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LEADING ARTICLES

What is a Precedent? William Cleary Sullivan............. 1

An Appreciation of the Williamstown Institute of International Law and Politics. Part II. Richard S. Harvey............. 10


Book Reviews............................................. 35

Notes and Comments...................................... 45

Recent Cases............................................. 72

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WHAT IS A PRECEDENT?
By William Cleary Sullivan

In common parlance a precedent is that which we follow because the same thing has been done before in the same way, and it has become recognized as the proper thing to do and way to do it. It may have been done but once before, or it may have been many times, but when used as something to follow it is a precedent. Such is the meaning of the term in common parlance, and it has no different meaning in legal language.

When in the law we speak of a precedent, we may mean either a form of contract, will, pleading or the like, or the decision of a court. In these pages, however, we shall deal only with the latter phase.

Of course, every court decision is not a precedent of equal value or application. Much depends upon the relations of the court in which it is cited to that which rendered it, of the facts of the one case to those of the other, and of the parties litigant to the respective cases.

Courts have been established for the purpose of putting an end to controversies between man and man. The primary purpose of their creation is to settle such matters. Of course, the aim is to settle them properly, according to right and justice, but that is a secondary consideration. The public welfare requires that they be settled once and for all, whether rightly or wrongly, and the public welfare is superior to all matters of private concern. The major purpose, therefore, in establishing courts of justice is to settle controversies and to prevent them arising. The latter purpose, the prevention of controversies, is accomplished by making the rules of law as definite and as certain as possible, and this end is served in court decisions by allowing them to become precedents.
When a court has once fully considered any question, and rendered its decision thereupon, there is little likelihood of a different decision each time that question again comes before the same court. To leave the matter open for reargument on every occasion, therefore, necessarily wastes the time of the court and delays other litigants in bringing their cases to a hearing, and serves also to greatly increase the cost of litigation. These considerations alone are more than sufficient to justify the courts in acting to overcome them. But they are nevertheless of minor importance in comparison with the real, outstanding object of the court in following precedents, which is to effect the purposes of their creation, namely, to terminate and prevent controversies and enable the people to know by what rules they may govern and regulate their affairs with an assurance that in so doing they are conforming to the requirements of the law. Indeed, any other mode of procedure would produce endless confusion. If the subject-matter of each court decision should be left open for reconsideration on every occasion upon which it arises in court, the situation would be intolerable in any business community.

The theme of our discussion, for present purposes, may be conveniently divided into three parts, namely: I. Stare Decisis; II. Obiter Dicta; III. Res Adjudicata.

I. STARE DECISIS

The doctrine which bears this name means to adhere to decided cases and not to disturb matters which have become established. It is only in instances of clearly and palpably erroneous decisions that the court will reverse a decision to which this doctrine is applicable. But it is not sufficient that it be made to appear, merely, that the decision is clearly and palpably erroneous, to effect a departure therefrom, but it must further appear that correcting the mistake so made will be beneficial to the public, for here as in all other matters the public benefit is the deciding test, and an erroneous decision will be overruled, so far as the application of this doctrine is concerned, whenever and only when the public interest requires it. But when the decision is itself overruled it has not the effect of changing the ruling, that is the judgment or decree, in the case in which it was rendered.
The rights of the parties to that particular case were settled by that decision once and for all. The overruling of it only affects the rights of other parties in cases which have not passed into final decisions of the court.

The only decisions which come within this doctrine are those of the individual jurisdiction. The doctrine does not apply in the State of New Jersey, for example, to any decision of a court of the State of New York, nor does it apply in a State court to a decision of the Supreme Court of the United States upon any other than a Federal question. It applies only to courts of last resort. Thus, in the District of Columbia, the doctrine has no application to any decision other than that of the Supreme Court of the United States or of the Court of Appeals of the District of Columbia, and when the latter court has once spoken the doctrine has full application even on a question reviewable by the Supreme Court of the United States, until it shall have pronounced judgment.

To courts of coordinate jurisdiction, it of course has no application. Thus, there are six Justices of the Supreme Court of the District of Columbia, all of equal authority, yet should the same question be presented to each one of the six Justices of that court, and be susceptible of six different decisions, and be decided differently by each of them, the doctrine *stare decisis* would not be violated or infringed upon in so doing; yet as a matter of practical convenience and comity, in most cases, after the question has been passed upon by one of the Justices, the other five will adopt and follow his decision, for the purposes of uniformity of decision, thus recognizing the principle upon which the doctrine itself rests, and in the exercise of their individual discretion giving application to it under circumstances in which they are not required so to do.

What is termed the "Rule of Property," though often discussed as a separate doctrine of law, is in reality but a branch of that which we are now considering. Yet the doctrine *stare decisis* is more strictly and vigorously applied as a rule of property than in any other case. If by court decision a rule has become settled determining questions of title to real estate, whether in the matter of conveyance, descent or otherwise, or determining questions of contract
rights, in their construction, validity or otherwise, the courts will move much more slowly in refusing to follow such decision than in other cases, and this is most true in the case of title to real estate. Such is the rule of property.

But whether we consider the broad, general doctrine, or view it only in its narrower application as a rule of property, the question whether it does or does not apply is to be determined academically. If the case is one to which the doctrine does apply, it matters not that it may be proved that the parties knew naught of the preceding decision, or even that it may be established as a matter of fact that no one ever acted upon it. On the other hand, if the case under consideration be one to which the doctrine does not apply, it cannot be made to do so by showing that it has been universally followed and applied to such cases, even in determining title to real estate.

As we have seen, the doctrine *stare decisis* applies only to the jurisdiction in which the particular decision or decisions was or were rendered. Yet, in actual practice, the number of decisions cited in court opinions from other jurisdictions far outnumber those from its own. Such foreign decisions, however, are often cited side by side with those which are local, and yet their status in that opinion and for the purpose of that case is altogether different. The local decisions are cited as binding, just as binding as a mandatory provision of a statute, but the foreign decisions are cited because of their persuasive effect, from the force and strength of the reasoning which is either expressed or inherent in them. Local decisions of courts of last resort are therefore binding and conclusive under the doctrine *stare decisis*. Foreign decisions have a certain persuasive effect, just as any argument or reasoning addressed to the court. In the last analysis, they depend upon their own logic and strength of reasoning, except only in those instances in which, because of the force of their numbers, they are regarded by the court with an awe and respect closely akin to that of local decisions.

Yet a decision of a foreign jurisdiction may indirectly become clothed with all of the majesty of the doctrine *stare decisis*, and this may be equally as true of the decision of a court of the most inferior and limited jurisdiction as of a
WHAT IS A PRECEDENT?

court of last resort. If the Court of Appeals of the District of Columbia, for example, in disposing of a case, states a principle of law for which it cites as authority the decision of some Justice of the Peace in a backwoods section of the country, it thereby adopts that decision as part of the law of the District of Columbia and makes it a part of its own decision, with the result that so far as the specific point to which it is cited is concerned it becomes just as much a part of the law of that jurisdiction as anything else stated in such opinion of the Court of Appeals.

II. Obiter Dicta

In examining and analyzing any court decision, we must bear in mind that the decision of the court is always limited to the facts of the case before it. It is those facts which the court has in mind and to those facts it directs all of the language of its opinion. This is true of local as well as of foreign decisions, theoretically at least. Courts sometimes, in their opinions, stray afield and give a general dissertation upon the subject under consideration, including aspects of it which have no application to the case before them, and frequently they use much broader language than the facts of such case call for or justify. When we come to examine such opinions, bearing in mind that in the briefs and oral arguments of counsel before the court attention was riveted upon the specific facts of that case, neither counsel nor their client having any interest in presenting a general treatise on the law of the subject, we readily realize that the attention of the court has been but incidently directed to anything more than such specific facts, and it may be that upon another set of specific facts differing substantially from those there under consideration the court might well, after hearing arguments, reading briefs and considering the case, reach a conclusion at variance with the broad language so used. Hence it is that, if a substantial difference in principle can be found between the facts of two cases, however broad may be the language of the decided one, it is not controlling under the doctrine stare decisis and is of no weight if a foreign decision.

Where we seek to distinguish a case upon the ground that its language is too broad for its facts, we do so upon the rule
that the language of a court opinion is limited to the facts of the case before the court, which rule is but a branch of the broader doctrine known as obiter dicta, which means that nothing in an opinion not necessary to the decision of the question before the court constitutes a part of that decision, to which broader doctrine we resort when the language from which we seek to distinguish our case is not merely too broad a statement of the principle announced by the court in deciding the prior case, but is language not at all necessary for that decision. Illustrations and analogies given and drawn by the court are not necessary to the opinion and therefore fall within this doctrine. Consequently, as often happens, when there are two or more conflicting lines of decisions and the court proceeds to analyze both of them and to show that under either the particular case is to be decided in the same way, while the decision becomes stare decisis upon the specific point decided, it does not determine which of the two lines of cases is correct, nor does it adopt either of them for its own jurisdiction. But if the court decides a case upon two or more grounds or points, expressing or clearly implying its approval of each or all of them, then it cannot be said that any particular one of them was not necessary to the decision of the case but all fall within the doctrine stare decisis so far as its jurisdiction is concerned, unless of course any two of them happen to be so conflicting and contradictory of one another as that both cannot logically stand together.

A practical qualification of the doctrine obiter dicta and as well of its narrower offspring, the rule that language of courts is limited to the facts of the case, must not be overlooked. They apply with full vigor and force to foreign decisions, but despite this doctrine and rule such decisions have and are entitled to great weight upon inferior courts in their own jurisdiction. Though those portions of opinions which fall within the doctrine or rule stated are naturally not entitled to equal consideration with the specific point decided by the court, yet they are some indication that the court leans in that direction, and while they are not binding upon that court itself or upon inferior tribunals, it would require a judge of unusual hardihood to entirely ig-
WHAT IS A PRECEDENT?

III. RES ADJUDICATA

Like the two doctrines which we have already considered, it has a broad significance as well as a narrow application under a rule carrying a distinct designation, namely, law of the case. It deals, however, not with principles decided but with the facts of the decision and the parties to the cause.

The doctrine res adjudicata is, that a final decision upon any state of facts is binding upon the parties and those in privity with them in all future litigation upon the same or identically similar facts, and in all jurisdictions whatsoever. Indeed, it is not limited to the identical facts involved in the prior case but it includes all facts which might properly have been brought into that case as part and parcel of it. It is sometimes said that set-off is an exception to the rule because, even though a defendant does not plead set-off in defense he may still sue upon it independently, but this is not in reality an exception to the rule. It is because set-off cannot be pleaded in defense as part and parcel of the suit in which it is pleaded. Set-off when pleaded is considered a separate and distinct suit brought by the defendant at the time of filing the plea, so much so that the statute of limitations interposed thereto runs not merely to the date of the original suit but to the date of the filing of the plea of set-off.

Res adjudicata, as we have seen, deals with the facts and the parties, rather than with the principles of law decided. It differs from stare decisis in that the latter applies to the points decided regardless of the parties to the cause while the former applies to the parties and their privies in relation to the specific facts involved, rather than to the points of law. Stare decisis and res adjudicata also differ in that the latter applies to any final decision of the case, whether of a court of last resort or not, and whether in the same or a different jurisdiction, while the former applies only to the decisions of courts of last resort in the same jurisdiction.

But there is a subdivision of the doctrine res adjudicata, known as the law of the case, which deals not with final but only interlocutory decisions, and it has reference to the decisions of appellate rather than trial courts. Thus, should
a question be raised on demurrer or preliminary motion, the decision of the trial court thereupon is not binding at any subsequent stage of the case; but should the case after decision on demurrer or by verdict go to the appellate court and be there reversed, that decision is binding and conclusive in every subsequent stage of the case, on both the trial and the appellate court, until such time, if at all, as the case shall reach a higher appellate court.

With one final observation, we will close these rambling remarks. It is one which has equal application to all of the doctrines and rules we have been considering.

A court decision often has a broader and greater significance than appears upon its face, particularly in the opinion by which it is expressed, for while the action of the court in sustaining an objection made upon several grounds or in reversing a judgment or decree, a reversal of which was sought for varying reasons, is an adjudication only upon the grounds and reasons assigned by the court. This is not so as to any action of the court either overruling an objection or affirming a judgment or decree, and the reasons for the difference is quite obvious.

If the objecting party bases his objection on ten separate and distinct grounds and the court sustains the objection without assigning any reason, there is no way by which it can be determined upon what ground the court did so decide. We cannot say that it sustained all of the points made, for obviously nine of them may not have met with its approval, nor can we say which was the one or more that found sanction in the judicial mind. The result in such a case is, that we know only that the court decided that, upon the specific facts of that case, there was something objectionable, but what the objection was is not disclosed. The decision in such a case, therefore, is res adjudicata, stare decisis, law of the case and/or rule of property only upon specifically identical facts. It is no more than a dictum upon each and every of the ten points or grounds of objection presented to the court for consideration. Yet, if the court selects some one or more of the ten grounds of objection so raised, or ignoring all of them states some one or more reasons of its own, we know the point or points so passed upon, and they
WHAT IS A PRECEDENT?

fit into the several doctrines and rules which we have been considering and are the only ones which do so.

On the other hand, taking again the same case in which ten objections are presented, or it may be one involving five hundred, if the court overrules the objections or the appellate court affirms the judgment or decree, even without giving any reason whatever for its action, the result is to deny each and all of the contentions so made, and thereby to make the decision *res adjudicata*, law of the case, *stare decisis* and rule of property upon every ground of objection so overruled.

As it is a matter of common occurrence for courts, in writing their opinions in cases involving many points, to consider but a few of them and make no mention of others, it will readily be seen that some of our most valuable precedents are to be found, in cases of affirmance, by examination of the records of those cases, to ascertain what points were presented to the court, and thus upon what grounds the decision is based, for whether the objections raised be one or a thousand the trial court cannot overrule them nor can the appellate court affirm the judgment or decree appealed from, without denying the soundness of each and every one of them as applied to the facts of that particular case, and such denial whether expressed or implied is equally effective under the doctrines we have been considering.

Each of these doctrines has been the subject of voluminous writings. Their ramifications and qualifications are legion. In the scope of such a paper as the present it is impossible to do more than briefly glimpse them and point to each reader the doors which he may open and explore to suit his own needs and requirements, and it is hoped that such explorations may be conducted with profit and advantage.
AN APPRECIATION OF THE WILLIAMSTOWN INSTITUTE OF INTERNATIONAL LAW AND POLITICS

PART II: ROUND TABLE CONFERENCES.

IN my previous article I endeavored to do justice to the addresses delivered before the Williamstown Institute of International Law and Politics during its second session, which closed August 25; but the series of Round Tables, conducted for the most part under the leadership of distinguished instructors drawn from our American Universities, constitute a somewhat more complex subject and one not easily described.

Perhaps this difficulty arises from the nature and scope of the plan itself, which is unique in the history of educational conferences, either in or without the United States; perhaps it arises from the fact that the conclusions resulting from these discussions were “open decisions openly arrived at” only so far as the members assigned to each of those conferences were concerned; perhaps it is due to the conflict of dates necessarily resulting from a schedule which allotted three meetings per week to each of the fourteen Round Tables—but, whatever the cause, as an honest chronicler of this phase of the Institute’s work, I must admit inability to attend all the meetings, even though this confession causes my narrative to sink into the class of hearsay evidence as to those doings which transpired in my absence.

When enumerating the various Round Tables which Dr. Garfield and his associates in the management provided for discussion of those vital world-topics now uppermost in the public’s mind, I shall—for convenience’s sake—retain the official numbering, with mention of the respective leader or leaders who presided over each group.

1. Foreign Policies of Soviet Russia.
   Dr. Alfred L. P. Dennis, Washington, D. C.

2. Problems of Eastern and South Eastern Europe.
   Professor Tobert H. Lord, Harvard University.

   Dr. Adam Shortt, Ottawa.
   Professor Jesse S. Reeves, University of Michigan.
5. New Questions on International Law.
   Professor George Grafton Wilson, Harvard University.
6. Central America and Caribbean Area.
   Dr. Leo S. Rowe, Director General Pan-American Union.
   Dean John H. Latane, Johns Hopkins University.
8. The Pacific Ocean and Its Problems.
   Professor George H. Blakeslee, Clark University.
   Dr. Stanley K. Hornbeck, Washington, D. C.
    President David P. Barrows, University of California.
    Rear Admiral Austin M. Knight, U. S. N., Retired.
11. The Rehabilitation of Europe.
    Dr. B. M. Anderson, Jr., New York.
    Mr. Paul D. Cravath, New York.
    Mr. David F. Houston, New York.
    Mr. Paul M. Warburg, New York.
12. The Problem of Interallied Debts.
    Mr. Oscar T. Crosby, Former Assistant Secretary of the Treasury, Washington, D. C.
    The Honorable W. S. Culbertson, Vice-Chairman of the Tariff Commission, Washington, D. C.
    Mr. Arthur S. Draper, London.
    Mr. Walter S. Rogers, Washington, D. C.

Official assignments allocated Institute members to those meetings for which their training and experience indicated they possessed special fitness; but as sessions were on alternate days, a second choice was permitted for the "off" days; indeed, many assumed the right to a roving commis-
sion that carried them into numerous camps. Thus it happened that while the assigned members were dependable attendants at their respective Round Tables—on “off” dates members would flock to sessions where debates of a highly interesting or even strenuous nature were known to be in progress. The rule as to secrecy and confidential communications was abrogated in certain Round Tables, particularly those numbered 11 and 12, the reason being that the subjects there under discussion had a public interest and were well within the scope of the burning issues of the day. The value of advice upon topics of that nature is so largely ephemeral that to delay or limit publication of the opinions of the experts in attendance or who officiated as leaders might cause the information to grow stale and to postdate the occasion when it could be of practical service. Accordingly, in those instances publicity was not only permitted, but encouraged.

Upon arrival at Williamstown on the opening day of the session, July 27, I learned that my assignment attached me to Round Table No. 5, which had for its theme “New Questions on International Law.” Among my co-members were representatives of the Army and Navy and State Departments of the United States Government, an Ambassador from a European country, and at least one President of a State University. The legal profession was not permitted to absent itself (even if its members had so desired), from a conference board where novel propositions of such a highly important nature were up for discussion—topics among which might even be discovered fit subjects for intellectual vivisection. Accordingly, I found in attendance there a member of the bench, together with law professors from leading universities. The well-known authority and expert in charge of Round Table No. 5 was Professor George Grafton Wilson, of Harvard University, and also of the U. S. Naval War College, occupying in each of these institutions the chair of International Law. Recognition of his ability as a publicist extends beyond the confines of the United States, as witness his election to membership in Institut de Droit International—a body to which the League of Nations is accustomed to refer its problems when in search of legal advice on knotty points.
Professor Wilson's method of procedure was to occupy an hour of his allotted time in a careful presentation of his topic for the particular meeting, with references to authorities where the problem admitted of consideration from various angles; and the remaining half hour was devoted to comments and queries with the purpose of extracting information and ideas to illuminate the dark places. Illustrations drawn from the practices of different countries where exigencies in statecraft had arisen in similar situations were sometimes presented, and the practical solution was frequently educed. In numerous instances these communications were confidential, and secrecy was enjoined.

Among the "New Questions in International Law" I will mention: (A) The status and jurisdiction of the International Court of Justice, organized in 1921, and which is now functioning at The Hague. This judicial institution has power to render judgments as to some twenty countries, which have agreed to be bound by its decisions. As yet it has no actual means of enforcement, outside of moral force; but doubtless equitable principles and considerations backed by public opinion are a power that will suffice in most cases. (B) The right to limit or otherwise regulate immigration. Here the decision of the individual state is supreme and controlling, as witness our exercise of that power when enacting the restriction that the incoming foreign population shall not exceed 3 per cent of American residents drawn from each nationality, as shown by the Census of 1910. (C) The creation of buffer states by neutralization as an international expedient was examined and found altogether wanting as a practical safeguard in time of war. The substitution of mandates is an expedient of uncertain value, because as yet it has not been put to actual test in international law. (D) The right of "angary" namely, the right to seize neutral ships and employ them, with compensation —was found to be a power exercised in medieval times; but this right was unused and almost forgotten until revived by the application of that doctrine or principle through the taking over of the Dutch steamships in the harbors of the United States. After an interesting discussion, it was the consensus of opinion that this ancient right, though so long dormant, was not only alive, but in full force and effect;
and its employment did not violate international law.
(E) Doubtful points as to the use of gas and submarines were largely settled by the recent Washington Conference on the Limitation of Armaments. The substantial gains resulting from the Conference show the advantages of a prior understanding as to probable limits to which each state agrees to be bound; and also through the use of accurate statements by the power calling the Conference together—in this instance the United States.

Having by taste and training a somewhat natural bent and predilection for subjects savoring of international law, my alternative choice lay with Round Table No. 4—"State Succession and Peace Treaties." The proceedings at that board were of a most interesting and absorbing character; but treatment of the several topics being by the Socratic method of question and answer, it is hardly feasible in this brief summary to present an account and appreciative description of those timely discussions.

The vexed question of allegiance in mandated territory was actively debated but no general conclusion could be reached. The complications were so numerous and puzzling that the question appeared to be one which might well demand decision by the International Court of Justice now in session at The Hague. Participation by bond-holding creditors ratably in the funded debts of the much-divided territory of Central Europe also received careful consideration; but in every instance the underlying facts seemed to demand some novel form of application of old-established equitable principles. Needless to add, it was not disclosed that any of the newly-formed states are actively desirous of and eagerly insisting upon allotment of a proportional share of the tax burden of its predecessor. Upon its face, leadership in a Round Table conducted upon the Socratic principle seems the most carefree of undertakings and the heart of the professor warms to it; but this appearance of simplicity is most deceptive. To impart instruction by the medium of open discussion calls for a consummate degree of experience and skill. The guiding hand must be always ready; yet art must conceal the art. Professor Jesse R. Reeves has acquired this skill during his occupancy of the Chair of Political Science at Ann Arbor; and in his further
service as a Captain in the Air Service and as Instructor at
the Staff School of the War College, as well as in the Judge
Advocate's Office. These varied experiences, taken to-
gether, have supplied him with excellent equipment for the
management of seekers after wisdom; and at no moment
was the gathering in the least danger of "getting out of
hand," although discussions might grow strenuous and
develop a warmth almost tropical. Furthermore, the
Socratic system implies that when in successful operation
the gap between the instructor and the instructed shall not
be too great; for otherwise how can intelligent responses to
questions occur. Naturally, Professor Reeve's "Class" was
neither juvenile nor frivolous—as Round Table Leader,
sedate Generals and bronzed Admirals came within his ken.
But none the less the guiding hand was an always present
and necessary factor; and the ability to answer the not
impossible query that might at any moment be propounded
was a factor that was nowise lacking and made largely for
success. For instruction purposes, the Socratic method is,
indeed, an effective method of procedure—when you have
the knowledge to fill in the gaps, and the art to conceal your
art.

Reverting to those weeks of educational experiences amid
Berkshire settings, I find some general conclusions that
occur to me, albeit they are only matters of individual
opinion, and are binding upon no other person than myself.
Among these generalisms, I may be permitted to record my
belief that while the learned addresses by statesmen, jurists,
and publicists were appreciated by the members of the In-
stitute and attracted throngs from our commercial centers
as well as from the summer colony which is domiciled in
those tri-State uplands—nevertheless, the people of the
United States in coming years will derive their greatest
measure of benefit from the Round Tables discussions. It
was the "still small voice" which transmitted the message
from Sinai; and it will be the quiet but abiding confidence
gained by persons seeking solutions of these intricate prob-
lems of international law and politics which will transform
the returning educator into a more forceful advocate of high
ideals. When these ambassadors of education realize their
views have found lodgment in the minds of other pioneer thinkers on the questions of the day, knowledge of that fact will tend to establish a higher degree of confidence and to confirm them in the faith. And who can estimate the potential effect and value of even one such experience?

Richard S. Harvey.
WAS THE TREATY OF THE HOLY ALLIANCE
AN UNHOLY FRAUD? A QUESTION
OF EVIDENCE

The great wars of modern times have been followed closely by the appearance of suggestions and plans designed to prevent or minimize wars. Some of these plans have ripened into international agreements. Of these agreements, the two most noteworthy are the Treaty of the Holy Alliance of 1815 and the Covenant of the League of Nations of 1919. Each agreement in terms aimed to establish among all civilized nations a League of Perpetual Peace. The League of Nations is still on trial while wars between second and third rate powers are disturbing the world's peace and shadows of impending conflicts are lowering over the great nations of Europe.

