COMMERCIAL BOOKS IN COMPARATIVE JURISPRUDENCE

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In the following study I propose to collate certain aspects of the comparative jurisprudence relating to the origin and development of the law of mercantile accounting under different systems of law. The purpose is to show that while there has existed a fundamental divergence between the juridical philosophy underlying the French and Spanish systems, on the one hand, and the Anglo-American system, on the other, the present tendency is toward assimilation. This assimilation implies a liberalization in the philosophy of the one, and a concomitant astriction in that of the other, and may clearly be attributed to the exigencies of modern international commerce.

Roman Books

Obligations arise in Roman Law, according to Gaius, "aut verbis, aut litteris, aut re, aut consensu."

Of these, the contract known in the Roman law as the literarum obligatio, according to De Colquhoun, is "involved in the darkness of antiquity, and is intimately connected with the practice prevailing among the respectable class of Roman citizens of the republican period, of keeping accurate and detailed accounts of their domestic pecuniary matters, termed codices accepti et expensi, or debtor and creditor ledgers, in which they inserted, in a formal manner, their debts and credits. . . . It appears that these codices or tabulae accepti et expensi were admitted as evidence in courts of law, contrary to the present practice in England; by what proofs they were supported it is impossible to as-
certain, but it may be surmised that they were put on oath.”

While the true nature of these tabulae remains problematical, Muirhead mentions the conclusion formed that “a citizen who made an entry in his codex—whether of the nature of a cashbook or ledger is much disputed—to the debit of another, thereby made the latter a debtor for a sum recoverable by an action certae creditae pecuniae. Gaius in his description of the contract does not mention the codices, but his account is not inconsistent with the notion that the entries (nomina) of which he speaks were made in them.” There is a sharp divergence of opinion, indicated by Muirhead, whether the consent of the debtor was requisite for entry of the debt by the creditor in his codex.

According to Thaller, “the Romans practiced bookkeeping, even outside of commerce (that is to say, in the regulation of home affairs as well). We know of the codex expensi et accepti, where the entries formed a solemn contract and one of strict right in the classic age. During the middle ages these were considered of highest importance. They were of the same authenticity and executory force, in consequence of certain statutes, as the acts of notaries, which is explained by the public nature with which the merchant is invested. The Livres de Raisons, especially in medieval France, are of great curiosity because of the practice of the merchants to record in them the daily happenings in the family.” Presumably they recorded such things as births, deaths, and betrothals of daughters, for which legal proof might be desirable later.

The better opinion seems to be that, at Rome, the entry in the creditor’s ledger was not conclusive proof or evidence of a debt, but that such entry converted an agreement not otherwise enforceable into a formal contract on which an action could be brought. In the early Empire it seems that the development of the real and consensual contracts made reliance on this form unnecessary, and in the late Empire it practically disappeared.

**Modern Types**

“Foreign legislation conforms substantially to the Spanish philosophy of bookkeeping,” says Álvarez del Manzano,
"but differs as to the methods of enforcing accounting. There are two systems, that of liberty and that of restriction. By the former system the merchant can carry his accounting in whatever books he sees fit, as long as he records in them all the acts which go to make up the commercial life, and does so with the formalities that the law prescribes; this is adopted by the legislatures of England, United States, Germany, Austria-Hungary, etc. By the second system, which is followed by the majority of foreign enactments, among them the codes of France, Italy, Holland, etc., the merchants must carry the number of books that the law prescribes, without prejudice to the value, as auxiliaries, of those which he thinks convenient for the better ordering of his operations."

In a succinct note to his translation of the Japanese commercial code, Yang Yin Hong points out: "In regard to the attitude of the Law toward trade books, the French advocate the principle of interference, and the English are in favor of the laissez faire doctrine. The Germans take a middle course; that is, the trader is obliged to keep trade books but they are not subject to governmental control or inspection. The Japanese code entirely adopts the German system." The Japanese code covers in seven short sentences its requirements concerning trade books, in contrast to the minute regulations of the French and Spanish systems.

Colfavru remarks that the "English law leaves the question of keeping books to convenience, natural evolution, and public opinion." Latin American countries, of course, follow the ideal of the French and Spanish jurisprudence.

Sanctions

The argument for the Franco-Spanish system is presented from different points of view by the several writers. Thaller, for example, finds for it a paternalistic explanation; the requirement of the government is primarily for the merchant's own benefit, for "books, and accounting in general, answer to the need of the merchant for orientation in his affairs. There, under his eyes, are entered and classified his operations. A periodic balance will tell him what he is gaining or losing. It will permit him to rectify bad
moves and advise him when economies are necessary." Obligatory keeping of books, according to the same authority, is, in French law, sanctioned in two ways: 1. Absence of books, or irregularity in the keeping of them, may, in case of failure of the merchant, bring upon him the penalty of a banqueroute simple," which, however, the court may impose or not at its discretion. Removal of books may imply a fraudulent bankruptcy. Reference to books is especially important in the case of bankrupt corporations. The law allows reference to books only in case of bankruptcy; the business of the merchant is closed to investigation by third parties. 2. Absence of books destroy for the merchant that benefit of proof which a well kept set of books assure him in his dealings with his clients, and, moreover, he falls under an unfavorable presumption, which in certain circumstances sufficient to convict him.

Lyon-Caen asserts that "the law, taking into consideration the rapidity of mercantile transactions, will admit all evidence of probative force; thus there will be presented daily to the magistrates grave difficulties concerning the dates and details of contracts which would resist solution did there not exist illuminating registries of the act, orderly and clear, which take the place of formal agreements." He speaks also of the contingency of bankruptcy, and submits that without books the law could not investigate the cause of the failure—whether proceeding from accident, negligence, or bad faith.

A Spanish viewpoint is given by Espejo in these words: "The existence of mercantile accounting is justified, above all, by the following considerations: 1. On account of the solidarity that it gives to commercial operations. 2. On account of the litigation which may involve the merchant. 3. On account of abnormal situations in the course of commerce, such as the suspension of payments and bankruptcy. First, solidarity in commercial transactions is effected by an uninterrupted series of purchases and sales to which the merchants in general dedicate themselves in the course of their business, perhaps now availing themselves of credit, now making use of their capital; and since it is necessary, in order to keep track of these operations, with their natural
rapidity and multiplicity, as well as to know whether or not credit has been strained by these operations, that an account should be kept, that account should appear in a rigorous and methodic manner in the books of commerce. Second, litigations and disputes will be solved so much more easily when there is a means of proof such as is contained in the books; for the entries should carry the inherent right of commercial faith and credence in all that which will favor the merchant as well as in all that will be to his prejudice. And this is especially true for the reason that no merchant, nor any other person, will do or write anything against himself, and when anything appears in his books to his prejudice it must be presumed to be a genuine representation of the truth. Here it is understood that legally conducted books constitute a proof in his favor, in derogation of that rule of evidence which declares that "no one may create a title in his own favor". Third, with regard to the abnormal conditions in the life of trade, as the suspension of payments or bankruptcy, accounting discharges a very important mission, for, thanks to it, we can learn whether the assets are greater than the liabilities, as well as determine whether the merchant was carried to the point of non-compliance with his obligations through fortuitous and involuntary causes, or by conduct that appears to be of questionable honor or of proven bad faith; which results we can reach by a scrutiny of the books, since, as in the graphic expression of Vidari, the merchant writes into his books his very conscience, and they are a mirror wherein is reflected faithfully his true economic condition."

Moreno y Cora says that "forthwith, and without need of much discussion, one understands the necessity to which all persons who dedicate themselves to commerce are subjected, of carrying with all exactness and the most perfect order their books of account." But the law, he adds, has set down precise rules for this important duty, and does not leave it to the caprice of the individual merchant.

The theory is justified by Dalloz in these words: "The obligation to keep books is very important, and places the merchant in a position to know, day by day, the condition of his business; it gives to him a means of justifying the
demands which he sees himself obliged to support before the courts, and to combat those which are directed against him; it reveals to the law, in the event of the merchant becoming bankrupt, whether the act can be considered unfortunate, culpable, or fraudulent; and, finally, only this accounting can, after the death of the merchant, assist the administrators in the liquidation of his affairs.”

Esquivel Obregón sums up the Latin idea of legal interference and regulation of bookkeeping in the statement that “bookkeeping, although a matter of convenience and personal benefit to the merchant himself, is, from the point of view of the law, a matter of social interest, an institution created principally for the benefit of third parties. The speed with which mercantile transactions are accomplished makes the fulfilment of the formalities of civil contracts an impossibility; hence the difficulty of adducing evidence in case of dispute. The book records kept by the merchants are, indeed, the only trace of many mercantile transactions and contracts. By making the appropriate entries in their books, merchants are considered, by the law, as agents for the other parties to the transaction, and this is a part of their social function.”

It is, of course, precisely on this point that the English law takes issue with the Latin idea. See Bl. Comm., ii, *448. By the Statute of Frauds the memorandum in writing must be signed by the party to be charged thereby or his duly authorized agent. It was early held that the agent to sign cannot be the other party, for to allow this would open the door to the very frauds that the statute was intended to prevent. See Clark on Contracts, Ch. 4. sec. 49. Cf.; Wright v. Dannah, 2 Camp. 203; Sharman v. Brant, L. R. 6 Q. B.

Proof

To every merchant belongs of right “el derecho a la fé commercial,” specifically recognized in some of the codes, and fairly to be inferred in others. On this is based the probative force of account books which the codes undertake to define. Muirhead compares it to the Roman “fides,” which he would translate as “the forum of conscience.” Says Alvarez del Manzano: “It is, as we know, the right of merchants to be believed with respect to their verbal or
written declarations, and, as both are very numerous, they will be noted in their proper order, it being sufficient here to indicate that the most important type—those which appear in proper account books—has been recognized in foreign legislations, although, indeed, according to some codes (as, for example, that of Austria-Hungary) such books furnish only an incomplete proof, leaving its appreciation to the discretion of the court; and according to others, the proof is full, even though other proof is admitted in derogation; and in some (like the German) the books are assimilated to other private documents, the appreciation of their probative value belonging to the judges.”

Thus, while Latin writers endeavor to base the probative value of books of trade on such notions as the good faith of merchants, Blackstone gives another and more plausible theory. He writes that “abroad . . . a man’s own books of account, by a distortion of the civil law (which seems to have meant the same thing as is practiced with use), with the suppletory oath of the merchant, amount at all times to full proof.” And he bases his statement upon two citations from the Corpus Juris, one (Code iv. 19.5.),

“Instrumenta domestica, seu adnotation, si non aliis quoque adminiculis adjuventur, ad probationem sola non sufficiunt.”

and the other (Code iv. 19.5.),

“Nam exemplo perniciosum est, ut si scripturae credatur, qua unusquisque sibi adnotationes propria debitorem constitit.”

But whether it be a distortion of the Roman law, or be founded on implied honor, responsibility and good faith of merchants as a class, it is certain that the practice is prevalent in all civil law countries, and particularly in those which follow the law of Spain.

