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A POST-GRADUATE COURSE FOR JUDGES AND LAWYERS
By F. Regis Noel, LL.B., Ph. D.
of the District of Columbia Bar

THE following anecdote is trite, but it illustrates so aptly the slant of this article that it is hazarded with the hope that, at least, law school students have not heard it. Many years ago, when bar admission examinations in this country were as searchingly stringent as they should be now, a young man was being inquisitioned by a full bench in Massachusetts. Many questions put by the judges pertained to the history and philosophy underlying the law, and the applicant realized that he was failing. He protested hotly that he knew all the statutes and codes, that he had been told such legal knowledge was all that was necessary to practice in Massachusetts, and, with confidence, he besought the judges to test his knowledge on such subjects. The Chief Judge turned, whispered to his associates and then addressed the applicant: "Young man, don't you feel a little shaky about your equipment to make a living, not to mention aggrandize the profession of the law? Do you realize that you may wake up some morning and find that the legislature of Massachusetts has wiped out all the law you know?" Our American Bar, generally, has been constantly sliding down hill to a very nearly similar situation in regard to background and fundamentals because of haste in preparation for practice which has been permitted and because of specialization in practice after admission to the bar. In an age of multitudinous statutes and decisions, encyclopedias, indexes, reviews and digests, the ever-applicable observation of Mr. Chancellor Kent, whose Commentaries had a deeper and more lasting influence in
the formation of our national character than any secular book of his century, either has not been imitated or has been forgotten. He recognized the value of a knowledge of legal principles and history of law when he wrote, the English Common Law "is the common jurisprudence of the United States, and was brought with them as colonists from England, and established here, so far as it was adapted to our institutions and circumstances. It was claimed by the Congress of the united colonies, in 1774, as a branch of those 'indubitable rights and liberties to which the respective colonies are entitled.' It fills up every interstice, and occupies every wide space which the statute law can not occupy. Its principles may be compared to the influence of the liberal arts and sciences. * * * To use the words of the learned jurist to whom I have already alluded (Du Ponceau, on Jurisdiction, 91): 'We live in the midst of the common law, we inhale it at every breath, imbibe it at every pore; we meet with it when we wake and when we lay down to sleep, when we travel and when we stay at home; it is interwoven with the very idiom that we speak; and we cannot learn another system of laws without learning, at the same time, another language.'"

Recognition of the lamentable condition was the spur which urged more than two thousand members of the American Bar Association to travel over three thousand miles this summer on a grand pilgrimage to the fountain and shrine of the Common Law. The stupendousness and influence of that trip scarcely can be appreciated by any one who has not had a nearly similar experience, and it is extremely doubtful if exactly the same program can be staged during the lives of those now in being. While the trip, from beginning to end, was a whirlwind of the highest, intellectual pleasure, there is yet one regret—too few Americans availed themselves of the great opportunity. It was not fully and thoughtfully considered by even some of our legal leaders and by a great many rank and file members of the profession. No one could have been disappointed as to the pleasures and professional thrills even though he had gone only because of his interest in the trip as an investment. The fraternal foregathering of the twin peoples who are proud to owe allegiance to the
Lady of the Common Law was really one of the greatest movements in the development of Anglo-Saxon civilization, comparable only in its influence, extent and effect to the Crusades, racial migrations, colonization of America and American participation in the late war. This is not an exaggerated statement but the sincere feeling of those whose affairs and inclination permitted them to join the pilgrimage.

The entertainment and pleasure of the journey actually commenced in New York harbor for the English Cunard Steamship Company immediately took hold of the party when it went on board the “Berengaria,” “Laconia” and “Aquitania” and acted as a real reception committee for the entire British Nation. Although extremely tempting, it would be out of place here to describe the splendor and comfort of those palaces floating in the sea and the uniform courtesy of the officers and the discipline of the crews. The American Bar Association has officially recognized the satisfactory character of the Cunard service and any one who desires to recollect the pleasures of those too few days in passage can turn to the “Logs” of the boats published in the September issue of the Association’s Journal.

Southampton, where the giant vessels glided as gracefully as gondolas right up to the railroad station, is undoubtedly the best port in Western Europe. It is as beautifully and typically English as it is convenient. The countryside from Southampton to London caused those Americans who were taking the trip for the first time to hang out of the rapid trains and marvel at the green fields, pretty gardens and architectural gems. At London the group was greeted by the most thoughtful and genial hosts one could desire. The arrival was on Saturday afternoon, and, although the great metropolis was overcrowded because of numerous conventions, conferences and the Wembley Exposition, still hotel accommodations had been reserved for all. Our English friends had been so thoughtful to reserve seats for worship next day at Westminster Abbey, Westminster Cathedral and old Saint Paul’s, and the bells chimed a welcome, one might say, from the centuries past, for it was the past, in history and law, embodied in old structures, institutions, symbols and customs which
attracted the pilgrims. On the next day the course in higher legal and sociological education commenced.

Most appropriately, the official program opened with a grand reception by the English and Canadian Benches and Bars in Westminster Hall—the shrine and home of the Common Law. The District of Westminster, whence the Hall takes its name, was not originally a part of the City of London, but the seat of the Saxon and Norman monarchs where they filled the treble rôle of civil, judicial and, more or less, religious leaders of the people. In Westminster, during ancient times, there were a church and royal residence. These edifices rose, fell and were improved as time passed. The church which survives, known as Westminster Abbey—the national sanctuary of England—was commenced by Edward the Confessor, in 1049-65, on the site of a more ancient Benedictine foundation and dedicated to Saint Peter, wherefore the present, official title of the Abbey is the Collegiate Church of Saint Peter. A royal palace existed at Westminster as early, at least, as the reign of Canute, but the building accurately known in history also was constructed by Edward the Confessor and enlarged by William the Conqueror. During 1512 the building suffered greatly from fire and thereafter was not used as a royal residence. Saint Stephen's Chapel, built by King Stephen, was used after 1547 as the meeting place of the House of Commons, which had theretofore convened in the Chapel House of the Abbey. The House of Lords used another apartment of the Palace, therefore, at the time the entire Palace was destroyed by fire, in 1834, both Houses of Parliament were using the old Palace. On the same site, the new, well-known Houses of Parliament were constructed between 1840 and 1867 at a cost of Three Million Pounds.

Quite generally throughout England, a large, usually one-room building, known as a hall, is one of the component parts of a community plant, such as a college or cathedral. And so it was in regard to Westminster. The original Hall at Westminster, as far as dependable records disclose, was built by William Rufus, in 1097, partly destroyed by fire in 1291 and altered by Richard II, in 1398, who had the walls buttressed and added the magnificent open roof of carved
oak, a most remarkable piece of timber architecture, both as to beauty and constructive skill. This is the only part of the original foundation which survives and it is now used as a vestibule to the Houses of Parliament. Its size is 290 feet in length, 68 feet in width, 92 feet in height, and there are no columns or other obstructions in the single room excepting a massive stone stair and platform at the end leading into the Houses of Parliament. No other building in the English-speaking world is so rich in stirring historical and legal associations. Here, at the outset, the king, surrounded by his religious and state advisers, heard complaints and administered justice. Later, as royal prerogatives were delegated, in this same building, the courts originated and developed, side by side with the legislative branch of government, mentioned above. Westminster Hall was long the habitation of the courts. Abutting it, in corners and alcoves, amidst the clangor of huckster's stalls and pens, were the Court of Chancery, the Court of King's or Queen's Bench, the Court of Common Pleas and the Court of Exchequer. The present Lord Chancellor Haldane, in his speech on the occasion being described, most succinctly and thoroughly reviewed the significance of this English forum, when he said:

"Sir James Aikins has referred to the fact that our welcome is being given in the hall of William Rufus. It is most natural that it should be so, for that hall belongs to those in the United States just as much as it belongs to us. It is the home of those who were our ancestors, in the fashioning of the common law and equity, too, and what is more, of much of the constitution even of the United States, for the genius of Alexander Hamilton was insufficient to keep out of the interstices of her written constitution and tradition the unwritten constitutional tradition which is always dear to every English-speaking interpreter of that constitution. John Marshall, your great Chief Justice, showed you that was so.

"Westminster Hall has a quality of its own. It was part of the King's Palace of Westminster which was burned down in 1834. The hall survived, and today
it is much as William Rufus left it. Yet one can not
dissever Westminster Hall from the palace itself. At
the back of where I stand, stretched, in the old days,
the Court of Requests, where Chancellors of the suc-
cessive Plantagenet Sovereigns fashioned the writs of
summons and other writs and looked after the interests
of the attendant barons and lords. By degrees the
scene changed. It is not generally realized that in
those old days the Lords and Commons were not
separate estates, and all the King's assembly sat to-
gether. They sat in this hall, and from this hall the
Plantagenet sovereigns dispensed justice as it was
understood then—a justice which in those days did
not separate sharply what were justiciable questions
and those of a political character. The bills with which
we are now familiar as being brought into Parliament
were the petitions presented to the Sovereign by the
people in this great assembly, and the King dealt with
them on the advice of his counsellors in a semi-judicial
way, much as he might have dealt with a law suit.
You can see how near state-craft and law-craft were
together.

"There came a time when they were separated. On
my right grew up the old Court of King's Bench, and
there many great men presided—men who belong to
the history of our guests, to their spiritual ancestry,
just as much as they do to our own. Edward Coke,
Holt, all King's judges, were there, and last but not
least, the silver-tongued Murray, Lord Mansfield, who
for many years presided over the Court of King's
Bench, just near where we stand. He was in many
respects the greatest of them all, and in that Court he
fashioned the Law Merchant which has had such an
influence on the jurisprudence of the United States as
well as of this country. In the House of Commons he
was almost equally great, but there was a greater, and
in that Court, when Mansfield came to preside there,
from the House of Commons the tones of Chatham
could be heard in sonorous volume reaching through
the Court of Requests so as to be heard, it was said,
where we are standing today. Murray, his rival, sat
there, and there and at the Guildhall fashioned the volume which has been the foundation of much of your jurisprudence in the United States.

"On my left was the old Court of Chancery, a court where that most brilliant of men, Francis Bacon, Lord Verulam, presided; where Somers, orator, statesman, man of character, also presided, as Lord Chancellor; and where, finally, the marble chair of the Lord Chancellor was occupied by the great Hardwicke, perhaps the greatest of all equity judges. In the United States the name of Hardwicke is very familiar, because the system of equity, of which he laid the foundation, was fashioned and put into even more scientific form by two great American equity lawyers: Story, who was judge and professor at Harvard, and Dean Langdell, who for twenty-five years at Harvard University strove to put the principles of equity into that crystal form which they have since obtained, partly owing to his exertions.

"These are great memories, and this hall is indeed a thing of which those who come from the United States can be proud. It is yours as much as our own, and up to the Declaration of Independence it was physically your possession. I have always thought the great event of 1776 a fortunate event in the end. I believe it has done more to fashion and strengthen the ties between the people of the United States and the people of Great Britain and Canada than anything else that has happened in the world's history. It has not prevented you from having a sense of common inheritance with us in this great legal institution of which I am speaking. Here in Westminster Hall the ancestors of both of us did their work, here they have given their names to some of the great deeds in history and law, and it is surely right that this hall should be the place chosen in which to accord to you a heartfelt welcome."

In this wonderful and venerable building, among many other events contributing to the development of Anglo-Saxon government, Edward II and Richard II were de-
posed; Charles I received there the death sentence, and a few years later, Cromwell was installed as Protector. There, too, Sir Thomas More, the Protector Somerset, Sir William Wallace, Sir John Oldcastle and the Earl of Stafford were tried and condemned to death; also, William Sacheverell and, later, the rebel lords of 1745 were convicted. The seven bishops who opposed James II were acquitted there and Warren Hastings successfully passed through that world-famous ordeal characterized by the eloquence of Burke and Sheridan and the most brilliant assemblage, perhaps, ever seen in a court of justice. It must not be overlooked that many coronation banquets, notably that of George IV, took place in the Hall and it was used for great public festivals, such as coronation ceremonies and swearing in of lords mayors down to 1882.

Doubtless no scene or event more solemn, dignified or momentous ever occurred in the majestic old Hall than that enacted on the unique and memorable occasion of the reception of the American visitors. Neither pen nor brush nearly adequately can describe it. To see it was the only way to grasp and appreciate the dignified solemnity and pageantry. The Hall was more than crowded. On the red baize-covered platform and stair, backed by a beautifully ornate old stained-glass window, were grouped the members of the English reception committee, including the Attorney-General, the Solicitor-General, the ex-Law Officers of the Crown and other distinguished British lawyers, all in wigs and gowns, not gaudy but solemn and sombre, every black, golden, ermine or colored fold or decoration meaning something in legal lore, flanked on either side by the dignitaries and officials of the Canadian and American Bars. The coloring of the window seemed to stream harmoniously down to the old flags in the floor, framed by the stone buttresses at either side of the picture. Promptly, the procession of judges moved from the north door and passed up the aisle to the platform. One felt that they drifted out of the past. The spirit of the centuries was embodied there, and, to render the picture more realistic, most of those in the procession were old men. The cavalcade was kaleidoscopic but not theatrical. Every gesture and appearance had a significance approved by the
ages and conceded to be efficacious in the present. No scene could possibly be staged which would suggest more strikingly the antiquity, dignity, vigor and grandeur of law. The tipstaff led the procession bearing his staff, followed by the Private Secretary to the Lord Chancellor. Next was borne the shining Mace and then the Purse, all symbols of office throughout the centuries. Lord Chancellor Haldane, who presided at the ceremony, followed, dressed in a robe of black and gold, with train bearers in attendance and wearing the chain of his office. He was followed by three prior Lords Chancellors, the Earl of Birkenhead, Viscount Cave and Lord Buckmaster; by the Lord President of the Council, Lord Parmoor; by the Law Lords, Shaw, Dunedin and Blanesburgh. Then in order, came Lord Trevethin, former Lord Chief Justice, Lord Wrenbury, former Lord of Appeal, Lord Hewart, present Lord Chief Justice, the Master of the Rolls, Sir Ernest Pollock, five Lords Justices of Appeal and ten Justices of the Supreme Court of Judicature. When all had been seated, Sir Patrick Hastings, the Attorney-General, presented the guests to the Lord Chancellor in a speech of very deep cordiality. Mr. R. W. Dibdin then spoke on behalf of the solicitors of England and Sir James Aikins, President of the Canadian Bar Association, spoke most brilliantly and feelingly for the Canadian hosts. The Lord Chancellor replied and extended a welcome in a speech largely quoted above. The Honorable Charles E. Hughes, American Secretary of State and President of the American Bar Association, responded in a speech which was scholarly, tactful, witty and entirely commensurate with the great occasion. Mr. Justice Sutherland, of the United States Supreme Court, then delivered a brief but very happy speech, and the ceremony was at an end. Without ado, the principal participants scattered and seemed to vanish once more into the past; but the impressions and influence of the occasion are ineffaceable in the minds and hearts of those who were privileged to be present. As Mr. Secretary Hughes fittingly said: "This meeting of those who enjoy a common tradition and cherish a common purpose can not fail to heighten our sense of responsibility, as we find our strength renewed, our ardor quickened and our hearts deeply stirred as we sit together at the fireside
"in the old homestead." This initiative event, more potent for good will than treaties, diplomacy, companionship in arms or leagues, was an outstanding feature and a prototype of a program of entertainment which, indubitably, will result in better understanding and more cordial relations between the two great nations.