The avowed purpose of the Treaty of the Holy Alliance was to make the precepts of the Christian religion the rule of conduct for all nations in their internal and international affairs. The original signatories were the sovereigns of Russia, Austria and Prussia. Within two years after its execution it was signed by all the Christian States, with the exception of Great Britain and the United States. It has never been formally abrogated, but ultimately it failed as a League of Peace. Its failure dated from the Congress of Verona in 1822. From the date of its publication the Treaty of the Holy Alliance was the object of sneers and ridicule by many who admitted the sincerity and good faith of its framers, but questioned their good sense. For a hundred years it has been anathematized by not a few statesmen, historians and diplomats, in every variety of characterization, as an unholy fraud. Some months after we had entered the World War a Senator of the United States inserted in the Congressional Record a "memo" concerning this Treaty in which this statement appears: "The Holy Alliance made Christianity the cloak under which the Kings of Europe tried to perpetuate the helotage of their subjects." The context does not disclose whether this is an original or merely the adopted opinion of the Senator. If the Treaty of the Holy Alliance did not in terms express the real intention of its framers, if it was not designed to found a League
of Peace, if its sole aim was to deceive and delude, then in truth it was an unholy fraud and our generation has no interest in it except as a historical curiosity, the greatest international swindle of all time. If, on the other hand, the avowed purpose of the Treaty expressed the real intention of the signatories, if under the provisions of the Treaty a League of Perpetual Peace was entered into by all the Christian States of the Continent, if this League made a sincere and honest attempt to prevent or minimize wars, and yet failed in its endeavor, the reasons for that failure are of vital importance today. Can these reasons be ascertained and analyzed? Can they be avoided? Or are they of such a nature that the League of Nations and all other Leagues of Peace are doomed to a like failure for the same reasons?

Whether the Treaty of the Holy Alliance was, or was not an unholy fraud, is a question that should be determined by evidence. In my opinion, the evidence will show that the Treaty was not an imposture. The evidence may be considered under four heads: first, the instrument itself; second, the conditions that prevailed in Europe at the time of the framing of the Treaty; third, the character of the author of the Treaty; and fourth, the contemporary opinion of the Treaty held by the two great powers that declined to sign it, with the grounds of their declination.

I

After the final abdication of Napoleon, Alexander I of Russia, Francis I of Austria, and Frederick William III of Prussia met in Paris. There the Treaty of the Holy Alliance, prepared in French in triplicate originals, was signed by these three sovereigns on September 26, 1815. The originals are now in the archives at Petrograd, Berlin, and Vienna. I give the official English translation from Hertlet's Map of Europe by Treaty, vol. I, page 317, et seq.:

"In the name of the most holy and indivisible Trinity.

"Holy alliance of sovereigns of Austria, Prussia, and Russia.

"Their Majesties the Emperor of Austria, the King of Prussia, and the Emperor of Russia, having in consequence of the great events which have marked the course of the
three last years in Europe, and especially of the blessings which it has pleased Divine Providence to shower down upon these States which place their confidence and their hope on it alone, acquired the intimate conviction of the necessity of setting the steps to be observed by the powers, in the reciprocal relations, upon the sublime truths which the holy religion of our Savior teaches.

"**Government and Political Relations**

"They solemnly declare that the present act has no other object than to publish, in the face of the whole world, their fixed resolution, both in the administration of their respective States and in their political relations with every other Government, to take for their sole guide the precepts of that holy religion, namely, the precepts of justice, Christian charity, and peace, which, far from being applicable only to private concerns must have an immediate influence on the councils of princes and guide all their steps as being the only means of consolidating human institutions and remedying their imperfections. In consequence, their majesties have agreed on the following articles:

"**Principles of the Christian Religion**

"Article I. Conformably to the words of the Holy Scriptures, which command all men to consider each other as brethren, the three contracting monarchs will remain united by the bonds of a true and indissoluble fraternity, and, considering each other as fellow countrymen, they will on all occasions and in all places lend each other aid and assistance; and regarding themselves toward their subjects and armies as fathers of families, they will lead them, in the same spirit of fraternity with which they are animated, to protect religion, peace, and justice.

"**Fraternity and Affection**

"Art. II. In consequence, the sole principle of force, whether between the said governments or between their subjects, shall be that of doing each other reciprocal service and of testifying by unalterable good will the mutual affec-
tion with which they ought to be animated, to consider themselves all as members of one and the same Christian nation, the three allied princes looking on themselves as merely delegated by Providence to govern three branches of the one family, namely, Austria, Prussia, and Russia, thus confessing that the Christian world, of which they and their people form a part has in reality no other sovereign than Him to whom alone power really belongs, because in Him alone are found all the treasures of love, science, and infinite wisdom; that is to say, God, our Divine Savior, the Word of the Most High, the Word of Life. Their majesties consequently recommend to their people, with the most tender solicitude, as the sole means of enjoying that peace which arises from a good conscience and which alone is durable, to strengthen themselves every day more and more in the principles and exercise of the duties which the Divine Savior has taught to mankind.

"ACCESSION OF FOREIGN POWERS"

"Art. III. All the powers who shall choose solemnly to avow the sacred principles which have dictated the present act and shall acknowledge how important it is for the happiness of nations, too long agitated, that these truths should henceforth exercise over the destinies of mankind all the influence which belongs to them, will be received with equal ardor and affection in this 'holy alliance.'

"Done in triplicate and signed at Paris, the year of grace 1815, 14/26 September.

"FRANCIS. (L. S.)
"FREDERICK WILLIAM. (L. S.)
"ALEXANDER. (L. S.)"

The keenest scrutiny will fail to disclose within the four corners of this brief document any intention express or implied on the part of the signatories to "perpetuate the helotage of their subjects," unless of course it is assumed that the perpetuation of helotage is one of the precepts of the religion of Christ.

It has been asserted that Metternich, the most resourceful statesman of his age, inspired the Treaty of the Holy Alliance, with the design of deceiving the people of Europe with
regard to his reactionary schemes. His own words refute this assertion and confirm the plain inference to be drawn from the words of the Treaty. In the account given by him in his Mémoires (vol. 1, p. 211) of the preparation and execution of the Treaty, he says: “The Holy Alliance was never founded to restrain the liberties of the people, nor to advance the cause of absolutism. It was solely the expression of the mystical beliefs of the Emperor Alexander; the application of the principles of Christianity to public policy.”

The contention is also made by critics of the Treaty of the Holy Alliance that the lack of specific details in its provisions is proof of a sinister purpose hidden beneath its generalities in accordance with the maxim dolus latet in generalibus. This contention is based upon an entire misapprehension of the fundamental character of the Treaty. The design of Alexander was that the Treaty should be a constitution for a League of Peace to be formed by an association of Christian States—a constitution to which all subsequent international action must conform. He fully understood that one of the chief characteristics of an ideal State Constitution is freedom from details and all temporary, controversial or legislative matter, and so he framed his draft of an International Constitution on broad, general lines, embracing two fundamental principles, the Brotherhood of Man and the Sovereignty of God. An American statesman earned great praise by his declaration that the diplomacy of the United States was governed by two principles—the Monroe Doctrine and the Golden Rule. A hundred years earlier Alexander maintained that world diplomacy should conform to the Golden Rule and he embodied his belief in a Constitution for a League of Perpetual and Universal Peace, and for a hundred years his suggestion has met with little but the sneers of skeptics and the ridicule of unbelievers. It is quite apparent from their own words that most of the skeptics and unbelievers and many honest commentators are unfamiliar with the provisions of the Treaty of the Holy Alliance, in fact have never read it. The Spectator of October 14, 1916, in an extended editorial entitled The League to Enforce Peace, says: “The Sixth Article of the Holy Alliance bound the high contracting Powers to hold at fixed
intervals meetings consecrated to great common objects,” etc. A glance at the Treaty of the Holy Alliance shows that it has only three articles and that the words quoted do not occur in the instrument. The provision referred to is in the Treaty of the Quadruple Alliance of November 20, 1815. Such an error in a journal of the Spectator’s standing and usual accuracy indicates the freedom with which the Treaty of the Holy Alliance has been discussed by those who have not read it.

The leading editorial of the London Times of January 31, 1919, entitled The League and Its Trustees, contains these sentences: “The new League of Peace will be no Holy Alliance hiding under a zeal for peace a policy of suppressing every national aspiration that conflicts with its own political scheme and every political development that does not fit in with its own philosophy. . . . The League will not, unlike the Holy Alliance, feel that it has a roving commission to interfere everywhere with everything of which it does not approve.” It requires a fertile and nimble imagination to read such sentiments into the provisions of the Treaty of the Holy Alliance.

If the intention of the framers and signatories of the Treaty of the Holy Alliance were fraudulent and sinister, proof of such intention must be sought elsewhere than within the terms of the Treaty itself.

II

Were conditions in Europe in 1810 of such a nature, and was public opinion running then in such channels as to make the Treaty of the Holy Alliance and the spirit of its avowed purpose seem the natural products of the times? The answer must be an emphatic affirmative. For two centuries each generation had witnessed the economic waste, the social and political upheavals, and the horrors of war. At the close of the Napoleonic conflicts, during which this country had been involved in a three years’ struggle with Great Britain, the world was sick of war and eager to welcome any plan designed to promote permanent peace.

Furthermore, there had been in 1815 a great revulsion from the “negation of God” that accompanied the French
Revolution and throughout Europe there had been a revival of Christian teaching and belief. From thousands of pulpits in Europe the gospel of “Peace on Earth, Good Will to Men” was preached with renewed fervor.

The Treaty of the Holy Alliance, Alexander’s proposed Constitution for a League of Peace, reflected the sentiments and aspirations of the common people with which, as we shall see, he fully sympathized.

The obvious sincerity of the Treaty of the Holy Alliance and its conformity with the spirit of the times receive confirmation from the most trustworthy contemporary witnesses, as shown by Mr. W. P. Cresson in his admirable monograph on the Holy Alliance:

“Perhaps the truest conception of this much misunderstood document may be obtained from the writings of the two philosophers to whom Alexander was chiefly indebted for his political theories—Bergasse and Laharpe.

“Two fundamental ideas (wrote Bergasse) appear as the basis of the Treaty of the Holy Alliance: The Sovereignty of God, the Brotherhood of Mankind.

“The spectacle offered by the events of the Revolution has afforded a terrible lesson both to the nations and their rulers. The catastrophes which have shaken the foundations of Europe had one fundamental cause: the weakening of the bonds of religion and the resulting corruption of both peoples and princes. This corruption of public morals brought with it inevitable disorder and anarchy. The systematic repudiation of all Divine Law—and the pretensions advanced by those who believed only in the sovereign rights of man—were the fundamentals of revolutionary doctrine. According to these theories (had such a result been possible) organized disorder would have been permanently established, thus inaugurating a period of fresh disasters.

“In the presence of such a possibility it became a great and solemn necessity to proclaim as a guiding principle the sovereignty of the Divine Will—and the essential doctrine that nations as well as individuals must obey His laws if they desire to continue in a state of peace and prosperity.”
When the three sovereigns who signed the Treaty of the Holy Alliance met in Paris in September, 1815, Francis was forty-seven years old, Frederick William forty-five, and Alexander thirty-eight. Alexander, the youngest of the three, was then the most powerful and the most enlightened ruler in Europe. He was the author of the Treaty of the Holy Alliance, and the first draft was written in his own hand. He felt that the opportunity had at last come for realizing what had been the dream of his mature years, the formation of a League of Universal and Perpetual Peace. This dream was the natural outcome of his character, early studies and later experiences. Alexander came to the throne in 1801 a young man of twenty-four.

The young ruler was deeply penetrated with a sense of his obligation to make his people happy and to promote their civilization and prosperity. He was the first to lay the foundation of the national culture and popular instruction on a regular plan, to introduce organization into the internal administration, unshackle the industry of the nation, raise the foreign commerce of Russia, and awaken in the people a feeling of unity, and a spirit of patriotism. His exertions on behalf of the language, literature and general culture of the Slavonic nations were intelligently directed. Seven universities were either instituted or remodelled by him; 204 gymnasiums and normal schools, and above 2,000 district elementary schools, were erected; and fresh life and activity given to the higher scientific institutions in St. Petersburg and Moscow. He did more than any other sovereign in Europe for the spread of the Bible, by supporting the Bible Society, and in 1820 he had a bishop instituted for the Evangelical Lutheran church, and a general consistory in St. Petersburg for the whole empire. He devoted large sums to the printing of important works, such as Krusenstern’s Travels and Karamsin’s History of Russia, and prized and rewarded scientific merit both at home and abroad. Several scientific collections were purchased by him, and in 1818 he invited two orientalists, Demange and Charmoy, from Paris to St. Petersburg, to promote the study of the Arabic, Armenian, Persian, and Turkish languages. Young men of
talent were sent to travel at his expense. By the ukase of 1816 he prepared the way for the abolition of slavery in the Baltic provinces; he also declared that no more gifts of peasants would be made on the crownlands. As early as 1801 he had abolished the secret tribunal which is said to have extorted confession from political offenders by means of hunger and thirst. The practice of slitting the nose and branding, which had been customary in connection with knouting, was also done away with. Laws were enacted to prevent the abuses of power by governors. The privilege of the nobles that their inherited property could not be confiscated as a punishment was raised by him to a common right for all subjects; and much was done in composing a code of civil law. He promoted the manufactures and trade of the empire by amending the laws regarding debt and mortgages; and by the institution of an imperial bank, the construction of roads and canals, making Odessa a free port, and above all, by the ukase of 1818, permitting all peasants in the empire to carry on manufactures, which was before only allowed to nobles and to merchants of the first and second guilds.

His farsighted policy with regard to the foreign commerce of Russia is shown in various expeditions round the world sent out by him; in the embassy to Persia in 1817, in which was the Frenchman Gradanne, who was acquainted with all the plans of Napoleon respecting India and Persia; in the missions to Cochin, China and to Khiva; in the treaties with the United States, Brazil, and Spain; in the naval and commercial treaties with the Porte; and in the settlement on the northwest coast of America.

His foreign policy was characterized at the outset by a desire for peace; in 1801 he concluded a convention, putting an end to hostilities with England, and made peace with France and Spain.

Alexander’s liberalism and enlightened views were well known and of course popular in the United States. He sent a portrait bust of himself as a gift to President Jefferson. In acknowledging the courtesy the President paid a high tribute to the Tsar.

As early as September 11, 1804, in his instructions addressed on that date to his friend, Nikolai Nikolaievich
Novosiltsor, envoy on special mission to England, Alexander proposed an Anglo-Russian alliance, an absolute condition of which was that the destruction of the Napoleonic system should not lead to any setback to humanity. The parties to the alliance must agree not to reestablish ancient abuses in the liberated countries, but give them liberty based upon sure foundations. This document of 1804 contains this striking paragraph:

"If Europe be saved, the union of the two Governments which has achieved these great results ought to last on, in order to preserve and augment them. Nothing would prevent, at the conclusion of peace, a treaty being arranged, which would become the basis of the reciprocal relations of the European states. It is no question of realizing the dream of perpetual peace, but one could attain at least to some of its results if, at the conclusion of the general war, one could establish on clear, precise principles the prescriptions of the rights of nations. Why could one not submit to it the positive rights of nations, assure the privilege of neutrality, insert the obligation of never beginning war until all the resources which the mediation of a third party could offer have been exhausted, until the grievances have by this means been brought to light, and an effort to remove them has been made? On principles such as these one could proceed to a general pacification, and give birth to a league, of which the stipulations would form, so to speak, a new code of the law of nations, which, sanctioned by the greater part of the nations of Europe, would without difficulty become the immutable rule of the cabinets, while those who should try to infringe it would risk bringing upon themselves the forces of the new union."

The words in italics foreshadow the Treaty of the Holy Alliance as an International Constitution.

Further evidence as to the uberrima fides of this Treaty drawn from the character of its author would seem to be superfluous.

IV

To many the most convincing evidence that the Treaty of the Holy Alliance was conceived and executed in the utmost good faith, is the official opinion respecting the Treaty given
by England and the United States, the two great Powers that declined to accede formally to the Treaty. According to the accepted canons of proof, the declination of England and the United States to sign the Treaty makes their testimony the best possible evidence as to its good faith.

On the day that the Treaty was signed the three sovereigns sent to the Prince Regent of England the following autograph note:

"Paris, September 26, 1815.

"Sir Our Brother and Cousin: The events which have afflicted the world for more than 20 years have convinced us that the only means of putting an end to them is to be found in the most free and most intimate union between the sovereigns whom divine providence has placed over the heads of the peoples of Europe.

"The history of the three memorable years which are about to pass away bear witness to the beneficial effects of which this union has been for the good of mankind; but in order to assure to this bond the solidity which the grandeur and the purity of the aim to which it tends imperiously demands we have thought it should be founded on the sacred principles of the Christian religion.

"Deeply convinced of this important truth, we have concluded and signed the act which we now submit to the consideration of your royal highness. Your royal highness may be assured that its object is to strengthen the relations which unite us, in forming of all the nations of Christendom in one single family and assuring them by this, under the protection of the Almighty, happiness, security, the benefits of peace, and the bonds of fraternity forever indissoluble. We deeply regretted that your royal highness was not united with us at the important moment when we concluded this transaction. We invite you, as our first and most intimate ally, to agree with it and to complete a work singularly consecrated to the good of mankind and which we ought to consider the best reward for our efforts.

"FRANCIS.
"FREDERICK WILLIAM.
"ALEXANDER."
The Prince Regent could not of course sign the Treaty without the consent of the Government; neither could he make formal reply to the invitation without the approval of the Ministry. The following note expressed the sentiment of the majority of the English people:

"Carlton House, October 6, 1815.

"Sir My Brother and Cousin: I have had the honor of receiving your imperial majesty's letter, together with the copy of the treaty signed by your majesty and your august allies at Paris on the 26th of September.

"As the forms of the British Constitution, which I am called upon to administer in the name and on behalf of the King, my father, preclude me from acceding formally to this treaty in the shape in which it has been presented to me, I adopt this course of conveying to the august sovereigns who have signed it my entire concurrence in the principles they have laid down and in the declaration which they have set forth of making the divine precepts of the Christian religion the invariable rule of their conduct in all their relations, social and political, and of cementing the union which ought ever to subsist between all Christian nations; and it will be always my earnest endeavor to regulate my conduct in the station in which Divine Providence has vouchsafed to place me by these sacred maxims and to cooperate with my august allies in all measures which may be likely to contribute to the peace and happiness of mankind.

"With the most invariable sentiments of friendship and affection, I am,

"Sir, my brother and cousin,
"Your imperial majesty's good brother and cousin,

"GEORGE, P. R."

When the Treaty of the Holy Alliance was originally executed in 1815, James Monroe was President of the United States and John Quincy Adams was Secretary of State. The latter was a statesman of wide experience in foreign affairs and one of the wisest scholars of his time. His diplomatic services had taken him to The Hague, Paris, London, Berlin and St. Petersburg. He was personally acquainted with
Alexander and familiar with his desire of securing the formation of a League of Peace. It might be said of Adams, as Tallyrand said of Alexander Hamilton, that he divined Europe.

For several years after the execution of the Treaty of the Holy Alliance, unofficial invitations to join the League were extended by Russia to the United States. In 1820, when the Treaty had been in force and peace had reigned in Europe for five years, Secretary Adams sent to Mr. Middleton, our Minister to Russia, the following letter for his guidance in dealing with the Tsar and the Russian Foreign Office:

"The present political system of Europe is founded upon the overthrow of that which has grown out of the French Revolution, and has assumed its shape from the body of treaties concluded at Vienna in 1814 and 1815, at Paris toward the close of the same year, 1815, and in Aix-la-Chapelle in the autumn of 1818. Its general character is that of a compact between the five principal European powers—Austria, France, Great Britain, Prussia, and Russia—for the preservation of universal peace. These powers having then just emerged victorious from a long, portentous and sanguinary struggle against the oppressive predominancy of one of them, under revolutionary sway, appear to have bent all their faculties to the substitution of a system which should preserve them from that evil—the preponderancy of one power by the subjugation, virtual if not nominal, of the rest. Whether they perceived in its full extent, considered in its true colours, or provided by judicious arrangements for the revolutionary temper of the weapons by which they had so long been assailed and from which they had so severely suffered, is a question now in a course of solution. Their great anxiety appears to have been to guard themselves each against the other.

"The League of Peace, so far as it was a covenant of organized governments, has proved effectual to its purposes by an experience of five years. Its only interruption has been in this hemisphere, though between nations strictly European; by the invasion of the Portuguese on the territory claimed by Spain, but already lost to her, on the eastern shore of the Rio de la Plata. This aggression, too, the European alliance have undertaken to control; and in connection
with it they have formed projects hitherto abortive of interposing in the revolutionary struggle between Spain and her South American colonies.

"As a compact between governments it is not improbable that the European alliance will last as long as some of the states who are parties to it. The warlike passions and propensities of the present age find their principal ailment, not in the enmities between nation and nation, but in the internal dissensions between the component parts of all. The war is between nations and their rulers.

"The Emperor Alexander may be considered as the principal patron and founder of the League of Peace. His interest is the more unequivocal in support of it. His empire is the only party to the compact free from that internal fermentation which threatens the existence of all the rest. His territories are the most exclusive, his military establishment the most stupendous, his country the most improvable and thriving of them all. He is therefore naturally the most obnoxious to the jealousy and fears of his associates, and his circumstances point his policy to a faithful adhesion to the general system, with a strong reprobation of those who would resort to special and partial alliances, from which any one member of the league should be excluded. This general tendency of his policy is corroborated by the mild and religious turn of his individual character. He finds a happy coincidence between the dictates of his conscience and the interest of his Empire. And as from the very circumstance of his preponderancy, partial alliances might be most easily contracted by him, from the natural resort of the weak for succour to the strong, by discountenancing all such partial combinations he has the appearance of discarding advantages entirely within his command, and reaps the glory of disinterestedness, while most efficaciously providing for his own security.

"Such is accordingly the constant indication of the Russian policy since the peace of Paris in 1815. The neighbors of Russia which have the most to dread from her overshadowing and encroaching power are Persia, Turkey, Austria and Prussia; the two latter of which are members of the European and even of the Holy Alliance, while the two
WAS THE HOLY ALLIANCE AN UNHOLY FRAUD? 31

former are not only extra-European in their general policy, but of religions which excluded them from ever becoming parties, if not from ever deriving benefit from that singular compact.

"The political system of the United States is also essentially extra-European. To stand in firm and cautious independence of all entanglement in the European system has been a cardinal point of their policy under every administration of their Government, from the peace of 1783 to this day. If at the original adoption of their system there could have been any doubt of its justice or its wisdom, there can be none at this time. Every year's experience rivets it more deeply in the principles and opinions of the nation. Yet in proportion as the importance of the United States as one of the members of the general society of civilized nations increases in the eyes of the others, the difficulties of maintaining this system and the temptations to depart from it increase and multiply with it. The Russian Government has not only manifested an inclination that the United States should concur in the general principles of the European league, but a direct though unofficial application has been made by the present Russian minister here that the United States should become formal parties to the Holy Alliance. It has been suggested, as inducement to obtain their compliance, that this compact bound the parties to no specific engagement of anything. That it was a pledge of mere principles—that its real as well as its professed purpose was merely the general preservation of peace—and it was intimated that if any question should arise between the United States and other governments of Europe, the Emperor Alexander, desirous of using his influence in their favor, would have a substantial motive and justification for interposing if he could regard them as his allies, which, as parties to the Holy Alliance, he would.