It would be a work of magnitude to delineate the degrees of probative force of books under the various codes, as there appear to be no two enactments alike in all particulars. Alvares del Manzano states that “very disordered and deficient is the doctrine of the Spanish code in respect to the manner of graduating the probative force of the books of
merchants. The code of 1829 was more explicit, but under the provisions of the present code recourse must be had to judicial interpretation. The courts (for example) have decided (January 22, 1884) that the probative provisions shall not extend to parties not merchants." On the face of the code, however, there is no distinction drawn between a merchant and a non-merchant in this regard, and eleven Latin American codes appear to have adopted this doctrine. In most codes, as between a merchant and a non-merchant, the books are merely a presumption or foundation of evidence (principio de prueba), but as between merchants certain general rules apply, though not without exception. These are summarized by Obregon as follows:

1. A merchant's books constitute irrebuttable evidence against him, but the other party can not accept entries favorable to himself while rejecting others unfavorable to him. Having accepted this means of evidence, he is subject to the consequences of the whole of it, both for and against him.

2. If entries in the books exhibited by two merchants should not agree and those of one have been kept with all the formalities... while those of the other contain defects or lack the requisites prescribed by the commercial code, the entries in the book correctly kept must be admitted against those of the defectively kept books, unless the presumption thereby arises in the merchant's favor is overcome by other evidence legally admissible.

3. If one of the merchants should not present his books or should state that he does not possess any, those of his adversary, kept with the required formalities, constitute evidence against him, unless it is proved that the absence of said books is caused by force majeure, and always reserving the privilege of adducing evidence against the entries exhibited by other means legally admissible in judicial proceedings.

4. If the books of the contending merchant possess all the legal requirements and are contradictory, the judge or court must resolve the conflict by other evidence, evaluating its weight and probative force according to the general legal rules of evidence.

Costa Rica differentiates between large and small merchants, against the latter of which classes the books of the
former do not constitute evidence at all, but in that country, otherwise, entires in regularly kept books constitute full proof against a merchant who does not keep his books in proper form.

“That the books,” says Thaller, “should be proof against the merchant who keeps them, is easily understood; but it will seem strange that a merchant can invoke the probative testimony of his own books in his own favor, in view of the maxim, nemo sibi titulum constituere potest.” Thaller is one of the commentators of the French code who disagrees with the French idea that books can be conclusive evidence of a transaction. Rather illogically, he upholds book entries which are a proof against the merchant, whether the book be kept in legal form or not; the force of the book, he says, is entire as evidence and proof. Moreover, a merchant can never take advantage of a section that is to his prejudice. “On the other hand,” he argues, “can a book ever be proof in favor of him who keeps it? Suppose I pretend to have a claim for 1,000 fr. against A. Can I establish my right merely by procuding one of my books which mentions that claim?”

“On this point,” he continues, “it is necessary to proceed with care. In vain do the legists imagine the entry to be a sort of procés-verbal with the due consent of both parties. In vain do they imagine a sort of constructive agency given by the other party. Those notions merely beg the question. Consequently, the proof should be limited as follows: In the first place, if the contestants are both merchants, the books of the alleged debtor should be produced, and if they agree with those of the claiment, the proof is satisfactory. If they disagree, then no more credence should be accorded to one than to the other, and other methods of proof should be sought. If, however, the opponent is not a merchant, and has no books of his own, then the entry in the merchant’s book should be considered as only prima facie or presumptive evidence. Moreover, a book, in order to constitute valid evidence, should be without exception regularly kept according to the law.”

Under various exceptions and limitations, auxiliary books, those not required specifically to be kept, may be received
in evidence (except in Costa Rica). Moreno y Cora, the Mexican commentator, raises the question what the result would be if there were contradictory entries in the regular and auxiliary books of the merchant, and gives it as his opinion that the entries in the book required to be kept by law should be given precedence, although without prejudice to proof of error if there should be such. A later decision, however, of the Superior Court of the Mexican Federal District, seems to hold that commercial books shall not constitute evidence at all when the entries in the ledger do not correspond to those of the journal.

Here it is interesting to note that the Court of Cassation of France (December 30, 1907) construed the code provision as limiting the evidential value of books against a non-merchant to claims for supplies furnished. In this connection, also, Thaller points out one consequence from the point of view of criminal law, that is, the extension of the idea of forgery to book entries, punishable by hard labor (Art. 147, Penal Code). A merchant who, by such entry, attributes to a person a suppositious operation is guilty of the crime. In France, tampering with the balance is not forgery, but a special law of Belgium of 1881 takes cognizance of this type of misrepresentation. Failure to keep books, of course, militates against one accused of fraudulent bankruptcy.

**Proof—English Law**

The admission in evidence of the account books of parties to litigation in English practice is justified as an exception to the familiar doctrine which excludes "heresay evidence." The contention of Thaller, that entries prejudicial to the merchant who make them should be admitted inasmuch as no merchant would write anything against his interest unless it were true, is satisfied in English practice by the rule—derogatory of the hearsay doctrine—that declarations against the pecuniary or proprietary interest of the declarant at the time of making them may be received when the declarant is dead and he had no probable cause to falsify them. Thus, if a merchant should write the word "Paid" after the entries, this would unquestionably qualify as competent evidence. *Higham v. Ridgway*, 10 East. 109. The utility of
employing this type of evidence—so obviously prejudicial to the declarant, lies in the fact that it may be the vehicle by which other and more important evidence adduced from the same document may be brought before the jury, upon the principle of incorporation.

The attitude of English juridical philosophy toward the question of the regulation of account books, as Yan Yin Hong suggested, has been the policy of laissez faire. Hence the account book in which a declaration against interest appears need not be one kept in the regular course of business, but may be a mere private diary or memorandum book. *Taylor v. Witham*, 3 Ch. D. 605. Indeed, in some jurisdictions, mere oral declarations of this type are admissible.

While not commanding that books be kept, the English law does, however, grant special favors to the account books of merchants which are accurately kept in the regular course of business, when certain other requirements are produced to palliate the maxim which is just as virulent in English jurisprudence as in any other, that *nemo sibi titulum constituere potest*. There is a vast accumulation of opinion, speculation, and exposition touching this question, and the modern law is divided and subdivided, and the subdivisions are as variant as the jurisdictions which apply them.

Of the early English practice with respect to this principle we have no evidence, but the Editor of Greenleaf suggests that the practice of receiving books in evidence might have been an innovation brought in by the Dutch immigrants who flooded England in the 1500's in flight before the Duke of Alva. These people, who were imbued with Roman law principles, must have made an appreciable impression upon British civilization, and it is quite plausible that this was one of their contributions.

Suffice it, however, that by 1600 the practice flourished, and like everything which flourishes, was subject to endless abuse. Therefore the Statute of 7 Jac. I. Ch. 12 (1609), was enacted, which, characteristically, recited the doleful situation of the realm and of humanity at large, because:

*Whereas divers men of trades, and handicraftsmen keeping shop-books, do demand debts of their cus-
tomers upon their shop-books long time after the same
hath been due, and when as they have supposed the
particulars and certainty of the wares delivered to be
forgotten, then either they themselves or their ser-
vants have inserted into their said shop-books divers
other wears supposed to be delivered to the same
parties, or to their use, which in truth never were
delivered, and whereas divers of the said tradesmen
and handicraftsmen, having received all the just debt
due upon their said shop-books, do oftentimes leave the
same uncrossed, or any way discharged, so as the
debtors are often by suit of law enforced to pay the
same debts again to the party that trusted the said
wares, unless he can produce sufficient proof by writ-
ing or witnesses, of the said payment, that may coun-
tervail the credit of the said shop-books, which few
or none can do after any long time after the said pay-
ment;
wherefore, the statute proceeded to limit the probative
force of such books against a non-merchant to a period of
one year after the making of the entry, but expressly left
the law, as between merchants, whatever that may have
been, unmodified.

The practice was swiftly changed, however, at least in
the upper courts of England, and Blackstone bore witness,
150 years later, that "books of account, or shop-books, are
not allowed of themselves to be given in evidence for the
owner; but a servant who made the entry may have re-
course to them to refresh his memory; and if such servant
be dead (who was accustomed to make those entries), and
his hand be proved, the book may be read in evidence. . . .
However, this dangerous species of evidence is not carried
too far in England, as abroad . . ." Today the entries made
by a party may under no circumstances be admitted as
technical evidence, although, as Taylor points out, by com-
mon law they may be employed by the party to "refresh
the memory." But in England, if the entry was made by a
clerk since deceased, who made it contemporaneously with
the transaction upon which the debt is predicated, who had
personal knowledge of the actuality of the transaction,
whose duty it was to make the entry in the regular course
of the business, and whose handwriting is proved, it may
be received in evidence.
In the United States the development has been radically different. The year 1682 witnessed the enactment in Plymouth Colony of a law which Lord Blackburn would have characterized as "unnatural," which, in effect, directed and ordained that account books be kept by tradesmen, for their own protection, inasmuch as "it is just that such dealers be duly paid for their wares and merchandise"; and these books were to be held sufficient evidence in law for the recovery of such debts within four years.

The rule today in Massachusetts, whose usage represents one of the grand divisions of the subject matter in the United States, is that an entry made in the usual course of business, is admitted after the maker's death by proving his hand, and during his lifetime by eliciting from him his suppletory oath (iuramentum suppletivum).

The oath is not sufficiently persuasive in New York, where entries made by the merchant himself are admitted only when he keeps no clerk for the purpose, when the entries are made in the regular course of business, when some of the goods are proved to have been delivered, and when witnesses are produced to swear, upon knowledge, to the honesty of the merchant. *Vosburgh v. Thayer*, 12 Johns, 461. In this state, a further extension of the rule is that if a clerk who made the entry did so upon the report of another employee who alone had personal knowledge of the fact of the transaction, the entry will be admitted if both employees testify to its accuracy.

Professor Thayer, the foremost American authority in this field, suggests that "at present the older States, it would seem, might well follow some of the newer ones in allowing the unhampered use of such books. They would thus rid themselves of certain irregular fragments of law, which came about, in a great degree, from a misapprehension of the older law, and have lost their main reason for existence, since parties have been allowed to testify."

**Privacy**

By all the commentators, except one or two who appear to have acquired a mistaken impression and who are sarcastically referred to by the others, a marked line is drawn as regards examination of books in court between what is
called in Spanish "exhibición o presentación" and in French "representation," on the one hand, and "comunicación" or "communication."

The misguided commentators imply that the books of the merchants, since their very raison d'etre is the public benefit, are common property, like the circulation books of ambitious American dailies which are advertised as being open to all. But this is not the sound rule. The exhibition in court, as Thaller puts it, is the act of consulting a single item on a specified page of the book, so that the merchant is protected in his business secrets. This takes place in the course of litigation between merchants, when one challenges the books of the other. On the other hand, communication usually takes places when it is necessary to make public the whole business of the merchant, as in cases on intestacy, bankruptcy, partition of property, or dissolution of a partnership or a corporation. The merchant is usually amply protected, the following provision of the Spanish Code being generally adopted in Latin countries:

No judge nor tribunal nor authority whatsoever shall be enabled to make ex officio inquiries, to investigate whether merchants carry their books in accordance with the dispositions of this Code, nor to make an investigation or general examination of accountability in the offices or counting-houses of merchants.

Details

This study will not attempt to set out in detail the numerous minute differences in the several effective codes, except to notice that there is sometimes a distinction drawn between the big merchant and the little one—the Minder-Kaufleute of the Germans—in the matter of the number of books to be kept by requirement of the law. I have mentioned that in Costa Rica the books of "merchants" shall not constitute evidence against small "traders."