More pages than this Journal embraces would be required to describe fully and adequately, if indeed it were at all possible, the perfection and wholeheartedness of the other events on the program. Many interesting incidents and details necessarily must be overlooked, and, obviously, some must be kept out of print purposely.

Boswell wrote that dinner lubricates business, and the series of dinners commenced on Monday evening at the various Inns of Court and the Law Society certainly greased the path of good cheer that already had been working well. The handsomely engraved invitations, souvenir volumes and menus for these banquets were equally masterpieces of English craft with law and the edibles dispensed. The viands, victuals and wines were all that could be desired and fully conducive to fellowship and good cheer. On either side of each American guest an English, Canadian, Irish or Scotch judge or lawyer was seated, according to arrangement, and, in most cases, it was the pleasure of the guest to be entertained at private dinners, clubs, races and such matters throughout the entire stay. Genuine hospitality was displayed on all sides.

The Inner Temple, The Middle Temple, Lincoln’s Inn, Gray’s Inn and The Law Society are organizations which embrace in their membership those qualified to practice law. Membership in one or the other of the Inns depends on early associations of the individual during his student days, while The Law Society is composed of about ninety-five hundred solicitors. On the whole, those connected with a certain Inn specialize more or less in some feature of the legal profession; but the training for admission is rigorous as to general law in each instance. There are grades within the membership, too, depending on the ability or attainments of the individual. An account of any one of these institutions would require a lengthy article. Each organization comprises a church or chapel, a
hall and numberless large and small buildings in which are located the offices or chambers of the members, the whole occupying; perhaps, squares of land entirely devoted to the Inn's affairs and those of its members. Always there are a court-yard, garden and walks, and, as a rule, the entrance to the Inn is a rather obscured, quaint old gate or arch. On entering these portals, one immediately catches the spirit and quiet of the old days. All of the Inns are located in the same general section of London, close to the Courts. Indeed, most of the Inns were there before the Courts, for the information as to the founding and early history of most of them has faded from records and memory. The halls of the Inns are generally large, elaborate one-room buildings—the pride of the members throughout the ages and the store-house of their relics and treasures. In many instances pictures, plate, china and furniture have been used for centuries. In the halls the community life of the membership centers. There history and regard for law and the profession are studied and cultivated, the traditions and customs of the particular organization are strictly and formally maintained, social intercourse of the members takes place and the younger men who aspire to the profession are trained and impregnated with the knowledge, culture and ideals which the institution fosters. To the surroundings, atmosphere, inflexible training and equipment inflicted on students of the law at these institutions is due the inevitable aroma which distinguishes the English lawyer, whether of high or low degree, and brands him as one who has studied, lived and struggled where "Manners Makyth Man."

During afternoons, garden parties and teas were held at the Inns, too, and were very greatly patronized and enjoyed by wives, families and ladies with the Americans. At all times, members of the Inns were available and extremely kind and courteous in showing parties around, explaining points of interest and answering multitudinous inquiries.

It is difficult to pack a description of the pleasurable experiences of such a lively week into an account thereof to be read in half an hour, especially when those experiences were so fine and appreciable that they will furnish the food
for reminiscences during the remainder of a life, but perhaps the next most striking feature of the schedule was the garden party at Buckingham Palace at which all who desired had an opportunity of meeting the King and Queen in the most democratic manner. The ladies of the party were especially avid and thrilled. On the other hand, the great pains which the gentlemen took with their toilets and dress was a matter of notation for the British press. The silk hat industry was revived, and, since the American visit, in order to be at all distinguishable, a duke or lord must wear a fawn-colored high hat.

On Wednesday evening, the Lord Mayor and The Corporation of the City of London gave a reception and most lavish and sumptuous banquet at the Guildhall. Lord Mayor, Sir Louis Arthur Newton, in offering to the guests a warm and most cordial welcome, said he doubted “whether in all the long existence of this historic Hall, many as have been the national and international events which have happened within its walls, a more interesting and important gathering has ever assembled. In truth, the banquet was staged as in mediaeval times. Trumpets flared, and our most imaginative theatrical producer would have envied the robes, costumes, jewelry and symbols of office worn by the officials of the city. Many curious customs were exemplified, noteworthy among which were the antics and manipulations of the official carvers, the ceremonials of the sheriffs and the passing of the loving cup. Speeches and toasts were delivered amidst great fun and good cheer.

The reception at the Imperial Institute, the University of London, on the following evening, displayed the same degree of ritual, hospitality and ceremony, but it was more sober and of an entirely different character. In the library of the University were exhibited many rare, valuable books and documents of which Americans had often heard. Receptions were given during the week by the Mayor and Mayoress of Westminster, at Caxton Hall, by the American Ambassador and Mrs. Kellogg at Crewe House, in Mayfair, at Grocers’ Hall, by the Master of the Rolls, Sir Ernest Pollock, and by the City of London Solicitors’ Company, at Salters’ Hall. All of these functions were brilliant and educational, especially to one who is interested in mediae-
valism, hospitality and good food and wines. Numerous dinners and garden parties were given by other officials and leading citizens of London and nearby places.

One of the outstanding events of the week was the presentation of the Blackstone Memorial to the lawyers of England by the lawyers of America, which took place in the Hall of the Law Courts. This ceremony partook more of the American type and much of the dignity and pageantry of the other occasions was lacking. The presentation speech was made by the Honorable George W. Wickersham, on behalf of the American Bar, and the gift was accepted and response made by Lord Chancellor Haldane. It is useless to explain the fitness of this memorial to those who have studied the works of the great Vinerian lecturer, for Blackstone's legacy was the strong connecting link between the English and American juridical systems.

Towards the end of the week, excursions were arranged to Oxford and Cambridge universities, and, at each of these venerable centers of scholastic England, luncheons, tours and dinners were enjoyed. At all times, honorary memberships in clubs were used by the Americans. Trips, excursions, such as that to Sulgrave Manor and on the Thames, hunts and tours were constantly being arranged, and places of interest, often referred to in literature and science, were visited. Of course, the American lawyers attended sessions of the various courts at every opportunity and they were courteously received and shown much attention.

After being privileged by the gods thus to live years in a week, the American party divided, some going to Ireland and Scotland and some to France, where equally elaborate programs of entertainment were enjoyed. In Edinburgh the reception was held in the Parliament House followed by lunch in the City Chambers. The party then was conducted over Holyrood Palace and the Castle, to the Forth Bridge, to Linlithgow Palace, where Provost Hebson and the Magistrates received, and then to Masonic Hall where tea was served. In the evening the various Scottish law societies gave dinners, followed by a reception in Parliament House.

About 200 members accepted the invitation of the
Irish Bar to visit their country at the conclusion of the London meeting, and they report the best times there of the whole trip, leaving absolutely nothing to be desired. A garden party at the Vice-Regal Lodge, Dublin, was the first function, at which Governor-General Healy received and welcomed all the guests. In the evening the Benchers of the King’s Inn were hosts at dinner, after which a high class musical program was rendered. Next day the party was taken on to Killarney, where the Governor-General of Canada received and John McCormack sang, then to a garden party at Muckross Abbey, a ball in Killarney and a regatta on the lake followed by a golf tourney. Many of the American lawyers who made this trip learned interesting facts concerning the operation of the new constitutional and judicial system.

Of course, every one went to Paris at some time or another; but those who accepted the invitation of the Paris Bar were especially fortunate. Naturally, the French hosts were somewhat under the necessity of toiling to entertain the then jaded Americans along the lines of the program, but, as one would anticipate, they were equal to the task. The French schedule partook more of the social than educational or professional features. In Paris and other parts of France the pilgrims were on a holiday sponsored and feted at every turn by the Bar, officials and general populace. France, ever bloomingly surviving, has changed so often that its edifices and institutions do not afford the appearances of tradition and organized compactness encountered in England. However, French zeal made the visit in all respects as pleasant and exciting as that enjoyed anywhere.

On Tuesday, July 29th, the Paris Bar received at the Palais de Justice. An address of welcome was delivered by the Batonnier, M. Fourcade, and responses were made by Mr. Secretary Hughes and Mr. Justice Sanford. An orchestra and chorus of the National Grand Opera led in singing the national anthems of France, United States, Great Britain and Canada. Then the guests were taken on an inspection tour of the Sainte Chapelle and Tribunal de Commerce, after which all departed on a walk along the Seine to the Hotel de Ville where the Municipality of Paris
received. After a brief address of welcome and response thereto, there were orchestral music and solos by artists of the Grand Opera.

On the following day, the President of the Republic, M. Gaston Doumergue, received all at the Elysée Palace, when the entire palace was thrown open for inspection while the National Band played and refreshments were served on the spacious lawns.

The same evening, the Batonnier of the Paris Bar entertained at a reception and dinner, and the next day all were taken in motors to the Palace of Versailles, where the Curator and his aides conducted the guests over the palace and parks. Dejeuner was served in the Grande Orangerie, after which visits were made to the Grand and Petit Trianon. Upon returning to Paris, a reception was given by the France-Amerique Committee, at 82, avenue des Champs-Elysées, followed by a reception by the Carnegie Foundation for International Peace, and by M. René Renoult, Ministre de la Justice, at the Hotel de la Chancellerie. The concluding event of the formal entertainment was the reception by the American Chamber of Commerce for France, on Friday, August 1st. The side visits to well-known places of interest, tours, dinners and theatre parties very general during the stay of the Americans were grand and lavish. Since the war, it seems, France, and especially Paris, is more cosmopolitan than any other part of Europe, certainly the members of the American Bar Association found it so. On completion of the visit to France, the party scattered in many, diverse directions. It would be inadvisable to recount further details of the trip. Even the police lost track of some, and it was observed frequently by French natives uninformed except as to name, that the American Bar Association was an organization of ex-saloonkeepers and ex-bartenders. Who can censure them? They were studying various legal systems, history and customs, and do not many of the leading institutions of learning in Europe not only foster sensible use of beverages but actually manufacture them?

An effort has been made attractively to describe this trip in such manner that students hoping to follow the law and practitioners who were not sufficiently fortunate to make
the journey will be stimulated to follow in the illumined path of the American Bar Association even though in an unorganized way. For it is possible practically for any one to obtain this course in higher legal training who has the determination to do so. In ten years' time, the lawyer who has not been in contact with the older stages of civilization and the sources of our legal institutions will be seriously handicapped. It is the only method of securing a vital and intensive background for a legal career, the profession needs more members who have the breadth of knowledge thus acquired, and the generally recognized advantages, both to the individual and the profession, to be derived from a more general contact has led to a concerted effort to make similar experiences available to all who have ambition.

The steamship companies, universities and colleges are especially cooperating in this beneficent work. A trip to England and the continent means to most minds the expenditure of two thousand dollars, whereas, a far more profitable trip actually can be made for five hundred dollars, perhaps less. True, it will not be in the best cabins of the ships, and one can not tarry at first-class hotels where newly-rich Americans madly throw away money. An accomplished voyager never stays at a first-class hotel, in a city in which he is unacquainted longer than is necessary to get his bearings and find a pension or private home in which he will be welcomed. As to ocean passage, it can be booked on the best boats for eighty-five dollars each way. On many good boats the entire passenger space is given over to students during the vacation period. On all of the boats large groups of students furnish the most delightful companions and contacts always can be made which will be valuable and enduring for the rest of one's travels. Francis Bacon, in his "Essay on Travel," wrote: "Let him (the traveler) sequester himself from the company of his countrymen and diet in such places where there is good company of the nation where he traveleth." An intelligent traveler always does this. It is the only way to see the other half of the world.

Next summer Oxford and Cambridge universities doubtless will repeat wonderful courses in various historical,
legal, sociological, economical and pedagogical fields. The University of London and the Sorbonne, in Paris, also will offer courses. A student can matriculate for about $45; he can live at one of the colleges, having two or three rooms, excellent meals in the college hall and a servant, all for the sum of ten shillings per day—at the present rate of exchange, about $1.70. He can live outside of the college walls for half that amount, and well, too. Very little spending money is required, for a considerable amount of social life is provided gratis by the townspeople and university authorities. Oxford and Cambridge, especially, are tourist centers for England, and much of that country can be seen on week-ends and holidays. In Paris, with its museums, operas, the Louvre, boulevards, palaces and other sights, quite easily a student can live and study for less than $150 a month. He will live, too, where living is extremely interesting, in the Latin Quarter, Montmartre section, in the small hotels of the Boulevard Saint Germain or the Luxembourg. An American dollar, at the present rate of exchange, will purchase four or more times as much in France or Italy as when money is at par. Taxi fare, almost any ordinary distance, in Paris, will be 15 cents to 20 cents; while if one knows where to go for it, he can get a good meal or a bottle of the best wine for 40 cents. A quart of the finest champagne can be bought for 90 cents, but in another part of the city, it may cost $5, of course, with a great deal of unnecessary, indeed irksome, service added. Every city has student quarters, where, now-a-days, a student can live as cheaply as at home during vacations. In Rome, Venice, Genoa, Naples or any of the other large Italian cities, bristling with cathedrals, art galleries, museums and schools, it is possible to live comfortably for 40 lire a day, and a lire is worth less than 4½ cents. The meals, too, will be among the best obtainable in the world. In Germany, even cheaper livelihood can be had. The cost of living in Belgium is about the same as in France. In London, near the University or close by the British Museum, both very good sections, one can obtain good quarters, including breakfast, for from three to four shillings upward per day. Switzerland is more expensive; but a student would not want to pass more than two or three
days in that country viewing the scenery, which no one should miss, and studying the habits and customs of the people.

Railroad fare is not excessive for the distances are not great and third-class sections easily can be tolerated. "Only the aristocracy and Americans travel first-class," the natives say. The railroads in a great part of Europe fulfill about the same function as our interurban trolleys.

A word of caution in regard to becoming stranded. It is not safe to throw all anchors overboard, and some arrangement always should be made for additional money by cable. There are organizations of Americans in the larger cities which are helpful in such situations, and the American consuls generally contrive some way out of financial or other difficulties.

Any eminent educator will urge a student to take advantage of the opportunities being held out at this particular time in the matter of European travel and study, and to no class of student should the appeal be greater than to the disciple of the law. A trip such as that suggested easily will advance one years beyond his fellows in experience, vision and judgment. Sir Matthew Hale, in his Preface to Rolle's Abridgment, wrote that law is "not the product of the wisdom of some one man, or society of men, in any one age: but of the wisdom, counsel, experience, and observation of many ages of wise and observing men." Indeed, law is but the crystallized common sense of all ages and all countries which have contributed to its form or substance. Greeks, Romans, Franks, Anglo-Saxons, Nordics and other races, both prior and subsequent to them, have, in greater or less degree, handed down to us the results of their social and political conflicts in the form of legal principles, which are more readily understood, firmly retained and effectively used as a present guide if impressed and rendered vital by personal study of the material relics of those earlier stages of civilization.

All worthy lawyers desire, some time, to make such a visit; but too many defer until after they have done a large portion of their professional work. How much better and more enjoyably they could have pursued their career if they
had the advantage to be gained from such study at the outset!