"It is possible that overtures of a similar character may be made to you; but whether they should be or not it is proper to apprize you of the light in which they have been viewed by the President. No direct refusal has been signified to Mr. Poletica. It is presumed that none will be necessary. His instructions are not to make the proposal in
form unless with a prospect that it will be successful. It might, perhaps, be sufficient to answer that the organization of our Government is such as not to admit of our acceding formally to that compact. But it may be added that the President, approving its general principles and thoroughly convinced of the benevolent and virtuous motives which led to the conception and presided at the formation of this system by the Emperor Alexander, believes that the United States will more effectually contribute to the great and sublime objects for which it was concluded by abstaining from a formal participation in it than they could as stipulated members of it. As a general declaration of principles, disclaiming the impulses of vulgar ambition and unprincipled aggrandizement and openly proclaiming the peculiarly Christian maxims of mutual benevolence and brotherly love to be binding upon the intercourse between nations no less than upon that of individuals, the United States not only give their hearty assent to the articles of the Holy Alliance, but will be among the most earnest and conscientious in observing them. But independent of the prejudices which have been excited against this instrument in the public opinion, which time and an experience of its good effects will gradually wear away, it may be observed that for the repose of Europe as well as of America, the European and American political system should be kept as separate and distinct from each other as possible. If the United States as members of the Holy Alliance could acquire a right to ask the influence of its most powerful member in their controversies with other states, the other members must be entitled in return to ask the influence of the United States, for themselves or against their opponents, in the deliberations of the league they would be entitled to a voice, and in exercising their right must occasionally appeal to principles, which might not harmonize with those of any European member of the bond. This consideration alone would be decisive for declining a participation in that league, which is the President's absolute and irrevocable determination, although he trusts that no occasion will present itself rendering it necessary to make that determination known by an explicit refusal.”

The italics are not in the original letter, but the italicized
sentences indicate the passages that deal with the American opinion of the character of the Treaty of the Holy Alliance. Those who doubt the intention of the author of this Treaty and question the motives of the parties to it, should read this opinion of one of the ablest statesmen, shrewdest diplomatists and ripest scholars of that age.

The Holy Alliance maintained peace in Europe until the Crimean War. It did more. “It left,” as W. A. Phillips in his Confederation of Europe shows, “certain permanent effects: the tradition of respect for the obligation of international engagements, the impetus thereby given to the study and application of international law, and the abiding hope of the ultimate establishment of an effective international system. Without the Holy Alliance, as we shall see, there would have been no Hague conferences.” And it may be added there would have been no League of Nations.

Ultimately the Holy Alliance failed as a League of Permanent Peace for reasons which will cause the failure of the League of Nations and of every other league of peace, if by failure, we mean failure to prevent wars. A league to maintain permanent peace must aim to prevent all wars, civil as well as international. In so far as it is a league to prevent civil wars, it will be a league to prevent or suppress revolutions. A league of peace is, therefore, of necessity a league to maintain the status quo. It becomes a league of stagnation. This would be too high a price to pay for universal peace. While human nature is what it is, no people will renounce the inalienable right of revolution.

As I have said, the failure of the Holy Alliance began with the Congress of Verona in 1822, when the members of the Alliance favored propositions to suppress popular movements in Italy and Spain, and to assist Spain in reducing to subjection her revolting colonies in South America. England refused to accede to these propositions. It is one of the greater ironies of history that the obloquy intended for what might be termed the legislative acts of the Holy Alliance should have been for a hundred years directed against the Constitution of the League.

If ever mankind is ready for the establishment of a league of universal and perpetual peace, such a league will be or-
ganized with a constitution framed in the spirit of Alexander's Treaty, and will march under the banner of the Prince of Peace. Secretary Hay received praise and commendation for his declaration that one of the principles on which American diplomacy was founded was the Golden Rule. Would it not be equally as praiseworthy and commendable for all other nations to observe the same rule in their international relation? But the adoption of this rule by the nations of the world would be simply a revival of the much-despised Treaty of the Holy Alliance, which was not an unholy fraud but an International Constitution that was more than a century—perhaps several centuries—in advance of its time.

Henry Sherman Boutell.
BOOK REVIEWS

READY REFERENCE DIGEST OF ACCIDENT AND HEALTH INSURANCE LAW—By Myron V. Van Auken, of the Utica, N. Y., Bar, General Counsel of the Commercial Mutual Accident Association of America, Utica, N. Y., with an introduction by William Brosmith, General Counsel and Vice President of the Travellers Insurance Co. of Hartford, Conn. Accident Defined, Disease Distinguished, Table of Cases, Topical Index. Albany. Matthew Bender & Company, Incorporated. 1922.

This volume contains 357 pages, including a topical index of 82 pages, a table of cases of 18 pages, and 250 pages of summaries of cases. Mr. Wm. Brosmith, General Counsel and Vice President of the Travellers Insurance Company, of Hartford, describes the work, in his Introduction, as “a helpful and dependable compilation of what the courts have declared to be the rights and obligations of the parties to such insurance contracts.” (p. v.) The Editor gives, in each instance, a topical heading for each case, followed by a brief outline of the facts and of the decision, and closes with the citation. There is no discussion or contrasting of opinions, which would be useful and interesting in many instances, for example, such a case as Sinclair v. Ass. Co., p. 25, might be considered in connection with cases like Bryant v. Cas. Co. and Higgins v. Cas. Co. (pp. 26 and 27), the first case, an English case, holding that sunstroke is a disease, and the other cases, American decisions, holding that sunstroke is a bodily injury. This is to be regretted, because the Author, who, as he states in his “Foreword,” has been the General Counsel of an accident insurance company for the past thirty-five years, could readily have contributed valuable commentaries to this rapidly growing and important branch of insurance law. Perhaps, the Author is reserving this material for another volume, and it is hoped that he will give the profession the benefit of his long experience in this form, as was done in Cornelius, “Accidental Means.”

It would seem that the compilation is selective, rather than exhaustive, because the following cases, decided not long before June 6, 1922, the date of the Author’s Foreword,
have been reported, discussing the meaning of "accident" in the accident insurance policy, and they are not found in the table of cases: Jones v. Ins. Co., 184 Iowa 1299, 11 A. L. R., 380, Iowa, 1918 (death from gas as accidental); Olinsky v. Railway Mail Asso., 182 Calif. 669, 14 A. L. R., Cal., 1920 (death from overexertion as accidental); Tracey v. Ins. Co., 109 Atl. 490, 9 A. L. R., 521, Me., 1920 (injury to eye by being struck by an insect while riding on a motorcycle as accidental); Martin v. Ins. Co., 1920, 223 S. W., 389, Ark. (injury received in battle as accidental); State Life Ins. Co. v. Allison, 1920, 269 Fed., 93 (see also 19 Michigan L. Rev., 754) (injury to soldier in battle as accidental); U. S. Fidelity & G. Co. v. Hood, 1921, Miss., 87 So., 115 (accident as proximate cause of latent disease); Emp. Indem. Co. v. Grant, 1921, 271 Fed., 136 (conductor killed by passenger he was trying to eject from wash room); Husbands v. Travelers' Acc. Ass'n, Ind., 1921, 130 N. E., 874 (rupture of bloodvessel while shaking the furnace as accidental); Fane v. Ry. Clerks Assn., 188 N. Y. Supp., 223, 1921 (mail clerk injured by lifting mail sack in usual way as accidental); Fammelt v. Ins. Co., Minn., 1921, 184 N. W., 565 (accidental means); Messersmith v. Am. F. Co., 133 N. E., 432, 1921 (accidental means); Wasmuth v. Karst, Ind., 1922, 133 N. E., 609 (drinking polluted water as accident); Kimball v. Acc. Co., R. I., 1922, 117 Atl., 228 (boil producing death as accidental means).

HUGH J. FEGAN.

THE FOUNDATIONS OF AMERICAN NATIONALITY—By Evarts Boutell Greene, Professor of History, University of Illinois. American Book Company.

Dr. Greene's latest and best work is the first volume of "A Short History of the American People" and is to be followed by "The Development of American Nationality" by Carl Russell Fish, Professor of American History, University of Wisconsin. The first volume covers the period ending with the adoption of the Federal Constitution and the second volume will bring the history down to the present time.

The Foundations of American Nationality surpasses and
will supplant all other treatises dealing with the same subject. The aim of this work is to indicate, with the proper historical background, the forces that led the American Colonists to assert and by force of arms maintain their independence, and then to frame and adopt the Constitution of the United States. Dr. Greene writes without prejudice and uses with judicious discrimination the new material that has been made available. He renders a distinct service to American Constitutional History in dealing a knockout blow to the absurd Gladstonian "struck-off-at-a-given-time" theory of the Constitution.

The English who settled in America in the 17th century brought with them the Common Law and English Constitutional principles. By the middle of the 18th century the three million inhabitants of the thirteen colonies were "predominately British." Their language, literature, laws, customs, traditions, even their fashions, were English. The English revolutions of 1649 and 1689 had been their revolutions. They drew their inspiration from Magna Carta, the Petition of Right, the Habeas Corpus Act, the Bill of Rights and the Act of Settlement. Up to 1764 the Colonists were loyal English subjects. They had proved their loyalty by the part they took as officers and men in the Seven Years Wars. There were no braver soldiers at the Heights of Abraham than the Americans. The passage of the obnoxious Sugar Act of 1764 and the still more obnoxious Stamp Act of 1765 surprised and shocked the Americans. They held them to be an impairment of their rights as loyal British subjects. While admitting the "legal omnipotence" of Parliament they held these Acts to be unconstitutional, that is, in violation of the spirit of the great liberty documents wherein were set forth the unalienable rights of Englishmen. The Declaratory Act that accompanied the repeal of the Stamp Act undid all the good that the repeal might have accomplished, by asserting in the most sweeping language that Parliament had and "ought to have authority to bind the colonies and people of America, subjects of the Crown of Great Britain, in all cases whatsoever."

Most admirable is Dr. Greene's analysis of the events in England and America that immediately preceded indepen-
Of the political philosophy of the Declaration of Independence, the character of the American Revolution, and the nature of the war that followed, Dr. Greene says:

“The political theory of the Declaration was not new. John Adams, who, with all his great qualities, was not always magnanimous, complained of its lack of originality; but in such a document originality was not desirable. What the occasion required, and what Jefferson actually did, for the most part, was to put together, in effective literary form, ideas and language familiar to all who had followed the discussions of the past fifteen years. All men are created equal; being naturally free, they have established governments for the purpose of securing their inalienable rights; all just governments rest on the consent of the governed and can be dissolved when they fail to serve the fundamental purposes for which the compact was made—all these doctrines Americans had learned from John Locke, Algernon Sidney, and other 17th century English writers. Locke had used them to defend the English Revolution of 1688, which established the sovereignty of Parliament as against the claims of the Stuart Kings; but now they were used against Parliament itself.

“The Declaration of 1776 resembled the Whig documents of 1765 and 1774 in denouncing acts of Parliament which were held to be unconstitutional, especially those imposing taxes and the Coercive Acts of 1774. Unlike the older statements, however, the Declaration of Independence directed its main attack against the King himself. Even acts of Parliament were treated as the result of a conspiracy for which George III was held largely responsible. Striking also is the long list of grievances, which included not merely those of recent years but reached back to the old colonial system. More fundamental, however, to an understanding of the American Revolution than any mere list of grievances, new or old, was the inevitable difficulty of reconciling imperial authority exercised across three thousand miles of ocean, with traditional English ideals of self-government, developed and made more aggressive by the stimulating atmosphere of the American frontier.

“Finally, it must be remembered that, though the Declaration was officially described as “unanimous,” it did not ex-
press the unanimous opinion of the American people, even after its tardy ratification by New York. In New England and Virginia, there was a decided preponderance of opinion in its favor; but elsewhere the opposing forces were strong and many people asked only to be let alone. So the great war for independence was not simply a conflict between the imperial government and a group of revolting colonies, but almost as truly a civil war between two American parties, one standing for an old allegiance and an old patriotism, the other looking forward hopefully to the establishment of a new order."

No other author has given so valuable a summary, as Dr. Greene gives us in Chapter XXVI, of the social, economic and political forces at work in America between Yorktown and the meeting of the Constitutional Convention. While Jefferson's description of the members of this convention as "an assembly of demi-gods" may be regarded as the product of chauvanistic license, it is certain that in no other country had there ever been gathered in one hall a body of men more wise, discreet and patriotic. In framing an Instrument of Government for a new nation that should recognize the Sovereignty of the People and the fiduciary character of all officers of the Government and limit their powers, the framers of the Constitution followed principles and precedents that had been tested and not found wanting in England and America. They put into written form the accumulated wisdom of centuries of experience. Dr. Greene recognizes fully the truth of Mr. Justice Holmes' statement in Gompers v. The United States:

"The provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic, living institutions transplanted from English soil. Their significance is vital, not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth."

Two paragraphs must suffice to show Dr. Greene's method of dealing with the work of the convention. While the question of the right of the Supreme Court to declare an Act of Congress unconstitutional would seem to be purely an academic one, it would be well for those who deny the right on
the ground that the convention rejected a proposition to con-
fer such a power on the courts, to read Dr. Greene's treat-
ment of the question and then refer to the original debates.

After discussing the rejection of the proposition to give
Congress a veto on State legislation, Dr. Greene says:

"On July 16, when the congressional veto was being dis-
cussed, it was suggested that a better way would be to have
unconstitutional legislation dealt with by the judges, as had
already been done in some of the state courts. Thereupon
the convention rejected the veto plan and, on the motion of
Luther Martin, declared that the laws and treaties of the
United States made in accordance with the Constitution,
should be the 'supreme law' of the states, whose judges
should be bound by them, any state law to the contrary not-
withstanding. Out of this resolution there developed a far
more sweeping statement, quite beyond Martin's intention
but finally embodied in Article VI of the Constitution, by
which the Constitution itself, together with the laws and
treaties made in accordance with it, was made 'the supreme
law of the land,' binding on the judges not only as against
state laws but against state constitutions as well. It was
also agreed that in such cases federal courts should have
original as well as appellate jurisdiction.

"The federal judiciary was expected to exercise a similar
check upon Congress. This is evident from the discussion
about the desirability of making federal judges members of
the council of revision. In opposition to that plan it was
argued that the judges could more properly act on legisla-
tion in their strictly judicial capacity, as individual cases
came before them. State courts had already declared state
laws unconstitutional and federal judges could do the same
thing for acts of Congress which did not conform to the
'supreme law.' Not all the members of the convention ac-
cepted this view, but the weight of evidence seems to indi-
cate that the framers of the Constitution meant the judges
not only to interpret the statute law, but also to determine
whether it was in harmony with the higher law embodied in
the Constitution."

This first volume of A Short History of the American
People covers 614 pages, divided into XXVIII chapters.
There is at the end of each chapter a short bibliography of
special value to students. There is a complete index, a rare thing even in good books. There are twelve illustrative maps and charts and six portraits. Of the portraits the most interesting is the frontispiece, Benjamin Franklin from the not very familiar portrait by B. Wilson, 1759.

The Foundations of American Nationality should be used in every high school in the country and it will make an excellent required preliminary to the study of Constitutional Law.

In the preface to his Select Charters the late Professor Stubbs said:

"The study of Constitutional History is essentially a tracing of causes and consequences; the examination of a distinct growth from a well-defined germ to full maturity; a growth, the particular direction and shaping of which are due to a diversity of causes, but whose life and developing power lies deep in the very nature of the people. It is not then the collection of a multitude of facts and views, but the piecing of the links of a perfect chain."

Dr. Greene in his tracing of causes and consequences has so skillfully pieced the links of early American Constitutional History as to make the perfect chain.

HENRY SHERMAN BOUTELL.


It is now fifty years since the late Professor Stubbs emphasized the value of the use of original documents in the study of English and American Constitutional History. His collection of Select Charters was prepared as a companion volume to his Constitutional History of England published in 1873. Since then various collections of documents covering different periods have been issued, but the Tudor period was never adequately treated until Mr. Tanner's Tudor Constitutional Documents was issued. In this volume of 636 pages the author gives over two hundred documents comprising statutes, judicial decisions, and court and parliamentary records relating to the foundations of
the Tudor Monarchy; the church settlements of Henry VIII, Edward VI, Mary and Elizabeth; the composition, procedure and business of the Privy Council, Star Chamber, Court of Requests, Council Courts, Financial Courts, Ancient Courts, Franchise Courts, and Ecclesiastical Courts; the Law of Treason; Local Government; the composition, procedure and privilege of Parliament; and the permanent and extraordinary revenues of the nation.

In accordance with the view stated in the preface that documents can most properly be studied in connection with the history of the times, Mr. Tanner has given a full historical commentary dealing with the more important problems of the constitutional history of the 16th century. This commentary consists largely of extracts from contemporary writers of prominence.

The portions of the book relating to the Dissolution of the Monasteries, the Star Chamber and Parliament are specially interesting. The author makes it clear that the Court of Star Chamber did not owe its origin to the Act of 1487, but was much older, was in fact the King’s Council or a Committee of the Council sitting in the “Starred Chamber.” As the courts of chancery overcame the defects of the common law on the civil side, so the Star Chamber supplemented the work of the criminal courts in dealing with cases for which the common law provided no punishment. “The punishment of death could not be inflicted by the Star Chamber, but it could fine, imprison, and sentence to corporal punishment, such as the pillory, whipping, branding, cutting off the ears, slitting the nose, or undergoing some form of public degradation. Some of the punishments were ingeniously devised to fit the crime, as in the case of a prisoner who, objecting on religious grounds to eating swine’s flesh, was ordered to be fed exclusively upon pork.”

Mr. Tanner’s researches dispel the old belief that the Star Chamber was abolished in 1641 on account of abuses practiced by the Court. “The corporal punishments imposed were often remitted by the Crown. But nothing was done under the Stuarts by way of fine and corporal punishment that had not been already done under the Tudors. The later unpopularity of the Court was due to a change in the popular point of view, and not in the action of the Court.”
John Rushworth, who attended all the more important cases in the Star Chamber from 1629 to 1640, wrote a lively description of the Court:

“Another manifestation of the dignity of it is that the proceedings are tam, lento pede, without precipitation, but giving time to the defendant to defend or excuse himself, both in producing testimony and in making defence at the bar. And that it taketh hold in judgment only of direct proofs, speaking circumstances, or more than probable presumptions, and these not single but double; which causeth the judgment thereof to be esteemed worthily, like the laws of the Medes and Persians, irrevocable. Besides the reasons of the sentence being succinctly collected and knit together and sagely delivered by grave, learned, and notable personages, whose very countenances add weight to their words, and who tie themselves to certainty and not to conjectural proofs. . . .

“The Court for the most part is replenished with dukes, marquises, earls, barons, also with reverend archbishops and prelates, grave councillors of state, learned judges . . . such a composition for justice, religion, and government as may be well and truly said (whilst so great a presence kept within their bounds), Mercy and Truth were met together.”

John Chamberlain in 1600 describes a speech that he heard in the Star Chamber:

“I was yesterday at the Star Chamber upon report of some special matter that should be delivered touching my Lord of Essex, where the Lord Keeper made a very grave speech in nature of a charge to the Judges, to look to the overgrowing idle multitude of justices of peace, to maintainers and abettors of causes and suits, to solicitors and petitfoggers, to gentlemen that leave hospitality and house-keeping and hide themselves in cities and borough towns, to the vanity and excess of women’s apparel, to forestallers and regraters of markets, to drunkards and disorderly persons, to masterless men and other companions that make profession to live by their sword and by their wit, to discoursers and meddlers in Prince’s matters, and lastly to libellers.”

The author analyzes the relation between the Tudor sovereigns and Parliament and shows how it was that under
the despotic rule of Henry VIII and Elizabeth Parliamentary privilege was greatly extended:

"It is remarkable that in the Tudor period—the period of despotic government, there should have been steady progress in the development and definition of the privilege of Parliament. The explanation is to be found not in the strength of Parliament but in its weakness. It was the Tudor policy to rule by means of Parliament because the Tudor sovereigns were not afraid of Parliament. They were too strong to be threatened by their assemblies, and they could scarcely be expected to look a century ahead, and see to what height the claims of an assembly might grow. Thus they were ready to do what they could to promote the efficiency of Parliament, and this led them to look with favor upon the growth of Parliamentary privilege."

In the pages dealing with Parliament, the Records of the House of Commons, and judicial proceedings, we find the origin of many existing rules of our Senate and House of Representatives relating to procedure, privilege of members, and freedom of speech in debate. Whoever would experience what an enthusiast calls "the fascination of documents" should read Mr. Tanner's book and in so doing he would rid himself of many venerable superstitions.

Henry Sherman Boutell.
NOTES AND COMMENTS

BILLS AND NOTES—ACCEPTANCE OF CHECK BY TELEGRAM. During the course of its business a bank is often called upon to cash a check drawn upon some distant bank. The question at once arises, "Is the check good?" The quickest answer is to be obtained by telegraphing to the bank upon which the check is drawn. A telegram is sent asking if the check is good, and upon receiving a favorable answer the bank cashes the check, resting upon the assurance of the other bank. This, in a general way, is a frequent occurrence in almost any bank. But suppose, when the check is sent through the regular channels to the bank upon which it is drawn, it should be returned for want of funds. If the bank cannot recover the money from the one to whom it was paid, must it suffer a loss or may it recover from the bank upon whose assurance the check was paid? This is to be determined from the words used in the telegrams, and the exact words are often of great importance.

That a bank may make itself liable upon a check drawn upon it by a formal acceptance of the check is well settled,1 and if the acceptance or certification is evidenced by writing the word "good" upon the check by a duly authorized officer there can be no doubt of its liability. But in the case we have given the check cannot be presented and the acceptance must be on other paper than the check itself. This acceptance however is none the less binding because of being on other paper and such cases are provided for by the Negotiable Instrument Law. That the acceptance may be by telegram is also generally held. The question resolves itself to what language used in a telegram by one bank in assuring another bank that a check is good will bind the first bank to pay the check. The correspondence is often in banker's code

and must of necessity be brief, and according to the Kansas court "brevity is not only allowable, it is commendable," and no particular form of words is necessary to constitute an acceptance. Yet the courts have been very slow to hold that a bank is bound unless a promise to pay is clearly and unequivocally expressed. The question comes up most frequently as to the meaning of the word "good." As was stated in the case of Home National Bank v. First State Bank, 133 S. W., 235, "It is one thing to say that a check is good, and quite another in legal effect to promise to pay it." The plaintiff in this case had telephoned the defendant and asked if a certain check was good, and the reply was that if the signature was all right, the check was all right. The court held that there had been no acceptance.

In Meyers v. Union National Bank, 27 Ill. App., 254, the plaintiff telegraphed the defendant, "Will drafts * * * be paid if presented Monday?" The answer was, "Drafts named are good now." The court in holding that there had been no acceptance of the drafts said that an acceptance is a contract and does not differ from other contracts in the essential requirement of the meeting of the minds, and that the answer of the defendant showed no intention to be bound to pay the drafts. In Kahn v. Walton, 46 Oh. St., 195, the following telegram was sent: "Are M. A. Walton's checks for $2,000 good?" The answer was "Yes, sir." The court held that there had been no acceptance because no specific checks had been designated.

The above cases can be accepted without much hesitancy as to whether the real intention of the parties were correctly interpreted, but when we come to cases such as First National Bank of Atchison v. Commercial Savings Bank, 74 Kan., 606, a doubt arises. The plaintiff bank telegraphed: "Is J. F. Donald's check on you for $350 good?" and the defendant replied, "J. F. Donald's check is good for the sum named." Most bankers would consider this an agreement to pay the check. They might not call it an acceptance, but when under such circumstances one bank informs another that a check is good, the bank so informed feels itself protected by the other bank in paying the check. But the Kansas court said that a request upon a bank to accept a check is a request for the creation of a legal relation between the holder and the bank, wholly beyond the purview of the paper, and that in all cases there must be no doubt that an absolute promise to pay was made, and that in this case the correspondence amounted to nothing more than an assurance that valid checks drawn by Donald for the amount stated were good at that time.