The codes differ in number of books required, the type of bookkeeping specified, the dispositions concerning the bookkeeper (who, to credit one commentator, should be required in theory to hold a general power of attorney from his principal), and the length of time the books must be retained when filled or discharged, most codes providing, in
this later particular, for ten years, while some, like the Spanish, require only five years, whereas, by the before mention statute of James I, in England the transaction formerly must have occurred within one year to endow the books with evidential value at all.

American Tendency

I conclude with mention of what appears to me to be the tendency in this materia at present in the United States. Just as the various States and the Federal Government have begun the work of codification, hitherto considered alien to all English concepts of jurisprudence, so also, in this particular—compulsory bookkeeping, regulated, inspected, surrounded with penalties, prescriptions, and forfeitures—American law is changing front. This tendency is manifest in many State statutes touching the topic, as those concerning bankruptcy, rules of evidence, and the like, but principally in the unfolding of a great phenomenon of contemporary government, which has been compared to no less striking a departure than the development of Equity itself—I mean the rise of inquisitorial governmental machinery, such as the Federal Trade Commission, income-tax bureaus, railroad commissions, the U. S. Shipping Board, and the Interstate Commerce Commission. Of this tendency, Section 20 of the Interstate Commerce Act will serve as a convincing and sufficient indication:

Section 20 (As amended). That the Commission is hereby authorized to require annual reports from all common carriers . . .; to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information; . . . and the Commission may, in its discretion, for the purposes of this Act, prescribe a limit of time within which all common carriers subject to the provisions of this Act shall have, as near as possible, a uniform system of accounts, and the manner in which such accounts shall be kept. (The Act then provides a penalty for failure to make and file said accounts or reports, and provides for a suppletory oath.) . . . The Commission may, in its discretion, prescribe the forms of any and all accounts, records and memoranda to be kept by the carriers subject to the provisions of this
The Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this Act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. (The Act then provides for a fine for failure or refusal to comply, and provides a heavy fine and imprisonment for one wilfully destroying, or falsifying the accounts, or neglecting to make correct entries therein. The Commission may in its discretion issue orders prescribing the length of time such books, papers, documents, etc., shall be preserved. United States Courts may issue mandamus to compel compliance with the provisions of the Act.)

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The cases decided by the Supreme Court of the United States, involving questions of constitutional law, in which Justice White wrote the majority opinion, concurred specially or dissented, will be grouped for discussion under the following headings: (a) The Commerce Clause; (b) Impairing the Obligation of Contracts; (c) The Full Faith and Credit Clause; (d) The Fifth Amendment; (e) The Fourteenth Amendment; (f) Taxation; (g) The Supremacy of the Constitution. Under each heading, his opinions will be summarized and combined, in order to present a connected statement of his position as to the portion of the Constitution under consideration.

(a) THE COMMERCE CLAUSE.

The following appreciations of Justice White's opinions, interpreting and applying the Commerce Clause of the Constitution, from the Chief Justice of the United States and from the Attorney General of the United States, are worthy of note: "The capital importance which our railroad system has come to have in the welfare of this country made the judicial construction of the interstate commerce act of critical moment. It is not too much to say that Chief Justice White, in construing the measure and its great amendments, has had more to do with placing this vital part of our practical government on a useful basis than any other judge." Chief Justice Taft, in Response from the Bench, Memorial Exercises in Memory of Edward Douglass White, Supreme Court of the United States, Memorial Volume, page 60, December 17, 1921.

"Among the most famous of the opinions of Chief Justice White are those defining the powers of Congress under the commerce clause of the Constitution and legislation thereunder, . . ." Attorney General Daugherty, in Address on behalf of the American Bar, Memorial Exercises, Supreme Court of the United States, Memorial Volume, page 54.
Justice White was convinced that the duty of the Supreme Court lay in deciding only the precise issue before it, and, in refraining from a discussion of other matters, particularly questions of constitutional law, unless necessarily involved in the actual case. Of course, these conceptions of the duty of courts are not new, but while many judges have expressed them, few have applied them so rigidly or so consistently as Justice White. Rarely has decision been so carefully distinguished from dictum. The emphasis, therefore, in his opinions, is upon the facts, and his purpose always is to state the facts so clearly and fairly that the mind is prepared to accept, indeed to anticipate his decision upon the whole case as a matter of course—a method which presents judgment almost in the guise of exposition.¹ But, facts cannot be marshaled in this way without a wide and accurate knowledge of the law applicable to the case. Consequently, his judicial style is severely

¹ The following from his opinion in U. S. v. Delaware & Hudson Co., 213 U. S. 366, 407, (1909), shows his position: "It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. Knights Templar Indemnity Co. v. Jarman, 187 U. S., 197, 205. And unless this rule be considered as meaning that our duty is first to hold that such ruling was unnecessary because the statute is susceptible of a meaning which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. Harriman v. Interstate Comm. Comm., 211 U. S., 407."

Yet, when an Act of Congress was found not able "to endure the test of the Constitution," he did not avoid the issue. In The Employers' Liability Cases, 207 U. S., 463, 494, 1908, he said: "... we do not think we are at liberty to avoid deciding whether, in any possible aspect, the subject to which the act relates is within the power of Congress. We say this, for if it be that from the nature of the subject no power whatever over the same can, under any conceivable circumstances, be possessed by Congress, we ought to so declare and not by an attempt to conceive the inconceivable assume the existence of some authority, thus it may be, misleading Congress and giving rise to future contention."
logical and impersonal; he does not give any of those intimate, self-revealing references to life and human experience, found in the opinions of Lord Bowen, Lord Shaw, Justice Holmes or Justice Cardozo. Nor does he often generalize in compact, quotable phrases. His opinions, as Woodrow Wilson remarks of Cleveland’s utterances, “tell only in the mass, and not sentence by sentence, were cast rather than tempered; . . .” The student of Justice White’s opinions should regard them as a whole, without undue attention to the individual case, since it is difficult to obtain a comprehensive idea of his views from a few opinions.

A rapid survey of the increase in transportation facilities, of the changes in the regulation of carriers, and of interstate commerce generally, by Congress, during Justice White’s term on the Supreme Court, will serve as an introduction to a study of his opinions, interpreting the Commerce Clause of the Constitution.

The United States passed through a period of remarkable growth, from 1894 to 1921, in population, in production and in wealth. Manufacturing, farming, mining and every industry increased the resources of the country, keeping pace with the multiplication of population. This rapid industrial expansion was aided greatly by the growth in transportation facilities. The mileage of railroads increased from 163,597 in 1890, to 193,346 in 1900; by 1920, it had risen to 260,000 in the United States, as compared with 440,000 in all the rest of the world. Great railroad strikes began to recur regularly and enormous associations of capital combined railroads with the allied industries of factories and mines. The situation called for legislative regulation. Yet, to move too fast in subjecting the railroads to governmental control might have killed, at the least checked, that part of the process of national growth by which the railroads were increasing the wealth and power of the country. It was a time for statesmanship of a high order on the bench, as well as in the legislature.

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2 "Mr. Cleveland as President," by Woodrow Wilson, Public Papers, Vol. I, p. 28.
The power of the States to regulate intrastate commerce was confirmed by the Supreme Court in *Munn v. Illinois*, 94 U. S., 113, 1876, though not long afterwards the Court declared as emphatically that the control of interstate commerce was the exclusive concern of the Federal Government, (*Wabash, St. Louis & Pacific Ry. Co. v. Illinois*, 118 U.S., 557; 1886). Regulation of the railroads by Congress dates virtually from "The Act to Regulate Commerce," of 1887, (24 Stat., 379). Section 11 of that Statute created the Interstate Commerce Commission; the remaining provisions were framed, in a comprehensive way, to secure reasonable rates, and to prevent discrimination and "pooling" by common carriers. The Sherman Anti-Trust Act (July 2, 1890, 26 Stat., 209) was passed shortly before Justice White took his seat on the Supreme Court. The purpose of the Expedition Act of 1903, (32 Stat., 823), was to insure a prompt hearing in cases arising under the Act to Regulate Commerce; in the same year, the Elkins Act, (32 Stat., 847), was passed to prevent rebating. Three years later, the Hepburn Act of 1906, (34 Stat., 584), empowered the Interstate Commerce Commission to fix reasonable rates for interstate transportation, where unfair charges were made by carriers, and the Act also enlarged the jurisdiction of the Commission in other ways. The Mann-Elkins Act of 1910, (36 Stat., 539), brought telephone, telegraph and cable messages within the control of the Commission, and the Panama Canal Act of 1912, (37 Stat., 560), subjected carriers by water to Federal regulation. These Statutes were followed by the Valuation Act of 1913, (37 Stat., 701), authorizing the Commission to evaluate the property of common carriers, and by the Clayton Act of 1914, (38 Stat., 730); regulating railroad securities.\(^*\) Shortly after the entry of the United States into the World War, on April 6, 1917, several statutes were passed by Congress to hasten the movement of trains, (40 Stat., 101, 270, 272). On December 28, 1917, the President mobilized the transportation systems of the country under the War Powers. Gov-

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\(^*\) Principles of Railway Transportation, by Eliot Jones, Chaps. 3, 10, and 20. (1925.) Principles of Railroad Transportation, Johnson and Van Metre, Chaps., 2, 3, and 4. (1924.)
ernment operation of the railroads continued until March 1, 1920, under the Federal Control Act of 1918, (40 Stat., 451). Congress also made use of the extensive police power of the Commerce Clause in the enactment, during the same period of a number of other statutes for example, The Wilson Act, (Act of August 8, 1890; 26 Stat., 313); the Safety Appliance Act, (Act of March 2, 1893; 27 Stat., 531); the Erdman Act, (Act of June 1, 1898; 30 Stat., 424); the Food and Drugs Act, (Act of June 30, 1906; 34 Stat., 768); the Employers’ Liability Act, (Act of April 22, 1908; 35 Stat., 65); the Webb-Kenyon Act, (Act of March 1, 1913; 37 Stat., 699); the Harrison Narcotic Act, (Act of December 17, 1914; 38 Stat., 790); and the Reed “Bone Dry” Amendment, (Act of March 3, 1917; 39 Stat., 1069). It has been said that these statutes “mark a new era in the domain of Federal activity,” and further, that Chief Justice White was not “wholly without responsibility for their coming, for he was with the majority, and with Harlan, who spoke for it in the Lottery Cases, 188 U. S., 321, which opened to Congress a new storehouse of power, and deserves to rank in its far-reaching effect second only to Gibbons v. Ogden.”

During Justice White’s term of service upon the Supreme Court, therefore, railroad transportation passed through a series of radical, and even dramatic changes in growth, in regulation and in management. At the same time, Congress also entered upon the field of police regulation, under the Commerce Clause, to an unprecedented degree. It is not too much to say that all this body of Federal statutory regulation, was considered by the Supreme Court during Justice White’s term of office, either in the direct application of some one of the Acts of Congress enumerated, or in its general effect, as an expression of legislative policy.

THE MEANING OF COMMERCE.