Secondarily to a personal visit, a student should acquaint himself with the books and essays of the legal classicists and study the lives and careers of Roman, English and American leaders in the profession in an effort to get legal background and perspective, something to which he can hook the detailed portion of a law education. No college or university should be allowed to train for the law which does not include in its curriculum a course which will direct such training and equipment for a profession, success in which is "only to be won by straining all the faculties by which man is likest to a god."
Prior to the enactment of the Revenue Act of 1924 taxpayers had no tribunal to which an appeal might be taken from the adverse decision by the Commissioner of Internal Revenue until after the payment of the tax claimed to be due. The actions of various units in the Bureau were subject to review, however, by various bodies within the Bureau itself. Under the practice then prevailing there were certain fundamental defects which sometimes led the public to feel that cases did not receive unprejudiced and equitable treatment. It was objected that the various reviewing organizations which considered appeals from the action of the various units were a part of the Bureau itself, that the person who was to decide the appeal acted both as advocate and judge, and that such conditions did not insure impartial decision of the cases. If the decision on the appeal was in favor of the Government the taxpayer, only after payment of the tax, had the right to protest the correctness of the decision in the courts, but if the decision was in favor of the taxpayer the action of the Bureau was final and the decision of the Bureau could never be contested in the courts. It was contended that this condition resulted in the decision of many doubtful points in favor of the Government.

To meet these objections, Congress established the Board of Tax Appeals. Although prior to the passage of the Act the taxpayer might, after payment of his tax, bring suit for the recovery thereof and thus secure a judicial determination of the questions involved, he could not, in view of Section 3224 of the Revised Statutes, which prohibits suits to enjoin the collection of taxes, secure such a determination prior to the payment of the tax. It was felt that the right of appeal after payment of the tax was an incomplete remedy and did little to remove the hardship occasioned by an incorrect assessment. The payment of a large additional tax on income received several years previous and which may have, since its receipt, been either wiped out by subse-
quent losses, invested in nonliquid assets, or spent, sometimes forced taxpayers into bankruptcy, and often caused great financial loss and hardship. These results were not remedied by permitting the taxpayer to sue for the recovery of the tax after payment. It was believed that he was entitled to an appeal and a determination of his liability for the tax prior to its payment. Congress, therefore, created the Board of Tax Appeals, Section 900 of the Revenue Act of 1924 being the charter of its existence. Under the provisions of this statute the taxpayer may, prior to the payment of additional tax, appeal to the Board and secure an impartial and disinterested determination of the issues involved.

In the consideration of the appeal, both the Government and the taxpayer appear before the Board to present their cases, with the result that each member of the Board sits solely as the judge and not both as the judge and the advocate. The provision allowing the Commissioner to sue in court for the recovery of any taxes thought by him to be due in excess of that decided by the Board to be due relieves the Board from the responsibility of finally passing upon questions involving large amounts and removes the necessity for a decision in favor of the Government in order to force the issues into court.

The President was empowered, with the advice and consent of the Senate, to appoint, solely on the grounds of fitness to perform the duties of the office, not more than 28 members to compose the Board. Those first appointed were to serve until two years after the passage of the Act, after which it is provided that the Board shall consist of seven members appointed for overlapping terms up to 10 years.

On July 3, 1924, the Senate not being in session, President Coolidge made recess appointments of the first 12 members of the Board.

Those appointed met in Washington on July 16, formally organized as a Board, elected a chairman and appointed a secretary. By remaining in continuous session the Board was able to prepare and publish its rules by July 28 and
printed copies were ready for the public by August 6. On July 30 the first appeal was filed.

On August 15, approximately 30 days after its organization meeting, the Board first sat to hear argument in a motion made by counsel for a taxpayer with respect to the Commissioner's pleading in his case, and on August 19 the first appeal was argued before the Board. The decision in the first case was handed down on August 27.

The Board of Tax Appeals is in effect a judicial tribunal of limited jurisdiction. It has power to review determinations of the Commissioner of Internal Revenue with respect to income and profits taxes, estate taxes, and the new gift tax. There are some interesting questions as to the extent of the jurisdiction of the Board over taxes asserted under past revenue acts. With respect to these, of course, it would not do to express any obiter opinions. It has already been necessary to decide, however, in a litigated case, that the Board has no jurisdiction over claims for refund. This necessarily follows from the limited power vested in the Board. When the Commissioner of Internal Revenue makes a determination proposing to assess a deficiency tax, the taxpayer may appeal to the Board, and, to the extent that he prevails, the Commissioner is prohibited from collecting the proposed tax by distraint. He may, however, sue in the courts for the collection of the tax, in which case the findings of the Board are prima facie evidence of the facts found. This constitutes a method of appeal by the Commissioner from the determination of the Board. The taxpayer has a similar method of appeal by paying such taxes as the Board determines to be proper and suing to recover them. If a tax has already been paid, however, the Board is vested with no jurisdiction to compel the Treasury to refund it, and the taxpayer's remedy is the same as it was before the passage of the 1924 Act—by suit in the District Court or the Court of Claims.

The first problem with which the Board was confronted was that of determining its policy with respect to rules of practice, including the admission of counsel, evidence and procedure. In the first draft of the Revenue Act of 1924, commonly known as the Mellon Bill, it was provided that
the proceedings before the Board shall be informal, but after several changes the Congress finally decided to substitute for that provision this language: “The proceedings of the Board and its divisions shall be conducted in accordance with such rules of evidence and procedure as the Board may prescribe.” Obviously Congress decided to leave the question of formality of procedure to the judgment of the Board. So it became necessary to decide whether to provide for highly informal proceedings, such as those conducted by conferees in the Income Tax Unit, or strict and technical rules such as those in force in the courts, or for some intermediate scheme.

The statute leaves no room for doubt as to the solemn nature of the function of the Board. It is not merely a newly created higher division of the Bureau or even of the Treasury Department. It is, in the language of the statute, “an independent agency in the executive branch of the Government,” and as such it is expected to act independently in all its determinations. This independent character cannot be too firmly emphasized because it seems not to be fully realized, for this is what makes necessary the formal procedure of the Board. If the Board were within the Bureau the entire record in the Bureau would be available to it, and all of the administrative aspects of each case would need be considered, with the result that the taxpayer would be in much the same situation as he has heretofore been.

This is very apparently not what Congress intended. The reports of the congressional committee and the language of the statute show that what was intended was an entirely independent body with no motive except to apply the law to the facts in each case and reach the correct answer in that case. The Board is not to collect the revenue and hence it has no fear of administrative precedents. Its concern is to see on the one hand that the citizen is not unjustly assessed and, on the other, that in the collection of its just revenue the Government is not unduly delayed. The Board represents neither party. Both parties are represented by their own advocates.

The provisions of Section 900 of the statute are very
specific as to how the Board shall perform its function. It must hear appeals, giving notice and an opportunity to be heard both to the taxpayer and the Commissioner. These hearings shall be open to the public and all the evidence shall be open to public inspection. It must not only decide the ultimate question of liability but it must in all cases make a written report of its findings of fact and decision. In cases where more than $10,000 is in controversy it must write an opinion. Witnesses are to be heard, and if necessary compelled by subpoena to testify; oaths are to be administered; papers and books introduced in evidence, and depositions taken. These are not the attributes of an administrative office. They give us the picture of a judicial tribunal.

We are familiar with the growth in recent years of the special tribunal outside the judiciary. In the Federal Government the Interstate Commerce Commission and the Federal Trade Commission are well-known examples. Such bodies have a composite function to perform, both judicial and legislative. They are largely concerned with the legislative function of prescribing specific rules of conduct for the future, and to that end they determine the facts of the past. Their primary interest is not for the parties but for the public, so that carriers' rates and business practice shall be fair. Their problems are perhaps more economic than legal, and yet these bodies have without exception found it necessary to adopt the forms of litigation in order to determine issues.

This Board has no such legislative function and the problems which it solves are only indirectly economic. They are primarily legal. The Board must see that a specific statute is correctly applied to a completed and past state of facts and the specific liability of a single person under that statute correctly determined—a purely judicial duty. If a correct determination discloses a wrong economic result for the future the remedy is with Congress.

But there is a further matter to be considered. The Act provides that in any subsequent proceeding in court, either by the taxpayer to recover the amount paid or by the Government to collect the amount abated, "the findings
of the Board shall be prima facie evidence of the facts therein stated.” This means that in practice the findings of the Board shall have judicial effect. While it is true the Board has no power directly to enforce its determination, here is a provision which gives the decision a legal sanction in a court of law. A finding of the Board cannot be arbitrary and still retain its weight as evidence. Its effect is only prima facie, which means that it may be overcome. But is it in the first instance entitled to prima facie effect unless supported by legal evidence? Will a court respect a finding of the Board if made other than in accordance with a legal record? If the record before the Board discloses that the finding is unsupported by legal evidence, how can it be justified? Does anyone, whether he represents the taxpayer or the Government, doubt that if a finding of fact were made against him he would demand that it be in accordance with legal evidence and that any adverse finding not so supported would be open to attack? If we act upon what the law of our land has after many years come to recognize as evidence, our feet are upon solid ground. To do otherwise would be to arouse suspicion and incur resentment.

Having in mind the provisions of the statute and the general principles to which I have alluded, the Board formulated its rules of practice in accordance therewith.

With respect to pleadings, the primary consideration was the elimination of delay. It was realized that the practice before the Board must be necessarily hybrid. Although designated in the statute as an appeal, cases cannot be brought before the Board on a record made below. The records made in the units of the Bureau of Internal Revenue are highly informal, and where conflicting statements have been made or conflicting affidavits submitted, there would be no basis for weighing the evidence. In many cases large portions of the record are never reduced to writing. The proceeding before the Board must necessarily take the form of a trial de novo. Such procedure is not entirely new but is common enough in the state courts where so-called appeals, taken from judgments of justices of the peace or courts not of record, result in complete new
trials before county or district courts. To a certain extent practice before the Board is appellate, but to a larger extent it is *nisi prius*. This had to be taken into consideration in drafting rules for the filing of appeals and the form of pleadings, and it was also necessary to take into consideration the very important point of eliminating, as far as possible, any tendency toward delay. It was apparent that if a practice was adopted similar to *nisi prius* practice at common law, or a common appellate practice, it would be possible for many months to elapse before issue could be finally joined and the case ready for hearing and decision, and in the meantime the collection of the revenues would be delayed. After thought, discussion, and consideration it was provided that the proceeding should be commenced by a petition which should, so far as practicable, combine the function of a summons or notice of appeal, a bill or complaint, and an opening on behalf of the taxpayer, the last to be brought about by the requirement that the taxpayer state in his petition not only the facts upon which he relies but the propositions of law involved, and in the same way the rule requires that the Commissioner set up in his answer not only his facts but any propositions of law upon which he might rely.

Following the practice adopted in a great many of the courts in recent years, no provision was made for demurrer, but by an amendment to the rules, published after the first printing, motions were provided for directed to the petition, which motions are intended to take the place of demurrer as well as motions to make more definite and certain, to amend, to strike out, etc.

The necessary limitations of an article of this nature will not permit of a detailed discussion of the rules adopted by the Board. The Board has attempted to devise as simple procedure as possible in its rules. It desires to have the issues presented to it in a clear and concise manner and, after the issues are raised, to avoid, so far as possible, any temptation on the part of the parties before it to delay the proceedings. What the Board desires is the truth in each case, and a speedy determination.
VARIOUS pacifist organizations during the past summer attempted to militate against the success of the Defense Test held by the War Department on September 1, 1924, and to nullify the appeals for citizen support, by saying that there was no legal requirement for citizens to participate in such an event, and by pointing out that the National Defense Act of 1920 (41 Stat. 759) speaks only of a national emergency expressly declared by Congress. Of course, the statutory reference to a mobilization had nothing to do with the September appeal to citizens. The word "mobilization" is used in the Act merely in definition of the character of the citizen forces, saying that they should be so organized as to form the basis of "a complete and immediate mobilization" in an emergency. In the September event, or test, the War Department merely invited the cooperation of patriotic citizens who responded voluntarily to the number of 16,000,000. Even the reserve officers, legally under Federal control as they were, were merely invited to serve for a day without pay, and were not ordered to active duty, since the project from the beginning was planned to be without expense to the Government and on a purely volunteer basis.

The procedure adopted was, in accordance with the decentralized plan of our citizen army, for local officials to be approached by local military commanders and requested to cooperate. There was no general appeal issued. Though there was definite approval given the project by the President of the United States in his capacity as commander-in-chief of the Army and Navy, yet he did not even issue a proclamation on the subject, not even a proclamation asking for general voluntary support. However, inasmuch as the type of support asked was such as might well have been asked in a proclamation, and inasmuch as his public approval had much of the force of a proclamation, it might
be profitable to scrutinize recent precedents to determine the law and custom in like cases.

Aside from the strictly legalistic and administrative use of the presidential proclamation relating to and announcing specific executive acts, the use of the proclamation for general public purposes is most familiar to the American people in the annual announcements of the dates set aside for Thanksgiving. In these the President has designated the day and called directly upon the citizens to render thanks to God for blessings received.¹ This action has been taken partially out of deference to what President Wilson called "the honoured custom of our people" ² and partially in accordance with an act of Congress. A Joint Congressional Resolution of January 6, 1885,³ provided for certain holidays with pay for all employees of the Government on duty in Washington and elsewhere in the United States and included "such days as may be designated by the President as days for national thanksgiving" thus clearly contemplating the annual designation of such a day by the President.

Without going through the formality of making the event a matter of creating holidays, similar action has been taken on other occasions. On April 26, 1911, Attorney General George W. Wickersham advised the President regarding a suggested celebration of the issuance of the Emancipation Proclamation (29 Ops. Atty. Gen. 52):

"There would seem to be no doubt whatever of your power to issue a proclamation requesting the citizens throughout the nation to commemorate by appropriate observances the event referred to. Such action was taken by President Grant in issuing a proclamation inviting the people of the United States on the 4th


of July, 1876, 'in addition to the usual observances with which they are accustomed to greet the return of the day, further, in such manner and at such time as in their respective localities and religious associations may be most convenient, to mark its recurrence by some public religious and devout thanksgiving to Almighty God for the blessings which have been bestowed upon us as a nation during the century of our existence, and humbly to invoke a continuance of His favor and of His protection.'” (19 Stat. 664.)

Within recent years similar proclamations have been issued for similar special purposes, and to call the attention of the public to matters deserving of their thought; e. g., Wilson’s proclamation on Mother’s Day in 1914 (38 Stat. 1996); Wilson’s day of prayer for peace in 1914 (38 Stat. 2028); Wilson’s Flag Day proclamation of 1916 (39 Stat. 1782); Wilson’s Boy Scout Week proclamation of 1919 (41 Stat. 1747); Wilson’s Pilgrim Tercentenary proclamation of 1920 (41 Stat. 1802); Harding’s Memorial Day proclamation of 1921 (42 Stat. 2239); Coolidge’s Fire Prevention Day proclamation of 1923 (Procl. No. 1674); and Coolidge’s Forest Protection Week proclamation of 1924 (Procl. No. 1686). The Mother’s Day proclamation of 1914 (38 Stat. 1996) was issued as a result of a Congressional Joint Resolution designating that day and authorizing the President to display the flag on Government buildings and to call on the people to do the same. In accordance with similar suggestions from the Senate and similar requests from the House, President Wilson issued proclamations designating days on which citizens might express their sympathy by giving relief to various stricken peoples of Europe, the Jews (39 Stat. 1762), the Lithuanians (39 Stat. 1802), the Syrians and Armenians (39 Stat. 1803), and the Ruthenians (40 Stat. 1645).