If in answering the inquiry the bank should add anything to its statement that the check is good that would further induce the other bank to pay the check, these additional words may be construed as amounting to an acceptance or at least to a legally binding promise to pay. In North Atchison Bank v. Garretson, 51 Fed., 168, the following telegrams were sent: "Will you pay Jas. Tate's check on

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8 State v. Morton, 29 Vt. 310.
Kahn v. Walton, 46 Oh. St. 195.
you, twenty-two thousand dollars?" and "James Tate is good. Send on your papers." The check was forwarded and was returned marked "want of funds." The court held that the defendant had bound itself by that answer to pay the check, that the question was asked if it would pay the check, that it could not be supposed that an ambiguous answer was sent for the purpose of misleading the plaintiff, and that the only reasonable interpretation was that an affirmative answer was sent to the question asked. The court said, "If the answer had been limited to the words 'Tate is good,' there would be ground for holding that the bank thereby intended an affirmative answer to the catagorical question put to it; but all doubt was put at rest by the addition of the words 'send on your papers.'" The court in its opinion said that it was not called upon to consider the nice distinction that may exist between bills of exchange, checks accepted, and checks certified, that in this case the bank agreed to pay the check and thereby became legally liable. Most of the cases do not go into this nice distinction nor distinguish between an acceptance of a check and the promise to accept. But a practical distinction is pointed out by the Texas court,4 that in case of an acceptance a suit may be brought by any holder of the bill while in case of a promise to accept action can be maintained only by the one to whom the promise was made. Along this same line, the Supreme Court, speaking through Mr. Justice Hunt, said that it was a sound principle of morality that one who promises another that he will accept a bill of exchange and thereby induces him to advance money upon this promise shall be held to make good his promise, and "whether it shall be held to be an acceptance, or whether he shall be subjected in damages for a breach of promise to accept, or whether he shall be estopped from impeaching his word, is a matter of form merely. The result in either case is to compel the promisor to pay the amount of the bill with interest." 5

Another case in which a telegram was held to be an acceptance though there was no express promise to pay is the case of First National Bank of Dunn v. First National Bank of Massillon, 210 Fed., 542. The plaintiff telegraphed the defendant, "Will you pay Werner Company's check fifty-nine hundred odd dollars?" The answer was, "Answering yours—forward your checks. They will undoubtedly be taken care of by the company when presented." This answer was held to bind the defendant to pay the checks, though there seems to be less promise to pay in this case than in some of the cases where the statement was that the checks were good. The words "send on your papers" or "forward your checks" seem to carry an implied promise to pay which the statements "check is good" or "Blank is good" do not. In Colcord v. Banco De Tamaulipas, 168 N. Y. Supp., 710, the plaintiff upon being asked to cash a check drawn on defendant bank in Mexico telegraphed to the defendant, "Please telegraph us immediately if you will pay draft * * *, municipal president of Nuevo Laredo, for five thousand Mexican dollars." The

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answer received was, "Draft * * * for five thousand Mexican dollars is good." The draft was not paid but was returned on the ground that it lacked the signatures of two other officials and the official seal. Nothing had been said in the correspondence about the requirement of these other signatures. But following the line of decisions the court said that there had been no acceptance, that an explicit question as to whether the defendant would pay the draft was asked, that the defendant did not reply directly to the question, and that no acceptance could be inferred from the circumstances. Page J. dissented, saying in part, "If the draft had been presented to the defendant and some one duly authorized had written "good" on the face thereof and duly signed the name of the defendant, there would be no doubt that this would be equivalent to an acceptance." To carry the argument on, if writing "good" on a check is an acceptance and an acceptance by telegram is valid, why then will a telegram stating that a check is good not be considered an acceptance? The cases give no satisfactory answer, but the answer must lie in the banking business itself. When a check is presented to the bank for acceptance or certification, it may appropriate from the drawer's funds on deposit a sum equal to that of the check, which sum is deposited in a special certified check account and the bank is thus made safe against any loss. But when a telegram is received asking if a certain check will be paid, the bank is not bound to accept the check even though the drawer have sufficient funds on deposit to cover the check. The bank is bound only to pay or accept checks as they are presented to the bank, and it cannot take out funds of the drawer when accepting a check that is not presented. For these reasons the Courts are loath to construe a telegram as an acceptance unless the promise to pay is expressly and distinctly made. This rule is followed in the recent case of Flathead County State Bank v. First National Bank of Caledonia, 282 Fed., 398. The plaintiff sent the following telegram: "We hold check of A. O. Myhre on your bank for $10,000.00. Is it good?" Defendant answered, "A. O. Myhre check for $10,000.00 is good." The Court in its opinion made reference to the circumstances under which the plaintiff received the check and the consideration for it, but said that the question of defendant's liability would rest upon the language of the telegram, and after citing cases said: "Our investigation leads us to conclude that a party is not entitled to recover where, as here, the alleged acceptance was by separate instrument, and there is not a clear obligation to make payment. We are of the opinion that there was no substantial evidence of a binding agreement on the part of the defendant bank to pay the check in suit, and for that reason the trial Court properly directed the verdict in its favor."

A. MC. H.

* Jersey City First National Bank v. Leach, 52 N. Y. 350.
NOTES AND COMMENTS

CORPORATIONS: WHAT CONSTITUTES DOING BUSINESS.

A corporation being a creature of the law, has no legal existence beyond the confines of the state or sovereignty creating it.1 If it migrates to another state or sovereignty, it is there considered and treated as a "Foreign Corporation," and its operations therein are subject to such terms or conditions as that state might deem proper to impose. Said state may discriminate as to the kind of corporations it will admit, and impose many or few conditions.2 It may accept any or all without question, or again, may wholly exclude them from its territorial limits.3

The recognition or privileges accorded by one state to the corporate creatures of another may be attributed to a general policy of comity and even the rules which go to make up this policy of comity may be modified or abridged by the local lawmaking body.4 The only limitation on this power of a state over foreign corporations arises where the case is one which falls within the realm of Interstate Commerce, for there state legislation on the subject would be in direct conflict with the exclusive powers of Congress.5

The state statutes regulating or restricting this rule of comity extended to foreign corporations usually prohibit these corporations from "doing business" until certain conditions have been complied with. As a result a question arises as to whether the "business" constitutes interstate or intrastate business. If in the latter class, it is sufficiently localized to come within the jurisdiction of the state and the next question presented for the court's determination is whether or not it constitutes a "doing of business" within the purview of the particular statute under consideration.

The proposition itself appears to be simple, but its application to particular cases has proven difficult. The frequency with which the question arises, as well as its commercial importance, lend more than usual interest to decisions on this point.

In the recent case of Banks Grocery Co. v. Kelly-Clarke Co., 243 S. W. 879, the Supreme Court of Tennessee holds: "That brokers soliciting orders for a corporation, which, when received, were transmitted to it in another state for its acceptance, did not constitute the doing of business so as to warrant the service of process on the

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2 Lathrop v. Union Pac. R. Co., 8 D. C. 234.
4 North British Co. v. Craig, 106 Tenn. 621.
7 Horn Silver Mining Co. v. New York, 143 U. S. 305, 12 S. Ct. 403.
8 Ins. Co. v. Spratley, 99 Tenn. 322, 42 S. W. 145.
9 Cincinnati, etc., Assurance Co. v. Rosenthal, 55 Ill. 85.
12 Clark v. Memphis St. R. Co., 123 Tenn. 202, 130 S. W. 781.
brokers as agents of such foreign corporation," and in so holding it follows the view generally recognized, viz: That a foreign corporation does not do business in a state merely by having therein an agent to solicit persons to deal with his principal, which solicitations are forwarded to the principal for acceptance and the purchaser is then dealt with directly.6

The phrase "doing or transacting business" is not given a strict or literal construction so as to make it apply to any and all corporate dealings. It is the character rather than the volume of the business which is considered.7

Illustration of this fact is found in the view that "single," "isolated," or "independent" transactions are not sufficient to bring the corporation under the operation of these statutes; among which the following instances of "single transactions" may be mentioned: Single sales or contracts for the sale of goods;8 taking a single mortgage on property, as security for goods sold at the domicile of the foreign corporation;9 making a single loan in the state; by making therein a single purchase of goods;10 by entering a contract of agency;11 or by entering a contract within the state for storage of its property therein.12

A contrary view is found, where the doing of a single act without more is considered sufficient to lawfully subject the corporation to the local statute; which view might reasonably be attributed to the construction placed on said statute. Under this view the making of a single loan secured by a mortgage on property therein constitutes a doing business;13 and the same has been held of a contract to furnish materials for and construct fixtures in a building.14

As expressed in the principal case the consensus of opinion seems to be that a corporation to come within the operation of these statutes must transact therein a substantial part of the business for which it was created and organized; "substantial" being used in contradistinction to "isolated" or "independent." Acts outside the grant of its corporate powers or franchises, as well as those necessarily incident to the carrying on of the business in which it is engaged, are there-

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Lehigh Portland Cement Co. v. MacLean, 245 Ill. 326, 92 N. E. 248.
8 141 Fed. 570, 73 C. C. A. 614.
15 Colo. 499, 25 P. 325.
245 Ill. 586, 92 N. E. 521.
183 N. Y. 98, 78 N. E. 935.
9 Kerne Guaranty Sav. Co. v. Lawrence, 32 Wash. 572, 73 P. 680.
11 Commercial Wood, etc., Co. v. N. P. Cement Co., 84 N. Y. S. 38.
13 189 U. S. 408, 23 S. Ct. 620.
24 Nev. 311, 53 P. 577.
193 Ala. 364, 69 S. 574.
14 176 Ala. 229, 57 S. 762.
fore considered as outside these statutory provisions; for example: engaging in litigation in a state;\(^\text{15}\) collection of debts therein;\(^\text{16}\) accepting or soliciting evidence of such debts;\(^\text{17}\) or again, adjusting or compromising these debts.\(^\text{18}\)

No complete or adequate summary of the cases arising under this point can here be attempted; but for purposes of explanation a few of the classes most frequently met with may be cited:

Those generally considered as not amounting to a “doing of business” are: sales of goods through traveling salesmen or agents;\(^\text{19}\) sales of goods through orders or solicitations received at the corporate office;\(^\text{20}\) sending of goods to local factors or merchants, for sale on commission;\(^\text{21}\) purchases by foreign corporations from local concerns;\(^\text{22}\) lending of money;\(^\text{23}\) owning and holding stock in domestic corporations;\(^\text{24}\) acting as trustee;\(^\text{25}\) conducting a correspondence school, which involves the transportation of books and papers.\(^\text{26}\)

Acts which have been held to constitute a “doing of business” include: investments in local realty;\(^\text{27}\) holding and managing realty in the same manner as resident owners;\(^\text{28}\) maintaining an office or place of business in the state;\(^\text{29}\) selling material and agreeing to install it;\(^\text{30}\) purchases of goods, where the payment and delivery are within the state.\(^\text{31}\)

The apparent conflict in the decisions is often reconcilable upon the ground that the language of the several statutes is variant and therefore admits of different construction; for, while in most of these statutes the prohibition is against “doing business,” in others it is

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\(^{17}\) Morgan v. White, 101 Ind. 413.

\(^{18}\) 37 Fed. 242.

\(^{19}\) 7 Fed. 146.

\(^{20}\) 168 Fed. 218.

\(^{21}\) 72 Fed. 76.

\(^{22}\) 76 Southern 914.

\(^{23}\) 57 N. Y. Supp. 1103.

\(^{24}\) 93 S. W. 711.

\(^{25}\) 93 Tex. 575.

\(^{26}\) 187 U. S. 622.

\(^{27}\) 47 L. Ed. 336.

\(^{28}\) 185 Fed. 451.

\(^{29}\) 235 Fed. 817.

\(^{30}\) 186 Fed. 220.

\(^{31}\) 101 Pa. St. 119.
against the "doing of any business," or "carrying on business," trans-
acting business," or again, "establishing business."\(^2\)

By way of contrast to the principal case, and because of the sig-
ificance it bears to the importance of the situs of the corporate acts,
the decision in Interstate Amusement Co. v. Albert et al., 128 Tenn.
417; 161 S. W. 488, which issues from the same state as that in the
principal case, proves interesting. There the making of contracts was
considered a sufficient "business," the decision hinging on the fact
that the contract was first signed in Illinois by the foreign corporation
and then in Tennessee by the defendant, thus making it a contract
entered into in the latter state and bringing it within the local statute.
(Acts of 1895, Ch. 81.) Commenting on this one writer has said:
"The simple expedient of having the contract signed first in Tennessee
subject to acceptance in Illinois might have saved the foreign cor-
poration in this case the sum of \$1,693.86."\(^3\)

J. A. D.

INJUNCTIONS AGAINST PICKETING. In the case of Yates
Hotel Co. v. Meyers,\(^1\) decided by the Supreme Court of New York on
July 15, 1922, the rule was laid down that picketing, if accompanied
by trespass, annoyance and intimidation, is illegal, and should be
restrained. In this case it appeared that the plaintiff was the opera-
tor of the Yates Hotel in Syracuse; that in September, 1920, when the
plaintiff had about 15 waiters in its employ, a representative of a
local union called on plaintiff's manager, requesting a signed contract
with such waiters, for one year, at an increased wage; that in view
of a business depression, and a consequent financial loss in the opera-
tion of the restaurant of the hotel, the increase was refused. There-
upon the waiters left the plaintiff's employ, and their places were
filled by other persons.

Further trouble arose at about the same time, because of the dis-
charge by the plaintiff of its chief engineer, because of his alleged
inefficiency, whereupon a strike was called by the engineers and fire-
men. Immediately following, the members of the union of which the
defendant was president, began a system of picketing that continued
for a time, then ceased for about eight months, and was then renewed.
The illegal acts of the defendants and their associates specifically set
forth in the bill included annoying the guests of the hotel, intimidat-
ing them, patrolling the sidewalks and entrances of the hotel, stand-
ing in the way of people attempting to enter or leave it, repeated
handing of "unfair" cards to them, shouting in a loud voice "Yates
Hotel unfair," blocking the entrance, using vile language, etc. The
plaintiff further alleged that this condition became so annoying that

\(^2\) 105 Tex. 8.
\(^3\) 142 S. W. 1157.
\(^3\) Corporation Journal No. 43.
\(^1\) Yates Hotel Co. v. Meyers. 195 N. Y. Sup. 568.
NOTES AND COMMENTS

a large number of the patrons of the hotel signed a written protest, objecting to the annoyance on the sidewalk, and characterized the acts of the strikers and sympathizers as a nuisance. The bill alleged that the wrongful acts complained of were in furtherance of a conspiracy between the defendants and others to dominate plaintiff’s service roll, and compel it to employ none but union help and members of Cooks’ and Waiters’ Union No. 150 at wages fixed by them, and if unsuccessful in that regard, to ruin plaintiff’s business.

Upon motion by the plaintiff, the court granted a preliminary injunction pending the hearing, restraining the defendants from further picketing and from annoying the patrons and employees of the hotel. The injunction was granted on the ground that picketing, when accompanied by annoyance, intimidation and trespass is illegal; that all picketing eight months after a strike is over is unlawful; and that irreparable injury was being caused by the illegal acts to the plaintiff’s business.

There has not been entire harmony in the cases as to the circumstances under which picketing may be enjoined. All courts are agreed that it may be restrained under some conditions, as when it is accompanied by violence or intimidation; but some go farther than this, and declare that picketing is per se unlawful, and may be enjoined irrespective of the question of actual violence or the conduct of the picketers. As stated by the New York court in the case already cited, “picketing as a concomitant of a lawful strike is so essentially an act of interference with individual and public rights that courts have hesitated in saying that any sort of picketing is lawful. It suggests aggression. In it there is always an element of unlawful interference with the personal and property rights of others. Demarcation between peaceful persuasion, on the one hand, and trespass and intimidation on the other, is not easily followed.”

It is undoubtedly true that picketing a place of business during the continuance of a strike, no matter how lawful may be the object of the strike, and no matter how orderly the conduct of the strikers and picketers, has an inevitable tendency to intimidate and coerce. This tendency has led the courts of several states to denounce picketing of any kind, and to enjoin it without reference to the question of violence or intimidation. So in Michigan, in the famous case of Beck v. Railway Teamsters’ Protective Union,² the court said: “To picket complainant’s premises in order to intercept their teamsters or persons going there to trade is unlawful. It itself is an act of intimidation, and an unwarrantable interference with the right of free trade. ¶ ¶ ¶ It will not do to say that these pickets are thrown out for the purpose of peaceable argument and persuasion. They are intended to intimidate and coerce. As applied to cases of this character, the

lexicographers thus define the word ‘pickets’: ‘A body of men belonging to a trades union, sent to watch and annoy men working in a shop not belonging to the union, and against which a strike is in progress.’ Century Dict.; Webster’s Dict. The word originally had no such meaning. This definition is the result of what has been done under it, and the common application that has been made of it.”

One of the strongest statements of this view is found in the case of Pierce v. Stablemen’s Union, in which the California court said: “A picket, in its very nature, tends to accomplish, and is designed to accomplish, these very things. It tends and is designed by physical intimidation, to deter other men from seeking employment in places vacated by the strikers. It tends and is designed to drive business away from the boycotted place, not by the legitimate methods of persuasion, but by the illegitimate means of physical intimidation and fear. Crowds naturally collect, disturbances of the peace are always imminent and of frequent occurrence. Many peaceful citizens, men and women, are always deterred by physical trepidation from entering places of business so under a boycott patrol. It is idle to split hairs upon so plain a proposition, and to say that the picket may consist of nothing more than a single individual peacefully endeavoring by persuasion to prevent customers from entering the boycotted place. The plain facts are always at variance with such refinements of reason. * * * We think it plain that the very end to be attained by picketing, however artful may be the means to accomplish that end, is the injury of the boycotted business through physical molestation and physical fear, caused to the employer, to those whom he may have employed, or who may seek employment from him, and to the general public.”

Other cases holding that picketing is necessarily unlawful, and may be enjoined regardless of the method in which it is conducted, are cited in the note.6

According to the weight of authority, however, picketing, if resorted to in order to accomplish a lawful object, and not accompanied by violence, threats, or intimidation of employees or prospective cus-

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6 Pierce v. Stablemen’s Union (Cal. 1909), 103 Pac. 324.
tomers of the employer, is lawful.\(^5\) According to the prevailing view, picketing will not be enjoined when reasonably conducted, and in reasonable numbers, for the purpose of observation only, to learn the names of persons remaining at work, and of those seeking to obtain positions, and to endeavor by peaceful means to persuade them to join the ranks of the strikers.\(^6\)

Workmen, when free from contract obligations, have a legal right, singly, collectively, and as a union, to quit work—that is, to strike—and they have the further right to use such lawful means to make their strike effective as are not inconsistent with the rights of others, and they may endeavor by peaceful argument and persuasion to secure the cooperation of non-union men, provided the persuasion is of such a character as to leave the person solicited free to do as he pleases, and he is not persuaded to do that which it would be unlawful for him to do.\(^7\) Such peaceable persuasion may be lawfully conducted by striking workmen by means of pickets, provided the pickets are so limited in numbers that their presence does not itself amount to intimidation, and so conduct themselves as to leave the persons solicited to feel that they are not being subjected to compulsion, but are at liberty to comply or not, as they please; and picketing so conducted will not be enjoined.\(^8\)

The persuasion which the law permits in aid of a lawful strike is such as appeals to the judgment, reason, or sentiment, and leaves the mind free to act of its own volition. The posting of pickets on the street in front of a place of business does not of itself constitute a trespass upon the premises of the owner of the abutting property. The means employed in aid of a lawful strike must be free from falsehood, libel, or defamation, and from physical violence, coercion,

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\(^7\) Goldfield Consolidated Mines Co. v. Goldfield Miners' Union, supra.

or moral intimidation. The use of the words "unfair to organized labor," if truthful, will not be enjoined, but the use of expressions which convey covert implications calculated to defame, coerce, or intimidate, will be enjoined.9 Picketing strikers are not limited in their attempts to persuade others not to work for an employer to the use of placid language, but may talk in their own language, though plain and strong. "Injunctions against striking workingmen can issue only to restrain lawlessness likely to cause irreparable damage; a strained construction of the words employed by the strikers not being enough, surmise and suspicion not sufficient, and an unusual vigor of speech among the strikers or groups of assembled laborers not justifying the writ."10

All the courts agree that when the picketers resort to force, violence, intimidation or threats, their actions are unlawful and may be enjoined.11 It is not, however, always easy to determine the boundary line between peaceable persuasion and intimidation. "Open threats, much less actual violence, are not an indispensable accompaniment or condition of intimidation. That which in appearance and outward form is but peaceful persuasion may, by virtue of the intent which lies behind it or the circumstances which surround it, carry a menace the practical effect of which is intimidation. Indeed it is quite conceivable that, under the circumstances generally surrounding a strike or other labor difficulty, that which was in good faith intended as peaceable persuasion and designed merely to influence the voluntary action of employees or persons seeking employment, may, by reason of the timidity or the unprotected condition of the persons upon whom it is exerted, operate practically as intimidation or coercion."12

Strikers who assault non-union men with threats, ridicule or insult, or who follow them to or from their work with vile language and abusive epithets, in order to compel them to quit work or to refrain from work, are guilty of unlawful conduct and may be restrained.13 The massing of unnecessary numbers of pickets at points which must be passed by non-union men whom the strikers desire to influence is

9 Robison v. Hotel & Restaurant Employees' Local (Idaho 1922), 207 Pac. 132.
12 4 L. R. A. (N. S.) 302 Note.
in itself intimidation." Violence, jostling, and crowding of those going to and from work may be intimidation, as may also jeering, and the use of insulting and abusive language."

Pickets should not disturb employees who are unwilling to hear, for it is the constitutional right of every person to refuse to hold conversation with others, even if such others' arguments be fortified with wisdom or benefit to the person whose audience is sought. "In going to and from work, men have a right to as free a passage without obstruction as the streets afford, consistent with the right of others to enjoy the same privilege. We are a social people, and accosting by one of another in an inoffensive way and an offer by one to communicate and discuss information with a view to influencing the other's action are not regarded as aggression or a violation of that other's rights. If, however, the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging become unjustifiable annoyance and obstruction which is likely soon to be intimidation. From all this the person sought to be influenced has a right to be free, and his employer has a right to have him free." 17

It has been held in a number of cases that the placing of pickets in front of a restaurant or hotel necessarily results in the intimidation of prospective customers and may be enjoined. 18 It was decided in a recent case in the United States Supreme Court 19 that the picketing of a restaurant by striking employees, which consisted in walking back and forth in front of the entrance, bearing placards charging that the restaurant was unfair to labor, and distributing handbills to all attempting to enter, which contained libelous charges against the employer and threatened injury to those patronizing him, is beyond question illegal means to effectuate the object of a strike.