Justice White wrote the majority opinion of the Supreme Court in the Employers’ Liability Cases, (Howard v. Illinois

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6 Ibid.
Central Railroad Company, 207 U. S., 463; 1908), involving the constitutionality of the Act of Congress of July 11, 1906, (34 Stat., 232), a statute which greatly modified the rule of the common law regarding fellow-servants. The Act was aimed, in terms, at "every common carrier engaged in trade or commerce . . . between the several states," and the case before the Court involved the death of a railroad fireman, who was actually employed, at the time, in moving a train in interstate commerce. Justice White held that, under the Commerce Clause, Congress had power to regulate the movement of trains in interstate commerce. He further held that, as "necessary and appropriate to the execution" of such power, Congress could deal with the relation of master and servant, and of servants among themselves, when engaged in the operation of such trains. (Page 497.) Coming to a consideration of the text of the Statute, he found that it extended to "every individual or corporation who may engage in interstate commerce as a common carrier," (page 497), and that such an individual or corporation was made liable to "any of its employes." The Act "regulates the persons because they engage in interstate commerce, and does not alone regulate the business of interstate commerce." (Page 497.) A person who engages in interstate commerce does not thereby subject all his business, in matters "of purely state control," to regulation by Congress. The Act was, therefore, held repugnant to the Constitution, (page 502), because by its terms it applied as well to intrastate as to interstate commerce.1

1 Justice White's opinion has been criticized in 22 Harvard Law Review, 45, apparently because it was not sufficiently candid, not explaining to Congress whether there was power to enact a statute limited in terms to carriers and employees, while both were engaged in interstate commerce:

"It is interesting to note with what rapidity Mr. Justice White passes upon the great, underlying question of the power of Congress. 'We do not think we are at liberty,' he says, 'to avoid deciding whether, in any possible aspect, the subject to which the act relates is within the power of Congress.' He proceeds with the discussion, he tells us, in order that the court may not mislead Congress and thus give rise to future contention. The
The revised Employers' Liability Act was recognized by Justice White as part of the general law of the land in *Grand Trunk Railway Company v. Lindsay*, 233 U. S., 42, 1914, where he held that the plaintiff, a member of a crew working on a switch engine, was entitled to the benefits of the Act, though the Act itself was not expressly referred to in the declaration.

After the Second Employers' Liability Act had been held constitutional, a case which had been filed under the First Employers' Liability Act, arising in the District of Columbia, reached the Supreme Court of the United States upon appeal. In announcing the opinion of the Court, Chief Jus-

result seems to be that nobody is assured whether this particular question has been decided or not. It is a noteworthy circumstance that Mr. Justice White omits to declare it to be *necessary* to decide the point as to the underlying power of Congress. The two pages just referred to are mostly taken up with assertion that the unsoundness of a denial of the power is demonstrable. With great respect, however, to the learned justice, we are unable to discover that any substantial reason has been brought forward to sustain the position that the power to enact this legislation exists in Congress. . . . whoever seeks in this region of the opinion for a solid reason to justify a claim for the existence of the power will be disappointed. Nor is there a distinct, unequivocal announcement in terms that the court actually so decides." 22 Harvard Law Review, pp. 45, 46.

This view of Justice White's opinion is not shared by the Supreme Court itself. The defects in the first Act were corrected by Congress in the later statute, and when the constitutionality of this second statute was before the Supreme Court, Justice VanDeventer, speaking for the majority, cites the pertinent part of Justice White's opinion to sustain the statement that Congress may regulate the relation of railroads and their employees, where there is a substantial connection with interstate commerce, and while both carrier and employee are engaged therein. (Second Employers' Liability Cases, 223 U. S., 1, 47, 1912.) Professor Goodnow also says that Justice White's view in this case was "that Congress has the power to regulate the relations of masters and servants engaged in interstate commerce," referring to this opinion. (Social Reform and the Constitution, page 63, 1911.) Mr. John W. Davis reaches the same conclusion in his article on White, where he says: "... the First Employers' Liability Cases, 207 U. S., 463, in which although the Act itself was found defective, the power of Congress to regulate the relation of master and servant on the railroads was sustained; ..." (American Bar Association Journal, Vol. VII, No. 8, p. 381, August, 1921.)
EDWARD DOUGLASS WHITE

White said that Congress had power to pass the first Act, so far as it applied to the District of Columbia. "because of its plenary authority as the local legislature of the District, and because the intention to make the provisions of the law applicable to the District locally was manifest and separable from the purpose to enact a statute which would be applicable generally throughout the United States." (Washington, Alexandria & Mt. Vernon Ry. Co. v. Downey, 236 U. S., 190, 191, 1915.)

Earlier decisions of the Supreme Court had not made it entirely clear whether a person transporting his own property from one state to another, not necessarily for the immediate purpose of sale, was engaged in interstate commerce. In the Pipe Line Cases, however, (234 U. S. 548, 560, 1914,) the Court held that the interstate transportation of oil, purchased from the producers by the owner of the pipe line through which the oil is drawn for sale at destination, and transported by the owner, constitutes interstate commerce and is under the control of Congress. The Court excluded from the Hepburn Act a company drawing oil through its own pipe line, from its wells in Oklahoma to its refinery in Kansas, as not engaged in transportation within the Commodities Clause of the Hepburn Act, (page 562). Chief Justice White agreed with the first ruling of the Court. As to the second, he said, in effect, that a company which has a pipe line leading from its own oil well in one state, to its own refinery in another state, is engaged in interstate commerce, but he says it would be contrary to the due process clause of the Fifth Amendment to compel such a company to become a common carrier of oil, (op. 562, 563).

Chief Justice White was of opinion, therefore, that the mere transportation of a saleable commodity from one state to another, for the remote but not necessarily for the immediate purpose of sale, constituted commerce in the constitutional sense. He had held in an earlier case, that interstate commerce included the transportation of people, by ferry, from one state to another, (New York Central &

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8 The law of the American Constitution, in C. K. Burdick, p. 209, 1922.
Hudson River Railroad Company v. Board of Chosen Freeholders of the County of Hudson, 227 U.S., 248, 1913). In that case, Hudson County, New Jersey, undertook to fix rates for the steam ferries, which connected the terminals of the New York Central lines at Weehawken, New Jersey, with New York City, across the Hudson River. The ferries transported passengers and freight coming from interstate trains, as well as from elsewhere. The Act of Congress of February 4, 1887, subjecting railroad companies to the authority of Congress, expressly included “ferries used or operated in connection with railroads.” Chief Justice White held that the Act applied not only to ferries used exclusively by interstate railroad passengers, but also included ferries transporting such passengers, as well as other passengers, in interstate commerce. The execution of the power of Congress, in the Statute, was “coterminous with the power itself.” (Page 264.) He held, further, that interstate ferries were not part of that subject-matter on which, in the absence of Federal legislation, the States might legislate in respect of rates. The ordinance was, therefore, unconstitutional.

In Caminetti v. United States, 242 U.S., 470, 1917, the Supreme Court sustained as constitutional the Act of Congress of June 25, 1910, (36 Stat., 825), known as the “White Slave Act,” passed to prevent the transportation of women in interstate commerce for immoral purposes. Justice McKenna wrote a dissenting opinion, in which Chief Justice White and Justice Clarke joined, reasoning that “It is vice as a business at which the law is directed,” (page 498), and therefore, that the actual cases were not within the Statute. In the Pipe Line Cases, therefore, Chief Justice White, speaking only for himself, said that commerce, in the constitutional sense, included the transportation of a saleable commodity from one state to another, by the owner, for the remote but not necessarily for the immediate purpose of a sale. In New York Central & Hudson River Railroad Company v. Board of Chosen Freeholders of the County of Hudson, he held, speaking for the Court, that an interstate ferry, transporting passengers and freight, was subject to control by Congress, and hence was operating
in interstate commerce. In *Covington & Cincinnati Bridge Company v. Kentucky*, 154 U. S., 204, 1894, the majority opinion states that “... the thousands of people who daily pass and repass over this ‘interstate’ bridge may be as truly said to be engaged in commerce as if they were shipping cargoes of merchandise from New York to Liverpool.” (Page 218.) Justice White concurred in the conclusion of the majority in this case that Congress has power to regulate tolls on an interstate bridge, but he did so on other grounds. (Page 223.) It is interesting to surmise, whether Justice White thought that commerce, in the constitutional sense, included the mere passage of people across a state line, not the transportation of saleable commodities, not the transportation of people by an instrumentality, such as a ferry or a bridge, admittedly subject to Federal control. The Act of Congress, June 25, 1910, is very closely associated with transportation by common carriers in interstate commerce; it would appear, therefore, that Congress itself considered that regulation of the passage of people from one state to another would be more effectively exercised if it were based on the acknowledged power over interstate common carriers.

The business of underwriting marine insurance was held not to be interstate commerce by Justice White in *Hooper v. California*, 155 U. S., 648, 1895, saying that insurance does “not generically appertain to interstate commerce.” Everything connected with interstate commerce, he explains, is not a part of it, for, if this were true, commerce would embrace “the entire sphere of mercantile activity in any way connected with trade between the states.” (Page 655.) Hooper was indicted under a California statute, prohibiting any person from making in the State, with a resident of California, a contract of marine insurance for a foreign insurance company, which had not complied with the laws of California. It was ingeniously argued that Hooper, the insurance agent, was the agent of Mott, the insured, not of the insurance company, and hence the law did not apply. But Justice White pointed out that this

would permit foreign corporations to do business in the State, without complying with the law of the State, provided only that an understanding were had that the agent of the insurance company was acting for the applicant. Justices Harlan, Brewer and Jackson dissented. It has been suggested that in this case, "Justice Harlan doubtless let his fondness for freedom get the better of his judgment." The decision of the majority is in accordance with earlier and later rulings of the Supreme Court that neither life nor fire insurance constitutes commerce in the constitutional sense. (New York Life Insurance Company v. Cravens, 178 U. S. 389, 1900. Paul v. Virginia, 8 Wall., 168, 1868. Insurance Company v. Dunham, 11 Wall., 1, 1870.)

The authority of Congress to punish the fabrication and utterance of fictitious bills of lading, for interstate shipments, was sustained by Chief Justice White in United States v. Ferger, 250 U. S., 199, 1919, in which he wrote the majority opinion. He says the power to regulate commerce does not depend on "the intrinsic existence of commerce in the particular subject dealt with" but "on the relation of that subject to commerce and its effect" upon commerce, (page 203). Bills of lading are instrumentalities of commerce, "the efficient means of credit, resorted to for the purpose of securing and fructifying the flow of a vast volume of interstate commerce." (Page 204.) The fictitious bills of lading in this case were not issued upon any actual or contemplated shipment in interstate commerce. Justice White's opinion rests upon the power of Congress to protect interstate commerce as a whole against the destructive effect of indiscriminate falsification of interstate bills of lading."

Was Justice White inconsistent in declaring that Congress has no power to control interstate insurance contracts, in Hooper v. California, while holding, in Ferger v.  