The exact action taken by the Presidents in these proclamations is somewhat significant. In the Mother’s Day proclamation nothing further was done than to direct government officials to display the flag and to invite the people to display flags on their homes, and this in spite of the fact that the observance of the day had congressional
sanction (38 Stat. 1996). In his Flag Day proclamation of 1916 all President Wilson did was to “suggest and request” the holding of “special patriotic exercises” (39 Stat. 1782). In 1921, President Harding invited the citizens to pay homage to the dead on Memorial Day (42 Stat. 2239). In his proclamation of a Sunday to be devoted to prayers for peace, President Wilson only made a “request” of “all God-fearing persons” (38 Stat. 2028), and that was all he did with reference to the Pilgrim Tercentenary (41 Stat. 1802). The Wilson proclamation of Boy Scout Week in 1919 (41 Stat. 1747), the Harding proclamation of Education Week in 1922 (42 Stat. 2289), and the Coolidge proclamation of Fire Prevention Day in 1924 (Procl. No. 1674) were content to “recommend” fitting observance and attention. In other words, in these cases there was merely an impersonal suggestion on the part of the President, merely giving strength to this or that idea without committing any person to necessary action—saving only the federal officials who hauled up the flags on government buildings on Mother’s Day in 1914 (38 Stat. 1996).

Another group of proclamations covers more concrete instructions. In proclaiming Fire Prevention Day in 1922, President Harding directed “the attention of all citizens, especially those in authority in the states and cities, to the desirability of * * * the observance” (42 Stat. 2284), and said:

“I appeal to the public authorities of the country, by such measures as to them may seem most effective, and to citizens generally, to take steps for the observance of Fire Prevention Day.”

Something more concrete in the way of action was contemplated by President Wilson’s Fire Prevention Day proclamation of 1920 (41 Stat. 1802), by President Harding’s Fire Prevention Day proclamation of 1921 (42 Stat. 2251), by President Harding’s Education Week proclamation of 1921 (42 Stat. 2258), and by President Harding’s Forest Protection Week proclamation of 1922 (42 Stat. 2268), all of which urged the Governors of the various states to set aside particular days for the purposes indi-
The influence of local authorities of all sorts and grades was particularly invited in the last of these four. But local districts have local prejudices and all the President really could do would be to request and suggest. For example, the Harding and Coolidge Forest Protection Week proclamations of 1923 (42 Stat. 2301) and 1924 (Procl. No. 1686), urged the Governors of the various states, "wherever practicable and not in conflict with state law or accepted customs, to celebrate Arbor Day within that week."

"It is not within the power of the President," said Attorney General Wickersham in the opinion already mentioned (29 Ops. Atty. Gen. 52), "to make by such proclamation, without the authority of Congress, a legal holiday of the day so designated. Such holidays, in so far as they allow the employes of the Government leave of absence without pay, are always established by Act of Congress or by Joint Resolution (see 21 Stat. 304; 23 Stat. 516; 24 Stat. 644). Congress by Act approved March 2, 1889, 'in order that the first centennial anniversary of the inauguration of the first President of the United States' might be commemorated, declared Tuesday, April 30, 1889, 'to be a national holiday throughout the United States,' and by the same Act made provision for ceremonies in connection with that event (25 Stat. 280)." In a similar manner, in 1921, after President Harding had issued a proclamation calling for a two-minute period of silent prayer for the Unknown Soldier on November 11 of that year (42 Stat. 2252), Congress passed a Joint Resolution "to declare November 11, 1921, a legal public holiday," and President Harding straightway issued a new proclamation announcing that holiday and recommending the tolling of bells and renewing his recommendation as to the two-minute prayer (42 Stat. 2255). This incident of 1921, with reference to Armistice Day and the burial of the Unknown Soldier, exactly illustrates the soundness of the Wickersham conclusion, in which the then Attorney General said:

"If it is desired that especial national observance be paid ** by making a legal holiday, and providing for
appropriate services under national auspices, the matter should be brought to the attention of Congress, to the end that the appropriate enactment be had by the passage of a bill or joint resolution, but it is within the power of the President to issue a general proclamation calling the attention of the people of the country to the event, and inviting them to unite in an appropriate celebration.” (29 Ops. Atty. Gen. 52.)

These uses are, however, all more or less unofficial uses of the proclamation; and, except insofar as they involve the question of a holiday, they are informal uses for general purposes and have no direct relation to the government and the cooperation of the people with governmental agencies. Somewhat different are the proclamations which have been issued with relation to the conduct of military affairs. On August 12, 1861, in response to a request from a joint committee from Congress which waited upon him, President Lincoln issued a proclamation setting aside a day of prayer “for the safety and welfare of these states, his blessing on their arms, and a speedy restoration of peace.” (12 Stat. 1261.) On October 19, 1917, in response to a Congressional Resolution requesting him so to do (40 Stat. 1582), the President issued a proclamation appointing “a day of supplication and prayer” for all the people to offer prayer “for the success of our armies and victory for our cause in this great conflict.” (40 Stat. 1808.) More concrete in the matter of calling upon the people to give tangible proof and evidence of support to their country are the two proclamations issued by President Wilson on October 12, 1917 (40 Stat. 1706), and on April 18, 1918 (40 Stat. 1771), urging and advising the people “to assemble in their respective communities and pledge to one another and to the Government that represents them the fullest measure of financial support” through the media of the Second and Third Liberty Loans. A further example of specific appeals from the President for specific aid from the people is found in President Wilson's proclamation of November 10, 1919 (41

*An example of such legislative action was the Resolution (41 Stat. 283) making a legal holiday in Washington on the day of the parade of the returning 1st Division.
Stat. 1772), making known that all persons should co-operate in the taking of the Census of 1920, promising secrecy as to the data collected, and urging "all persons to answer promptly, completely and accurately all inquiries addressed to them by the enumerators or other employees of the Census Bureau."

The precedents in the matter of proclamations, therefore, indicate that, although the President cannot declare a national holiday or provide for an official national event without specific authorization from Congress, he is empowered to appeal to the people to participate freely and voluntarily in any event to which he wishes to call attention. Following the precedent of the proclamation regarding the taking of the Census of 1920, he might have asked the people of the country to co-operate in the "Defense Test."

In the case of the Defense Test, it was desired to make a complete check of the mobilization plans of the country, to insure the effectiveness of these plans in obeying the mandate of the National Defense Act of June 4, 1920, that "the organized peace establishment, including the Regular Army, the National Guard, and the Organized Reserves, shall include all of those divisions and other military units necessary to form the basis for a complete and immediate mobilization."

(41 Stat. 759.) As commander-in-chief the President can issue orders for such a check, test, or inventory to the Regular Army provided he does not exceed the appropriation provided by Congress. The National Guard he cannot call into Federal Service as militia except to repel invasion, suppress rebellion, or execute the laws; nor can he draft the Guard into Federal Service without specific

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1 When President Lincoln issued the Emancipation Proclamation, he was criticized for "an unconstitutional exercise of authority" (Taft, W. H., Our Chief Magistrate and His Powers, p. 148), but defended it as an act of the Commander-in-Chief justified by military necessity to weaken the enemies of the nation and suppress their rebellion. The proclamation itself (12 Stat. 1268) purported to be issued "in time of actual armed rebellion" and "as a fit and necessary war measure." That proclamation is therefore of a different type.
2 Taft, W. H., Our Chief Magistrate and His Powers, p. 94.
authority from Congress. The most he can do in this instance is to urge the Governors to take suitable steps to insure co-operation locally, as was done in the Wilson, Harding, and Coolidge Fire Prevention, Education Week, and Forest Protection proclamations. The President cannot call Reserve Officers or Enlisted Reservists to duty, even with their own consent, or even for less than fifteen-day periods, in any other than national emergencies specifically declared by Congress, except "to the extent provided for * * * by appropriations for this specific purpose." (Act of June 4, 1920, secs. 37a and 55b, 41 Stat. 759.) For the purposes of the Defense Test there are no appropriations specifically so designated; nor were general funds used for this purpose, for the entire procedure was based on an inexpensive local application which, in the words of Secretary of War Weeks in making public the plans for the event, would "not involve any increased expenditures of public funds." The Act of June 4, 1920 (41 Stat. 759, section 5) provides that it shall be the duty of the War Department General Staff:

"to prepare plans for National Defense and the use of the military forces for that purpose, both separately and in conjunction with the Naval forces, and for the mobilization of the manhood of the nation and its material resources in an emergency" and "to investigate and report upon all questions affecting the efficiency of the Army of the United States, and its state of preparation for military operations."

Under the warrant of this act, the War Department prepared its plans and devised means for "the mobilization of the manhood of the nation." The testing of these plans by a nation-wide inspection and inventory is a proper function of the War Department General Staff under its mandate to

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10 War Department Press Release, May 9, 1924; New York Times article, May 15, 1924.
"investigate and report." So much for the legality of the action taken. Inasmuch as the action taken required widespread citizen co-operation, we have further to assume the propriety of securing that voluntary citizen support which was sought and secured. The test and determination of the efficiency of our defense forces and their plans of operation were matters of interest to every member of our self-governing and self-protecting nation. It seems entirely proper for the President to have ordered the military establishment to have made public its democratic plans for possible mobilizations of the future. The plans could only be completely visualized in operation at the present day so as to permit of their being subsequently perfected and improved if civilian support were forthcoming. Consequently it was entirely proper for the President to have invited the citizens to co-operate, proper according to the political theory on which our government rests, and proper in view of recent precedents in proclamations, notably in view of the Census Proclamation of President Wilson already mentioned, which relates to a very similar subject: a Federal inventory by Federal officers in which individuals were asked to co-operate as individuals.

The fact that the popular support given the event was secured without the formality of a Presidential proclamation is not legally significant one way or another. Instead of appealing to the people through a formal document emanating from the Executive Mansion and Offices and duly authenticated by the Secretary of State, the President simply chose to appeal through his subordinates. Local communities and organizations were approached, not by the President, not even by the Secretary of War, or by the General of the Armies and Chief of Staff, but rather by subordinate Corps Area commanders, in order to depict to the people in detail the decentralized organization and administration which underlies our present military policy. The only question remaining is whether an announcement by the Secretary of War of his plans for such an event with the publicly expressed approval of the President has really the force of a proclamation. It has not the legal form. Yet there are vast differences in proclamations: some are senti-
mental purely; some are clearly extra-legal; and others are
downright constitutional necessities, like those which an-
nounce the ratification of treaties which forthwith become
the "supreme law of the land." Although the publicly
expressed approval of a project may really have the popular
effectiveness of a proclamation without its legal form, there
certainly was no proclamation issued, either directly or
indirectly; and yet the action of the President in this in-
stance constitutes an interesting precedent.
THE ORIGIN OF THE AMERICAN SYSTEM OF GOVERNMENT

By Richard S. Harvey, Ph. B.

It is novelty that attracts the human mind. What we see about us and the things with which we come in daily contact too frequently lose their charm. We picture to ourselves something ideal, upon the other side of the hill—until we visit the spot and discover it has features very similar to those of the place where we live. A thousand experiences do not cure us completely of this disregard for familiar scenes, this disproportionate valuation of the distant scene.

And so it is in matters of government and politics. The institutions amid which we were bred seem scarcely worthy of inquiry as to their source or original purpose and scope, while we readily inquire into the nature of the latest theory of statecraft which is promulgated by Soviet Russia or in New Zealand or by some petty state in the Balkans.

Notwithstanding this migratory tendency in thought, it may transpire that we are going farther and faring worse. Let us look about and see whether there is not awaiting us at our very door a theme which will repay us for the thought and attentive consideration it requires.

What is the origin of our system of Government? That is the topic we shall discuss in the space at our disposal here; and while we hope the discussion will warrant attention, we assert that the interest does exist, and we as freely admit the fault will be ours if we fail to disclose its appealing force and present day value.

Three separate sources have been marked as the fountainhead of these institutions; whereas it may be found there is still another source. But before we enter upon this investigation, let us enumerate and define of what those institutions consist. These essentials of free government fall readily within four heads: (a) Selection of rulers by the people governed; (b) representation in the body which formulates and enacts the laws; (c) control of the taxing power; and (d) trial by jury and exemption from arbitrary exercise of judicial powers. If any of these four
qualities are absent, the Government—however efficient and well intending—fails to possess the right to be styled "free" in the sense in which that term is employed in matters which concern sovereign states.

Doubtless the most obvious course is to derive our free institutions from those of England; but does this most frequently traveled route lead us to the place whence those institutions are derived? Lord Bryce has characterized the English constitution as in reality non-existent, since Parliament has power to set it aside or ignore it, when it contravenes any legislation that a majority of the members decide to inscribe upon the statute books. Without this check, and without any judicial power that has authority to interfere, Parliament is the dictator of the realm. In the days when the American Revolution freed our land from England's control, "rotten boroughs" were numerous, and election of members of Parliament to a large extent was dictated by the land-owning peers and gentry.

Can it be said that the free institutions we enjoy were copied from a government with the absolute control vested in a Parliament thus constituted? I have purposely omitted mention of the Crown, since the right to interpose an effective veto was taken away at the time when William and Mary ascended the British throne. Tax bills, it is true, were introduced in the Lower House, in the first instance; but the Peers were enabled to so shape the membership that those measures did not necessarily bear the imprint of the popular will.

Granting that in England the ruler in a negative way was subject to approval by the people and that trial by jury was an existing factor in government, it is seen that in representation and in control of the taxing power, American models could not well be copied from the then existing institutions in the British Isles.

The second source consists of the forms of government which survived from the Roman Empire as exemplified in Germany and the other sovereign states of Continental Europe. A study of the Germany of those days—the period around 1788—discloses a mass of petty states, from which Prussia was emerging as the dominant factor, while France was in a state of unstable equilibrium, going from revolu-
tion to revolution. Italy, too, was passing through a transition period, with autocratic Austria in control of regions once in possession of Venice; indeed the word "national" cannot correctly be applied to Italy until it was unified in 1860, under the leadership of Cavour. Switzerland, it is true, furnished some ideas that might be incorporated in a free government; but the federal element was almost non-existent, for the Swiss of those days were members of a league or federation of cantons held together by due regard for their own protection from encroachment by the land-hungry states which encompassed them about.

The Roman law is centralizing in its tendencies; at least, such has been its influence since those early days of the Republic, prior to the period when Augustus covered autocracy with a thin veneer of republican forms. The still earlier city republics of Greece do not afford much that is suggestive of our modern democratic state. It is true that a translation of Plato's Republic had recently been issued from the press, and was in the hands of the fathers of the Constitution, in the formative days of 1788; but the ideal state was a philosopher's dream, which the instructor of Alexander the Great never saw—or hoped to see—grow to fruition in a concrete form. The ancient republics were, in fact, founded upon the right to enslave subjects or inferior races; and this condition in America was tolerated rather than encouraged. History has shown—and the Civil War proved beyond dispute—the truth of that dictum of Lincoln—"A State half free and half slave cannot endure."

