract, and that, therefore, he was an intrastate passenger, so far as that part of his journey was concerned, and the contract was subject to the laws of the state, so that the stipulation releasing the carrier from liability for negligence was void, in accordance with the public policy of the state. A minority opinion, also holding the release to be of no effect, was based on the ground that the evidence showed the injury was caused by wilful and wanton negligence on the part of defendant's servant, against which even a trespasser is protected. (New York Central R. R. Co. v. Mohney, U. S. Supreme Court, Oct. term, 1919).

J. J. H.

RAILROADS—FINDING OF INVITATION TO NEWSPAPER EMPLOYEE RECEIVING PAPERS AT BAGGAGE CAR WARRANTED.

In a tort action to recover damages the evidence showed that it was the usual custom for the plaintiff and other newspaper employes to take bundles of newspapers from the door of the baggage car where they were placed by the baggage master. This "system was in vogue for a year or so" before the time plaintiff was injured by the baggage master negligently pushing a bundle of papers out of the door on plaintiff. In the lower court defendant asked for a directed verdict, contending that under the law plaintiff was a mere licensee, which was refused.
Upon appeal the upper court held that as defendant had knowledge of the delivery system used by its employees, whereby the plaintiff and other newspaper men took the papers from the door of the car, that there was an invitation to plaintiff to receive the papers at the car door and as the defendant by acquiescence invited the plaintiff to receive the papers in the manner described, it was their duty to use ordinary care and that as the act of the baggage master was negligent, plaintiff could recover. (Belyea v. N. Y., N. J. & H. R. R. C., Supreme Court of Massachusetts, Suffolk, Feb. 28, 1920, 126 N. E. 282).

I. J. F.

MARRIAGE—COMMON-LAW MARRIAGES BINDING.

The defendant in the Court below entered into a common law marriage with a woman and by her had three sons during the seventeen years they lived together. At the end of this period, Hummel, with the consent of the mother of these children, married his stenographer, and agreed with his common law wife that she would stay with them to keep house. Shortly after the marriage took place, the mother became dissatisfied and, with her children, voluntarily left the defendant’s house and went to her father who cared for them. Hummel was not asked, and did not offer, to provide for the children and the Court below, for his failure so to do, gave him a maximum penalty under a statute which made it an offense “wilfully to neglect to furnish necessaries, clothing, shelter and medical attention to his children.”

Upon appeal, counsel for defendant contended that, since the children were being provided for and no demand had been made to Hummel to provide for them, he could not be successfully prosecuted for wilfully neglecting them, and called the Court’s attention to the fact that there was no legal precedent in the United States permitting prosecution under such circumstances, but the Court held that they did not hesitate to establish a precedent for Indiana in such cases in holding that it was the unescapable duty of the father to create a shelter under which the children could safely live, and said that “to furnish shelter must be held to mean more than simply protection from the weather. It means a home with proper environment, and not a place where the depravity of the father, along with the vicious immoral conduct of others, will destroy the moral sensibilities of the child, and train it to a life of immorality and lawlessness.” The Court further held that where a common law marriage agreement exists and the
two have held themselves out as man and wife, this marriage cannot be cast aside by their own caprice any more than they could annul a statutory marriage by mere mutual agreement, and, therefore, the second marriage was bigamous. (Hummel v. State, 126 N. E. 444).

J. C. W.

This is an action for recovery of damages by the administrator of the deceased because of the latter's death alleged to have been caused by the negligent operation of one of the railway company's trains over a section where it crossed a public highway, over which crossing the decedent was traveling when killed.

The plaintiff, in his declaration, made a number of statements upon which he based his prima facie case. The defendant moved the Court to require each statement in the declaration to be made more specific "by alleging facts to show what duty the defendant owed to the decedent" with respect to each averment of negligence and to show how the duty arose. This motion the Court overruled. A verdict was returned for the plaintiff, and the defendant moved for a new trial, upon the grounds of errors of law in rejecting defendant's motion and in instructing the jury. The Appellate Court of Indiana held that the lower Court was correct in refusing to grant defendant's motion to have the declaration stated in more specific terms, for the reason that it is only necessary to set up a prima facie cause of action in a declaration, and upon the plaintiff's failure in this respect the remedy would have been by demurrer; and the Court also held that, while there were a few inaccurate statements in the instructions, when considered in the entirety it was apparent that the inaccuracies were not of such a character as would tend to mislead the jury in the law of the case. (Railway Co. v. Nichols, 126 N. E. 443).

J. C. W.

Attachment—Fees of Attaching Officer Holding Automobile After Ten Days Within Discretion of Court.