10 The Constitutional Doctrines of Justice Harlan, by Professor Floyd B. Clark, John Hopkins University Studies, Series XXXIII, No. 4, page 117. (1915.)  
United States that Congress may control the issuance of interstate bills of lading? It must be remembered that Hooper v. California was decided in reference to the power of the State, not of the Federal Government, while Ferger v. United States involved an Act of Congress. Perhaps all that Hooper v. California decides is that the State may legislate in reference to insurance, in the absence of Congressional action. Whether, in the abstract conception of commerce, insurance might not fairly be included, is a question upon which there is some difference of opinion," but, as a matter of practical judgment upon the facts, had the Court declared insurance subject to the control of Congress, wholly exclusive of State legislation, it would have thereby compelled Congress to create a new department of the executive government, a department of insurance, to supervise insurance companies. It was in cases of this kind that Justice White, to the confusion of the strict analyst of governmental functions, exercised a legislative as well as a judicial discretion, recalling what Justice Holmes says of Chief Justice Shaw: "The strength of that great judge lay in an accurate appreciation of the requirements of the community, whose officer he was. . . . few have lived who were his equal in their understanding of the grounds of public policy to which all laws must ultimately be referred. It was this which made him, in the language of the late Judge Curtis, the greatest magistrate this country has produced." 18

In Browning v. Waycross, 233 U. S., 16, 1914, an occupation tax was imposed by the town of Waycross, Georgia, on an agent of a St. Louis company, soliciting orders for lightning rods in the State. The rods were shipped from St. Louis to Georgia, and the contract of sale bound the seller, at its expense, to put the rods up on buildings. Justice White held that the work of attaching the rods was not a

18 There is a sentiment in favor of Federal control of insurance. See Vol. XXXIX Am. Bar Assn. Reports, 1906, Part 1, p. 538, Report of the Committee on Insurance Law, three members holding that insurance is commerce; Wm. R. Vance dissented. See also Federal Control of Insurance, by Wm. R. Vance, 17 Green Bag, 83. 1905.
19 The Common Law, by Oliver Wendell Holmes, p. 106.
part of interstate commerce, but was subject to State control, and sustained the municipal tax. This decision was cited in the argument of York Manufacturing Company v. Collery, 247 U. S., 21, 1918. In that case the York Company, a Pennsylvania corporation, sold the machinery for an ice manufacturing plant to a purchaser in Texas. The machinery was shipped from Pennsylvania to Texas, and was set up at destination, under the supervision of an engineer of the York Company, who also tested the completed machinery. This work occupied four weeks. When the York Company sued for the purchase price of the machinery, the defense was that the Company had not obtained a permit to do business in Texas, on the assumption that the work of erecting and testing the plant was local, and did not constitute part of interstate commerce. Speaking for the majority, Chief Justice White said that the value of the machinery depended largely on its efficient assembling and installation, (page 25), and, therefore the work of installing and testing the plant was part of a transaction in interstate commerce, and not subject to State control.14

A statute of Arkansas, (Act of April 19, 1907), Chief Justice White found, imposed an unreasonable burden on interstate commerce, in view of legislation by Congress, because it sought to punish interstate railroad companies for delay in giving notice to the consignee of the arrival of freight, in interstate commerce, (St. Louis, Iron Mountain & Southern Railroad Company v. Edwards, 227 U. S., 265, 1913.) On the same grounds, a statute of Indiana was declared by Chief Justice White unconstitutional, which undertook to punish an interstate telegraph company for failure to make prompt delivery of an interstate message, because by the Act of Congress of 1910, the Federal Government had taken possession of the field, intending thereby to subject telegraph

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14 An apparent departure from the grounds of the opinion of Chief Justice White in these cases by the Supreme Court of the United States in the recent case of Kansas City Steel Co. v. Arkansas, 46 Sup. Ct. Reports, 59, 1925, is criticized in XXXIX Harvard Law Review, 489, 492, February, 1926, No. 4, as providing "an undesirable result in creating uncertainty as to the method of approach in cases involving acts by the vendor subsequent to delivery," where there is question whether such acts are part of a transaction in interstate commerce.
companies "to a uniform, national rule." (Western Union Telegraph Co. v. Boegli, 251 U. S., 315, 316, 1920.) A very notable statement as to the rule of construction to be applied to Acts of Congress was made by Chief Justice White in his opinion in this case. It was argued that the Act of Congress of 1910 should be rather narrowly construed, but he summarily disposed of this by saying that: "The proposition that the Act of 1910 must be narrowly construed so as to preserve the reserved power of the State over the subject in hand, although it is admitted that that power is in its nature Federal and may be exercised by the State only because of nonaction by Congress, is obviously too conflicting and unsound to require further notice." (Page 316.) He could be relied on for unhesitating support of Federal, as well as State authority, each in its proper field. To the same effect is the decision of Chief Justice White in Postal-Telegraph Cable Co. v. Warren-Goodwin Lumber Company, 251 U. S., 27, 1919, where he held that the validity of contracts with telegraph companies, stipulating for reasonable limitations of interstate rates, is not determinable by State law.

In Yazoo & Mississippi Valley Railroad Company v. Greenwood Grocery Company, 227 U. S., 1, 1913, he declared an order of a state railroad commission of Mississippi unconstitutional, because it unreasonably burdened interstate commerce. The order sought to compel interstate railroads, within 24 hours after arrival, to deliver freight, or to place the car containing it in an accessible place for the consignee of interstate shipments, without any allowance for justifiable or unavoidable delay. To the same effect is his decision in St. Louis & Southwestern Railroad Company v. Arkansas, 217 U. S., 136, 1910, in which the order of the Arkansas State Railway Commission was held unconstitutional, which required interstate railroads to supply freight cars within five days after the application of a shipper, disregarding proof of diligent effort to comply with the order.

That the original package doctrine is a convenient, but not a controlling test, and that it should not be applied in a mechanical way to determine when imported goods have lost their character as part of interstate commerce, was ex-
plained by the concurring opinions of Justice White in *Austin v. Tennessee*, 179 U. S., 343, 363, 1900, and in *Cook v. Marshal County*, 196 U. S., 261, 275, 1905, involving State statutes regulating the importation of cigarettes. In the majority opinion, Justice Brown placed the chief emphasis on “the size of the package,” (pages 355 and 359), as decisive of whether it is an original package. Justice White is careful to say that this question is determined “not only from the size of each particular parcel, but from all the other surrounding facts or circumstances, among which may be mentioned the trifling value of each parcel, the absence of an address on each, and the fact that many parcels, for the purpose of commercial shipment, were aggregated, thrown into and carried in an open basket.” (Page 364.) In *Cook v. Marshal County*, he again emphasized that one detail did not give a complete picture, saying that in *Austin v. Tennessee*, a small basket was used to hold the cigarettes, and in *Cook v. Marshal County*, no basket was used, but the small cartons of cigarettes were shoveled into and out of a railroad car (page 275).

Congress has power to prohibit the importation from abroad of films depicting a prize fight, according to the opinion of Chief Justice White in *Weber v. Freed*, 239 U. S., 325, 1915, sustaining the Act of Congress of July 31, 1912, (37 Stat., 240), on that subject, though the exhibition of the films, after importation, might be purely subject to state control.

POWER OF CONGRESS TO PROTECT INTERSTATE COMMERCE.

The Adamson Law, (Act of September 3, 5, 1916; 39 Stat., 721), establishing an eight-hour day as the basis of wages for railroad employees, was passed under circumstances of great national excitement. Early in 1916, the railroad brotherhoods demanded an eight-hour day, on

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"The Supreme Court expressly followed White's thought, in *Kirmeyer v. Kansas*, 236 U. S., 568, 573, 1915, when Justice McReynolds said, explaining the exact ground of the decision in *Austin v. Tennessee* and *Cook v. Marshall County*, that: "Looking at all the circumstances, this Court concluded" that the packages in which the cigarettes were shipped into the State were not original packages."
freight train service, without the reduction in wages that would have resulted in changing from the normal ten-hour working day, to the proposed eight-hour day.\textsuperscript{10} No agreement could be reached between the railway executives and the brotherhoods, and four hundred thousand trainmen voted to strike, beginning on Labor Day, September 4, 1916. Freight service on virtually all the railroads of the country would have been affected. President Wilson asked Congress to prevent the strike by enacting legislation, establishing the eight-hour day as the basis of wages. In his special message to Congress, read on August 29, 1916, the President explained what would happen if the trainmen struck: "Cities will be cut off from their food supplies, the whole commerce of the nation will be paralyzed, men of every sort and occupation will be thrown out of employment, countless thousands will in all likelihood be brought, it may be, to the very point of starvation, and a tragical national calamity brought on, to be added to the other distresses of the time, because no basis of accommodation or settlement has been found."

In accordance with the recommendation of the President, a statute was quickly passed on September 2, 1916, and was signed by the President on September 3 and again on September 5, to prevent an attack on the validity of his first signature, as September 3 was Sunday. A test case, Wilson v. New, was brought before the Supreme Court, and decided on March 19, 1917, 243 U. S., 382. Chief Justice White, speaking for the majority, sustained the Act as constitutional; four justices dissented.\textsuperscript{18} The Act provided that after January 1, 1917, eight hours was to constitute a day's work for the purpose of reckoning compen-

\textsuperscript{10} Principles of Railway Transportation, by Eliot Jones, p. 428 et seq. 1925.

\textsuperscript{11} The Messages and Papers of Woodrow Wilson, Edited by Albert Shaw, Volume One, page 295.

\textsuperscript{18} The grouping of the justices was unusual. The Chief Justice wrote the majority opinion, in which Justices Holmes, Brandeis and Clarke concurred without writing separate opinions. Justice McKenna concurred, but wrote a separate opinion. Justices Day, McReynolds and Pitney each wrote a dissenting opinion, and Justice VanDeventer concurred in the dissenting opinion of Justice Pitney, but filed no separate opinion.
sation for all railroad employees engaged in the operation of trains in interstate commerce, excepting certain railroads. The appointment of a commission was authorized, to observe the operation of the eight-hour day, during a period from six to nine months, and to report to Congress. Any reduction in the wages of employees within the Act, below the existing standard, pending the report of the commission, and for 30 days thereafter, was forbidden. (39 Stat., 721, 722.)

The Chief Justice, with the concurrence of five other members of the Court, held that the Act was a valid regulation of interstate commerce, because it is within the power of Congress to regulate the relations among themselves, of persons engaged in interstate commerce; he held, necessarily, that there is a direct connection, in the constitutional sense, between the wage scale of such employees and the commerce among the states, in which they are engaged. To establish this connection, by affirmative reasoning, the Chief Justice refers to the comprehensive body of statutory regulations, enacted by Congress, dealing, in great detail, with the business of railroad transportation. These enactments have been sustained as constitutional. In a situation where employers and employees, engaged in interstate commerce, cannot agree, threatening to stop all interstate freight service, Chief Justice White asked how could Congress have power to regulate, but no power to protect and preserve the movement of interstate commerce? (Page 350.) How can Congress have power to provide for adequate train service in interstate commerce, but no power to prevent all such service from being destroyed? (Page 351.) Dealing with objections, he acknowledges that an emergency cannot be made the source of power, but, in a typical antithetical sentence, he says that although "... an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exertion of a living power already enjoyed." (Page 348.) The Act is assailed as unwise, but this, he says, is not reviewable by the Court. "The highest of judicial duties is to give effect to the legislative will and in doing so to scrupulously abstain from permitting subjects which are exclusively within the field of
legislative discretion to influence our opinion or to control judgment." (Page 359.) He says further in effect, that the Act did not interfere with freedom of contract, but dealt with a situation where employers and employees could not agree upon a contract. (Page 340.) It was argued that the Act constituted a taking of property by compelling the railroads to pay increased wages against their will, but the Chief Justice goes far in sustaining the power of Congress to deal with interstate commerce, saying, in effect, that both employers and employees dedicate their property and services to society, subject to other constitutional safeguards, when they enter a calling so vitally affecting public welfare as transportation in interstate commerce. (Page 352.) The reasoning and the conclusion were carefully guarded in the opinion of the Chief Justice and lie within a somewhat narrow compass.20

20 Much of the criticism of the majority opinion centers on the unwisdom of the Statute. Mr. Frank W. Hackett, in 52 Am. L. Rev., 23, 29, 30, (1918), asks: Was the Act the "sole remedy to which Congress can resort," and then upon this ground criticizes the decision of the majority, quoting a passage from Chief Justice White's opinion, discussing the power of Congress to pass the Act. In his keen and discriminating analysis of the opinions in Wilson v. New, Professor Thomas Reed Powell says: "The practical wisdom of the majority in Wilson v. New in regarding the facts of the situation with which the Adamson Law dealt, can hardly be open to question.... Any other answer to the particular problem before the Court than that given by the majority would have been so devoid of simple common sense that it would inevitably have shaken the confidence which our supreme judicial tribunal deservedly enjoys." (University of Pennsylvania Law Review, Volume 65, 1916-1917, 607, 615.) See also the Supreme Court on the Adamson Law, by C. W. Bunn, 1 Minn. Law Review, 395, 1917; The Adamson Law Decision, by C. K. Burdick, 2 Cornell Law Quarterly, 320, 1917; The Inarticulate Major Premise of the Adamson Act by A. M. Kales, 26 Yale Law Journal, 519, 1917.