If the pickets obstruct the entrances to buildings, or free passage along the walks, their conduct may be enjoined. For pickets to take their stand at store entrances or to patrol in front of them, so as to cause the entrances to be somewhat obstructed, and during all the business hours to call out in loud tones, denouncing the proprietor,

14 Goldfield Consol. Mines Co. v. Goldfield Miners' Union (supra); United Shoe Machinery Corp. v. Fitzgerald (Mass. 1921), 130 N. E. 86; American Steel Foundries v. Tri-City Central Trades Council (U. S. 1921), 42 S. Ct. 72; Keuffel & Esser v. International Assoc. of Machinists (N. J. 1922), 116 Atl. 9.
15 Folsom Engraving Co. v. McNeil (Mass. 1920), 125 N. E. 479; Robison v. Hotel & Restaurant Employees Local, supra; Denston Hair Co. v. United Leather Workers' Union (Mass. 1920), 129 N. E. 489; Langenberg Hat Co. v. United Cloth Hat & Cap Makers, supra.
16 Segenfeld v. Friedman (1922), 193 N. Y. Sup. 128.
17 American Steel Foundries v. Tri-City Central Trades Council (U. S. 1921), 42 S. Ct. 72.
19 Traus v. Corrigan, supra.
and advising all not to buy from him, thus causing him annoyance and substantial loss, was held in Oregon to be unlawful.\textsuperscript{20}

It is provided by Section 20 of the Clayton Act that no injunction shall be granted against (1) recommending, advising, or persuading others by peaceful means to cease employment and labor; (2) attending at any place where such person or persons may lawfully be for the purpose of peaceably obtaining or communicating information or peaceably persuading any person to work or to abstain from working; (3) peaceably assembling in a lawful manner and for lawful purposes. Similar statutes exist in many of the states. But it is held that these statutes are simply declarative of the law as it was already conceived, and do not prevent the enjoining of picketing when unlawful means are resorted to, or when an unlawful end is sought.\textsuperscript{21}

Within the limitations already set forth, picketing may be resorted to during the course of a strike called for a lawful purpose,\textsuperscript{22} but it may be enjoined where the object of the strike is an unlawful interference with the employer’s business, as to compel him to adopt the policy of the closed shop,\textsuperscript{23} or of collective bargaining;\textsuperscript{24} or to reopen a department of his business which he had closed because it was losing money,\textsuperscript{25} or to enforce recognition of a union;\textsuperscript{26} or to make an agreement infringing his primary right to hire workmen in the labor market,\textsuperscript{27} or to compel the dismissal of an employee who is in arrears as to his union dues,\textsuperscript{28} or to compel the owner of a moving picture theater to desist from operating his own moving picture machine and to employ a union operator,\textsuperscript{29} or to refrain from working on the contracts of another employer with whom the union has a quarrel.\textsuperscript{30} A strike was held unlawful where its object was to compel the employer to accept a contract with the union, prohibiting the discharge of any employee except with the approval of a board of arbitrators, and

\begin{footnotes}
\item[20] Greenfield v. Central Labor Council (Oreg. 1920), 192 Pac. 783.
\item[22] Heitkemper v. Central Labor Council (Oreg. 1920), 192 Pac. 765; Ex parte Heffron (Mo. App. 1914), 162 S. W. 652.
\item[24] United Shoe Machinery Corpn. v. Fitzgerald (Mass. 1921), 130 N. E. 86.
\item[26] Heitkemper v. Central Labor Council (Oreg. 1920), 192 Pac. 765.
\item[29] Hughes v. Kansas City Motion Picture Machine Operators (Mo. 1920), 221 S. W. 95.
\end{footnotes}
NOTES AND COMMENTS

providing that the factory should not operate more than five days a
week, irrespective of trade conditions.\footnote{Jaeckel v. Kaufman (1921), 187 N. Y. Sup. 889.}

All picketing is unlawful when there is no strike, or when the strike
is over and the places of the striking workmen have been filled.\footnote{Heitkemper v. Central Labor Council (Oreg. 1920), 192 Pac. 765; Henrig Co. v. Alexander (Ili. App. 1917), 198 Ill. App. 568; Yates Hotel Co. v. Meyers (1922), 195 N. Y. Sup. 568.}

In summary it may be said that the majority of courts hold that
picketing in connection with a lawful strike may not be enjoined so
long as intimidation and coercion are not resorted to. But it cannot
be denied that there is an ever-increasing tendency to hold all picket-
ing unlawful, because it is almost inevitably accompanied by intimi-
dation and unlawful acts, and because experience has shown that peace-
ful picketing is a very rare occurrence.

H. C. B.

DEED TO GRANTEE AND HER "HEIRS" HELD TO MEAN,
GRANTEE AND HER CHILDREN—MODERN TENDENCY
ALLOWS THE INTRODUCTION OF PAROL EVIDENCE TO EX-
PLAIN THE INTRODUCTION OF PAROL EVIDENCE TO EX-
PLAIN A PATENT AS WELL AS A LATENT AMBIGUITY IN A
and not, as infrequently used, a word of purchase, being so interpreted from
note.}
"to (John Doe) and his heirs," when found in a deed or will, has always, in the
absence of a clear expression of intention to the contrary, been con-
strued to vest in the grantee or donee a fee simple estate in the sub-
ject of the grant or gift, the words "and his heirs" being words of
art, with a special legal significance, conveying briefly, and in unequi-
vocal terms, the intention of the donor or grantor to give or devise
property in full and perfect ownership. Such a general proposition is
fundamental and undisputed. Where, however, there are other clauses
in the instrument, which indicate with sufficient force and clearness
that the term was used in other than its technical sense, it may, in
the discretion of the court, be construed to mean children, grand-
children, etc., as the contents thereof may suggest.\footnote{243 S. W. 991.}

In a very recent case, Texas Co. v. Meador et al., decided May 24,
1922, the Court of Civil Appeals of Texas, sustaining the finding of
the trial court, held that a deed, reciting that for consideration of
$805 paid by the grantee "and her heirs," the grantor conveyed to
the grantee "and her heirs," a certain parcel of land, created a
tenancy in common in favor of the grantee and her children, and not
a fee simple estate in the grantee named.

That part of the deed which is pertinent to our present discussion
is as follows:

"That we, G. B. Branton and his wife, L. B. Branton, of the county
of Eastland, in the State aforesaid, for and in consideration of
the sum of eight hundred five ($805) dollars to me paid by M. C. Arnold
and her heirs, have granted, sold, and conveyed, and by these presents
do grant, sell, and convey unto the said M. C. Arnold and her heirs,
of the county of Eastland and State of Texas, all that certain parcel
or tract of land situated in Eastland county, Texas, known as Tract
14, a part of the John F. Sapp survey and more fully described as
follows: * * * To have and to hold the above-described premises, to-
gether with all and singular the rights and appurtenances thereunto
in any wise belonging, unto the said M. C. Arnold and her heirs, heirs
and assigns, forever; and we do hereby bind our heirs, executors, and
administrators to warrant and forever defend, all and singular the
said premises unto the said M. C. Arnold and her heirs, heirs and
assigns, against every person whomever lawfully claiming or to
claim the same or any part thereof."

As the court suggests, the repetition of the word "heirs" in the
habendum and warranty clauses was manifestly due to the use of
a printed form.

The opinion was founded upon the modern interpretation of two
general principles of law, both of which, in the light of their peculiar
application, are interesting and worthy of note.

The first question which the court disposites of, and upon which the
majority hinge their conclusion, is "whether the rule in Shelley's
case applies to this case," necessitating the presumption that the
words "her heirs," as they appear in the granting clause, were used
in their technical sense, or whether such words are to be taken as
used with apparent untechnicality in the consideration clause and
other parts of the deed.

In this connection, there was, as referred to and favorably com-
mented upon in the court's opinion, an elaborate citation, by counsel
for the respective parties, of conflicting authorities, which were far
from harmonious in content and beyond all hope of reconciliation,
even by the most learned and delicate reasoning.

The court, however, relied mainly upon the case of Simonton v.
White,† which it considered to be the leading case on the subject and
controlling in the decision of the present question. Although the facts
were concededly different from those in the Texas Company case, in
that the deed was in the nature of a gift to Mrs. Simonton and "her
bodily heirs," and made express provision for Mrs. Simonton and her
family, providing, further, for an equal distribution at her death be-
tween her bodily heirs, the case is important because of the fact that
the court, in its opinion, gave considerable weight to the recital in the
consideration clause, reading as follows: "For and in consideration of

the love and affection and duty as a father towards my daughter, Ava Anna Simonton, her children, Willis, David, Curry, and Prince," as evidencing the intention of the grantor to convey to the children, as well as to the daughter, and further observed that to construe the phrase "bodily heirs" in its technical sense would be to exclude the children from all benefits of the conveyance, although they are embraced in the consideration expressed. Quoting from Justice Brown’s opinion:

“Under the rule in Shelley’s case, the words ‘give and convey unto the said Ava Anna Simonton and her bodily heirs,’ if not qualified, would vest in Mrs. Simonton an estate in fee simple, not because the grantor intended to convey to her such estate, but because the law gives to the language that effect: Taylor v. Cleary, 29 Gratt. 451. However, that rule does not preclude a construction of the words ‘bodily heirs’ so as to ascertain the grantor’s intention, but the well-established doctrine is, if it appears from the instrument that Gentry used the words ‘bodily heirs’ to designate children of Mrs. Simonton, effect will be given to that intention and the estate conferred upon her will be limited to her life with remainder in fee to the children thus pointed out: Doe v. Lamin, 2 Burr, 1100; Taylor v. Cleary, 29 Gratt. 448; May v. Ritchie, 65 Ala. 602.”

This case is obviously authority for the proposition that the clause reciting the consideration may be referred to and taken into consideration in seeking to ascertain the intention of the grantor.

The court in applying this proposition to the instant case, says:

“Here we have the recital that the consideration for the deed was paid by Mrs. Arnold ‘and her heirs.’ It is fair to presume that the words ‘her heirs’ were used in the same sense in the succeeding clauses of the deed. If the instrument spoke the truth, as must be presumed, the grantor received the sum of $805 from Mrs. M. C. Arnold and some other person or persons. Mrs. Arnold was at that time living and had no heirs, within the meaning of the rule in Shelley’s case. We judicially know that many persons use the word ‘heirs’ as synonymous with children, and if the entire grant shows that the term was used in its popular sense, that meaning will be given it rather than its technical significance.”

Although this conclusion may not, in its general nature, be entirely novel, it goes a long way toward supporting and extending the gradually but surely accepted rule, that the term “heirs” will be construed as meaning children, and vice versa, whenever justice or reason of the particular case requires it.

The second question which the court considers, although not with as much deference as the first, is whether the deed was sufficiently ambiguous to put a purchaser upon notice, and to allow the introduction of parol evidence to establish its true meaning.

In this regard, the court has the following to say:

“If, however, we should be mistaken in the conclusion just announced, nevertheless we are firmly of the opinion that, by reason

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of the recital of the payment of part of the consideration by the heirs of Mrs. Arnold, the deed was at least rendered ambiguous, and was sufficient to put a purchaser through Mrs. Arnold upon notice that the grantor may have intended to make the conveyance to her and also to other persons, intended to be described by the phrase 'and her heirs.' Therefore, the testimony of Mr. Grogan (in substance to the effect that Mrs. Arnold's father gave him, Grogan, the money to purchase the land from Bratton, and told him to purchase it, having the deed made to Mrs. Arnold and her children, which he did, the deed being prepared by a notary public, who stated that the term 'heirs,' as therein used, was the equivalent of the word 'children,' which is admitted to be true and correct as to the facts established thereby, clearly shows the intention of the grantor to provide for Mrs. Arnold's children, and to vest in them an interest in the land, and sufficiently supports the judgment of the trial court."

Again, the conclusion reached in this respect gives expression to the leniency exhibited in the more recent rulings, and supported by the modern trend of judicial opinion, in allowing the explanation of ambiguities as they appear in a deed, by the application of the parol evidence rule.

According to the earlier decision, and contemporary text writers, as well as to some of the later authorities that are inclined to be conservative, parol evidence is not admissible in the case of a patent ambiguity, that is to say, where a deed upon its face is ambiguous; whereas, in the case of a latent ambiguity, that is, where no doubt or uncertainty exists on the face of the deed but proof aliunde thereof establishes an uncertainty or ambiguity, parol evidence is allowed to remove the same and to show definitely what persons or things were intended by the parties. The tendency of modern decisions, however, as evidenced by this recent Texas case, is to disregard these technical rules of evidence, when a strict adherence thereto would work manifest injustice and hardship when applied to a particular case, and to treat all ambiguities appearing in a deed or will in the same manner, subject to be cleared up by resort to the intention of the parties, as expressed in the instrument itself, the circumstances attending and leading up to its execution, the subject matter of the grant or gift and the situation of the parties as of that time.

R. A. B.

4 Parenthesis supplied.


8 Ann Cas. 444.
MASTER AND SERVANT: THE MINIMUM WAGE DECISION IN THE DISTRICT OF COLUMBIA. In dealing with a problem like minimum wage legislation it is necessary to look at more than the words of the enacting statute. The meaning, the purpose, and the scope of such a law cannot be clearly understood or interpreted without reference to the historical causes that brought about its adoption.

Minimum wage laws are in a sense a foreign importation, in another sense, a natural outgrowth of domestic labor problems. The first Minimum Wage Act was adopted in Victoria to remedy the flagrant evils of the sweating system. Originally the act affected only five trades; by 1913 the system had spread to over a hundred.

These experiments soon attracted attention in the Western World. In 1909 the United Kingdom created Minimum Wage Boards for the clothing and allied trades; in 1912 she settled a coal strike by the creation of a minimum wage; and in 1918 she extended the authority of Trade Boards over many more trades.

The most striking fact about this movement has been, not its rapid growth, but the conditions that have been revealed by the reports of investigating commissions. Especially bad were the conditions in those trades in which women and children predominated—there the sweating system and its evils were seen at their worst.

Soon commissions were appointed in several of the United States to investigate the feasibility of this idea and the possibility of its practical application to various trades. In almost every case, wretched conditions were found and Minimum Wage Acts followed shortly thereafter. In 1918, when Congress passed the Minimum Wage Law for the District of Columbia, similar acts had been adopted and were in force in eleven states.

Economists and sociologists who have studied the actual operation of minimum wage laws have pointed out numerous advantages and disadvantages, of which we shall advert to only the most important. It is said that they cause unemployment, tend to make the minimum wage the usual wage in industry, discourage self-help by encouraging paternalism and handicap industry, sometimes driving a particular industry out of a state. On the other hand, it is shown that the conditions of the worst paid employees are improved, that employers are compelled to establish more efficient methods of production, being unable to live at the expense of sweated employees; that the operation of the law emphasizes the fact that there is a class of people incapable of earning even the minimum wage, pointing out the need of industrial education and social insurance; and that by continued contact and investigation, accurate information as to wage conditions

2See generally: Adams and Sumner, Labor Problems, 1918 (pp. 122-141); Commons and Andrews, Principles of Labor Legislation, 1916 (ch. IV); Tawney, Minimum Rates in the Tailoring Trade, 1915; Hutchison, Women's Wages; etc.
3See reports of the various state commissions, especially those of Indiana and Massachusetts.
is collected and published, thus bringing public opinion to bear upon the question and tending thereby to alleviate the worst conditions.

These advantages and disadvantages must necessarily be considered by a legislature in determining upon the expediency or necessity for a proposed statute; they have no place, of course, in a judicial determination of the constitutionality of a statutory enactment.

The various state statutes have in several instances been before the highest state courts and without exception have been declared valid. It is to be noted that all of the minimum wage laws in the United States are in reference to women and minors only, and not to men. The courts have singled out this fact and made it the basis of their decisions. They point out that women and minors rest under a disability in contracting; that the handicap is more than a mere physical one; and that therefore, in protecting the health and welfare of these particular classes of persons, the legislature has the power to regulate and fix their wages within reasonable limitations, if it should deem such legislation necessary and expedient.

For instance, in affirming the validity of the Arkansas act, it was said in State v. Crowe:

"It is a matter of common knowledge of which we take judicial notice that conditions have arisen with reference to the employment of women which has made it necessary for many of the states to appoint commissions to make a detailed investigation of the subject of women's work and their wages. Many voluntary societies have made this question the subject of careful investigation. Medical societies and scientists have studied the subject, and have collected carefully prepared data upon which they have prepared written opinions. It has been the concensus of opinion of all these societies, medical and other scientific experts, that inadequate wages tend to impair the health of women in all cases and in some cases to affect their morals. Indeed it is a matter of common knowledge that if women are paid inadequate wages so that they are not able to purchase sufficient food to properly nourish their bodies, this will as certainly impair their health as overwork. It is certain that if their wages are not sufficient to purchase proper nourishment for their bodies, the deficiency must be supplied by some one else or by the public, if they are to keep their normal strength and health. The investigations above referred to show that it has become absolutely necessary for many women to work to sustain themselves, and that they have no one to assist them. The strength, intelligence, and virtue of each generation depends to a great extent upon the mothers. Therefore the health and morals of the women are a matter of grave concern to the public and consequently to the state itself."
And even more clearly it is laid down in Williams v. Evans:

"There is a notion, quite general, that women in the trades are underpaid, that they are not paid as well as men are paid for the same service, and that in fact in many cases what they receive for working during all the working hours of the day is not enough to meet the cost of reasonable living. Public investigations by publicly appointed commissions have resulted in findings to the above effect. Starting with such facts, there is opinion, more or less widespread, that these conditions are dangerous to the morals of the workers and to the health of the worker and of future generations as well.

"It is a strife for employer and employee to secure proper economic adjustment of their relations, so that each shall receive a just share of the profits of their joint effort. In this economic strife, women as a class are not on an equality with men. Investigating bodies, both of men and women, taking all these facts into account, have urged legislation designed to assure to women an adequate working wage. The legislatures of 11 states have passed laws having the same purpose as the one here assailed.

"* * * It is not necessary that we should hold that statutes of this kind applicable to men would be valid. We think it clear there is such an inequality or difference between men and women in the matter of ability to secure a just wage and in the consequences of an inadequate wage that the legislature may by law compensate for the difference. * * *

"We sustain the principle of minimum wage legislation as applied to women. By like reasoning the principle may be sustained as applied to minors."

In the principal case there was only one question before the Court of Appeals, namely, Did Congress have the power to enact the legislation? It was not contended that Congress had attempted to delegate legislative power or that the wage fixed was unreasonable; the power of Congress alone was questioned and denied.

This is only another example of a case where the constitutional limitations are invoked as a barrier against a further extension of the police power; many examples of such conflict are to be found in the Supreme Court Reports. The question in each case is usually twofold, first, whether the subject matter is one that may properly be regulated by the state in its care for the physical and moral welfare of the people; and, secondly, if, in exercising this power, the legislature has restricted the exercise of any rights guaranteed by the Constitution, whether the restriction is a reasonable one from which the welfare of the people as a whole will be benefited.

It has been clearly set forth in the decisions that there is no absolute freedom of contract; this right to contract is and must be limited by the power and the obligation of a state "to enact laws for the promotion of the health, safety, morals, and welfare of those

\[165 N. W. 496, 497.\]
subject to its jurisdiction." The question is whether the limitation is such a "palpable invasion of rights" as to destroy the guaranties of the fundamental law.

The Supreme Court has decided that the legislature may properly limit the hours of employment in mines and smelters, compel a corporation to redeem its own orders in cash, prohibit options to buy and sell at a future time, but it may not make it a misdemeanor to discharge a railroad employee because he belongs to a labor union, nor limit the number of hours that a male laborer may work in a bakery. These decisions help one to understand that the right of contract is not an absolute one; and by analogy, they indicate in a general way that borderland between valid and void enactments.

But it seems clear that there is no decision that could be construed as controlling the question involved in the present case. The Supreme Court itself seems to have recognized this fact when it, as an equally divided court, affirmed without opinion the decision of the Oregon Supreme Court upholding the Oregon Minimum Wage Law.

Yet, in Muller v. Oregon, the court sustained a law regulating the number of hours that a woman might be employed in a laundry. And in the opinion of the court, Mr. Justice Brewer used language that has direct bearing upon the ratio decidendi of the State decisions, before quoted. He said:

"That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. *

"Still again history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the schoolroom are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase in capacity for business affairs it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against

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4 Chicago, etc. Railroad v. McGuire, 219 U. S. 549, 558. See also German Alliance Ins. Co. v. Kansas, 233 U. S. 389; and minority opinion in principal cases, ibid, 731.
7 243 U. S. 629; see note 3, supra.
8 208 U. S. 421, 52 L. Ed. 556 (italics inserted).
a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when legislative is not necessary for men, and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal, and contractual rights were taken away and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the wellbeing of the race—justify legislation to protect her from the greed as well as the passion of man. * + **

This is in striking contrast with the majority opinion of the Court of Appeals in the principal case, which denies that there now is any judicial distinction between the sexes: 14

"We are here called upon to weigh the subject matter of certain legislation in the balance of the Constitution, the general power of Congress to fix wage contracts between private individuals. If Congress may establish a minimum wage for women, it may establish a maximum wage, or it may name a fixed wage. If it may regulate wages for women, it may by the exercise of the same power establish the wages to be paid men. The power of Congress to fix wages between private individuals is either constitutional or unconstitutional. There is no leeway for legislative or judicial discretion. A fundamental principle is involved; and it does not lie in the courts to declare a law fixing the wages of women constitutional and a law fixing the wages of men unconstitutional. The moral stimulus in the one instance is no greater than in the other. If higher wages are essential to preserve the morals of women, they are equally essential to preserve the morals of men."

And further on the court says: 15

"But it is suggested that the act may be sustained, since Congress is legislating for a class. The constitutional limitations upon Congress involve fundamental principles of human rights reserved to the whole people and not to any favored class of citizenship. They are for the protection alike of the rich and the poor, the strong and the weak, the high and the low, and may not, either by legislative or judicial fiat, be used to extend special protection or privileges to any particular class of citizens. No reason is apparent why the operation of the law should be extended to women to the exclusion of men, since

14 ibid, 722.
15 ibid, 723 (italics inserted).
women have been accorded full equality with men in the commercial and political world. Indeed, this equality in law has been sanctioned by constitutional amendment; and so fixed has the tendency in this direction become established in English-speaking lands that the opportunity for official and business preferment, upon complete equality with men, is limited only by the scope of her aspirations."

It is to be noted that no attempt was made to distinguish this case so as to bring it outside of the doctrine of Muller v. Oregon, supra. The Court of Appeals apparently holds that the doctrine should be allowed only so far as the decision carries it, and not so far as Mr. Justice Brewer has expressed it. Yet it is submitted that the doctrine contended for in the principal case is only a reasonable extension of the decision and clearly within the language of the court, in Muller v. Oregon.

P. S. P.

TRADE UNIONS—Whether suable in their own name when unincorporated.

In the famous Coronado Coal Co. case, recently decided by the Federal Supreme Court, and reported in 66 L. ed. p. 643, the opinion of the Chief Justice contains some obiter dicta that cannot go unchallenged, inasmuch as the procedural matter there discussed is of great importance, in federal practice especially, because of the increasing number of cases in which unincorporated labor unions are parties, plaintiff or defendant, in the federal courts, and the likelihood that this dictum will be quoted as precedent in future litigation on the law side of the court.

The plaintiffs, certain coal operators, brought an action in the district court for treble damages under the Sherman Anti-trust Act, against the United Mine Workers of America and its officers, District 21 of the United Mine Workers of America and its officers, twenty-seven local unions in District No. 21 and their officers, and divers individuals, charging them with conspiracy to restrain and monopolize interstate commerce, in violation of the Anti-trust Act, and with destroying plaintiff's property in the consummation of this conspiracy.

The defendants set up that they were unincorporated associations, and therefore not suable in their names.

Unquestionably such unions are to be regarded and treated as unincorporated associations, unless they have availed themselves of the right to incorporate under the Act of Congress.¹

The rule is well settled at common law and in the absence of statute changing the rule, that an unincorporated society or association, being considered a partnership, cannot be sued in its society or company name, but all of the members must be made parties, since such bodies have, in the absence of statute, no legal entity distinct

¹ Cyclopedic L. Dict. Title Trade Union.
from that of their members, or if the members are so numerous that they cannot be made parties to a cause with any chance of bringing it to a hearing, in consequence of abatements and the like, two or three may be made defendants to represent the interests of all. And even where a statute provides for the bringing of suits against unincorporated voluntary associations, and provides for service of process upon certain of its officers, yet this statutory remedy is merely cumulative, and does not take away the right to sue all the members of the association, if the plaintiff sees fit to do so. Statutes in some of the jurisdictions now provide in varying language, that where the parties are numerous, and it is impracticable to bring all before the court, one or more may sue or be sued for all the members of an unincorporated association, or that the action may be maintained against the president or treasurer, etc.

While it should be borne in mind that the Coronado Coal Co. case was an action at law, it may not be amiss to state that the equitable doctrine has been long well settled that when the question is one of a common or general interest to many persons, or where the parties are very numerous and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all, and this beneficent rule has often been applied to equitable proceedings against unincorporated associations, whereby a few members are permitted to represent all the others as defendants, when their number is great, or when some of them are unknown. But even under the liberal equity practice, some parties representing all the divergent interests involved must be brought before the court, and they should be selected, both as to numbers and in their relations to the subject-matter of the suit with reference to having all the conflicting interests fairly represented, so that, after an intelligent view of the whole matter, the court should administer full justice. To make merely the custodian of the funds of a charitable association party defendant omitting its controlling and managing officers, will render the bill demurrable.

It will be seen from the foregoing statements that both at law and

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9 Pearson v. Anderburg, 28 Utah 495, 80 Pac. 307.


in equity, where the parties to be sued are very numerous, one or more may be made "parties defendant by representation," but this is quite different from making the entity party defendant as in case of incorporated societies, yet the court says: "Equitable procedure adapting itself to modern needs has grown to recognize the need of representation by one person of many, too numerous to sue or to be sued, and this has had its influence upon the law side of litigation, so that, out of the very necessities of the existing conditions and the utter impossibility of doing justice otherwise, the suable character of such an organization as this has come to be recognized in some jurisdictions, and many suits for and against labor unions are reported in which no question has been raised as to the right to treat them in their closely united action and functions as artificial persons, capable of suing and being sued."