Some authorities of great weight seek for the antecedents of our free institutions in the Republic of Holland; and it is certain that the Pilgrim Fathers acquired much of their toleration during fourteen years of sojourn in the Low Countries. The contrast between their breadth of political and religious views and those of the later-arriving Puritans is not sufficiently noted by historians of the settlement of New England. In New Amsterdam the same republican spirit was abroad in the land; but it was a negative rather than a positive factor in the character-building of the American people. The fact is that Holland was a republic in which the control for the most part was in the hands of an oligarchy composed of great landowners and the
burgher-merchant class; it was not a democracy in the sense that the people themselves held the balance of power. The governors despatched to hold sway over the colonies of Holland on the continent of North America and in the West Indies were despots who governed arbitrarily in the name of the immediate overlord—the Dutch West India Company. From all of which it will, perhaps, be seen we must look farther if we are to discover the true source and inspiration of the essentials of American government, as we see them in active exercise, day by day, in our home-land.

The third source which historians display before us need not concern us long. Jefferson somewhere calls attention to the similarity of our republic to the government carried on by the Six Nations in their Indian Republic dating from times unknown and having its seat in the lake county of Northern New York. There existed a federal background which permitted independent action by the separate tribes, and yet provided direct contact with the individual members. Upon the surface this similarity is striking; and historians have made the most of the salient feature—federal control. But readers of Parkman and other chroniclers of the French and Indian Wars will be given a less sanguine impression of the government conducted within that native state. While there was the semblance of representation, the taxing power was scarcely developed; and the federal control failed to operate effectually. Treaties of peace did not restrain parties of “braves” who were intent upon making armed expeditions into the territory of the other contracting party. The history of Quebec under the French régime is replete with such instances of broken pledges and invasions on the part of the Iroquois.

It is needless to say that in the scheme of savage government trial by jury had no place or lot.

If we find that the England of 1788 did not afford a true example for the creation of an American republic, and no prototype exists in the story of continental Europe of those times—far less in the annals of pagan Greece and Rome; and we discover in the Indian confederation, which at its prime ruled from Maine to the Carolinas, merely a suggestion of a federated democratic state—where then shall
we seek for the real source of our institutions of government? No doubt this process of elimination has prepared the reader for the answer as I see it. The essentials of our system of government were native-born—they developed in loco, upon American soil.

In this development of true republican principles, no single element or province can claim preeminence. The clergy-led citizens of New England were dominated by a spirit of independence no less fervid because somewhat narrow—for we find enlisted in the patriotic cause that ability for keen analysis which research carried on for the most part at Cambridge University had created in those leaders’ minds. In New York, the composite population comprising Dutch, Germans, Scots, Irish and Huguenots were almost a unit in their democratic ideas. In Maryland, Virginia and the Carolinas, country gentry of a type rare in the northern provinces, brought to this paramount mission a stability of character and masterly leadership which towered above adverse considerations of descent or creed.

There are two distinctive features we Americans developed and adopted as suited to our needs, and which exist in addition to the simpler form of government under which Europe is content to exist down to the present day. These two features are, first, a federal system whereby the States remain independent, excepting in what concerns the welfare of all; and second, an independent judiciary, equipped with authority and power to restrain Congress and the other departments of government and keep them within their several jurisdictions, as laid down in the Constitution.

While this second essential of our government may appear entirely distinct from the legislating and taxing powers which we have seen are an attribute of a free people, this is not true in fact. The existence of a supervisory court is required to preserve to the people those rights and powers which the Constitution provides. It restrains legislative tyranny. Self-perpetuation of the law-making body or intrusion of tax legislation by arbitrary means are dangers which may likewise be overcome by a judiciary with restraining powers.
The Constitution embodies the expressed wish of the people. It is the charter conferred by them. There—and there alone—will be found the grant of the measure of power which the various departments of government may validly exercise. Therefore, as may be apparent to all, a watchful judiciary, with restraining power, is the keystone of our governmental arch.

If my contention is correct, a judiciary with restraining power is the very acme of free government. It protects the people from arbitrary action by their collective agent—the legislating body. It is the most remarkable element in our governmental system—a political invention. It is a contribution to free government of which every American citizen should be proud.

In the words of the philosopher Goethe:

"Wouldst thou give freedom to many?
First dare to do service to many;
'Tis faith and service that secure individual life."
BOOK REVIEW

THE FEDERAL TRADE COMMISSION: A STUDY IN ADMINISTRATIVE LAW AND PROCEDURE—By Gerard C. Henderson. New Haven, Yale University Press, 1924

THIS is a distinctive and outstanding book. In it is displayed a large measure of originality not only as to the subject matter and the method of treatment employed but also as to the purpose sought to be accomplished.

It should be noted at the outset in what this distinctive feature consists. In 1920 the Commonwealth Fund financed a campaign of legal research. In furtherance of this plan the Federal Trade Commission was selected for discussion and analytical study as an example of the instruments of government employed for the enforcement of legislative policy, more particularly in the way of carrying out reforms. Such intensive study may be said to require—in fact, demand—“dissection” of the Commission, and comparison of its qualities with those of the various commissions, boards and other devices for enforcement of administrative laws.

With this introductory statement in mind, it will be seen that this book is not intended primarily as a work for classroom use, nor as a mere history of the development of the employment of continuing bodies like commissions or boards to supervise and if necessary enforce the wish of Congress as expressed in a federal statute; it is rather a study of the manner in which a particular commission is functioning, with the intention of applying the results of that study in a creative and formative way. As the first of a series of such studies the book takes on a special interest all its own.

In the chapter upon “Political and Legislative History,” the author finds occasion to express views adverse to the language employed by the draftsman who prepared the Sherman Law. That statute was written at a time when there was strong popular feeling and general indignation, due to obvious wrongs and the hardships under which the public was smarting. No citizen of the United States for one moment experienced any uncertainty as to what was
meant by the term "trust" or "monopoly" or "restraint of trade"; and the fact that this law was intended to meet and overcome a national exigency seems to afford not only an explanation but a justification of the familiar terms which Senator Hoar, veteran statesman and jurist, employed when revising the wording of the original draft.

The Sherman Law has stood the test of attack by innumerable interests, with legal advisers including the most distinguished counsel of their times; and the fact that down to the present moment it has remained without amendment must be considered a virtual challenge to those who assert the language was not in accord with the reforms intended to be carried into effect by the proponents of that famous measure.

The Federal Trade Commission Act is a composite statute. It embodies features of five bills then pending either in the Senate or House. Each of the proposed measures was intended to enlarge the scope of the anti-trust laws.

One provision which was considered and rejected had for its purpose to amend and "put teeth" in the Sherman Law; while another ambitious draftsman undertook to define the term "monopoly"—forgetful of the fact that to define an aggressive term of this description makes a law static; and therefore it becomes a mere inert obstacle in the path of violators of the statutory provisions.

When dealing with this general theme the author correctly diagnoses the situation as to the purpose of Section 5 of the Federal Trade Commission Act. He characterizes the provision "that unfair methods of competition are hereby declared unlawful" as presenting "a general ethical and economic principle * * *." It is this "principle" which permeates the measure; and it is because of this principle that the Commission can claim the right to exist.

No one can intelligently grasp the significance of this law, or of the Clayton Act—which its heading states to be "An Act to supplement existing laws against unlawful restraints and monopolies"—without considering these statutes in conjunction with the Sherman Law, the parent anti-trust measure.
When Congress enacted the Clayton Law and its twin statute, the Commission Act, they together embodied the legislative expression of a wish to respond to the popular sentiment by forestalling and preventing incipient "trusts," and thereby to *nip them in the bud*. To accomplish that purpose it was deemed necessary to take stock, as it were, of the tendencies of corporate managers to exclusively occupy the commercial field in their particular lines, and, once in possession, to make those positions secure by intrenching themselves strongly.

It was felt that when the trusts had accomplished those results they had in numerous instances exercised virtual "restraints of trade," thereby violating the spirit if not the letter of the prohibitions of the Sherman Law. These "unfair" practices were believed to consist of (a) discrimination in prices as between customers of equal responsibility, who were willing to pay the same price for similar shipments; (b) "tying" leases, sales and contracts which compelled persons purchasing trust-controlled goods, whether patented or unpatented, to agree to refrain from using or dealing in the goods of competing concerns; (c) acquiring a stock interest in a competing corporation with the intention of obtaining control of its business; and (d) by means of "interlocking directorates" obtaining undue advantage in the operation of banks or competing corporation.

In consequence of this survey and study of the field, Congress in the Clayton Law declared each of these acts unlawful; but since no corrective statute can become self-operative, some board or other continuous body was required to uncover those infractions of fair dealing and to prosecute the offending parties. Accordingly, the Federal Trade Commission was entrusted by Congress with the duty of enforcement; and the omnibus provision in Section 5 of the Commission Act is merely an enlargement of this duty, with the object of reaching and penalizing those who violate the general principle of plain dealing which permeates the five specific prohibitions enumerated above.

The author of this book believes the contributions of the Commission toward the solution of the trust problem have
not been very material as to either substantive law or administrative practice. He feels the issuing of a commission-drawn complaint in the first instance should be done away with, and an interlocutory order substituted in its place. As to the latter point, an order to show cause would certainly be the better practice. There then would remain no stigma upon the defending party's reputation when the case is dismissed. Signed opinions are also suggested—such as have been in use for generations untold in the British courts; and are universal in our own tribunals of record. The advantage is obvious; and this change cannot come too soon.

The book as a whole is somewhat doctrinaire and didactic. Although its influence will be confined within the limits of its self-imposed horizon, the author is not chargeable with being dominated by any spirit of carping criticism. The reasoning is logical; and the conclusions carry conviction with them. As to the Federal Trade Commission and the necessity for its continued existence, the author says "the Commission has a valuable and important function to perform."

Richard S. Harvey.
RECENT LEGAL PUBLICATIONS

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Zoline, Federal Appellate Jurisdiction and Procedure, 1924. (Clark Boardman & Company, New York, N. Y.)
THE GEORGETOWN LAW JOURNAL

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With this issue of the JOURNAL we include for the first time a legal directory of the Georgetown Alumni. We believe that no extended comment as to its advantages are necessary. With the graduates of our great institution engaged in the practise of their profession in every state of the Union and in practically every city of importance in this country, the desirability of such a directory is obvious. It has been pointed out that alumni who have legal business in other places would prefer to employ fellow alumni if their addresses were known. Believing that in a small degree at least it may promote greater unity among the graduates and help them retain some touch with their Alma Mater, we inaugurate the department and hope that it will meet with approval.

There has been considerable demand made upon us to supply back volumes of the LAW JOURNAL. These requests have come from some of the great libraries of the country. We would like to comply, and have our JOURNAL placed in these institutions. To that end we are asking that those who have back numbers of the JOURNAL communicate with the Editor, if they are willing to favor us in this connection. We need especially all numbers of the following years: 1914, 1915, 1916, 1917, 1918, 1919. We shall be pleased to pay for the numbers required at current rates.

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CONTRIBUTORS TO THIS ISSUE OF THE JOURNAL


Charles D. Hamel is a graduate of the University of North Dakota and is a lawyer by profession. From 1906 to 1907 he was clerk to the United States Senate Committee on Public Lands, and in 1908 was clerk to the Senate Committee on Agriculture and Forestry. From 1909 to 1915 he was employed in legal work in the Western States for the Interior Department, assisting United States attorneys in the trial of cases. From 1915 until he entered the Bureau of Internal Revenue in February, 1922, he was a special assistant to the Attorney General assigned to the trial of cases of special importance in California, Wyoming and a number of other Western States. He entered the office of the Solicitor of Internal Revenue in February, 1922, and afterwards served on the Special Committee on Appeals and Review as assistant solicitor, and in November, 1923, was made chairman of the Committee on Appeals and Review, from which position he resigned to accept appointment as chairman of the Board of Tax Appeals.

Elbridge Colby, now a captain of Infantry, U. S. A., on duty with the General Staff in Washington, holds the degree of Doctor of Philosophy from Columbia University, and has been a frequent contributor to The Minnesota Law Review, The Michigan Law Review, The American Journal of International Law, Current History, and The American Mercury, chiefly on subjects dealing with the Army and with international law. He is author of books on education and the Army, and on The Profession of Arms.
Michealson et al. vs. The United States, 45 Supreme Court Reporter 18

MAY THE RIGHT OF TRIAL BY JURY BE EXTENDED TO CASES OF CONTEMPT?

Public opinion in a measure seemed to ascribe the decision to the influence of severe attacks upon our Supreme Court by one of the parties in the recent presidential election. The current opinion of those who are willing to think that political policies may have shaped this decision is suggested by Samuel Gompers, president of the American Federation of Labor, when he says, "The Supreme Court of the United States has taken a long step ahead in its decision that strikers charged with violating an injunction are entitled to a jury trial. * * * Unquestionably the court is mindful of the trend of the times and recognizes in some degree that the growing tendency of the courts to assume autocratic power must be curbed if the entire court system is not to be injured."

Perturbed by this statement I have endeavored to find out through judicial history and previous cases, whether this supreme judicial body has in this case lowered its standard to the basis of political expediency.

On October 15, 1914, the Clayton Act was placed in the body of the Anti-Trust Law (1914, 38 Statutes at Large, 738, 739, Pars. 21-22). This Act gave the right of jury trial in certain cases of contempt, not at the discretion of the chancellor but mandatory, if called for by the accused. The statute provides: that willful disobedience of any lawful writ, process, order, rule, decree or command of any district court of the United States or any court of the District of Columbia by doing an act or thing forbidden, if such act or thing be of such character as to constitute a criminal offense under any statute of the United States or law of any state, shall be proceeded against as in the statute provided. This gratification narrows the class of cases which come under this law. It does not include cases of contempt in the presence of and offensive to the dignity of the Court, nor to those so near to the presence of the court as to interfere with the administration of justice unless the acts are in themselves criminal. The statute applies to acts which would be criminal whether there had been an injunction ordered or not. That is, the act would be punishable by the common law of crimes as statutory criminal law although no restraining order from the court was issued.

In 1922, by order of Attorney General Daugherty, the District Court issued an injunction which provided, among other things, that the strikers could not use such means as picketing, force, violence and oral pressure on employes of the railroad. Michealson was held for a verbal intimidation of the restraining order and summoned before the
court. Counsel asked the District judge to submit the case to a jury, whereupon he refused, and proceeded to try the case. Micheelson was found guilty of contempt. Appeal was taken to the Court of Appeals which sustained the Judge below by holding the Act unconstitutional. Judge Baker gave the opinion of the Circuit Court (291 Fed. 941), wherein he says: "The original jurisdiction of the Supreme Court comes directly from the Constitution and cannot be enlarged or diminished by Congress. The Appellate jurisdiction of the Supreme Court can be limited as to subject matter and regulated as to procedure. Appellate jurisdiction assumes the existence of trial courts, and Congress in ordaining trial courts and other courts inferior to the Supreme Court can limit their jurisdiction as to subject matter and regulate their procedure. Viewing the inferior courts and also the Supreme Court as an Appellate tribunal we see that Congress, the agency to exercise the legislative power of the United States can, as a potter, shape the vessel of jurisdiction, the capacity to receive; but the vessel having been made, the judicial power of the United States is poured into the vessel, large or small, not by Congress, but by the Constitution."