21 The Supreme Court, speaking through Mr. Justice Holmes, puts the decision on a somewhat limited ground as follows: "In Wilson v. New it was decided that the Act was within the constitutional power of Congress to regulate commerce among the States; that since by virtue of the organic interdependence of the different parts of the Union, not only comfort but life would be endangered on a large scale if interstate railroad traffic suddenly stopped; Congress could meet
The student of Justice White's opinions will find much of interest in his dissent in Northern Securities Company v. United States, 193 U. S., 197, 364, 1904, with which Chief Justice Fuller, and Justices Peckham and Holmes concurred. The Northern Securities Company, a New Jersey corporation, was organized to take over the stock of the Northern Pacific and the Great Northern Railroad Companies, competing railroads. The subscribed capital of the Securities Company was $30,000 and the authorized capital was $400,000,000, just sufficient to cover the exchange value of the stock of the two companies. The Supreme Court held that the combination of the two companies was a monopoly, within the Sherman Anti-Trust Act, that its mere existence was a menace to freedom of commerce, and enjoined the Securities Company from voting the stock of the two companies, and enjoined the two companies from paying any dividends to the Securities Company. The majority held, in effect, that the acquisition of the stock alone constituted a restraint of interstate commerce, though no affirmative, monopolistic act was proved. Justice White, in his dissent, reasons that the case involved only the ownership of stock, which, as the Court has decided in United States v. E. C. Knight Company, 156 U. S. 1, is not interstate commerce at all. "The fathers founded our government," he says, speaking of the Constitution, "upon an enduring basis of right, principle and limitation of power." (Page 397.) In this three-fold conception, the elements—

the danger of such a stoppage by legislation and that in view of the public interest, the mere fact that it required an expenditure to tide the country over the trouble would not of itself alone show a taking of property without due process of law. It was held that these principles applied no less when the emergency was caused by the combined action of men than when it was due to a catastrophe of nature, and that the expenditure required was not necessarily unconstitutional because it took the form of requiring railroads to pay more, as it might have required the men to take less during the short time necessary for the investigation ordered by the law." Ft. Smith & W. R. R. Co. v. Mills, 253 U. S., 206, 207, 1920. Justice Sutherland speaks of the law being a "temporary measure," in Adkins v. Children's Hospital, 261 U. S., 525, 551. 1922.

right, principle and limitation—are blended; no one part predominates. The conception of the Constitution as a great restraint, a prohibiting or nullifying principle, instead of a source of political energy, is false. He made this clear in one of his rare public addresses, when, on October 27, 1914, he said before the American Bar Association, in commemorating the 125th Anniversary of the Supreme Court of the United States, "... there is great danger, it seems to me, to arise from the constant habit which prevails where anything is opposed or objected to, of resorting without rhyme or reason to the Constitution as a means of preventing its accomplishment, thus creating the general impression that the Constitution is but a barrier to progress instead of being the broad highway through which alone true progress may be enjoyed." He finds, therefore, that unconstitutional action, in any sphere, inevitably betrays itself by inconsistency, by a lack of harmony among the conceptions of right, principle and limitation. Where a principle is sought to be applied, it may be that a right guaranteed by the Constitution will be invaded, because a limitation upon the principle has been ignored. We find him, therefore, saying in this case: "Indeed, the natural reluctance of the mind to follow an erroneous principle to its necessary conclusion, and thus to give effect to a grievous wrong arising from the erroneous principle, is an admonition that the principle itself is wrong. That admonition, I submit, is conclusively afforded by the decree which is now affirmed. Without stopping to point out what seems to me to be the confusion, contradiction and denial of rights of property which the decree exemplifies, let me see if in effect it is not at war with itself and in conflict with the principle upon which it is assumed to be based." (Page 372.) He then points out an inconsistency in that the Court discovers a conspiracy to restrain interstate commerce by the mere ownership of certain stock, and yet directs the return of the stock to the conspiring stockholders. (Page 373.) He finds an unconstitutional exercise of power in the attempt, under the Act, as construed by the Court, to restrain not merely

23 XXXIX American Bar Association Reports, 1914, page 119.
what an owner may do with his property, which government may regulate, but to limit the quantity and kind of property which may be acquired and owned, which is beyond governmental control in this case. The difference between these two, he says, is the difference between constitutional government and absolutism. (Page 399.)

Justice White, speaking for the minority, reasons that the decision in United States v. E. C. Knight Company, is decisive of the issue in Northern Securities v. United States. It is true that the acquisition of stock was involved in both cases, and both the sugar refineries and the railroads were engaged in trade—the refineries in the sale of sugar and the railroads in the sale of transportation as a commodity. But the character of the business in the Northern Securities Case would seem to differentiate it from the Knight Case. Transporting commodities is commerce, and the physical property of the railroads in the Northern Securities Case was necessarily dedicated to such transportation from one state to another. But the Government did not sufficiently prove that the sugar refineries, in the Knight Case, were clearly connected with interstate commerce, even conceding that they were combined for the purpose of dominating commerce in sugar.

For a discussion of the ethical foundations of ownership see Cronin, Science of Ethics, Volume II, p. 119. 1922. See also "Note on Fundamental Rights, Including Property," by Professor James S. Easby-Smith, LL. D., in Selected Chapters from Blackstone, page 11.
MILITARY PERSONNEL IN STATE COURTS

By CAPTAIN ELBRIDGE COLBY.

A FEDERAL statute declares that when any revenue officer finds himself faced by a civil suit or criminal prosecution in any State court for "any act done under color of his office . . . the said suit may, at any time before the trial or hearing thereof, be removed for trial into the Circuit Court next to be holden" in the Federal district where the suit is pending, simply upon the petition of the defendant to the Circuit Court. (Sec. 67, Act of July 13, 1866; 14 Stat. 171; R. S. 643.)

The days of State Sovereignties were passed. The Civil War was over. The Federal Government had been proved supreme. The days of the Worcester v. Georgia, 6 Peters 534, decision of John Marshall unenforced by the Chief Executive were done and gone. Federal revenue agents were penetrating the mountainous regions where moonshine is in the woods as well as in the sky. If these federal officers got into trouble, they could not expect fair trials from folk who considered them meddling "foreigners." The authorized officers of the Washington government had to be sustained and protected in enforcing revenue laws just as well as nowadays in enforcing prohibition laws. (See "Double Jeopardy and Prohibition" by E. Colby, in American Review, 643.) And as a matter of fact today this protection is extended them by the simple process of giving prohibition enforcement agents commissions as internal revenue officers.

Before long the matter came to an issue. A "revenuer" who had killed a man in Tennessee was charged with murder under the laws of that State. His petition for removal of the case to the Circuit Court went eventually to the Supreme Court of the United States, where the constitutionality of the statute was upheld in the year 1879. (Tennessee v. Davis, 100 U. S. 257). In this, the leading case, Mr. Justice Strong included in his opinion the following passages:

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"As was said in Martin v. Hunter, 1 Wheat. 363, 'the general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers.' It can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offense against the law of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection,—if their protection must be left to the action of the State court,—the operations of the general government may at any time be arrested at the will of one of its members . . . . We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme."

The problem which then arises is whether or not this protection of federal officers against local prejudices is extended to others than the revenue agents. Are not others who hold their special status as employees of the Washington government equally liable to suffer at the hands of local sentiment as reflected in a local sheriff, local prosecuting attorney, and local jury?

In Nebraska, some years ago, a prisoner escaped from the guard house at Fort Crook and was only caught up with when some three miles off the military reservation. Members of the guard pursuing him under orders called to him to halt, and when he failed to obey, shot him dead. The two soldiers were tried by court-martial for manslaughter and acquitted. The civilian county sheriff thereupon seized them on the charge of murder. The plea of previous trial was swept aside on the ground of separate jurisdictions. Moore v. Illinois, 14 How. 13; U. S. v. Clark, 31 Fed. 710; State v. Rankin, 4 Cold. (Tenn.) 145; Coleman v. Tennessee, 97 U. S. 506; Bennett, Military Law and Courts Martial, pp.
100-102. But the Circuit Court for the District of Nebraska granted the petition for the release of the two soldiers of the guard (*In re Fair*, 100 Fed. 149), saying that "an act done by an officer or agent of the United States in and about a matter solely within federal control, and in pursuance of an authority given by the laws of the United States, is not an offense against the laws of the State." (Citing *Tennessee v. Davis*, 100 U. S. 257; and *In re Neagle*, 135 U. S. 1.)

The court added: "Neither can it be denied that, when an officer or agent of the United States is held in custody by the process of a state court for an act done within the authority conferred upon him by the laws of the United States, the United States government may protect itself by procuring the release of such officer through its judicial department." (*In re Fair*, 100 Fed. 149.)

It was later said, in another case, "a court or judge of the United States has power to issue a writ of habeas corpus on petition of the United States for the purpose of an inquiry into the cause of detention of a prisoner held by a State to answer to a criminal charge, where it is alleged by the petitioner that the act charged as a crime was committed by the prisoner in the performance of his duty as a soldier of the United States; and it has authority to determine summarily as a fact whether or not such allegation is true, and, if found to be true, to discharge the prisoner on the ground that the State is without jurisdiction to try him for such act." (*U. S. v. Lipsett, ex parte Gillette*, 156 Fed. 65.)

The tendency all the time was to secure simple justice, to protect the federal government in the enforcement of its laws through its officers, and to protect those officers from local prejudices. Statutory enactments gave temporary relief and certain summary rights. (R. S. 752, 753, 761.) But it took a serious revision of military law to give a general and correct protection.

This principle enunciated by Judge Munger in the *Fair* case has been adopted into statutory enactments, and it is now provided that any civil or criminal case commenced in a State Court "against any officer, soldier, or other per-
son in the military service, on account of any act done under color of his official status, or in respect of which he claims any right, title, or authority under any law of the United States" may be removed for trial into the United States District Court of that region. (Article of War No. 117; Act of August 29, 1916, 39 Stat. 619; Act of June 4, 1920, 41 Stat. 759.)