It is difficult for us to subscribe to this obiter dictum of the court in the Coronado Coal case, inasmuch as an alteration of the rules of practice by judicial legislation, even ex necessitate rei, is not in accord with our past judicial history. The rules of practice at law are to be changed and modernized in time just as those in equity practice in the federal courts were changed in the last few years, and much liberalized. If statutory enactments, such as we find in California, New York, and other jurisdictions, were necessary to mitigate the harsh rule of the common law, there would seem to be no reason why such a method should not also be followed in our federal practice. It is known that the Chief Justice of the Federal Supreme Court is anxious that the rules of practice at law in the federal courts should be revised, and in his address before the American Bar Association in San Francisco August 10, 1922, he urged the appointment of a commission to draft amendments to the present statutes of practice, because "dependence upon action of Congress to effect reform, to remove delays and to bring about speed in the administration of justice has not brought results, and some different mode should be tried. The failures of justice in this country, especially in the state courts, have been more largely due to the withholding of power from judges over proceedings before them than to any other cause, and yet judges have to bear the brunt of the criticism which is so general as to the results of present court action. Judges should be given the power commensurate with their responsibility. Their capacity to reform matters should be tried to see whether better results may not be attained." This language was used by Chief Justice Taft immediately after his return from England, where he found that "it is not possible for an honest litigant in His Majesty's Supreme Court to be defeated by any mere technicality, any slip, any mistaken step in his litigation."

Accordingly, the court says in the Coronado Coal Co. case that: "It would be unfortunate if an organization with as great power as this International Union has in the raising of large funds and in directing the conduct of 400,000 members in carrying on, in a wide territory, industrial controversies and strikes, out of which so much
unlawful injury to private rights is possible, could assemble its assets to be used therein free from liability for injuries by torts committed in course of such strikes. To remand persons injured to a suit against each of 400,000 members to recover damages and to levy on his share of the strike fund would be to leave them remediless.”

This is argumentum ad populum, and was unnecessary to a decision of the case holding the union suable in its own name, because Section 7 of the Anti-trust Law gives the right to sue “associations.” But the whole trend of the court’s opinion discloses that it would have been held, even in the absence of this statute, that these labor unions might be sued in their own names as artificial persons because in many previous cases “unincorporated associations were made parties to suits in the Federal courts under the Anti-trust Act without question by anyone as to the correctness of the procedure.”

It is quite certain that this dictum will be used in some subsequent case as authority for the proposition that an unincorporated association or society may be sued in its own name, as an artificial person, even in the absence of statute giving such right.

F. D. M.
RECENT CASES

EVIDENCE—UNLAWFULLY OBTAINED—Evidence unlawfully obtained cannot be used in court, nor can it be made the basis of a valid search warrant. United States v. Boasberg, 283 Fed. 305.

Prohibition agents, under a search warrant of another building searched defendant's residence, where they found liquor. On an affidavit of such facts and that it had been imported in violation of law, of which there was no evidence, a second warrant was obtained, under which the liquor was seized. Held, that search of defendant's house under the first warrant was unlawful, and that information so obtained could not lawfully be made the basis of a second warrant or justify the seizure of defendant's property.

The courts do not as a rule concern themselves with the method by which a party has secured the evidence which he adduces in support of his contention, and evidence which is otherwise admissible will not be excluded because it has been fraudulently, wrongly, or illegally obtained. Firth Sterling Steel Co. v. Bethlehem Steel Co., 199 Fed., 333; U. S. v. Slenker, 32 Fed., 694; Commonwealth v. Hurley, 158 Mass., 159, 33 N. E., 342.

In some jurisdictions it is held that the court cannot go behind the action of the grand jury to inquire as to what evidence they had or did not have when considering a bill of indictment. Mercer v. State, 40 Fla., 216, 24 So., 154; State v. Conner, 157 Ind., 611, 62 N. E., 452; State v. Smith, 74 Iowa, 580, 38 N. W., 492; Clark v. State (Texas), 43 S. W., 522. Other courts hold that if it is shown that an indictment was found entirely upon illegal evidence it will be quashed upon a plea in abatement. Boone v. People, 148 Ill., 440, 36 N. E., 99; Commonwealth v. McComb, 157 Pa. St., 611, 27 Atl., 794; U. S. v. Farrington, 5 Fed., 343. And in other jurisdictions it is held that if the legal evidence given before a grand jury is such as would warrant a finding of an indictment, it will be sustained, notwithstanding the admission of improper evidence. People v. Lander, 82 Mich., 109, 46 N. W. 956; People v. Molineaux, 58 N. Y. S., 156.

In the case at bar the court based its decision squarely upon the Fourth and Fifth Amendments to the Constitution of the United States guaranteeing to every citizen the right to be secure in his person, house, papers, and effects against unreasonable searches and seizures and not to be required to give evidence against himself in a criminal case. The court said this case comes squarely under the recent decisions of the Supreme Court in Goulden v. U. S., 255 U. S., 298, 41 Sup. Ct., 261, 65 L. Ed., 647; Amos v. U. S., 255 U. S., 314, 41 Sup. Ct., 266, 65 L. Ed., 654; and Silverthorne Lumber Company v. U. S., 251 U. S., 385, 40 Sup. Ct., 182, 64 L. Ed., 319.

In the course of the decision the court quotes with approval the following language from the Goulden case:

"The Fourth Amendment reads: 'The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated, and no warrants
shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'

'The part of the Fifth Amendment here involved reads: 'No person * * * shall be compelled in any criminal case to be a witness against himself.' It would not be possible to add to the emphasis with which the framers of our Constitution and this court (in Boyd v. U. S., 116, U. S. 616, in Weeks v. United States, 232 U. S., 383, 34 Sup. Ct. 341, 58 L. Ed., 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, and in Silverthorne Lumber Co. v. United States, 251 U. S., 385, 40 Sup. Ct., 182, 64 L. Ed., 319) have declared the importance to political liberty and to the welfare of our country of the due observance of the rights guaranteed under the Constitution by these two amendments. The effect of the decision cited is: That such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty, and private property, that they are to be regarded as of the very essence of constitutional liberty, and that the guaranty of them is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen, the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these amendments should receive a liberal construction, so as to prevent stealthy encroachments upon or gradual depreciation of the rights secured by them, by imperceptible practice of courts or by well-intentioned but mistakenly overzealous executive officers. In the spirit of these decisions we must deal with the question before us.'

W. C. K.

NEGOTIABLE INSTRUMENTS—DEFECTIVE TITLE—Breach of warranty not available as defense against transferee of note unless his knowledge of warranty and breach before transfer is shown.

Where the title of the person who negotiated a note was not defective, a defense of breach of warranty is not available against the transferee unless it be shown that he had knowledge of the warranty and of its breach before he parted with the consideration for the note. First National Bank of Mankato v. Carey et al. (Minn.), 190 N. W. 182.

The defendants owned a Little Giant tractor which they had used for six years. They took it to Mankato and had the Little Giant Company overhaul and repair it. They testified that when they came for the tractor the company represented and guaranteed that it had been put in first-class shape and would do good work, but refused to let them have it until they had settled for the repairs; that they gave the note in controversy for the cost of the repairs; that at their instance the company promised not to transfer the note; that they took the tractor home and about a month later attempted to use it and found that it would not work. The note was dated July 1, 1920, and was payable on or before December 1, 1920. The Little Giant Company did its banking business with the plaintiff bank. On July 2,
1920, the company indorsed the note and delivered it to the bank as a part of its deposit made on that day and received credit for the amount in its account with the bank. At the close of business on that day it had a credit balance in this account of more than $3,000. At the close of business on the following day, July 3, the account was overdrawn, showing that the bank had paid out the full amount of the note. When the note became due the defendants refused to pay it and the bank brought this action.

The defendants' main contentions were that there was a breach of warranty and lack of consideration, and that the bank was chargeable with notice of the representations and warranties made by the Little Giant Company for the reason that the president and cashier of the bank were officers of the company, one being president and the other secretary and treasurer.

The holder of a negotiable instrument is deemed prima facie to be a holder in due course; but when it is shown that the title of the person who negotiated the instrument was defective the burden is on the holder to prove that he, or some one under whom he claims, acquired it in due course. The note was unconditional on its face, and the promise not to transfer it did not make the title defective nor furnish any ground for a defense to the note. Farmers' State Bank v. Skellet, 149 Minn. 266, 183 N. W. 831; Snelling State Bank v. Clasen, 132 Minn. 404, 157 N. W. 643, 6 A. L. R. 1663.

In order to use a breach of warranty as a defense to a suit on a negotiable instrument the maker must not only prove the warranty and its breach, but he must also prove that the transferee had actual knowledge that the warranty had been breached or the consideration had failed when he acquired the instrument or parted with consideration for it. Bank v. Walser, 162 N. C. 53, 77 S. E. 1006; Bank of Polk v. Wood, 189 Mo. App. 62, 173 S. W. 1093; Night v. Parsons, 136 Iowa, 390, 113 N. W. 858, 22 L. R. A. (N. S.) 718, 125 Am. St. Rep. 265, 15 Ann. Cas. 665.

W. C. K.

WILLS—Failure of executrix to appeal from denial of probate is not fraud on other beneficiaries.


This was an appeal from the circuit court of Marshall County, Illinois, sustaining the county court in dismissing a petition praying the court to set aside an order denying probate of a will which was denied probate on the testimony of the attesting witnesses, one of them having testified to the effect that he was not sufficiently acquainted with the testator to state whether he was or was not mentally competent to make a will or was of sound mind and memory at the time he executed the same, and the other attesting witness testified that the testator was not of sound mind and memory and not competent to make a will.
The petition in this case was filed more than five years after the order of the court denying probate.

The record shows that the widow, who was named as executrix in the will, did not like the provisions of the will and did not want it probated, but when her attorney, who was custodian of the will, informed her that he would have to file the will and that it was her duty to have it probated if she wished to qualify as executrix, she filed her petition in the county court, obtained service on all parties, including the appellants, and produced the witnesses who attested the will and had them examined before the court.

There was no appeal from the order of the court denying probate and the widow filed her petition for the appointment of herself as administratrix, and was appointed, took the oath, and proceeded to administer the estate.

The petition of the appellants charged certain specific acts of fraud against the widow. These acts being, in substance, that, very soon after the probate of the will was denied, the executrix informed the appellants that the will was duly probated; that appellants relied on such information and believed that it was true and acted upon it, and did not learn that such information was false until five years after the order of the court was entered, when they were advised that the will had not been probated; that the executrix did not make any effort to prove or establish the will in the county court and did not appeal from its order denying probate of the will, and that she at all times knew that she could establish by the testimony of many witnesses that the testator was of sound and disposing mind and memory at the time he executed the will.

Appellants introduced testimony of the competency of the testator to make a valid will and contended that the executrix, by reason of such facts as shown by the testimony, must have known that the testator was competent to make a valid will, and he did make a valid will and that it was, therefore, her legal duty to have appealed to the circuit court from the order of the county court denying probate of the will.

The court held that the mere failure of the executrix to appeal to the circuit court is not sufficient ground for setting aside the order of the county court denying probate of the will. Where the court has jurisdiction of the subject matter and the parties in a proceeding, and hears testimony and renders its order and judgment, the same is binding on all parties to the suit and can only be set aside for fraud. Where both parties have a right to appeal, as they had in this case, neither side can complain because no appeal was taken by the other side. Appellants being parties to the proceeding to probate the will and, having been served with notice according to law, are conclusively presumed to have known the results of the court's decision within a reasonable time thereafter and without any further notice by the executrix or anyone else. It was their duty to ascertain the result of the court's holding and its order, and, failing to do so and failing to appeal, they were guilty of such negligence in pro-
tecting their rights as to estop them from now claiming that they did not learn of the order of the probate court until years after. Their laches in this regard is a complete bar to their petition in this case. They were not only required to prove fraud, but were also required to show that they were diligent in taking advantage of their rights. Citing, Evans v. Woodsworth, 213 Ill. 404, 72 N. E. 1082.

Referring to the refusal of the attesting witnesses to support the will in the probate proceedings, the court said: "The testator in this case was simply unfortunate in not knowing his friends sufficiently to select therefrom two that had manly courage enough to stand by what they had acknowledged and said in his presence, after he was dead and gone. This often happens, and attesting witnesses cannot be too severely criticized for signing such an attesting clause as appears in this will and then swearing to the contrary, when they are produced as witnesses in court. Such treachery is of the vilest character, no matter what is the character and standing of the attesting witnesses in the community in which they live. It is their duty either to refuse to become attesting witnesses, or else to know the character of the statements they sign and stand by them when they are called on to testify." The attestation clause signed by the attesting witnesses recited, in part, "And we, and each of us, do hereby certify that we were well acquainted with the said Theodore Lash at the time he so signed, sealed, published, and declared said instrument to be his last will and testament, knew him to be of sound and disposing mind and memory, acting freely and voluntarily and not under duress or contraint of anyone."

In Stevens v. Leonard, 159 Ind. 67, 5 Prob. Rep. Ann. 369, it was said, "Little credence should usually be given to testimony of a subscribing witness denying the validity of the will," although it may be sufficient to prevent probate.

Also see In re Sizer, 195 N. Y. 528, 88 N. E. 1132, holding that while signature of a third attesting witness would not affect the validity of a will, his testimony, which contradicted recitals in the attestation clause, should be considered on the weight of the whole evidence offered to show execution.

J. A. C.

DAMAGES—There can be no recovery for expenses of advertising in addition to the loss of profits.


Plaintiff was the operator of a moving picture theater in Enid, Oklahoma, and had contracted with the defendant, a producer of moving picture films, for the furnishing of a feature film for the 4th, 5th, and 6th days of July, 1918. The producers failed to furnish the film until the 5th day of July, and the plaintiff brought this action to recover damages for the breach of contract.
Evidence was introduced to show the expenses incurred for advertising this feature film, and also the loss of patronage due to the failure to show the film.

Sec. 2852, Rev. Laws of Oklahoma, defines the measure of damages for breach of contract as follows: "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this chapter, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom. No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin."

The lower court, after stating the law, instructed the jury, "for the purpose of ascertaining such damages, you may take into consideration the amount of money, if any, expended by the plaintiff in advertising and other preparations made by him for the purpose of exhibiting said special feature film on July 4th, 1918, and which expenditures were lost or of no avail to him by reason of the failure of the defendant to furnish said film. You may also consider the loss he suffered, if any, resulting from loss of patronage on said day.

The jury returned a verdict for the plaintiff in the sum of $830.54, and judgment was rendered accordingly.

Defendant perfected this appeal assigning as error, among other things, that part of the instruction to the jury which directed their attention to the items that would fall within the measure of damages for the breach of contract.

It was held error to give that part of the instruction which authorized the jury to assess as a part of the damages the amount of money plaintiff had expended in advertising and other preparations made by him for the purpose of exhibiting the film on July 4th, as he would not be entitled to recover the admission fees he lost because he did not have the film, and then recover the expense he incurred for advertising and inducing persons to attend. The judgment of the lower court was modified by deducting $109.34, which was the amount claimed for the expense of advertising.

The finding of the court seems to be in accord with the settled principles that the "law contemplates, in case of contract broken, two elements of damage, first, losses sustained, and, second, gains prevented," Bulkley v. U. S. 7 Ct. Cl. 547, and that the "measure of damages for breach of contract involving the injured party in labor and expense in performance on his part is not the amount he would have received if the contract had been performed, but the profits he lost by the failure of the other party to keep the contract on his part," Robinson v. Bullock, 66 Ala. 548, "and while the jury in an action for breach of contract, including prospective profits, are authorized to find for the plaintiff for expenses incurred in an effort to perform the contract, where they are unable from the evidence to find profits, if they find profits they should not find expenses,"
Cutting v. Miner, 30 App. Div. 457, 52 N. Y. Supp. 388. In Blood v. Herring, 22 Ky. 1725, 61 S. W. 273, it was held that "a party to a contract broken by the other party cannot recover the estimated profits he would have made, if he had been permitted to perform his contract, and in addition thereto damages for loss of time.

J. A. C.

INJUNCTION—MUNICIPAL CORPORATION—City enjoined from interfering with erection of garage.

*Pratt v. City and County of Denver et al., 209 Pac. 508.*

This is a suit for an injunction to restrain the City and County of Denver, its officers, and employees, from preventing or interfering with plaintiff's construction of a garage building. Judgment for defendants, and plaintiff brings the case to the Supreme Court for review.

On May 18, 1921, the plaintiff obtained from the building inspector a permit to build the proposed building. The construction was not authorized by the city council, but this fact is material only in the event it is held the proposed building is a public garage within the ordinance hereinafter mentioned. If it is, as the city claims, such a public garage, the judgment below must be affirmed.

Ordinance No. 121 of the series of 1919 provides substantially that it shall be unlawful to erect any building for use as a public garage within the city and county of Denver, and no permit shall be issued unless authorized by resolution of the Council of the City and County of Denver.

The proposed building is one 40 by 100 feet in width and length, respectively, and about 10 feet high. It is to be subdivided into 24 separate rooms or compartments. Each room is to be let out for the purpose of storing an automobile therein, and the tenant of each room is to care for his own machine and to have a separate lock and key to the compartment. Is this building, then, a public garage? The definition given by the ordinance itself is, as it must be, controlling in this case. In this respect the ordinance reads as follows: "For the purpose of this ordinance a public garage is defined as, any building or place used in whole or part for carrying on the business of repairing or storing for hire of automobiles * * * or other vehicles."

It is seen from this definition that the mere use of a building for storing automobiles does not make the building a public garage. To be a public garage it must be "used for carrying on the business of storing for hire of automobiles." Here the owner is only allowing the tenant to store his automobile there and is merely renting his building to be used as a private garage.

"A garage has been likened to a livery stable, for which it has become a substitute to a great extent, and the rules of law governing livery stable keepers apply to garage keepers," 2 R. C. L. 210.
In Congregation Beth Israel v. O'Connell, 187 Mass. 236, 72 N. E. 1011, the plaintiff, a religious corporation, sought to restrain defendants from erecting a stable within 200 feet of its church building. It was claimed that the stable came within the definition of a statute which read in part as follows: "No person shall occupy or use a building for a livery stable or a stable for taking or keeping horses and carriages for hire or to let." The court held that the statute did not apply to a stable let out in specified parts to tenants who take care of their own horses. That case shows there is a difference between keeping or taking horses for hire and renting a stall wherein the tenant may take care of his horse. The same applies to storing automobiles for such use. In the former case the party acting would become a bailee; in the latter case he would be a landlord and not responsible as a bailee. Under the admitted facts in this case the building is not a public garage, and the city cannot rely on the ordinance as a justification for preventing plaintiff from constructing such building.

The trial court held that the permit which was given had been legally revoked. About a week after permit was issued, the building inspector attempted to revoke it until such time as it might be determined what the character of the proposed building was. The plaintiff, acting in reliance on the permit, incurred considerable expense for work, labor, and material necessary for construction of the building prior to the time of the attempted revocation. Under these circumstances the city is estopped to claim that the permit has been revoked.

The rule is stated in 25 C. Y. C. 646 as follows: "In a number of states, when the licensee has acted under the authority conferred and has incurred expense in execution of it, by making valuable improvements or otherwise, equity regards it as an executed contract, and will not permit it to be revoked, regarding it substantially as an easement, the revocation of which would be a fraud on the licensee."

This doctrine need not be confined to easements. Thus in Town of Spencer v. Andrew, 82 Iowa 14, it was applied so as to estop a city from revoking a permit to erect scales, where the licensee had incurred expense in making preparations to erect the scales. In City of Buffalo v. Chadeayne (Super. Ct.), 7 N. Y. Supp. 501, it was held that a city council's rescission of a permit to construct a building is void where the builder has acted on the permit and made preparations for the construction. To the same effect is City of Barre v. Perry & Scribner, 82 Vt. 301; and the City of Lowell v. Archambault, 189 Mass. 70.

An ordinance of the city provides for revocation of a building permit under circumstances which do not exist in this case. The judgment is reversed, and the cause is remanded for further proceedings not inconsistent with the views herein expressed.

F. A. M.
CONTRACTS—Contract for right of inheritance may be specifically enforced.

Barrett v. Miner et al., 196 N. Y. S. 175.

Action by James P. Barrett against Frances B. Miner and another for specific performance of a contract.

When plaintiff, whose real name is Bibby, was three years old, he came to live with Patrick and Sarah Barrett. He was related to Mrs. Barrett, and she cared for him as she would her own son. He took their name and was known as “Barrett boy.” He was educated by them and helped with work about the farm. Later he was married, but still visited the old home frequently and acted in all respects as a son would. There was no effort made to legally adopt him.

In 1902 the defendant, Evelyn M. Purvee, was legally adopted by the Barretts and lived with them till her marriage. In 1911, after plaintiff had reached his majority, he and the elder Barretts entered into a written contract which is the subject of this litigation. The important part of the contract was that plaintiff was to be considered in all respects as the Barretts’ son and was to be treated as their lawful heir and next of kin to the same extent as though he was their lawful issue. The plaintiff on his part was to treat the Barretts as his lawful parents and to give them the rights, privileges, and benefits of such relationship. The contract was under seal, and the consideration stated in the instrument was love and affection, $1.00, and the mutual covenants and agreements of the parties. No money consideration ever passed between them.

Patrick devised all his property to the plaintiff subject to the life estate of his wife. Sarah died intestate. Mrs. Purvee claims to be the only heir at law and next of kin of her foster mother. The action is brought to have the court decree specific performance of the contract making plaintiff an heir at law. There is no question of incompetency of parties or of fraud or duress. The parties met on equal terms.

Mrs. Purvee opposes on the following grounds: (1) That the contract is for the adoption of James Barrett, and as such is illegal; (2) that there was no consideration for the agreement; (3) that the contract is of such a nature that the court should not exercise its discretion and decree specific performance.

Defendant claims this contract is one for the adoption of the plaintiff and insists that his right to share in the decedent’s property rests solely on the theory that he was the legally adopted son of decedent, and he can only take by right of the statute of descent and distribution. If plaintiff’s right to recover rested upon such theory, I would dismiss the complaint. The legal adoption of a child can only be accomplished by virtue of a statute. Carpenter v. Buffalo General Electric Co., 213 N. Y. 101; 106 N. E. 1026; U. S. Trust Co. of N. Y. v. Hoyt, 150 App. Div. 621, 135 N. Y. Supp. 849. No proceedings were ever taken pursuant to the Domestic Relations Law (Consol. Laws, c. 14). At the date of this contract plaintiff had
passed his majority, and the statute, as it then stood, did not provide for the adoption of an adult.

Defendant, however, misapprehends the nature and purport of this contract. While it did not bring about the legal adoption of plaintiff, I think it should be construed to be an agreement to make a particular disposition of property at death for the benefit of plaintiff. If that is the purport of the contract, judicial opinion is almost unanimous that it will be enforced in equity against those to whom the legal title of the property has descended. Winne v. Winne, 166 N. Y. 263; Burns v. Smith, 21 Mont. 251; Kofka v. Rosicky, 41 Neb. 328; Morgan v. Sanford, 225 N. Y. 454.

The well-established principle applicable in such case is concisely stated in Winne v. Winne, supra, as follows:

"It is undoubtedly the settled law of this state that where a certain and definite contract is clearly established, even though it involves an agreement to leave property by will, and it has been performed on the part of the promisee, equity, in a case free from all the objections on account of the adequacy of consideration or other circumstances rendering the claim inequitable, will compel a specific performance."

In Burns v. Smith and Kofka v. Rosicky, supra, it was held that, although an instrument was invalid as a contract of adoption, it might still be valid as a contract to make a certain testamentary disposition. There is no difference between an agreement to will one's property to an individual and a promise that the same individual shall be considered as lawful heir and next of kin of obligor. The effect is the same.

The contract is certain and definite and is in all respects fair, and the fact that it will deprive defendant of plaintiff's share does not prevent enforcement on the grounds that it will work an injustice to third parties. Godine v. Kidd, 19 N. Y. Supp. 335.