This was an action by Helliwell Garages, Inc., against Feinberg. The trial judge found that at the day of the attachment the defendant's automobile was stored on the premises of the plaintiff, where it remained during the entire period for which as part of the plaintiff's taxable costs the officer's charges for the attachment custody, and keeper's fees are claimed. The defendant contends that charges for
the custody of personal property is limited by Section I of the Statutes to "not more than two dollars for each day of not more than eight hours for the keeper while he is in charge, and not more than a dollar a day for the officer for a period not longer than ten days" and that the officer after ten days having discharged the keeper and moved the automobile from the third to the first floor of the building, where it was secured by a chain fastened and locked across the rear wheels his fees are excessive. The return shows a charge of ten dollars only for custody, which amount being permitted by statute, the defendant's complaint is restricted to the item for keeper fees. The amount is also regulated by statute, leaving the amount to be determined by order of Court.

_Held,_ the amount if greater compensation is asked is expressly left to the sound discretion of the Court, which is reviewable only for manifest error of law. The defendant's requests in so far as not given were rightly denied, and the order dismissing the report should be affirmed. (Helliwell Garage, Inc. v. Feinberg, Supreme Court of Mass., March 5th, 1920, 126 N. E. Reporter 476).

**Brokers—Stockbrokers Carrying Stocks on Margin Not Liable to Customer as for Conversion.**

Plaintiff's alleged claim grows out of certain stock transactions handled by the defendants as his brokers. Prior to the opening of his account with them the plaintiff had a margin account with Nickerson and Co., a broker in Boston. In April, 1916, on orders given by him, the securities which he had on margin were transferred from Nickerson and Co. to the defendants, the latter paying to Nickerson and Co. the amount of the indebtedness for which the plaintiff's securities were held as margin. The plaintiff's account with the defendants was a margin account and ran until December, 1916. He visited the Boston office almost every day. Most of the orders to buy and sell were signed in plaintiff's name by one Kane, an employee of the defendant's, whose advice he followed. During the summer, fall and early part of the winter, the market was falling; in December the defendant called upon the plaintiff for additional margin; and upon his failure to comply, they sold or pretended to sell practically all his securities during that month. Plaintiff brought this action to recover the value of the securities received by the defendants from Nickerson and Co.
Held, that where, as here, there is a contract between a Boston customer and a New York stockbroker for sale of stocks on margins made and to be executed in Boston, and the securities received as margin were taken over from Boston broker, were mostly acquired in such city, and the orders to buy and sell were given at the Boston office of the brokers, the legal title to the stocks carried on the margin was in the brokers as between them and their customer, and they are not liable to him as for a conversion, which is true both of stocks bought on margin by the brokers themselves and those deposited with them when the account was transferred from the Boston broker to them. (Crehan v. Megarel et al, Supreme Court of Mass., March 20, 1920, 126 N. E. 477).

Entrapment—Evidence of Intent.

Defendants were convicted under an indictment charging them with a violation of the espionage act of June 15, 1917, by distributing a certain book denouncing the army and navy. Held, that the purchase of the copies of the book from the defendants by officers of the law was a lawful procedure in the detection of crime, and not an inducement to commit a crime; that on trial of defendants, other publications distributed by them were admissible in evidence as tending to show the specific intent with which the book had been circulated. (Partan, et al, v. U. S. Circ. Ct. App., 9th Circ., Dec. 1, 1919.) J. J. H.

Indispensable Parties—Jurisdiction—Quieting Title—Receivers.

Plaintiff, claiming a life interest in certain real estate, brought suit against tenants who were in possession under a lease from an agent deriving authority through an instrument under which he claimed a half interest in the rents from the property during the life of plaintiff. The plaintiff and the agent were residents of the same state, and the property was situated in another state. The agent and his assignee intervened and were substituted as defendants. A receiver was appointed on petition of the plaintiff. Held, that a court of equity will not render a final decree which will seriously affect the interest of one not a party to the suit; that the substitution of parties, resulting in making the controversy one between citizens of the same state, will sustain the jurisdiction of a federal court, even though the property is
situated in another state; that where the defendant is in possession, a suit to quiet title cannot be maintained, but plaintiff must seek his remedy at law; that where a receiver has been appointed at the instance of the plaintiff, and it is decided the court is without jurisdiction, plaintiff is responsible for the costs and expenses of the receivership, and all property seized must be redelivered to defendants. (Fryer, et al v. Weakley. Circ. Ct. App., 8th Circ., Oct. 30, 1919).

J. J. H.