Sometimes statutes precede the court decisions which make the law certain, as in the case of the "revenuer." (Tennessee v. Davis, 100 U. S. 257.) Sometimes the court paves the way by establishing the needed principle (In re Fair, 100 Fed. 149 and Article of War No. 117, ut supra.), or indicates the need of general or special legislation. (Cf. Regina v. Keyn, L. R. (1905) 2 K. B. 391, with 41 & 42 Vict. c. 73. Cf. People v. McLeod, 25 Wend. 483, 26 Wend. 663, with Act of August 29, 1842, R. S. 7,534, 2 Moore's Digest of International Law, 24-30. Cf. The Charming Betsy, 2 Cranch 64, with Act of January 31, 1805, 6 Stat. 56. See also The Mentor, 1 C. Rob. 179, and The Acteon, 2 Roscoe 209, 211.) Sometimes the court stretches statutes and treaties to the limit in order to do substantial justice. (Techt v. Hughes, 229 N. Y. 222.) But often the court is powerless in the absence of statute, Regina v. Keyn, L. R. (1905) 2 K. B. 391; or in the face of statute. (Ex parte Larucea, 249 Fed. 961.)

The object always is to do justice. The object of legislation and of court proceedings is just that. The Fair and Tennessee v. Davis cases indicate the liability of friction between local community opinion and persons connected with the federal government. A federal judge in California was publicly threatened. A deputy marshal assigned to protect him shot and killed the sworn enemy when that enemy in the presence of the judge reached into a bit of luggage where a loaded pistol or revolver lay ready to hand. And the federal government offered removal. A colored soldier in the regular army was shot and killed in a southern town and the white slayer was rapidly freed in court proceedings marked by many references to the years from 1861 to 1865 and to "our sainted and beloved commander, General Robert E. Lee."
There are many vicinities where the uniform of the United States Army is anathema to the civil populace, and feeling runs as bitter as between town and gown in mediaeval university days.

As far as the interests of real justice are concerned, what difference does it make who is the defendant and who the accuser, soldier or civilian? The same community sentiment, governed by right in some cases, and swayed by prejudices in others, rules the psychology of the court room and the jury box. It is submitted that the right of removal should apply equally whether the matter at issue arise from an official or from a personal act—provided it be grave enough—and whether the soldier or the civilian be the defendant.

There has been in years past a tendency to attempt to throw a mantle of protection about soldiers of the nation somewhat similar to the right of trial by ecclesiastical court once provided for members of the clergy. It has been felt that the apparent "double jeopardy" involved in the possibility of two trials for the same act as offenses against two separate jurisdictions (Moore v. Illinois, 14 How. 13; U. S. v. Clark, 31 Fed. 710; Coleman v. Tennessee, 97 U. S. 506; In re Stubbs, 33 Fed. 1012; In re Fair, 100 Fed. 149; 3 Op. Atty. Gen. 749; 6 Op. Atty. Gen. 413; Dig. Op. J. A. G. ed. 1912, pp. 168-169), should be done away with. In the Philippine Islands a soldier on sentry duty shot and killed a civilian. After trial and acquittal by court-martial, he was brought before a civil court on the charge of murder. The case went to the Supreme Court of the United States, boosted along through voluntary contributions for counsel and court fees made by army personnel. The soldier was freed by the Supreme Court on the plea of previous trial because the Philippine Court and the court-martial derived from the same jurisdiction, that of the federal government, through legislative acts of the same body, the Congress of the United States. (Grafton v. U. S., 206 U. S. 333.) Such was the point upon which the case turned. It was stated in addition, however, that had the two courts been one a court-martial and one a State court within the Continental limits of the country, the plea would
have been denied and that a soldier can be tried by both state and military courts for the same act. This, of course, was dictum in this particular case, sound though it might be in general and a modern reminder of the doctrine governing Moore v. Illinois and similar cases. The re-statement of the principle, however, had the effect of checking for a time the agitation for the creation of special military privilege.

It had been felt that, since members of the army are subject to trial by courts-martial with personal rather than territorial jurisdiction over persons in the service (Dig. Op. J. A. G., 1912, pp. 510, 1072), the army should be left to discipline its own members, even for non-military offenses. Its members have a peculiar and different status from ordinary citizens. (In re Morrissey, 137 U. S. 157; In re Grimley, 137 U. S. 147.) Its courts-martial are lawful tribunals. (Graften v. U. S., 206 U. S. 333, 347.) "The whole proceeding from its inception is judicial. The trial, findings, and sentence are the solemn acts of a court organized and conducted under the authority and according to the prescribed forms of law. It sits to pass upon the most sacred questions of human right that are ever placed on trial in a court of justice; rights which, in the very nature of things, can neither be exposed to danger nor entitled to protection from the uncontrolled will of any man, but which must be judged according to law. And the act of the officer who reviews the proceedings of the court, whether he be the commander or the president, and without whose approval the sentence cannot be executed, is as much a part of this judgment, according to law, as is the trial or the sentence." (11 Ops. Atty. Gen. 19, 21.)

The military service is very jealous of its good name and of the good name of its members. It tries officers and soldiers for conduct unbecoming an officer and gentleman and for conduct of a nature to bring discredit upon the military service, even so trying retired officers and soldiers. (Articles of War No. 95 and No. 96; Manual for Courts-Martial, U. S. Army, 1921, p. 462.) It is a matter of common practice to prefer charges under these heads against military personnel who may have been arrested, tried, and
convicted by civilian authorities for "downtown" offenses of a non-military nature. There exists a tendency in the army to attach as promptly as possible in any cases where the military and the civilian law might have concurrent jurisdiction. (Dig. Ops. J. A. G., ed. 1912, p. 170.) It is desired that in general army men should be tried by army courts.

In cases arising in which soldiers and civilians are concerned, the army—with its perfectly valid courts, its deeper understanding of soldier psychology—would wish to have exclusive jurisdiction. Under existing legislation (Article of War No. 117, cited above), it is possible to secure removal from State to Federal jurisdiction of military defendants only. It is also not possible to try civilian defendants by courts-martial except in a limited class of cases concerned with persons connected with the army or involved in war offenses like spying. (Morgan, Jurisdiction over Non-Military Persons, in 4 Minnesota Law Review 79.)

It has been suggested that all cases arising between soldiers and civilians, whoever might be the defendant, should be transferred to courts-martial just as the revenue officer cases may be transferred to federal district courts. Such a procedure, however, might be as unfair to the civilians as a trial before a prejudiced jury would be today to a soldier. The civilian would not be acquainted with military court procedure. And it might seem as if the soldier were trying to secure trial for himself before his friends.

Justice is all that is desired. Justice would be secured by removal to a "neutral" court, by the removal of all cases in which soldiers and civilians are concerned to the federal district courts, whoever might be the defendant. Such removal to a federal court would carry with it the right of transfer from one federal district to another, and the assurance of an absolutely fair judgment. Such a right of removal now exists by virtue of statutes in cases where the military man is the defendant. It does not exist where the military is involved but the defendant is a civilian. Yet, when prejudice arises between town and fort, between soldiers and adjacent civilian communities, it really makes
no difference as far as real justice is concerned which one may be the defendant. Equally, the removal would be desirable. Such removal cannot now be affected under existing law. The problem is not one for the courts but rather one which as the legal man would say "must be left to the determination of the political departments of the government." New legislation will be necessary. And such legislation would plainly be in the interests of justice for those citizens who have taken solemn oaths to support the Constitution and to defend the nation.

If such legislation were enacted, it would not be abused. The present statute giving the right of removal when the military man is the defendant is but rarely invoked. It is only called into play when the possibility of a fair trial seems but slight in the state courts. The army would not wish to antagonize the people, dependent upon them as it is for financial support through legislative appropriations, and would only invoke the force of such a statute in cases where a civilian is defendant for a tort or a crime against a soldier in which it palpably appears to the responsible military officials that justice may not be easy of attainment.
This is a translation, one suspects, of the French translation rather than of the Spanish original, both of which were published earlier in the same year, of a book which well deserves the great popularity it has received wherever its subject-matter is of general interest. It would perhaps receive even greater popularity in its English dress, were it not for its propagandist origin. The present volume, as its fly-leaf indicates, was published by the American Foundation; there is "an introductory word" entitled "Looking at Things Internationally" from the pen of Edward W. Bok, and even the title of the book has been transformed in the process of translation from "El Tribunal Permanente de Justica Internacional" to "The World Court." There is no reason, however, to infer that the author is responsible for these features of the undertaking beyond permission to print; they are not a part of the French translation.

Students of law who keep abreast of their profession will need no introduction to the author of this work. He is a man of great distinction both at home and abroad and his titles to eminence are many and varied. He could have written authoritatively enough upon the present subject as Professor of International Law at the University of Havana or Member of the American Institute of International Law or Member of the Permanent Court of International Arbitration at The Hague or Vice-President of the Institute of International Law, that select body of outstanding jurists of international reputation, but greater interest if not greater weight is attached to his book by reason of the fact that he himself is a member of the court which he is describing.

The book itself is divided into sixteen chapters. Chapter I traces in the veriest of outlines the historical antecedents of the Court, and although these are more fragmentary than one would wish, perhaps the author was
mindful of the egg origin of the Trojan War. There is included here LaFontaine's table, so inspiring in these days fresh with the memory of the World War, showing the triumphal march of arbitration from one every two years in the period 1789-1840 to over $4\frac{1}{2}$ a year in the period 1881-1900.

Chapter II outlines the theories and projects of statesmen and writers from Pierre Dubois to the present, including our own James Brown Scott, who in season and out of season, in press and forum, "in all the methods within his reach, visible and invisible, has been an indefatigable propagandist of the idea of international justice, and has tirelessly prepared such formulas for putting it into operation as were adapted to the actual situation at each moment." Collective proposals are reviewed in the following chapter, wherein among others are mentioned the American Society for the Judicial Settlement of International Disputes, the American Society of International Law, and the American Institute of International Law.

The Hague Conferences of 1899 and 1907 and the Central American Court of Justice are discussed in Chapters IV and V, while the Paris Conference and the Treaty of Versailles and the Advisory Committee of Jurists, the Council and the Assembly of the League of Nations constitute the subjects of Chapters VI and VII. These four chapters trace the idea of judicial settlement from the First Hague Conference to the signature of the Statute of the present court, and the reviewer knows of no account in English which accomplishes this with such accuracy and completeness in so brief a space. Chapter VII particularly is illuminating in showing the stages through which the plan of the Advisory Committee passed before it emerged as the Statute of the Court.

The most valuable part of the book, however, begins with Chapter VIII. Herein is described the method of election of the judges, their qualifications and their rights and duties. No important detail escapes the searching eye of the distinguished author. The advantages and disadvantages of life-tenure, the possibility of reelection, diplomatic privileges, salaries, pensions, the right to hand down dis-
senting opinions and honors and decorations are some of the topics discussed.

The organization and the working of the Court are treated in Chapter IX. Much of this might be expected to be technical, but the author explains the operation of the court in a popular fashion, since the rules of the Court as well as the Statute are contained in an Appendix at the end of the volume.

An interesting question is expounded in Chapter X, namely the financial situation of the Court. The money necessary to pay the bills of the Court is now collected from 55 nations, all members of the League of Nations, while only 36 have actually ratified the protocol of signature of the Court's Statute. As Doctor Bustamante points out, "a nation may be a member of the League without joining the Court or being bound by it," and yet "these nations that neither approve of it nor want it nevertheless are obliged to help to maintain it. They are forced to contribute to its financial support, although they make no use of it."

The insecurity of this arrangement is striking, he says.