Defendant urges that there is no valuable consideration. She claims that the only inducing cause was the past relationship that existed between the parties, and there is no present consideration for the contract. There must be a present consideration to establish plaintiff's case. Dempsey v. McKenna, 45 N. Y. Supp. 973, 18 App. Div. 200. There is, however, not only a present but also a valuable consideration passing to the elder Barretts. The gist of the contract is the mutual covenants on the part of each to do certain things in the future for each other. This is a bilateral contract. The promises were mutual, and the rule is well established that under such circumstances the promise of one is a sufficient consideration for the binding declaration of the other. Bracco v. Tighe, 75 Hun. 140; Briggs v. Tillotson, 8 Johns 304. Especially ought this rule be enforced when one of the parties has performed his part. Consideration assumes its strongest form when executed. Grossman v. Schenker, 206 N. Y. 466. Mere love and affection would not be sufficient to support an executory contract, but in this case the contract is executed as far as plaintiff is concerned. Mere inadequacy of consideration
or a substantial difference in value between the consideration paid and the services performed will not defeat specific performance. Northrup v. Giffs, 1 N. Y. Supp. 465. It is impossible to say what plaintiff’s services were worth to the Barretts. They may have been worth many times the value of her estate.

That brings us to the third objection of the defendant, viz: that the facts are such that Court of Equity should not exercise its discretion and decree specific performance. Even if a contract belongs to a class where that right exists, it is not absolute but is rather within the judicial discretion of the court whose aid is invoked. Sherman v. Wright, 49 N. Y. 227. The word “discretionary,” as used in the decisions, is inaccurate and misleading. The discretion referred to does not mean a whimsical, fickle, or arbitrary one, but rather the sound judicial discretion of the court, controlled by principles of equity, and exercised upon a consideration of all the facts and circumstances of the case.

Pomeroy, in section 1404 of his work on Equity Jurisprudence (4th Ed.), states the rule as follows: “Where, however, the contract is in writing, is certain in its terms, is for a valuable consideration, is fair and just in all its provisions, and is capable of being enforced without hardship to either party, it is as much a matter of course for a Court of Equity to decree its specific performance as for a Court of Law to award a judgment of damages for its breach.”

I think that this contract comes within the above rule. If, however, I were free to use my own judgment, I should reach the same conclusion. The deceased entered into the contract of her own free will. She is not asking to be relieved; she never sought to repudiate the contract. The objection comes from a third party who would benefit if its terms were not enforced. Why should a third party, for reasons of her own, be permitted to produce a result not contemplated by the parties at the time of the execution of the contract? The court should not substitute its judgment for that of the parties. I think, therefore, that on the merits of the case, plaintiff is entitled to a specific performance of contract.

F. A. M.

CONSTITUTIONAL LAW: Statutes punishing the advocacy of “criminal anarchy” are not violative of the free speech clause in the Constitution.

People v. Gitlow (136 N. E. 317 or 234 N. Y. 132).

The Penal Laws of the State of New York made it unlawful for any person to print, publish, edit, issue, or put before the public any book, paper, document, etc., advocating the necessity or duty of overthrowing organized government. The defendant, Benjamin Gitlow, edited and published in the “Revolutionary Age” an article, in which he advocated the overturning of the government by gradual movement of the working class of people. In this article he laid open a plan by which the American Proletariat, or working class, could gain control and management of the government by means of contin-
ued and extended labor strikes. He was tried and convicted and took appeal on the ground that such a statute, prohibiting the advocacy of "criminal anarchy" was in violation of the First Amendment of the United States Constitution.

HELD: That section of the United States Constitution which secures freedom of speech and press does not protect the violation of this liberty, or permit attempts to destroy that freedom which the Constitution has established. Referring to the case of People v. Most, 171 N. Y. 423, where it was said "while the right to publish is thus sanctioned and secured, the abuse of that right is excepted from the protection of the Constitution, and authority to provide for and punish such abuse is left to the legislature." The same point was brought out in the case of Patterson v. Colorado, 205 U. S. 454; 27 Sup. Ct. 556. In the present case it was argued by the defense that such a statute had as its end the protection of the particular state in which it was in force and could not extend to the protection of the other states and the United States. This was denied by the court in saying that to advocate the destruction of any one state, or even a community, is to advocate the destruction of all "organized governments," including state and Federal. The defense further argued that the method of the article under consideration in this case, for the overturning of the government, was a gradual change from one system of government to another and not a radical and immediate change under the term revolution, and that the article did not advocate directly the change from the present system of government to the proposed system, but that it merely showed the manner in which it might be accomplished.

But to this the court said that it had as its object the overthrowal of the present system and that no words could disguise the object. It had as its basic principle the defeating of the government as it stood, which government was the one under which the court as a court was bound to follow, and that any attempt, regardless of the form in which it was expressed, which had as its end and object the overturning of that government was unlawful and could not be tolerated. It is not the words or means by which a thing is done but the ultimate object that is to be accomplished that is looked at. It was also said that that freedom which is given by the Constitution is not an absolute right to speak and publish anything that one pleases, freed from all illegal and criminal liability. Warren v. U. S., 183 Fed. 718. The exclusion of alien anarchists from this country because their views are in violation of the Constitution is not in conflict with the free-speech clause because it is the right of all governments to exclude any person from their borders, 126 Fed. 253. While the publishers of newspapers, magazines, etc., are protected by the same guarantees of the Constitution, they do not enjoy any additional immunity or freedom, and are responsible for any violation as are persons writing such articles. U. S. v. Toledo Newspaper Company, 220 Fed. 458.

J. J. McG.
TAXATION: That Bible teaching, prominent in the course of study, or that school is a denominational institution, does not prevent exemption under a tax law.

South Lancaster Academy v. Inhabitants of Town of Lancaster (136 N. E. 627).

A statute in the State of Massachusetts recited that any charitable, benevolent, scientific, or literary institution should be exempt from taxation. The petitioner was incorporated by the Seventh Day Adventist denomination for the purpose of the establishment and maintenance of a school for the instruction of persons of both sexes in the sciences and Holy Scriptures, and also to provide for manual labor. In the running of the school it was necessary to manage and have under their control some 135 acres of land; 75 acres were used for tillage which was worked by the students. They raised enough farm produce to furnish the school the year round, and in addition they sold all over the amount that they used to persons around at retail prices. The institution had been at a loss and therefore was not of any pecuniary gain to either itself or to the denomination of which it was a part. It was contended on the part of the institution that it was within the statute and on the part of the town that it was a religious institution solely and therefore it was barred from exemption. The question resolves itself down to whether the fact that religion was taught and made a part of the course of the institution would bar it from claiming exemption.

HELD: That although the Bible was taught and made part of the course would not take it out of the statute. It was merely another phase of the course, and any of the other branches of education could be taught and which would not be hindered by the religious views. Nor the fact that the institution was denominational make it any the more barred from claiming exemption. Wesleyan Academy v. Wilbraham, 99 Mass. 599. And in the last cited case it was also held that where a certain academy, denominational in form, held a farm and worked it for the benefit of the institution, that it was still within the statute. Still further it was said in another case that houses and lots used by the head master and professors of the school were as much a part of the institution as the immediate property of the institution and were exempt. Thayer Academy v. Nantintree, 122 N. E. 410. The court cited the case of Mount Hermon Boys' School v. Gill, 13 N. E. 354, in which it was said that institutions of learning were to be favored and encouraged. That although the primary object of the institution was to further the denomination that it represented it would still continue in the meaning of the statute. There is also a New York case on this subject which agrees in the opinion that schools and educational institutions should be encouraged and that to do so they should not be taxed, as most of them run at a very small profit, if any. 146 N. Y. 753. It has also been said that exemption applies to educational associations even where they are privately owned and not chartered by the state. 129 Tenn. 412. But in 141
N. Y. St. 199 it was held that a society for the prevention of cruelty was not within such a statute, which gave exemption to educational institutions. Neither is it a charitable or benevolent organization. As to collateral inheritance tax it was decided that an educational, benevolent, or charitable institution was not exempt. 88 Atl. 136 or 48 L. R. A. N. S. 373. On summing up this case the court said that in the case of any educational, literary, benevolent, or charitable institution, if any of the funds are received for any of the above purposes then it is exempt from taxation. But that if the funds are used for any other purpose than that alone, then they are not. This does not mean that the funds cannot be applied to both purposes.

J. J. McG.

DIVESTING RIGHT OF DOWER IN NEW YORK.

In the recent case of Monroe County Savings Bank v. Yoeman et al. (195 N. Y. Sup. 531), on motion of the claimant of dower rights for an order directing the treasurer of Monroe County to pay to her a gross sum as value of her dower interest in surplus moneys arising from sale under a foreclosure decree in the action, it was held that where a wife received a divorce in a foreign jurisdiction on grounds and process not available in the State of New York, her dower rights were divested.

It appears in that case that in the year 1910 in an action brought to foreclose a mortgage one-third of the surplus arising upon the sale was retained by the treasurer of Monroe County to secure the inchoate right of dower for the mortgagor’s wife.

In the year 1912, the wife procured a divorce in the State of Ohio in an action brought against her husband upon grounds of his alleged cruelty and neglect; that the husband was served by publication but did not appear.

The widow’s right to dower in her husband’s lands and the causes by which it may be defeated are determined by the law of the place where the property subject to dower is situated.1

In the instant case the land subject to the claimant’s dower rights was located in New York, therefore on the authority cited the law of New York governed the case as to her dower rights and not the law of Ohio, where she received her divorce.

The statutes of New York neither bar dower nor preserve it.

The statute of New York declares, however, that a widow shall be endowed.4

In deciding adversely to the claimant’s right of dower the court in the instant case bases its argument on the ground that the claimant

98 N. E. 488.
41 L. R. A. N. S. Ann. Cas. 1913 E. 553.
2 Van Blaricum v. Larson, supra.
3 Monroe County Sav. Bank v. Yoeman et al., 195 N. Y. Sup. 531.
4 Monroe County Sav. Bank v. Yeoman et al., 195 N. Y. Sup. 531.
at the death of her husband was not a widow, for by the decree of
divorce the marital relations was completely dissolved as to her, and
being no longer a wife, she had no capacity of becoming a widow, for
as the court in the present case says:

* * * "The statute declares, however, that a widow shall be en-
dowed. This implies the existence of marital relation, complete
or partial, at the time of the husband's death. This relation is utterly
destroyed by a valid decree of divorce, except that, when granted
because of the guilt of the husband, there is a residuum sufficient
to support the wife's right of dower and of maintenance, and her
status as a widow if she survives her husband." * * *

Now the husband in the instant case under the New York law,
had done no wrong, therefore there was no residuum of marital rights
sufficient to support the wife's right of dower.

There is a distinction to be observed between the instant case and
that of Van Blaricum v. Larson.

In the latter case, the divorce decree was rendered by a court of
the state, where the marriage contract was entered into and was
the state of matrimonial domicile until the time of the dissolution of
the marriage. Therefore, that marriage was validly dissolved for the
court had jurisdiction over both parties, but in the instant case, the
marriage was not validly dissolved as no personal service was made
on the husband and as he did not appear to defend in the suit, the
Ohio court had no personal jurisdiction over him and therefore under
the full faith and credit clause the Ohio decree was not entitled to
obligation enforcement by virtue of the full faith and credit clause.

In the Van Blaricum case the New York court was bound to recognize
the decree of the Indiana court for it was a valid dissolution of the
marriage relation and therefore the question before the New York
Court was whether or not the plaintiff as to her dower rights was
within the protection of the Statutes of New York.

The court in its opinion makes the point clear when it says:

* * * "Her right to dower here, of course is a matter to be de-
termined by the courts of this jurisdiction; but she brings herself
within the protection of our statutes, which forfeit her right only,
where her misconduct—that is her adultery—has been the cause of
the dissolution of the marriage. Her existing right of dower, already
vested was not forfeited, although the relation of husband and wife
was destroyed by the Indiana judgment." * * *

"* * * The decree dissolving the plaintiff's marriage relation with
her husband was prospective in its operation to the time of its
rendition, her vested right in lands possessed and acquired by her
husband during marriage had not been forfeited; * * * but as to
the lands acquired by him while the marriage relation existed, her
inchoate title became consummated upon his death."

So in the present case, if personal service had been made as is
required under the New York rule, and the Ohio court had acquired
personal jurisdiction over the husband, under the full faith and

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1 Instant case, 195 N. Y. Sup. 534.
2 Haddock v. Haddock, 201 U. S. 562.
credit clause, the decree of the Ohio court would have been entitled
to enforcement in the New York court, and the question of the claim-
ant's dower rights would have been the same as presented in the
Van Blaricum case, namely, was the claimant within the protection
of the Statutes of New York where the land subject to her dower
rights was located.

F. W. D.

DOCTRINE OF SUBROGATION—Persons owning funds or prop-
erty applied by others to debt or incumbrance.

The Supreme Court of Connecticut in the recent case of First Tax-
ing District v. Gregory et al., held that where the treasurer of a
taxing district who also held another office of trust in the capacity
of administrator of an estate, wrongfully used funds of the taxing
district to make good his defalcation as administrator of the estate,
the taxing district was subrogated to the rights of the state against
the surety on the administrator's bond.

On the date of the administrator's appointment, there was ex-
ecuted by the defendant surety company a bond in the penal sum of
$70,000 in which bond the administrator was made principal and the
surety company surety.

The condition of the bond reading that upon the faithful discharge
of the duties of the office of administrator that the bond would be
null and void.

Between the date of his appointment and final account, the admin-
istrator misappropriated the funds of the estate to the amount of
some $13,000, thereby violating his trust, and to make good his
defalcation, the administrator wrongfully took the funds of the taxing
district of which he was treasurer.

The plaintiff claimed by way of equitable relief that it should be
subrogated to the rights of the estate, its creditors and beneficiaries
against the surety company.

The Supreme Court held that when the administrator appropriated
to his own use the funds of his estate, he violated his trust and the
obligation of the surety company conditioned upon his faithful per-
f ormance of the duties of the trust according to law then arose and
the plaintiff was subrogated to the right of the estate against the
surety on the administrator's bond.

And so it has been held in Massachusetts (1910) in the case of
Newell v. Hadley, 206 Mass. 335, 92 N. E. 507, 29 LRA N. S. 908,
that where money of one has been used in extinguishing the legal
liabilities of another, equity will let the former enforce against the
latter, the obligation of the latter's creditors, paid off by the former's
money, although no obligation is created by law.

Same in Michigan in case of Keller Allen Co. v. Ries, 129 N. W.

8 Checuer v. Wilson, 9 Wall. 108.
9 Haddock v. Haddock, 201 U. S. 570.
Van Blaricum case cited supra.
118 Atlantic Reporter 96.
724, 164 Mich. 501, where the defendant in the case misapplied the federal pension money belonging to his mother-in-law, to the payment of a mortgage on his land, she became subrogated to the rights to the extent of such payment and the interest to accrue thereon.

So it was held in another Michigan case that where a trustee obtained amounts from complainants under a sale of land to them afterward avoided and applied the same to the discharge of mortgages on the land, the complainants or vendees under the sale of land avoided, are subrogated to the rights of the mortgagee. Curan v. Bartlett, 165 Mich. 205, 130 N. W. 633.

In the case of Young v. Pecos County, 101 S. W. 1055, 46 Tex. Civ. App. 319, the facts resemble somewhat those of the Connecticut case.

The husband of the mortgagor used money held by him as county treasurer to pay the mortgage and it was held that the county was subrogated to the rights of the mortgagee under the mortgage.

And so in the case of Reddington v. Franey, 131 Wisconsin 518, 111 N. W. 425, in part of its opinion, the court says:

* * * “It is also held without substantial conflict of opinion that where a fund is appropriated by an agent or trustee without the owner's consent to the payment of the debt of another, the owner is not a volunteer, but will be entitled to subrogation if necessary for his due protection.” * * *

F. W. D.

CONTRACTS: Mailing of acceptance before receipt of letter of withdrawal held to consummate contract.

In the case of Jennette Bros. v. Hovey & Co. (113 S. E. 665) the Supreme Court of North Carolina said that if the plaintiff mailed his letter of acceptance in North Carolina on November 29th, including a check as agreed, and before any notice of withdrawal had reached him, a valid contract had been completed. In this case Mr. W. H. Jennette was in Maine, and while there made a tentative agreement with the defendant to purchase potatoes from him. The plaintiff took the contract with him to North Carolina for consultation. The acceptance was to be made within a reasonable time by letter which should contain a check for a percentage of the purchase price. The mailing of the acceptance was delayed three weeks, and upon the day before the acceptance was mailed in North Carolina a withdrawal was mailed in Maine. The court in this case restated what is today the well-established rule of law. This the text writers Elliot (p. 44); Clark (p. 32); and Page (p. 134) agree to be the rule. It is also so stated in Henthorn v. Traser (2 Ch. 27); Byrne v. Tienhoven (5 C. P. Div. 349); Household Fire Ins. Co. v. Grant (L. R. 4 Exch. D. 216, 234); and in Tayloe v. Ins. Co. (9 How. 390; 13 L. Ed. 187). The dissenting opinion is best stated in the case of Household Ins. Co. v. Grant, by Judge Branwell. “If I post money to my tailor and the letter is lost, is my bill paid?” asks the judge. Is it not a violent assumption to attribute to the offeror a different
intention than that which would be expressed by making the offer conditional upon the receipt of the acceptance?

The majority opinion says that the offeror has made the post office his agent, and the posting of the letter is delivery to the agent and thus constructive delivery to the offeror himself. (Adams v. Lindsell, 1 B. & Ald. 681.) It is the established rule, therefore, as stated in this case, that an acceptance is made at the moment it is posted, and a revocation cannot be held to be communicated merely because it has been put in the course of transmission.

H. C. S.

HUSBAND AND WIFE—Right of one to sue the other during coverture in civil action for a personal injury.

The observation is sometimes made, nowadays, usually in a more or less humorous vein, that "so complete has been the married woman's emancipation from the legal fetters which bound her at common law that, at the present time, she has even greater freedom of action, in a legal sense, than her husband."

The continued activity of the more ardent feminine exponents of the doctrine of the legal emancipation of woman, through such organizations as the National Womans Party, would indicate that this broad statement of the situation is not considered in all quarters as strictly in accordance with the facts, and that from the woman's point of view there is still much to be desired.

Certain it is, however, that a great change has taken place in the legal conception of the status of the marriage relation.

At common law the identity of the wife was merged into that of the husband.1 "By marriage, the husband and wife are one person in law (Co. Lit. 12); that is, the very being or legal existence of the woman is suspended during marriage, or at least is incorporated and consolidated into that of the husband. Upon this principle, of a union of person in husband and wife, depend almost all the legal rights, duties and disabilities that either of them acquires by marriage." ** (1 Blackstone Com. 442.)

Among the principal disabilities of the wife at common law were, the incapacity to contract; to own or control property; or to sue and be sued.2 The husband also, by the old law, might give his wife moderate correction. (1 Hawk. P. C. 2.)

Referring to these disabilities, Blackstone remarks: "These are the chief legal effects of marriage during coverture; upon which we may observe, that even the disabilities which the wife lies under are for the most part intended for her protection and benefit, so great a favorite is the female sex of the laws of England." (1 Blackstone Com. 444.)

In spite of the enviable position of married women under the common law, as adverted to by Blackstone, substantial alterations in that

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2 Vol. 21, Cyc. Husband and Wife, 1157.
position have been effected. The common law conception of the relation of husband and wife was undoubtedly affected by the prevailing notions of society regarding the marriage state, and as those general ideas have undergone modification since the early days of the common law, there has been a corresponding change in the law on the subject. It is, of course, understood that the marriage relation is the offspring of the law of nature, and, in the words of the court in a Connecticut decision, "The family and the obligations and privileges pertaining to it reach back of all state regulations. It is not the creature of the law * * * The positive law defines the legal status of husband and wife." While, therefore, the law ordinarily corresponds, in a greater or less degree, to the prevailing notions of society, the law does not create the relation, nor does it of necessity correspond with it perfectly.

In modern times, the greater independence asserted by the wife, and the alteration in the general view as to the complete subjection of the wife to the husband, have resulted in the enactment of statutes in England, Canada, and in all of the American states, modifying or destroying the husband's common-law rights in the property of the wife, and making such property the separate estate of the wife. These statutes vary in their extent in the different jurisdictions, but in general they remove one or more of the particular disabilities of the wife during coverture, by conferring upon her the capacity to contract, to sue and be sued, and to own and control property.

Whether the legislatures, by the general provision of these statutes, intended fundamentally to alter the legal status of husband and wife by abrogating the common-law doctrine of the merger of legal personalities; or whether the legislatures, still recognizing the theory of legal identity, enacted these statutes merely for the purpose of ameliorating the condition of the wife at common law by affording her new remedies, without conferring upon her any additional substantive right not expressly provided for by statute, is the interesting inquiry suggested by a decision handed down by the Supreme Court of Minnesota in the case of Woltman v. Woltman, on October 6, 1922.

In that case, a wife sued her husband during coverture for injuries received when the automobile in which they were riding overturned as a result of the alleged negligence of the husband in driving.

The question which the court was called upon to decide suggests the angle from which we are to approach the problem, for by reason of the very broad field which the subject presents for investigation it will be necessary for us to confine ourselves in a brief analysis to a consideration of this particular phase of it: Can the wife under the modern statutes maintain a tort action against her husband during coverture?

It is conceded that at common law, owing to the doctrine of identity

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9 Mathewson v. Mathewson, 63 Atlantic 285.
1 Married Woman's Property Act, 1882, 45 and 46, Vict. c. 75.
2 21 Cyc. Husband and Wife, Statutory Separate Estate.
3 See statutes of the various states.
of legal personality, neither spouse could sue the other for a personal wrong. The plaintiff, however, in this case claimed the right to sue under section 7142, Gen. Stats. 1913, which reads as follows:

"Women shall retain the same legal existence and personality after marriage as before, and every married woman shall receive the same protection of all her rights as a woman which her husband does as a man, including the right to appeal to the courts in her own name for protection or redress; * * *"

The court ruled against the plaintiff on the ground that the question is no longer an open one in Minnesota. The two cases of Strom v. Strom, 98 Minnesota 427, 107 N. W. 1047, 6 L. R. A. (N. S.) 191, 116 A. M. St. Rep. 387, and Drake v. Drake, 145 Minnesota 388, 177 N. W. 624, 9 A. L. R. 1064, were relied upon as authorities. The former case is the leading one in Minnesota on the subject, and is the authority for the ruling in that state that the purpose of the statute is to place husband and wife on an equality as to the right to bring an action in tort, and that as the husband has never had the right to sue the wife, the latter has, consequently, no right to sue the husband. It is thus evident that the Minnesota courts do not consider the statute as fundamentally altering the legal relations of husband and wife.

The same question under almost identical circumstances recently came before the courts of New York and Georgia for adjudication. In Heyman v. Heyman, 92 S. E. 25, decided in 1917, the Georgia Court of Appeal ruled that the Georgia statute, which gives the wife the right to recover in her own name for a tort committed upon her person or reputation, and confers upon her the power of separate control over her property, does not, by the authorities in that state, give her the right to sue her husband during coverture for injuries sustained as a result of the husband's negligence in driving an automobile.

As recently as 1921, in the case of Perlman v. Brooklyn City Railroad Co. et al., 191 N. Y. S. 891, the Supreme Court, Special Term, Kings County, New York, was called upon to decide whether or not a married woman could join her husband as codefendant in an action for damages for injuries received when the automobile in which she was riding collided with a street car, as a result of the alleged joint negligence of her husband, who was driving the automobile, and the street car company.

Sec. 57 of the N. Y. Domestic Relations Law reads as follows:

"A married woman has a right of action for an injury to her person, property, or character, or for an injury arising out of the marital relation as if unmarried."

The court cited the New York authorities to the effect that the

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2 Married Woman's Act of 1866 as embodied in the Civil Code 1910, Par. 2993 and 4.
law is settled that a wife cannot sue her husband for assault and battery,9 nor may she sue her husband to recover damages for slander.10 The court also pointed out that the position of the plaintiff was weaker under the facts of her case because she was suing not upon a wilful tort but upon mere negligence.