In fact, Judge Baker's analogy to the potter cannot be held as true. The power of the Supreme Court is limited by the Constitution, and no body can change it other than by amendment. If powers were given to the inferior courts, specifically by the Constitution, as were given to the Supreme Court, neither could they be changed by Congress. The inferior courts of the United States are made and their jurisdictional powers are delegated to them by Congress. The power to make carries with it the power to destroy, and incidentally the power to modify or alter. This power is granted to Congress in the Constitution by these words: "The judicial power of the United States shall be vested in one Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish." In place of the analogy of the potter substitute that of a gardener who must transplant his bush when it grows too large for the vessel or when necessary to meet the change of season. So must Congress change the jurisdiction and procedure of the inferior courts to meet the needs and demands of the time.

In reading Judge Sutherland's opinion the fallacy of Judge Baker's view is apparent. So too is it made clear that no basis exists for the opinion that political expediency dictated the opinion of the Supreme Court.

Judge Sutherland in speaking the thoughts of the Supreme Court of the United States says: "Contempts of the kind within the terms of the statute partake of the nature of crime in all particulars. So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure. (3 Transactions of the Royal Historical Society N. S., page 145, 1885) and that at least in England it seems that they still may be and preferably are tried in that way." This sentence,
though short, contains an important line of thought. American Constitutions are based on equality, justice and freedom. Anything which would hamper or destroy these unjustly would be in opposition to the fundamentals of our law. One of the great instruments in distributing equal justice in criminal cases was the trial by jury. It originated in early English history and has become an integral part of jurisprudence of this country. Why should the courts of the United States then say that this is a criminal case which they must place outside the realm of jury trial? They thereby place tremendous power in the hand of an individual judge. Does not the decision approach more nearly the belief of the American people in fair and complete justice?

The court has long had the inherent power to punish acts which are either in disobedience to the orders of the court or such acts as are discourteous to the court, or would interfere with the administration of justice. Such power is still vested in the courts. The statute deals only with those acts which are in their own nature criminal and does not deal with them because of the breach of the injunction which they constitute, as I have pointed out. So the arguments which are offered in In re Debs, 158 U. S. 564, and in Smith vs. Spud, 55 L. R. A. 402, namely, “To submit the question of disobedience to another tribunal, be it a jury or another court would operate to deprive the proceedings of half its efficiency,” are of no avail. The Equity theory has been mentioned “That the injunction is an equitable procedure and the chancellor shall have full power.” This is an extreme statement on the face of it. American ideals are in conflict with the idea of issuance of injunctions, which will bind the citizen and upon breach of an injunction when a crime is involved will compel him to be brought again before the judge who used the injunction, without recourse to trial by jury. Moreover, there is a maximum in Equity as follows: Equity will follow the Law. Is not the law to give jury trial in case of crime? And is the present statute any more than forcing equity to follow the law in criminal cases?

There is no ground for holding that the statute is unconstitutional, and the opinion of the Supreme Court is not one effected by popular criticism but represents sound judicial thinking. A. D. C.

WASTE—Duty of Tenant for Life to Keep Premises in Repair.

The Statute of Gloucester (6 Edw. I, Ch. 5; 1278) allowing a writ of waste in Chancery, applied to tenants in dower, for life, and for years, but not to tenants at will. It further provided for forfeiture and three-fold damages. But the right of suing for waste rested only in one who had the immediate estate of inheritance (Co. Lit., 53, b). Later, any remainderman could bring an action on the case in the nature of waste; and forfeiture and treble damages were abolished. In 1879, in fact, the Statute of Gloucester was repealed. In England, according to the recent cases, a tenant for life is not liable for permissive waste, although a tenant for
years is (Davies vs. Davies, 38 Ch. D. 499, 1888). In the United States, the authorities seem rather consistent in holding both kinds of tenants liable for permissive waste.

What constitutes permissive waste is not always easy to determine. Clearly, a tenant is not liable today for acts of waste by strangers who destroy without the consent of the tenant. So, too, is the law similar as to acts of God. But the question has again arisen whether a tenant for life or his assignee, is liable for permissive waste—for suffering the property gradually to fall out of repair.1

Today, however, no principle of real property law is probably more thoroughly established than the duty of a tenant for life to keep the premises in which he has an estate in reasonable repair. In Tiffany on Real Property, p. 84, the rule is laid down as follows: "A tenant for life must, according to some decisions, make at his own expense, such ordinary repairs, as are necessary to prevent the structures on the land from passing into delapidation."

This rule is exemplified in a recent New York case, Peerless Candy Co. vs. Kessler et al., 205 N. Y. Supp. 884, decided June 23, 1924, in which certain premises were devised by the will of Johanna D. Lane to James Kealey for life, with remainders to several other persons in fee simple. The plaintiff acquired a tax lien on the property, and later bought in Kealey's life estate and the estates of some of the joint remaindersmen in fee. Kealey had suffered the premises to fall into disrepair. Thereafter, the plaintiff voluntarily spent large sums to restore the said premises. This action was brought to recover these sums out of the proceeds of the sale of the property, prior to distribution among the several joint owners. The life estate had been terminated by Kealey's death just prior to these proceedings. In holding that the plaintiff was entitled to recover, the Court said: "It is elementary that it is the duty of the life tenant to keep the premises subject to the life estate in repair, or at least in as good condition as they are in at the inception of the life estate. The evidence shows that the premises were in good tenantable condition at the decease of Johanna D. Lane, when the life estate began. Their condition at the time of the purchase of the life estate by the plaintiff appears to have been due to the neglect of the life tenant to perform his duty with regard to keeping them in repair, and clearly at that time the duty of restoration rested on him. If he had expended his money for the repairs, which plaintiff caused to be made, he could not have recovered therefore from the remaindersmen, and I think plaintiff having succeeded to the interest of the life tenant is in the same position. It is not necessary to hold that plaintiff could have been compelled by the remaindersmen to restore the premises, but as it has done so voluntarily—has vol-

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1 For earlier cases as to waste generally, see I Gray's Cases on Real Property.
untarily performed the neglected duty of the life tenant whose interest it purchased—I think it is in no better position than the life tenant himself would have been to claim reimbursement, either in whole or in part, from the remaindermen.”

As a general rule, a tenant for life must make all ordinary, reasonable and necessary repairs required to preserve the property in the condition in which it was received; and if he fails to do so, the remaindermen may, by appropriate proceedings, either require him to make such repairs, or allow his interest in the property to be taken in satisfaction thereof. The law casts upon the life tenant this burden, because he receives all of the rents, income, and profits arising out of the property during the existence of the life estate. He may not suffer it to decay or go to waste for want of necessary repairs, any more than he may injure its value by voluntary waste. (Wilson vs. Edmonds, 24 N. H. 517; Hooker vs. Goodwin, 99 Atlantic 1061.)

Again, in Fisher's Executors vs. Haney, 202 S. W. 495, the rule was precisely stated as follows: “A tenant for life is not held to a high degree of accountability and is under no duty to make costly or extensive repairs; nor is he to be held accountable for depreciation in value that may result from the reasonable and proper use of the premises. He is only required to exercise reasonable care, or such care as a person of ordinary prudence would exercise, under the surrounding circumstances; to so manage the property as to prevent its getting out of repair, and deteriorating in value by the failure to keep it in reasonable repair.”

In short, then, the life tenant is liable for permissive waste. A brief consideration of this form of waste, therefore, may not be inappropriate. “Permissive waste is waste by reason of omission of doing or not doing, as for want of reparation—for he that suffereth a house to decay which he ought to repair, doth the waste.” (Co. Lit. 145; 2 Black. 284.)

In Tiffany's Real Property, Par. 254, it is said: “What is known as permissive waste is injury to the inheritance, not by voluntary act of the tenant, but by his failure to take measures to prevent such injury from the elements, as when he fails to keep the building wind and water tight, or allows part of the premises to be submerged with water, to their injury, or even when by negligence in keeping or guarding a fire on the premises, the building is destroyed. It is not, however, permissive waste to leave the building without a roof, if that was its condition at the beginning of the tenancy, nor is the tenant bound to make extraordinary repairs, involving the substitution of new structures, or parts thereof, for old.” (See also Minor and Wourtz, Real Property, Par. 379.)

NOTES AND COMMENTS

Not only must a life tenant be on his guard against permissive waste, but he cannot, by the great weight of authority, recover from the remainderman for permanent improvements put upon the land at his (the life tenant's) expense. Minor and Wourtz put it in this manner: "In the absence of express stipulations, it is not the duty of the tenant for life or for years, to repair the premises further than is necessary to prevent liability for waste. A fortiori, he is not compelled to make improvements. On the contrary, the question has rather been * * * whether the life tenant, or his personal representative or assignee, can recover of the reversioner or remaindermen, the value of the repairs and improvements he has voluntarily put upon the land. The better view is, that at common law, he has no such right." (Minor and Wourtz, Real Property, Par. 202.)

In Wilson vs. Parker, 14 So. 264, Woods, J., said: "The tenant of a life estate making permanent and valuable improvements, can have no claim upon the remainderman for reimbursement. The improvements were made upon his own estate, for its better enjoyment by him, and presumably with full knowledge of the right in the remainderman to the entire estate with all its improvements, upon the termination of the life estate."

Like all general rules, the one above set forth is subject to some apparent exceptions. Accordingly, in a few jurisdictions it has been held that the cost of permanent improvements may be prorated between the life tenant and the remainderman. It has been also held that the life tenant cannot recover for permanent improvements, unless they are due to changed conditions, or are for the remainderman's benefit, or of a municipal nature. (In re Whitney, 136 N. Y. Supp. 633.)

But another exception is where improvements have been made under some mistake on the part of the life tenant. In Thomas vs. Evans (105 N. Y. 601, 12 N. E. 571, 59 Am. Rep. 519), the life tenant was held entitled to reimbursement for improvements made under the impression that he owned the estate in fee simple; and in Peerless Candy Co. vs. Kessler, supra, Benedict, J., referred to this case and remarked that "in most of the cases where a life tenant has been allowed the costs of his improvements, he has made them

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4 Corbett vs. Laurens, 5 Rich. Eq. (S. C.) 301; Wilson vs. Parker (Miss.), 14 So. 264; Merritt vs. Scott, 81 N. C. 385; Hagen vs. Varney, 147 Ill. 281; Frederick vs. Frederick's Adms., 102 S. W. 858; accord.

4 Accord: Deanes vs. Whitfield, 65 So. 246; Shelangowski vs. Schrack, 143 N. W. 1081, 162 Iowa 176; Galbaugh vs. Rouse, 104 S. W. 959, 31 Ky. L. Rep. 1195; Holmes vs. Lane, 123 S. W. 318, 196 Ky. 21; Wilson vs. Hamilton, 131 S. W. 32, 140 Ky. 327; Stroh vs. O'Hearn, 142 N. W. 865, 176 Mich. 164; Burns vs. Parker, 137 S. W. 705; Richmond vs. Sims, 144 S. W. 1142; Stahl vs. Schwartz, 142 Pac. 651, 81 Wash. 293.
under some such misapprehension." Although these cases form apparent exceptions to the general rule, most of them may be explained by the reasoning and decision in Peerless Candy Co. vs. Kessler, supra.

In some cases, moreover, equity has granted relief against the hardships incident to the strict enforcement of the legal rule. It is clear, therefore, as regards the present status of the law as to permissive waste with respect to life tenants, that the decision in the principal case is sound.

W. L. C.

MUNICIPAL CORPORATIONS.—Liability for negligent operation of fire trucks.

We note with great interest two cases decided in the Supreme Court of Florida under date of February 14, 1924, entitled Maxwell vs. City of Miami (100 So. 147) and City of Tallahassee vs. Kaufman (150 So. 150), construing the liability of a municipal corporation for the negligent use of fire equipment.

In the Maxwell case the plaintiff while traveling in his automobile was struck by the automobile of the chief of the fire department in the city of Miami, and suffered damages, etc., and he brought suit against the city of Miami to recover for the damages so sustained. A demurrer to his petition being sustained, he took writ of error to the Supreme Court of Florida.

In the Kaufman case the action was brought to recover damages from the city of Tallahassee for personal injuries received by the plaintiff while on the sidewalk and alleged to have been caused by a trailer on wheels attached to one of the city's fire trucks, which trailer, it was alleged, was of such length and construction that in turning corners of streets that the trailer swept over and across adjacent sidewalks and caused plaintiff to be injured. Upon the second trial of the cause verdict was rendered for the plaintiff and the city took a writ of error.

The Supreme Court reversed the decision in the former case and affirmed the decision in the latter case, holding that a municipal corporation is liable for the reckless driving or operation of fire trucks.

In its opinion of the Maxwell case the court said that the operation upon the public streets of an automobile as a part of the fire-extinguishment equipment of a city is not such an essentially or exclusively governmental function as to exempt the city from liability for injuries to persons lawfully using the streets, when such injuries are

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*As to these exceptions, in general, see Lantz vs. Caraway, 103 N. E. 335; Fuller vs. Devolld, 128 S. W. 1011, 144 Mo. App. 93; Stevens vs. Melcher, 152 N. Y. 551; Matter of Laytin, 20 N. Y. Supp. 72; Betts vs. Betts, 4 Abb. N. C. 317, 438; Cromwell vs. Kirk, 1 Dem. Sur. 599; Matter of Decklemann, 84 Hun. 476, 32 N. Y. Supp. 404; Hay vs. McDaniel, 26 Ind. App. 683; Hale vs. Tibbetts, 171 Ill. 547; Peak vs. Peak, 228 Mo. 536, 128 S. W. 981.
caused by the grossly negligent manner in which the automobile is
driven at a high and dangerous rate of speed upon the streets, which
persons are lawfully traveling on foot or in permissible vehicles. It
further says that while the right of way should be given to the
passage of fire equipment while in the performance of their duties,
yet the rights of persons lawfully upon the streets may not be violated
by the reckless driving of fire extinguishment equipment.

It further says that in the exercise of the police power property
and individual rights may be interfered with or injured or impaired
only in the manner and to the extent that is reasonably necessary
to conserve the public good, and any other unreasonable or unneces-
sary exertion of municipal authority or of the police power in the
manner or extent in which personal or property rights are curtailed
or impaired violates organic law; that it deprives persons of liberty
and property without authority or due process of law. Municipalities
are given police powers to conserve, not to impair, private rights.

It says that reckless driving of fire trucks on streets is not essential
to efficiency in fire fighting, and such conduct, when permitted by
the city, liability of the city may result therefrom if duly established.

In the Kaufman case the court rendered its decision on the princi-
pies enunciated above, quoting from the opinion given in the Maxwell
case.

That the weight of authority is against these cases is shown by
the following:

The power to organize and regulate a fire department and otherwise
provide for the prevention of and guarding against damage by fire
is generally held to be a legislative or judicial one, or a governmental
one, as distinguished from a mere corporate one, and the failure of
the corporate authorities to exercise the power to the full extent
necessary to protect the citizens from such damage does not render
the city liable to an action therefor. Thus the municipality will not
be liable for losses resulting from the neglect or failure to provide
an adequate water supply for the protection of property against
damage by fire, or from the failure of the municipality or its fire
department to keep its waterworks, pumps, pipes, plugs, hose, car-
riages, etc., in repair. Upon the same principle the municipality will
not be liable for injuries caused by the wrongful or negligent acts
of a fire department or of the firemen employed therein while they are
engaged in the performance of their functions or are actually in the
discharge of their duties in and about the extinguishment of fires.
28 Cyc. 1303.