The Georgia, Minnesota, and New York decisions follow what was, prior to 1900, practically the unbroken current of authority,11 and what is probably today the majority ruling on the subject. A review of the decisions of the past two decades, however, reveals that there has been an increasing tendency on the part of the courts in a number of the states so to construe statutes in their jurisdictions as to give the wife a right to sue her husband for a personal wrong, and there is today a growing minority ruling. The courts which have in comparatively recent times aligned themselves with the minority include those of the states of Alabama,12 Arkansas,13 Connecticut,14 New Hampshire,15 North Carolina,16 Oklahoma,17 and South Carolina.18

On the other hand, more or less recent decisions in the following jurisdictions have adopted the majority ruling: California,19 District of Columbia,20 Georgia,21 Kentucky,22 Michigan,23 Minnesota,24 Missouri,25 New York,26 Tennessee,27 Virginia,28 and Washington.29

The consequence is that the authorities are in conflict as to whether or not the legislatures intended, by the general provisions of the statutes, to work a fundamental alteration in the law.

In attempting to account for this conflict, the two prime factors to be considered are: 1, the language used in the statutes themselves, and, 2, the principles involved in interpreting the language.

The diversity in the rulings is not altogether due to the phraseology

10 Freethy v. Freethy, 42 Barber 641.
12 Johnson v. Johnson, 77 So. 335 (1915), assault and battery.
13 Fitzpatrick v. Owen, 186 S. W. 382 (1916), assault and battery.
15 Gilman v. Gilman, 95 Atl. 657 (1915), assault and battery.
16 Crowell v. Crowell, 106 S. E. 149 (1921), personal tort.
17 Fieeder v. Fieeder, 140 Pac. 1022 (1914), assault and battery.
18 Proser v. Proser, 102 S. E. 787.
20 Thompson v. Thompson, 218 U. S. 611 (1910), assault and battery.
21 Heyman v. Heyman, 92 S. E. 25 (1917), negligence; automobile accident.
22 Dishon's Administrators v. Dishon's Administrators, 219 S. W. 794 (1920), assault and battery.
23 Bandfield v. Bandfield, 75 N. W. 287 (1898), personal tort.
24 Strom v. Strom, 107 N. W. 1047 (1906), assault and battery.
25 Rogers v. Rogers, 177 S. W. 382 (1915), false imprisonment.
26 Perlman v. Brooklyn City Ry. Co., 191 N. Y. S. 891 (1921), negligence; automobile accident.
27 Lillienkamp v. Rippetoe, 179 S. W. 629 (1915), assault and battery.
28 Keister's Administrators v. Keister's Executors, 96 S. E. 315 (1918), assault and battery.
29 Schultz v. Christopher, 118 Pacific 629 (1911), personal tort.
used, for statutes of a substantially similar wording have been con-
strued in different states as of contradictory significance.

For instance, the wording of the Minnesota and Oklahoma statutes
is almost identical, and the effect of each is to confer upon the wife
the same power to sue in her own name for the protection of her
rights as a woman that her husband has as a man.30 Nevertheless,
the Oklahoma courts have, contrary to the Minnesota authorities,
construed their statute as abrogating the common-law doctrine of
identity.31 The Washington statute, though worded differently, has
the same general purpose as the Minnesota and Oklahoma statutes,
viz.: to confer the wife the same rights as had been possessed by
the husband.32 The Washington court has followed the majority
ruling, giving practically the same reasons as those cited in the
Minnesota decision.33

Again, in North Carolina,34 South Carolina,35 and California36 the
statutes which the courts were called upon to interpret have sub-
stantially the same provisions, viz. that when a married woman is
a party to an action her husband must be joined with her, except
that, 1, when the action concerns her separate property she may sue
or be sued alone and, 2, when the action is between herself and her
husband she may sue and be sued alone. Nevertheless, the California
court held that the statute relates entirely to property rights,37
whereas North Carolina38 and South Carolina39 have declared that
the intention of the legislature to work a complete severance of legal
identity is patent.

With minor variations, the purport of the statutes in the following
states is to confer upon the wife the power to own and control prop-
erty, or to sue and be sued, or to contract and be contracted with,
or to do all of these things, in the same manner as if she were unmar-
ried: District of Columbia,40 Michigan,41 Missouri,42 New Hampshire,43
Tennessee,44 and Virginia.45 There is greater uniformity of construc-
tion here. The District of Columbia,46 Michigan,47 Missouri,48 Ten-

29 Oklahoma, Sec. 3863, Revised Laws 1910; Minn., Sec. 7142, Gen. Stat. (1913).
30 Fiedeer v. Fiedeer, 140 Pac. 1002.
32 Schultz v. Christopher, 118 Pac. 629.
33 Sec. 454, Civ. Pro. Code; C. S. Sec. 2513.
36 Peters v. Peters, 103 Pac. 219.
37 Crowell v. Crowell, 106 S. E. 149.
38 Prosser v. Prosser, 102 S. E. 787.
41 Sec. 8304, R. S. (1909).
42 Chapter 176, Sec. 2, Pub. St. 1901.
43 Chapter 26, Public Acts (1913).
45 Thompson v. Thompson, 218 U. S. 611.
46 Bandfield v. Bandfield, 76 N. W. 287.
47 Rogers v. Rogers, 177 S. W. 382.
nessee,\textsuperscript{44} and Virginia\textsuperscript{45} unite in refusing either spouse the right to bring a civil suit against the other for a personal wrong. New Hampshire,\textsuperscript{63} however, comes forth with a distinctly audible dissent.

Perhaps the Arkansas ruling adds to the volume of this dissent. The statute in that state is closely related, by reason of its wording and general purport, to the statutes of the last mentioned group of states,\textsuperscript{16} but in a Virginia decision\textsuperscript{99} it was pointed out by way of distinction that the Arkansas statute contains the words, not found in the Virginia act, "* * * and every woman * * * in law and equity shall enjoy all rights and be subjected to all the laws of this state, as though she were a feme sole."

The distinction seems rather subtle, and though the Arkansas court states in the leading case on the subject\textsuperscript{44} that "none of the statutes is similar to ours, nor were they passed under the same circumstances," and although the decision was based upon the relation of the section relied upon with sections preceding and following, those who have occasion to investigate the subject may experience some difficulty determining in just what substantial particular the Arkansas legislation differs from that of other states.

It is also worthy of note that Tennessee, with a statute the wording of which is most strongly calculated to remove all of the married woman's disabilities, has joined the conservative majority ranks in interpreting that statute; whereas Connecticut, with perhaps the most tenuous statutory support,\textsuperscript{65} has effected by construction a radical alteration in the law.

A further and more satisfying explanation for the conflict of authority is to be sought in an examination of the principles which the courts in the different states have considered as applicable to the question.

Quotations from the opinions handed down in the leading cases will reveal the reasons lying back of conflicting interpretation. In Thompson v. Thompson, 218 U. S. 611, the Supreme Court of the United States was called upon to decide whether or not under the District of Columbia statute a married woman could sue her husband during coverture for assault and battery. The court, over the dissenting opinion of Justices Harlan, Holmes, and Hughes, ruled that she could not. The majority argument is succinctly stated by Mr. Justice Day in his opinion: "Whether the exercise of such jurisdiction would be promotive of the public welfare and domestic harmony is at least a debatable question. The possible evils of such legislation might well make the lawmaking power hesitate to enact it. But

\textsuperscript{44} Liljenkamp v. Rippetoe, 179 S. W. 628.
\textsuperscript{45} Keister's Administrators v. Keister's Executors, 96 S. E. 315.
\textsuperscript{46} Gilman v. Gilman, 95 Atl. 587.
\textsuperscript{16} Acts 1915, p. 684; act to remove the disabilities of married women in the state of Arkansas.
\textsuperscript{99} Keister's Administrators v. Keister's Executors, 96 S. E. 315.
\textsuperscript{65} Fitzpatrick v. Owens, 186 S. E. 832.
\textsuperscript{63} Pub. Acts 1877, p. 211, c. 114 (Revision 1902, par. 4545, 4546, 391, 392).
these and kindred considerations are addressed to the legislative, not to the judicial branch of the government. In cases like the present interpretation of the law is the only function of the courts.

"* * * Conceding it to be within the power of the legislature to make this alteration in the law if it saw fit to do so, nevertheless such radical and far-reaching changes should only be wrought by language so clear and plain as to be unmistakable evidence of the legislative intention. It would have been easy to express a stronger intent in terms of irresistible clearness."

Additional reasons are suggested by Burks, J., in a Virginia decision, Keister's Administrators v. Keister's Executors, 96 S. E. 315. "Statutes in derogation of the common law are to be strictly construed, and I am unwilling, upon such language as is contained in the foregoing statute, to obliterate the primary obligations growing out of the marriage relation, to revolutionize the whole law relating to husband and wife, and open the courts to the public discussion of domestic differences, which when of sufficient consequence may be settled by the Chancellor in suits for divorce or by prosecution for violation of the criminal laws of the state."

In the last-mentioned Virginia case the question of legislative intent to effect a radical change in the law is made to turn upon the meaning of the words "as if unmarried." The Virginia court construing them to mean "as if she did not have a husband at the time suit was brought," and not to mean "as if she had never been married," declared that a mere remedy, rather than the substantive civil right of separate legal existence is conferred, and that this remedial measure is entirely consistent with the continued existence of the common-law rule of identity.

Passing to the arguments advanced by the minority authorities, an explanation of the discrepancy between the Virginia and New Hampshire rulings is to be found in Gilman v. Gilman, 95 Atl. 657. In that case the court construed the phrase "as if unmarried" to mean "as if she had never been married." The liberal construction of the statute, contrary to the Virginia construction, naturally follows.

The presence in the codes of California,\textsuperscript{66} Oklahoma,\textsuperscript{67} and South Carolina\textsuperscript{68} of sections embodying contradictory principles of statutory construction may serve to explain in part the diversity already referred to between California on the one hand and Oklahoma and South Carolina on the other. In the two latter states the codes provide expressly that the rule of common law that statutes in derogation thereof are to be strictly construed has no application to the laws of those states. In California, however, the Political Code, Sec. 4468, provides that the common law, not repugnant to the constitution or statutes, is the rule of decision in the courts of the state.

\textsuperscript{66} Pol. Code, sec. 4468.
\textsuperscript{67} Sec. 2948, Rev. Laws 1910.
\textsuperscript{68} Code Civ. Pro., sec. 487.
The Connecticut court, in Mathewson v. Mathewson, 63 Atl. 285, eliminates the common-law rule of strict construction of statutes by laying down as a premise that the statute in question is not merely in derogation of the common law, but that it is the expression of a fundamental change of public policy on the part of the state. Quoting from the words of the court: "In an act which, leaving the foundation of the marriage status unchanged, merely provides certain exceptions to the necessary consequences of that status, such exceptions might properly be limited by the necessary import of the language used in describing them, and, for a similar reason, an act which changes the foundation of the status necessarily involves the consequences of the new status and not those of the old, and these consequences cannot be prohibited by inference unless the inference of prohibition is necessary."

A difference of opinion as to the public policy involved is expressed in the Oklahoma case of Fiedeer v. Fiedeer, 140 Pacific 1022, the court failing to comprehend wherein greater damage is done in civil suits than in divorce or criminal proceedings; and the adequacy of such divorce and criminal proceedings to meet the situation is questioned by the Alabama Court in Johnson v. Johnson, 77 So. 335.

In answering the majority argument, the progressive authorities frequently indulge in no elaborate reasoning process. The defendant, ordinarily the husband, has been found guilty of assault and battery or of some equally obnoxious conduct, and the important consideration is to mete out suitable punishment, without resorting to lengthy arguments over rules of statutory construction. In Crowell v. Crowell, 106 S. E. 149, a North Carolina case decided as recently as 1921, the court skips lightly over the question of legislative intent with the remark: "The statute is not limited to property rights, hence, considering the two sections together, I have no difficulty in arriving at the conclusion that the plaintiff's right to maintain this action is an entirely permissible construction." Judge Stacy was moved to the following eloquent expression of opinion: "This position (the defendant's) is supported by eminent authorities; but to my mind the reasons are not conclusive. * * * His (defendant's) only defense now is that he and the plaintiff are one by reason of the marriage tie. Shylock, in the Merchant of Venice, as he stood in court insisting upon the terms of his bond, was in a better position than the defendant in this case. Then nothing had been done to increase the burdens and hazards of the party obligated, but not so here. In the case at bar the strenuous demand for what is called the defendant's legal right forces plaintiff's counsel to play the role of Portia. A mere rule of procedure, based upon a unity of husband and wife, ought not to prevail over the plaintiff's claim founded upon a wilful and deliberate wrong.'

WILLS: Destruction of revoking will as reviving former will.

Under the Connecticut statute of wills providing that no will or codicil can be revoked except by burning, cancelling, tearing, or ob-
literating it, or "by a later will or codicil," the Supreme Court of Errors of that state held recently that such "later will or codicil" must be an operative will or codicil—that is, one in existence at testator's death. Hence, in this case an instrument in the form of a will, duly executed in 1919 and expressly revoking all former wills, but which was destroyed by testatrix in 1920, did not revoke a prior will of 1914; the will of 1914 was admitted to probate. Whitehill v. Halbing et al., 118 Atl. 454, August 11, 1922.

There is much in the court's opinion, by Burpee, J., and in the elaborate and vigorous dissent of Wheeler, C. J., as to whether this decision overrules James v. Marvin,1 as the Chief Justice contends, or whether the law upon which that case was decided had been changed by the legislative revision enacted four months prior to, and effective three months after, the decision in James v. Marvin.2 But the matter of general importance is the holding that under a statute denying revocation "except by burning * * * or by a later will or codicil," an express revocation clause, in an instrument subsequently duly executed as a will, is amebulatory and of no force unless the "will" of which it is a part becomes operative by the death of the testator; and the holding that, therefore, a prior, existing will "revives" upon the destruction by testator of this second, revoking, will.3

At common law, if a will was revoked by a second will the cancellation or destruction of the second will revived the first.4 The ecclesiastical courts, however, made it a question of the intention of the testator as manifested in the destruction of the later will; in these courts there was no revival by virtue of the revocation of a subsequent will unless the testator was shown to have so intended.5 The statute of 1 Victoria, c. 26, par. 22 (1837), declared there should be no revival by mere revocation of a later revoking instrument, whether this last contained an express revoking clause or was only inconsistent.

In this country a number of states have copied the statute of 1

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1 (1821) Conn. 576. This is a leading case and is frequently cited.
2 The controversy as to legislative intent in the revision of 1821 is disregarded, and the statute is taken as it reads. The court decides that the legislature by that revision omitted the words "or other writing" expressly to preclude revocation in writing by anything but an operative will.
3 This rule here announced was favored but not directly decided in Peck's Appeal, 50 Conn. 561.
4 Goodright v. Glazier (1770), 4 Burr. 2512.
5 This was on the theory that the first was revoked only by the second, and that when the second passed out of existence the first again became the last will and testament of the decedent; that all wills were amebulatory until the death of the testator, and effect would be given to the then last existing will. The revoking will was required to be duly executed, for revocation was deemed conditional and dependent upon the attempted redissipation. (Jarman, 6th ed., vol. 1, p. 334.)
6 But if the later will failed from incapacity of the beneficiary to take, or from vagueness of the designation, or from illegality of its provisions, the revoking clause was permitted to operate, though the remainder of the will should be invalid (Underhill, vol. 1, p. 340) (37 L. R. A. 562).
Victoria, c. 26. And generally, under statutes which do expressly or are construed impliedly to regulate the revival of revoked wills, it is held that such revival is equivalent to the making of a new will, and hence that the same formalities must be observed. In the absence of any statute on revival, the authorities are not in harmony. Some hold the revocatory clause operates immediately. Others hold it ambulatory, and that upon destruction of the later will the revoked will is revived, whether the revocation had been express or only by implication. But most states follow the rule of the English ecclesiastical courts that there is no presumption of the revival of a revoked will to be found in the mere destruction of the revoking will and the continued existence of the will which had been revoked, but that it is a question of intention to be collected from all the circumstances; and in the absence of affirmative evidence there is no revival.

A distinction is drawn by some courts in this country to the effect that the revocation of a subsequent inconsistent will does, but that revocation of a subsequent will containing an express revocation clause does not revive the prior will. In several states, however, this distinction is expressly held not to exist. In Whitehill v. Halbing et al., the Connecticut court declared no such distinction could be recognized under the Connecticut statute.

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6 Including New York, Indiana, Ohio, Kansas, Missouri, and California, according to the opinion, Whitehill v. Halbing.
7 40 Cyc. 1212.
8 Pickens v. Davis, 134 Mass. 252.
9 Bohanon v. Walcot, 1 How. (Missa.) 336.
10 Peck's Appeal, 50 Conn. 561.
12 Colvin v. Warford, 20 Md. 357.
13 Gardiner, 2d ed., par. 82.
15 Williams v. Miles, 68 Neb. 463.
16 Cheever v. North, 106 Mich. 390. Distinguishable from the instant case because the statute under which it was decided (Sec. 6793, 2 How. Stat.) permits revocation "by some other will or codicil, in writing, executed as prescribed in this chapter, or by some other writing." Note "some other writing."
17 Scott v. Fink, 45 Mich. 241. This case relies upon James v. Marvin and Boudinot v. Bradford, 2 Dall. 266. The first, according to Whitehill v. Halbing, had been superseded by statute. The latter, while permitting revocation in absence of evidence, indicates that the intent of the testator will control when there are circumstances from which it may be gathered. Hence neither case is strong in support of the principle decided by Scott v. Fink.
18 28 R. C. L. 196 cites Cheever v. North, above, but inadvertently states the rule as opposed to the holding in that case. It also cites, as accord, Blackett v. Ziegler, 153 la. 344. This case relies heavily upon testator's intention. Like Cheever v. North, it is distinguishable from Whitehill v. Halbing, as the court indicates, because under the Iowa statute revocation may be accomplished "by execution of subsequent wills." It is not here required that there be more than a good execution.
20 115 Atl. 464 (Aug. 11, 1922).
RECENT CASES

The dissenting opinion stresses the fact that the revocation here is expressly made, and quotes James v. Marvin that such “express revocation is a positive act of the party, independent of the will which may happen to contain it, and operating instantaneously and per se.” Continuing, the Chief Justice quotes from Pickens v. Davis (134 Mass. 252, 256), “The clause of revocation is not necessarily testamentary in its character,” and adds, “there is no difference between the express revocation in the will and that in any other writing.” Hence, he argues, the express clause of revocation is a positive, substantial act which conclusively shows testator’s intention to abandon his former will, and as such it must be operative immediately; for otherwise it is nugatory, since the last will of a testator of itself revokes all former wills, upon his death.

But the court in its opinion emphasizes that there is no privilege under this statute of revoking wills orally, or by any other writing except a will or codicil.20 In a number of states21 the statutes permit wills to be revoked by “some other writing” than a will, or “by the execution of subsequent wills,” and properly under such statutes an express revocation clause in a subsequent “will” does operate immediately, and is effective to revoke the prior will, even though the instrument containing the revoking clause is destroyed before the testator’s death. But the Connecticut statute permits revocation only by will, and a will is ambulatory.

Granting that an express revocation clause is unnecessary,22 the court says the clause is not nugatory since it serves to indicate, clearly and positively, testator’s intent to substitute the provisions of this

20 The statute reads in full: “No will or codicil shall be revoked in any other manner except by burning, cancelling, tearing or obliterating it by the testator or by some person in his presence by his direction or by a later will or codicil.” Gen. Stat. 1918, par. 4946.
22 Because this last and inconsistent will would alone be received for probate if existing at testator’s death.

It is noteworthy that in the case of Lasier v. Wright (June 21, 1922), 136 N. E. 545, the Supreme Court of Illinois, saying “we inadvertently laid down” the contrary rule, and “our own decisions on this subject are not harmonious,” decided that an express revocation clause is unnecessary even under their statute which requires that the revocation be “by burning * * * or by some other will, testament or codicil in writing, declaring the same * * *” The court says that former Illinois decisions, hereby overruled, “appear to be out of harmony with all the other courts of last resort.” Dunn and Cartwright, J. J., dissent upon the ground that the words of the statute “declaring the same” must here apply to “some other will, testament or codicil,” whereas statutes in England and nearly all the states of the Union include among the methods of revoking a will “some other will or codicil or some other writing declaring the same,” and the words “declaring the same” are, in those jurisdictions, limited by construction to the “other writing” only, and do not extend to the “other will or codicil.” Wherefore the dissenting judges would have Illinois continue to require an express clause of revocation and hold that a subsequent totally inconsistent will, under their statute, did not itself revoke.

The difficulties involved in this decision of Lasier v. Wright, it will be noted, spring from precisely the same words, or, more exactly, from the omission of precisely the same words, as are the bone of contention in the case of Whitehill v. Halbing, being considered.
will, when it shall take effect at his death, and to forestall any effort to construe the former and this last will together. Schouler says: "No well-drawn testament omits at the present day a clause of revocation." 22 The revocation clause shows, of necessity, only the intent that the will containing it, if ever it becomes operative, shall be construed alone as the one last will of the testator. A testator may execute several wills, at different times, keeping all, uncanceled, intending ultimately to preserve but one, depending upon the then existing circumstances, as was the case in Williams v. Williams (142 Mass. 515). The revocation clause is not distinct, necessarily, but may, on the contrary, be made only in contemplation of the new dispositions made by the will in which it is found. And so, though the will last executed contains an express clause of revocation and is then itself destroyed, the court in allowing probate of another will, previously made and still existing, cannot be said certainly to be defeating the intent of the testator.

But even when the ruling of the instant case does operate to defeat the testator's intent, still must the decision receive support. For, in words of the opinion, the statute "allows to every person the privilege of individual control over his estate after death only upon certain conditions," and the statute is "not only directory but prohibitive and exhaustive." While "revocation is an intent evidenced by an overt act," "to be effective it must take one of the statutory forms." 23 In Connecticut, under this statute, an intention to revoke in writing must be expressed and made known in a will; and a will is "operative for no purpose until death." 24

To this the Chief Justice, in his dissent, objects that while the statute provides thus for revocation, it does not mention how a revocation may be revoked. He says that, therefore, a revocation is irrevocable; that the prior will, once thus revoked, is not revived by destruction of the second will; and that in permitting such revival the court construes the statute away from its purpose as a statute of frauds (prescribing how only revocation shall be accomplished) into a statute of revivor, which revives a revoked will by destruction of the revoking clause. All this is well argued. 25 The only answer

22 Wills, 5th ed., par. 417.
23 Gardiner, 2d ed., par. 79.
25 The Chief Justice says: "The statute of 1821 required a revocation by 'will or codicil in writing declaring the same,' and this meant that the will itself should contain the express revocatory clause. Stetson v. Stetson, 200 Ill. 601, etc." Singularly, it was on precisely the point relied upon by Chief Justice Wheeler that the Supreme Court of Illinois, June 21, 1922, expressly overruled the case of Stetson v. Stetson. The court says: "In Stetson v. Stetson * * * we inadvertently laid down the rule that under our statute * * * a later inconsistent will does not revoke a former will by implication, without a positive declaration in the later will that the former will is revoked." Lasier v. Wright, 136 N. E. 545, 551. (See note 21, above.) The case holds that a later inconsistent will does revoke a former will by implication; and, as it is thus entirely unnecessary, the revocatory clause, of course, need not be "in the will itself," as contended by the Chief Justice.
is that by the holding in the opinion no revival is necessary, for there has not yet been an effective, operative, actual revocation; there has been only a writing in the form of a will, which would have revoked if existent at testator's death, but which never acquired force or effect, because it was destroyed before the event (testator's death) which would have vitalized it.

Under this statute, so construed, a man who has misplaced a will, being thereby unable to burn, tear, or mutilate it, cannot revoke that will except by executing a new one and so carefully preserving this latter as to insure its operation as a will upon his death. For though he write a revoking will, if the same be later destroyed for any reason, and the misplaced will be found after his death, it will operate as his will despite his intentions.

As stated above, the statute 1 Vict., c. 26, copied in American states, including New York, Indiana, Ohio, Kansas, Missouri, and California, provides that a will in any manner revoked shall not be revived otherwise than by reexecution or by a duly executed codicil showing intention to revive. Most of the states, following the rule of the old ecclesiastical courts, will not hold a will, once revoked, to be revived by the destruction of the revoking will alone, but require affirmative evidence that the testator intended thereby to revive the earlier will.28

V. S. M.

28 Williams v. Miles, opinion by Pound, C. 68 Neb. 463.
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