As the extinguishment of fires is a governmental function, the
firemen are not the servants or agents of the city or town by which
they are employed, so as to render it civilly liable for their miscon-
duct or negligence. Thus it has been held that a city or town is not
liable for injuries to a traveler on the highway who is run down by
the negligent driving of fire apparatus, or whose injury by obstruction
or other dangers negligently placed in highways by members of the
fire department or to a citizen who is injured by the defective con-
dition of a fire hose. In any case of the foregoing it makes no difference whether firemen belonged to a voluntary organization or regularly employed by the city or whether the city voluntarily undertook the maintenance of a fire department or was obliged to do so under general laws. It is immaterial whether firemen were not actually engaged in the extinguishment of a fire when the injury occurred or that officials had knowledge of the incompetence and recklessness of the firemen who caused injury. 19 R. C. L., Sec. 398.

The following cases illustrate the universality of the majority rule: Freeman vs. Philadelphia, 13 Phila. 154 (negligent driving while responding to a fire alarm); Lilly vs. Scranton, 18 Pa. Co. Ct. 433 (reckless driving while exercising horses on public streets); Gillespie vs. Lincoln, 52 N. W. (Neb.) 811 (negligent practice with water towers); Ogg vs. Lansing, 35 Iowa 495; Hays vs. Oshkosh, 33 Wis. 314; Burill vs. Augusta, 78 Me. 118; Elliot vs. Philadelphia, 75 Pa. St. 347; Edgerly vs. Concord, 59 N. H. 78; Wild vs. Patterson, 57 N. J. 406, 24 Atlantic (R. I.) 100; Grube vs. St. Paul, 34 Minn. 402; Jewett vs. New Haven, 38 Conn. 368; Wilcox vs. Chicago, 107 Ill. 334; Greenwood vs. Louisville, 13 Bush (Ky.) 226; O'Meara vs. New York, 1 Daly (N. Y.) 425; Howard vs. San Francisco, 51 Cal. 52; and Long vs. City of Birmingham, 49 So. (Ala.) 881.

In the case of Higgins vs. Superior, 134 Wis. 264, it was held that a municipal corporation is not liable for injuries to a traveler upon the highway who was run down by the negligent driving of fire apparatus by an incompetent and reckless driver, knowingly selected and retained by city officials, although by such selection and retention they are amiss in their official duties.

In 11 Tex. Civ. Apps. 271, 32 S. W. 918, it was held that officers of the fire department were agents of the general public and not of the corporation appointing them, and the document of respondent superior did not apply.

In Workman vs. New York City, 179 U. S. 552, the United States Supreme Court held that under admiralty law there was liability for the negligent operation of a fire tug of the city of New York, but in Harris vs. District of Columbia, 256 U. S. 650, it confined this ruling strictly to admiralty cases.

The Supreme Court of Ohio, in the case of Fowler vs. City of Cleveland, 126 N. E. 72 (1919), held that a municipal corporation was liable for the negligent operations of fire apparatus and said that it was difficult to understand the justice of a ruling which denies to a citizen the protection of the law and the remedy guaranteed by the Constitution when the injury is done to him by the servant of a city instead of by a servant of a private corporation. However, in Aldrich vs. City of Youngstown, 140 N. E. 164 (1922), the court overruled the Fowler case and adhered to the principles set forth in the case of Wheeler vs. Ohio, 19 Ohio St. 19; and said in respect to the Fowler case that the only case cited in support of the Fowler case was Workman vs. New York, supra, and that the Supreme Court had confined this ruling solely to admiralty cases.
It is noteworthy that the decision in Kaufman vs. City of Tallahassee (84 Fla. 634, 94 So. 667), in 1922, followed the decision in Fowler vs. City of Cleveland, and the appeal in the later case from the judgment in favor of the plaintiff was based upon the reversal by the Supreme Court of Ohio of the position taken in that case. While in Kaufman vs. City of Tallahassee the Supreme Court of Florida seemed to base its decision partly upon the fact that the city had accepted the commission form of government and had elected to become liable as a private business corporation, the instant case is put upon the broader principles of the constitutional rights of individuals.

Whether the rulings set forth in the Florida cases will be accepted by the courts remains to be seen, but it is undoubtedly true, as said in Fowler vs. City of Cleveland, supra, there is and has been for some time a growing dissatisfaction with any comprehensive rule (and its unsatisfactory and unjust results) which exempts municipalities from liability for all acts which have been loosely classed as governmental. As said before, this case has been overruled; but some other court may see fit to adopt this ruling.

W. S. C.

OWNER CANNOT DEFEAT BROKER'S RIGHT TO COMMISSION BY HIS OWN DEFAULT.

An owner of real estate cannot defeat the right of a broker, whom he has employed to sell his property, to his just compensation, when the latter has found a purchaser, "ready, able and willing to buy" though the purchaser subsequently refuses to complete the sale; provided such failure is due to the fault of the seller alone.

This rule is equitable; if this were not the rule a seller could by his mere caprice or whim, if not indeed, with deliberate malice, annul all the labor, time and expense of an honest broker in securing a prospective buyer. The broker would be completely at the mercy of the seller, and the latter could perpetuate a fraud.

This rule was applied in Preston vs. Postel, 300 Fed. 134, in the U. S. District Court of Texas.

The facts of that case were: The plaintiff acted as broker for the sale of the defendant's land in Houston. He procured a purchaser who entered into a contract with the defendants agreeing to purchase the land for $525,000, provided it had a good merchantable title. If there were any defects existing, the defendants were to have a certain time in which to remove same. The defendants then contracted with the plaintiff brokers to give them a stated commission which was to be paid as soon as "the sale is consummated"; and if it should not be consummated, the defendants were to have nothing. It appears that there was a defect in the title, but it was such that could have been removed by reasonable effort on the defendant's part. The defendants, however, entirely neglected to rectify this defect, and the purchaser refused to complete the sale. Upon this action by the broker for his commission, the
court held that the plaintiff was entitled to his agreed compensation.

Even though, the court said, the parties had expressly stipulated that there should be no commission unless "the sale was consummated" yet when such failure of consummation is due to the owner's default or his arbitrary action, he cannot withhold the plaintiff's commission, * * * citing McLane vs. Petty, 159 S. W. 891; Dean vs. Williams, 56 Wash. 614; and Alvord vs. Cook, 174 Mass. 120.

The doctrine enunciated by this court seems entirely reasonable, and is completely in accordance with principles of Equity. Fortunately the decisive weight of authority fully supports its view. Two or three notations from jurisdictional decisions will probably aid in demonstrating the attitude of our courts with respect to at least certain phases of this decision.

In Home Banking & Realty Co. vs. Baum, 85 Conn. 383 (1912), the broker was held entitled to his commissions where he had procured an offer which the owners accepted, though they refused to convey.

In Dotson vs. Millikin, 27 App. D. C. (1906), where an agent employed for the purpose procures a purchaser "ready, able, and willing" to buy on the authorized terms, he becomes entitled to his compensation although the sale was not consummated, provided the consummation is prevented by the refusal, fault or defective title of the principal.

In Sibald vs. Bethlehem Iron Co., 83 N. Y. 378, the court held that the broker is entitled to his fee even in an unsuccessful effort to effect a sale, where such failure is caused by the fault of the principal.

See also Johnson vs. Stewart Bldg., 171 Mo. App. 543; Gordon vs. Rosenthal, 130 N. Y. S. 226 (1911); Frank vs. Connor, 107 N. Y. S. 132, and others noted in American Digest, Vol. 4.

The fact remains, however, that diversity of mind has led to diversity of conclusion, and this is so even in the realm of the "immutable law."

In November, 1895, the case of Curtiss vs. Mott came before the Supreme Appellate Division of New York for final determination. It was also an action instituted by a real estate broker for commissions in the sale of certain lands which the owner had placed in his hands. The latter had represented to the broker that the rentals of this property amounted to a certain sum. The broker in turn communicated this information to a prospective purchaser whom the broker had found, and who was in the common legal phraseology "ready, able, and willing" to buy, provided, of course, the statements concerning the property were true. Subsequently upon learning that the rentals did not amount to sum represented to him, he declined to proceed further to complete the sale. Upon this action for commissions by the broker, the court held (speaking through Van Brunt, P. J.) that the broker was not entitled to his commission as he had not fulfilled his contract to procure a purchaser to "buy" the property—even though the broker was prevented from making a sale by the seller's own misrepresentation.
In other words, this was an utter disregard of the doctrine laid down that where the failure to sell is due to the seller's default (even in a contract making the broker's fee contingent on a sale), the right to commissions is not defeated. It may be observed that Mr. Justice O'Brien dissented to this conclusion of the court.

Several years later the same court, speaking through the same judge, decided the case of Hauserman vs. Hartfelder (80 N. Y. Supp.) where the same practical situation arose, and it was held again that the broker could not recover.

It must be observed that these cases did not decide that a general real-estate agent, in the absence of a special contract, cannot recover commissions where the fault lay on the side of the seller, simply because a contemplated sale was not consummated. On the contrary, that was acceded, but what it did decide was that an agent with a contract expressly stipulating that no commission is to be received, until completion of the sale, cannot recover such commission unless there is actual consummation, notwithstanding the failure is due entirely and wholly to the seller's own fault or his own arbitrary action.

It is obvious that these two cases cannot be reconciled with Preston vs. Postel. The former cases proceed upon the theory that although the seller warrants good title to a purchaser, he does not extend any such warranty to his broker, and therefore cannot be called to account by the latter because of any defects that might exist, howsoever they might be remedied by him. On the other hand, Preston vs. Postel specifically states that the seller does extend a warranty of good title even to a broker. Furthermore, the N. Y. cases lay a great stress on the duty of an agent to perform his contract to the letter, the latter while acceding that such contracts are fully binding and valid, and any departure therefrom will negative the broker's rights, yet, it adds, that when a departure is due solely and wholly to the seller, then the seller cannot deny the broker his fee which he otherwise would have justly earned.

It is submitted that the New York cases are against the weight of authority, if not indeed, against the trend of opinion in New York State itself.

In the case of Humphries and Jackson vs. Smith, 5 Ga. App. 340 (1915), it was held: A broker has made a sale under the provisions of the code, when through his influence a person ready, able and willing to buy on the terms proposed is brought to the principal, though through the principal's fault no sale is consummated.

The doctrine that a broker for “sale” must sell before earning his commission is subject to the qualification that the failure to sell must not be due to the seller's delinquency.

Humphries vs. Smith (supra); Kessler vs. Stults, 82 S. E. 914; Brand vs. Nagle, 107 N. Y. S. 156; Fawver vs. Fullingim, 149 S. W. 746 (1912). In the latter case the broker was to receive compensation only on consummation. But it was held that he was entitled
to commission notwithstanding the refusal of the purchaser to complete the same, due to the fault of the principal.

McLane vs. Petty, 159 S. W. 891, was also the same character of case, in which the broker’s fee was expressly made contingent upon an actual sale, but the court held that the agent could recover his commission where it was found that the purchaser’s default was attributable to the seller alone.


In the latter case of Colvin vs. Mortgage Co. (supra) there was handed down a decision by the Supreme Court that is diametrically contra to the Curtiss and Mott case and which goes far in negativing whatever precedent the latter may have established in the juridical annals of New York.

There the broker’s contract specifically recited that he was to receive commissions only as, and when, the installments were paid by the purchaser on account. The latter, however, after paying a single installment, refused to complete the sale, due to a defect of title. The broker then brought this action for commissions, and the court held that if the failure of the purchaser to carry out the contract is due to the seller’s fault, then the broker is entitled to his commission on all installments then due and payable, whether actually paid or not. Gilder vs. Davis, 137 N. Y. 504; Sibald vs. Bethlehem Iron Co. (supra).

The gist of the holdings of the various authorities is simply this:

It is admitted that parties may contract on whatever terms they see fit—and both will be bound thereby. A broker may be willing to contract that he shall have nothing for his services unless he has effected an actual sale of the premises—and this would bar receiving of commissions until he has performed of this condition precedent. The parties may even go further and agree that the broker will not be entitled to commission until an actual sale is consummated, the seller’s fault or neglect notwithstanding—and in such a case, the broker’s rights will accrue only upon an actual sale.

Except in the last mentioned situation, the seller is always bound to give the broker his fees whenever the latter has found a purchaser ready, able and willing to buy—even though he does not complete the sale, provided that such failure is due wholly to the seller’s neglect, fault, or defective title.

F. S. R.
RECENT CASES

TAXATION—National Banks

Des Moines National Bank vs. Fairweather, 44 Supreme Court Reporter 23

In this case the Supreme Court affirmed judgment entered against a national bank which sought to secure a reduction in a tax assessment on the shares of its capital stock. The tax was imposed under Iowa statutes, which the bank contended were construed so as to violate Section 5219, Revised Statutes, governing state taxation of national banks. These Iowa statutes imposed a tax upon the real property of the bank, and then taxed the shares to the stockholders. The arguments urged by the bank and rejected by the court were, first, that the statutes in substance commanded an assessment of the property of the bank, rather than of the shares, in direct violation of Section 5219; second, that by measuring the value of the shares by the value of the bank's property, including tax-exempt securities and stock in federal reserve banks, the statutes in effect taxed such securities; and, third, that the shares of the national bank were therefore taxed at a higher rate.

Mr. Justice Van Devanter delivered the opinion of the court. After examining Section 5219, which limits state taxation of national banks to a tax on real property and which requires the shares to be taxed to the shareholders and at a rate not higher than other taxable moneyed capital employed in competition with such banks, he considered the Iowa statutes and rejected the contention that they in effect directed an assessment of the property rather than of the shares because the capital, surplus and undivided earnings of the bank were made the measure of the value of the shares, or because the bank was primarily required to pay the tax on the shares. He then said:

"The next contention—that the statute subjects securities of the United States to taxation contrary to exempting laws of the United States in that it requires that the assessment be based on the aggregate of the capital, surplus and undivided earnings without any deduction or allowance on account of the investment in such securities—confuses the shares, which are the property of the stockholders, with the corporate assets, which are the property of the bank. It is quite true that the states may not tax such securities, but equally true that they may tax the shares in a corporation to their owners, the stockholders, although the corporate assets consist largely of such securities, and that in assessing the shares it is not necessary to deduct what is invested in the securities. The difference turns on the distinction between the corporate assets and the shares—the one belonging to the corporation as an artificial entity and the other to the stockholders."

A careful consideration of authorities showed that the court had
never overturned the ruling laid down in Von Allen vs. The Assessors, 3 Wall. 573, wherein it had been said in part:

"The interest of the shareholder entitles him to participate in the net profits of the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct independent interest of property, held by the shareholder, like any other property that may belong to him. Now, it is this interest which the Act of Congress has left subject to taxation by the states, under the limitations prescribed, as will be seen by referring to it."

Finally in disposing of the contention that the state statutes subjected shares in a national bank to a higher rate of taxation than was laid on moneyed capital of individuals because in taxing capital employed in private banking, investments in tax-exempt securities were deducted, the learned Justice said:

"National bank shares are taxable—made so by congressional assent. That much or little of the bank's assets consists of tax-exempt securities of the United States does not affect the taxability of the shares—they being distinct from the corporate assets. The State taxes such shares without regard to the exempt government securities held by the bank. The capital of private bankers is taxable, save the part invested in exempt government securities. The State taxes all of that capital save the exempt securities. They are exempt because the United States makes them so, and the State merely respects the exemption.

J. T. S.

Partlow vs. State, 144 N. E. 661
(Supreme Court of Indiana, July 3, 1924)

JURISDICTION OF COURTS—Courts Possess Judicial Elements of Sovereign Power Independent of Legislative Sanction: Supreme Court Has Power to Determine Jurisdiction of All Courts within the State.

Original proceeding by John L. Partlow for permission to file motion for new trial. The appellant was convicted in the Marion Criminal Court for knowingly receiving a certain automobile, then the property of one Bert Ashley, from Thomas Sterrett and Carl E. Bernauer, the confessed thieves who stole the automobile. The testimony of Bernauer and Sterrett given at the trial of appellant was the only evidence before the trial court that in any manner connected him with the crime save the presence of the stolen automobile in a garage in the city of Indianapolis, of which he was General Manager. From the Marion Criminal Court an appeal was taken to this court where judgment was affirmed. After conviction of appellant and judgment the confessed thieves executed affidavits in which they stated that appellant was in no way concerned with the crime. The reason given by Bernauer and Sterrett for testifying against Partlow was to make him a "fall guy" and thereby
they were in hopes that they would be released or sentence would be suspended.

In the present proceeding the appellant filed in this court an original verified petition asking that he be granted leave to file a motion for a new trial in the Marion Criminal Court and which petition is based upon the presentation of new matter and evidence disclosed by the sworn confessions of Bernauer and Sterrett who were witnesses of the prosecution as shown by their affidavits.

Courts in the different states are not uniform upon the jurisdiction of a cause after judgment of a trial court has been affirmed by the Appellate Court and remittiter of the judgments of the Appellate Court back to the trial court. Some hold that after such remittiter jurisdiction again wholly vests in the trial court, while others hold that the Appellate Court may again take jurisdiction to correct its record or to correct the remittiter formerly sent to the trial court which did not follow the actual mandate of the Appellate Court, while others hold that the Appellate Court loses all jurisdiction, and the trial court gains no jurisdiction except to execute the mandate of the Appellate Court. In the present case the court held that there was no act of the legislature which granted or defined jurisdiction to this Supreme Court in a similar situation but it could assume jurisdiction without the express sanction of the Legislature or, in other words, assume jurisdiction by virtue of the Constitution, as it was through the Constitution that the people gave to the courts all the judicial elements of the sovereign power, thus creating a separate and distinct arm of the Government with sovereign judicial power. This position was previously taken by this court and expressed as follows:

"That courts possess inherent powers not derived from any statute is undeniably true. * * * If it were granted that courts possess only such rights and powers as are conferred by statute, they would be mere creatures of the Legislature, and not independent departments of the government. They are not mere creatures of the Legislature, but are co-ordinate branches of the government and in their sphere not subject to legislative control."—(Sanders vs. State, 85 Ind. 318, 328, 329, 44 Am. Rep. 29; Deutschman vs. Town of Charlestown, 40 Ind. 449.)

It was further held that the Supreme Court under the Constitution was the highest tribunal and had the power to determine the jurisdiction of all courts within the state, therefore it was within its power to grant the petition and since the testimony of Bernauer and Sterrett at the trial in the Criminal Court of Marion County was false and perjured, and a fraud upon the court and jury, it was ordered that a motion for a new trial be granted.

E. A. B.
C. & J. CAMP vs. MILLER, ALIEN PROPERTY CUSTODIAN, ET AL.
(300 Fed. Rep. 579)
(District Court, S. D. Florida, July, 1924)

EVIDENCE—(a) Rebuttable Presumption That Note, in Terms Payable in Dollars, Represented Entire Agreement as to Medium of Payment. (b) Intent, Shown by Correspondence and Conduct to Have Note Paid in Marks, Prevails over Note in Terms Payable in Dollars, so as to Bar Evidence of Prior and Contemporaneous Agreement.

The bill alleges that the plaintiffs are engaged in mining and selling phosphate. They had contracts to sell to a German firm in Hamburg, and the course of the dealings between the parties was that advances were made to the complainants by the German firm, and credit given at the contract price for such shipments, but owing to the existence of a state of war between Germany and European Allies, all shipments of phosphate had virtually ceased. About the 1st of January, 1915, the complainants applied to the said German firm, through the agent residing in Ocala, Fla., for an advance of $30,000; which advance said German firm was willing to give, providing the complainants should be debited with the amount in reichsmarks actually paid by them for the $30,000 in American currency, and that the repayment of said amount so advanced should be made in reichsmarks. In pursuance of this agreement the German firm forwarded to complainant the sum of $15,000 for which 72,900 reichsmarks was paid; thereafter complainants were informed that their account had been debited with 72,900 reichsmarks, with interest, from the date the $15,000 was so purchased; subsequently the balance of $15,000 was furnished to complainants, but this amount was not purchased with reichsmarks, and complainants' account was debited with $15,000.

Two notes were executed to the German firm for $15,000 each, the first note being made payable in dollars only as a matter of convenience to the parties in keeping their records, but in fact the said note was given for the said 72,900 reichsmarks, paid for the $15,000 first advanced under the agreement, and which was to be repaid in 72,900 reichsmarks, with interest thereon at 8 percent without reference to the rate of exchange at the time of repayment. The complainants subsequently received statements of account from the German firm, showing that the first note was debited with 72,900 marks; at about the same time the German firm, by its agent, made a report to the Alien Property Custodian of effects in his hand belonging to alien enemies, showing that the said note was to be discharged by the payment of 72,900 marks, with interest, without regard to whether the German marks cost more or less than the rate of exchange at the time the advance was made; thereupon the two notes were delivered to the Alien Property Custodian, and pursuant to an Act of Congress such Custodian became the legal holder of said notes.

On the 1st day of June, 1918, the Alien Property Custodian demanded payment of the amounts reported due the alien enemy,
and the complainants paid to said Custodian the open account and the second note, and informed the Custodian that the first note was payable in 72,900 German marks—by reason of the agreement between the parties; the complainant forwarded 97,994 German marks for that purpose to the Custodian, with a request that same be applied to discharge said note; but the Custodian refused to accept said marks, and demanded that complainants pay said note, with interest, in dollars; that in 1921, the Custodian by legal proceedings enforced this demand, and complainants paid said Custodian the note, with interest, making a total of $24,546.67.

The complainant’s bill prays for the return of the amount paid the Custodian with interest from the date of payment.

To this bill the Alien Property Custodian and the Treasurer of the United States filed a motion to dismiss, admitting for the purpose of testing the sufficiency of the bill, the truth of the allegations of the bill.

The court stated that Mr. Wigmore, in treating of Partial Integration (section 2430), gives three tests by which to ascertain whether the writing, the promissory note in this case, embodies the entire agreement. The tests are as follows:

1. “Whether a particular subject of negotiation is embodied by the writing depends wholly upon the intent of the parties thereto.”

2. “This intent must be sought where always the intent must be sought, in the conduct and language of the parties and the surrounding circumstances.”

3. “In deciding upon this intent, the chief and most satisfactory index for the judge is found in the circumstance whether or not the particular element of the alleged extrinsic negotiation is dealt with at all in the writing. If it is mentioned, covered, or dealt with in the writing, then presumably the writing was meant to represent all of the transaction on that element.”

Applying these tests, there can be no doubt that the allegations of the bill and the proof indicate that the intention of the creditors and the debtors was to have the advance returned to the creditor in German “marks,” and not “dollars.” Therefore the promissory note, given payable in dollars, for convenience in bookkeeping, did not and was not intended to embody the entire negotiation.

The testimony introduced by the complainants proves the allegations of the bill, and entitles the complainants to a return of the amount paid to the Alien Property Custodian under legal pressure.

The motion to dismiss must be denied. A. P. D.
MUNICIPAL CORPORATIONS—Municipalities Empowered to Enact and Enforce Penal Ordinances Not in Conflict with State Laws.

CRIMINAL LAW—Prosecution under Municipal Ordinance Not Bar to Prosecution under State Law; Same Facts May Constitute Different Offenses Against Municipality and State.

CUMPTON VS. CITY OF MUSKOGEE
(Criminal Court of Appeals of Oklahoma, 1923)
(225 Pacific Reporter 562)

This cause came up on an appeal from the County Court of Muskogee County, Okla., affirming a conviction in the City Court of the City of Muskogee.

The defendant (now the plaintiff in error) had been suspected of violating the municipal ordinance of the City of Muskogee with regard to the sale and possession of intoxicating liquors. Two police officers went to his room in a hotel at which he had registered and knocked on the door for admission. The officers had no warrant for the arrest of the defendant; neither had they a search warrant empowering them to search the room. The defendant admitted them, and, when informed of their suspicions, told them to "help themselves." In the search, a handbag containing whiskey, empty bottles and corks was found. The defendant was placed under arrest, and the handbag and its contents were carried away by the officers. The defendant made no protest either against his arrest or the seizure of the goods.

The defendant was tried and convicted in the City Court of the City of Muskogee on the charge of the illegal possession of intoxicating liquors and his punishment was assessed at a fine of $25. On the trial, evidence of a telephonic conversation between a police officer and a third party in the presence of the defendant was admitted over the objection of the defense. On an appeal to the County Court of Muskogee County, the defendant was again found guilty and his fine assessed at $75. This appeal was then taken.

The defendant first urged that the ordinance under which he was convicted was void because it provided for a maximum penalty of $100 and imprisonment for a period of 60 days; that the lawmaking body of the municipality had no authority to enact an ordinance, penal in its nature, providing such a penalty, and that the city court was without power to enforce such an ordinance.

In answering this contention, the court cites Sec. 3, Art. 18, of the Constitution of Oklahoma, in which the state delegated to municipal corporations under special charters enlarged powers of self-government. Judicial notice was taken that Muskogee came within the group of cities granted such special charters. In interpreting the constitutional provision, the court stated that "municipalities have no power to enact ordinances that tend to defeat or run counter to the penal laws of the state, but it is within the power of such municipalities to enact and enforce ordinances penal in their
nature in aid of, or not in conflict with, the penal laws of the state.”
(Ex parte Johnson, 201 Pac. 533.)

It was further contended by the defense that the ordinance in
question was unconstitutional or void, as being beyond the power
delegated by the state to the municipality on the following grounds:
That the municipal ordinance prohibits an act which is also an
offense under the general criminal law of the state; that, therefore,
the original prosecution in a city court would be a bar to a second
prosecution under the state law, for the reason that it is pro-
vided by the Bill of Rights of the state that no person should
be twice put in jeopardy for the same offense.

The court, following the case of ex parte Simmons (4 Okl. Cr.
662; 112 Pac. 951), ruled against the defense on this point. The
opinion in this regard holds that “a prosecution in a city court
for a violation of a municipal ordinance which prohibits an act
which is also an offense under the general criminal law of the state
is not a bar to a prosecution under such state law; such a second
prosecution would not be in conflict with section 21 of our Bill of
Rights, providing that no person shall be twice put in jeopardy
for the same offense. The violation of a municipal ordinance is
an offense against the municipality, and the same facts and cir-
cumstances may constitute another and different offense against
the state, the same facts constituting different offenses against
different governing bodies.

“We hold, therefore, that the ordinance here in question is not
unconstitutional or void as being beyond the power delegated by
the state to the lawmaking body of this municipality.”

In disposing of the other points in the case, the court held that
the arrest without a warrant was justified under the circumstances;
and that the facts in the case did not constitute an unreasonable
search and seizure within the meaning of the Federal Constitution
or the Bill of Rights.

Toward the conclusion of its opinion, however, the court decided
that the admission by the lower court of the evidence of the tele-
phonic conversation had by the police officer, in the presence of
the defendant, with an unknown third party, was erroneous and
for this error, the cause was reversed.

(An interesting case, recently decided by the U. S. Supreme
Court, in which the question of double jeopardy is involved, is that
Chief Justice Taft, in his opinion in that case, in substance said:
That two punishments for the same act, one at the instance of
the federal government under the national prohibition act and the
other under a state law for the enforcement of prohibition, do not
constitute double jeopardy under the fifth amendment of the Con-
stitution.)
CRIMINAL LAW—Abduction from Foreign Country of Fugitive from Justice of United States Not Ground for His Discharge on Habeas Corpus.

UNITED STATES vs. UNVERZAGT, 299 Federal 1015

(District Court, W. D. Washington, N. D., May 7, 1924)

Habeas corpus proceedings to remove Unverzag from the district court in Washington to the Western district of New York, to answer an indictment charging him with using the mails to defraud. The defendant filed a petition to be discharged on the grounds that he did not commit the crime and that he had been forcibly brought into this country from British Columbia. He claimed this was a violation of the treaty between Great Britain and the United States.

District Judge Neterer discharged the petition.

The Judge declared that, even if extradition for the crime of fraudulent use of mails were covered by the above mentioned treaty, which it was not, treaties are not judicial but political matters. In considering the effect of a prisoner being forcibly brought into the country as to the power of the courts to make him stand trial, the case of the United States vs. Rauscher (7 Sup. Ct. 249) the statement of Chief Justice Waite's dissenting opinion was given. The statement being as follows:

"Under the law and practice in the United States a prisoner is not permitted to set up such a defense (violation of the extradition treaty) for the clear reason that he is within the jurisdiction of that court, which has the authority to try him for the offense of which he is charged."

The court relied mainly, though, upon the case of Ker vs. Illinois, 119 U. S. 436.

The Supreme Court of the United States in this case held that it could not question Ker's conviction by an Illinois court merely because he had been brought from Peru by force, no constitutional right having been violated.

The following law was also laid down by the Supreme Court of the United States in the case of Ker vs. Illinois, U. S. 436.

The court ruled that where the prisoner had been kidnapped in a foreign country and against his will brought within the jurisdiction of the state whose law he violated, with no reference to an extradition treaty, though one existed, and no proceedings or attempt to proceed under the treaty, this court can give no relief, for these facts do not establish any right under the Constitution or laws or treaties of the United States.

The court also stated in this case that how far such forcible transfer of the defendant, so as to bring him within the jurisdiction of the state where the offence was committed, may be set up against the right to try him, is the province of the state court to decide, and presents no question in which this court can review its decision.
Now, the court in the present case goes a step further and holds that the Federal Courts will themselves try a man on a charge within their especial province, regardless of how he has been brought in, provided that his arrest in this country was entirely regular, a fact unquestioned in this case.

The court defended the rule thus laid down on the ground that any outrage to the prisoner's person caused by the forceful abduction could lie fully redressed in a tort action (trespass and false imprisonment), but it should not be permitted to be set up as a defense to an indictment in a court within whose jurisdiction he actually is, regardless of how he got there.

The present case seems to be the first in which a Federal Court have themselves tried a man on a charge within their especial province, regardless how he was brought in, providing his arrest in this country was entirely regular as it was in this case.

As to the sufficiency of the indictment which has been suggested upon argument, Judge Lacombe, in Re Benson (C. C.) 130 Fed. 486, stated that it is well settled that the sufficiency of an indictment is not a matter of inquiry in removal proceedings, but rests with the court to which the indictment was returned, and that has been followed uniformly throughout the United States, unless the defect is so apparent that there could be absolutely no question about it. And as to the other objection raised under the certificates of the judge of that district and the clerk of that court, certifying that an indictment has been returned in words and figures following (setting out the indictment), must be accepted by the court as true. The indorsement customarily placed upon an indictment which follows the provisions of the common law is not vital, and omission is not fatal.

The writ is therefore discharged. J. S. S.
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