"Two radically different institutions are financially joined—the League of Nations, essentially a diplomatic and political organ, in spite of its varied functions in other fields, and the Permanent Court of International Justice, essentially a judicial organ. Any tempest that beats down on the League will inevitably react on the Court. Suppose another general war were to break out in Europe, lasting for several years, and ending with a new peace treaty, which, by the familiar hazard of conflict, might not be influenced by the same considerations that ruled the Paris Peace Conference: all the tremendous progress implied in world-wide justice might vanish, carried down by the destruction of another institution, more easy to overwhelm, but perhaps not less lamentable."

Having stated the difficulty so succinctly, the author has not left us without a solution, and one that does credit to his ingenuity. The remedy, he says, lies in the endowment of the Court. "With the income from its own capital covering all its expenses, it could dispense justice to all the
world—justice, which, according to the phrase used in the constitutions of certain American republics, ought to be free to all who need it.” The endowment might be supplied by annual contributions that need never be burdensome, in that as the sum capitalized increased, the amount of League revenues allotted to the regular expenses of the Court would decrease, until it disappeared entirely.

Chapter XI deals with the jurisdiction of the Court. By its Statute, the Court is open to members of the League of Nations and to states mentioned in the Annex to the Covenant, the Council deciding the terms upon which the Court shall be available to non-members of the League. The Council has done this by its resolution of May 17, 1922, according to which virtual acceptance of the Covenant of the League is required. The Annex to the Covenant divided the nations into two groups, the first, of original members of the League, and the second, of those invited to accede to the Covenant. Article 34 of the Court’s Statute, in mentioning that the Court is open also to the states mentioned in the Annex to the Covenant, seems to refer to this second group. Consequently, it was not surprising that, during the recent debate in the United States Senate, the question was raised, whether the United States did not cease to become an original or prospective member of the League when it failed to ratify the Covenant and entered into separate treaties with the Central Powers, and therefore become subject to the above-mentioned resolution of the Council. A discussion of this point by the author of the present volume would help to clarify the question.

This chapter also points out, a fact which is frequently lost sight of, that compulsory jurisdiction can and has been granted in particular matters for definite states, apart from the optional clause, by special treaties.

Procedure and judgments and sanctions are the subjects of Chapters XII and XIII, and the reviewer has no comment to make upon them which would not take him too far afield.

Chapter XIV discusses the advisory function of the Court and Chapter XV reviews the work of the Court both in judgments and advisory opinions. Even the Court’s severest critics have found no fault with the work of the Court to
date. They may have railed at the practice of giving advisory opinions, but they have not impeached the integrity of the judges. They may have lamented the intimate connection between the Court and the League, but they have cast no aspersions upon the uprightness of the judges. Chapter XIV contains the discussion of the interesting difference of opinion in the Court itself with regard to an expression in Article 14 of the Treaty of Versailles concerning the rendering of advisory opinions. John Bassett Moore held that the English text of the treaty did not require the rendering of advisory opinions when requested in the proper manner, but left the rendering to the discretion of the Court. In this he was upheld by a majority of the Court in the Eastern Carelia matter. Judge Bustamante holds that the French text of Article 14 leaves no option to the Court, and the reviewer, while deploring the resultant situation, believes that his reasoning is sound. There are ten pages added to Chapter XV which do not appear in the French and Spanish editions, due to subsequent actions of the Court.

Near the end of his volume, which contains a rather complete bibliography in the Appendix, Judge Bustamante allows his patriotism to get the better of him, when apropos of the expediency of regional courts, for instance, in America or Central America, he boldly proposes Havana as an alternate seat of deliberations for the Permanent Court of International Justice. However, one can not lay down his book without having become firmly convinced that in the establishment of the Court a great step has been made in the development of law which, as Mirabeau tells us, will one day rule the world.

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This volume is incorrectly titled. Of its 330 pages only about 60 pages refer to the martial law, domestic disturbances, and riot duty which might be covered in a book so named. The major part of the text is taken up with a
primer in international law and belligerent occupation for staff officers and commanders, for whose instruction the volume was specifically prepared. Indeed the most valuable part of the book consists of the 130 central pages which deal with the subject of military government.

Dealing with this subject the author fails to distinguish between administration of civil affairs, *flagrante bello*, *nondum cessante bello* and *post bellum* by virtue of treaty provisions. In spite of the fact that he confuses real belligerent occupation whose motive is military action, armistic occupions whose military character is passive, and continuing occupations whose motive is civil government as in Cuba, Porto Rico, Manila, California, New Mexico, etc., the confusion seems one of terminology only. The facts are there in detail, and this portion of the volume gives a fine analysis of the measures adopted by the United States in Porto Rico, Cuba, and Germany, making available facts and data, not only previously difficult of access, but immensely valuable to military officials liable to have similar duties thrust upon them. Supplementing this volume with General H. A. Smith's little brochure on "Military Government," which covers belligerent occupation as practised in Mexico, the field is adequately covered for any reader.

It is very gratifying to find a writer in these days laying emphasis, as does Major Dowell, on the fact that laws of war are actually advantageous to armies, and their enforcement is valuable for the maintenance of discipline and military efficiency. Too frequently the tendency has been to imply that those laws are disliked by the fighters and are liable to be cast aside. They are actually desirable, and are welcomed as fully as any athletic team welcomes the clarity and certainty of playing any game according to established rules. In the American Journal of International Law, some time since, Admiral Rodgers emphasized this point. The Germans emphasized it still more when, failing to find a lawless submarine commander, they discovered, hailed into court, and punished subordinates who had participated in a deed which "threw a blot upon the German Navy."

We cannot, however, give this volume unqualified ap-
proval, excellent and valuable as it is in many respects. It lacks those citations and references necessary to any scholarly work and desired by serious students of the subject. It seems to depend too exclusively on a single treatise in international law, that of Lawrence, which—excellent as it may be—does not rate with the major British and American works, those of Hall and Hyde. It seems to betray an anti-Teutonic animosity in its sweeping accusations that all four of the central powers violated the requirement that a notice of declaration must precede warlike acts, in its eagerness to compare French and German indemnity payments of 1871 and 1919, and in its eagerness to condemn Germany's gas cloud attack at Ypres as a violation of the Hague agreement not to use projectiles containing gases. It would have been preferable to use the Bassett, not the Parton, life of Andrew Jackson. When he says “the decision of the arbitral tribunal is binding,” he speaks in general rather than legal terms, for although most arbitral decisions have been accepted, there have been rejections, a notable list of the valid causes of which is given in Moore's brief in the Nicaragua-Honduras brief of 1920. When he says that international law must be ascertained by municipal courts and applied where necessary, he forgets the case of The Caroline, 2 Moore Digest 24, the Larrucena case, 249 Fed. 961, the Vanderventer v. Hanke Transvaal, (1903) Sup. Ct. 401, the Jager v. Attorney General of Natal, L. R. (1907) App. 326, and the Regina v. Keyn cases, 3 T. R. 79.

In spite of these difficulties which will inevitably arise in the mind of the lawyer reader, the book by Major Dowell has done a distinct service in summarizing the facts involved in the Dorr Rebellion, the Kansas disturbances of 1854-58, the labor strikes of 1877, the Chicago railway strike of 1894, the San Francisco earthquake emergency of 1906, and the West Virginia troubles of 1921. His presentations are clear and all essential documents and papers that passed are neatly used... In his analysis of the conduct of the American Forces in Germany, Major Dowell has surpassed the work of his chief, General Smith.

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NOTES ON RECENT CASES

ADKIRALTY—State Workmen’s Compensation Acts.

_Millers’ Indemnity Underwriters v. Brand_, 46 Sup. Ct. Reporter 194, decided by the United States Supreme Court February 1, 1926, was a suit to recover under the Texas Workmen’s Compensation Law for the death of the plaintiff’s brother, a driver suffocated while at his work sawing off the stumps of an abandoned set of ways which were obstructing navigation 35 feet from the shore in the Sabine River, a navigable stream. The statute provided that the board created by it was to be the sole source of compensation, unless the employee should previously give it definite written notice to the contrary. No such notice had been given in this case. The defendant contended that the tort was maritime in its nature and, therefore, that the rights and liabilities under it could not be changed by the State.

Granting the maritime character of the tort, the Supreme Court affirmed the right of the State to exclude the jurisdiction of admiralty in such matters of purely local concern. Mr. Justice McReynolds stated the ratio decidendi of the case in the following passage from _Grant Smith-Porter Co. v. Rohde_, 257 U. S. 469, involving injuries to a carpenter at work on an unfinished vessel lying in navigable waters within the State of Oregon:

"Regulation of the rights, obligations and consequent liabilities of the parties, as between themselves, by a local rule would not necessarily work material prejudice to any characteristic feature of the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations."

Cases in which the Supreme Court has held that the injured worker’s activities had a direct relation to navigation or commerce, and that the Admiralty jurisdiction was therefore exclusive are: _Great Lakes Dredge & Dock Co. v. Kierelewski_, 261 U. S. 479 (1923), where the workman was thrown from a floating scaffold while repairing a scow moored in the Buffalo River; _Washington v. Dawson & Co._, 264 U. S. 219 (Feb. 1924), involving injuries to stevedores, and holding unconstitutional the Act of Congress of June 10, 1922, 42 Stat. 634, which by amendment of Judicial Code, sections 24, 256, undertook to permit application of workmen’s compensation laws of the several states to injuries within the Admiralty jurisdiction, excepting the masters and crews of vessels; _Gonalves v. Morse Dry Dock Co._, 266 U. S. 171 (Nov. 1924), where the explosion of a blow torch injured a mechanic working aboard a steamer in floating dock; _Robins Dry Dock Co. v. Dahl_, 266 U. S. 449 (Jan. 1925), where scaffolding broke and precipitated workmen into the hold of a vessel being re-
paired in floating dock. The opinions in all these cases were written by Mr. Justice McReynolds.

The fact that the Workmen's Compensation Acts usually place recovery on a contractual basis, by giving both employers and workmen the option to accept or reject it, brings all these cases within the fundamental rule that in contract matters admiralty jurisdiction depends upon the nature of the transaction, rather than on locality, as in torts. Waring v. Clarke, 5 How. 441, 459; Phila., Wilmington & Baltimore R. R. Co. v. Phila. Towboat Co., 23 How. 209, 215; The Propeller Commerce, 1 Black. 574, 579; The Plymouth, 3 Wall. 20, 33; Leathers v. Blessing, 105 U. S. 626, 630; Martin v. West, 222 U. S. 191, 197. Cf. Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 59.

In Washington v. Dawson & Co., supra, Mr Justice Holmes declared himself unsatisfied with the decisions taking injuries to a stevedore while unloading a vessel out of the operation of the State statute, as in Southern Pacific Co. v. Jensen, 244 U. S. 205, and Mr. Justice Brandeis, in a vigorous dissenting opinion, declared that the relations between an independent unloading contractor and his stevedore, could not in any case, "mar the proper harmony and uniformity of the assumed general maritime law in its interstate and international relations." He also adverted to the practical impossibility of framing a Federal compensation law fitted to the varying economic needs incident to the diversity of conditions in the several States.

The rule seems well settled, however, that if the workman is injured while on a vessel unloading it or even on a completed vessel in floating dock, the State compensation law cannot apply, such presence being considered as having a direct relation to navigation and commerce.

B. C.


An interesting decision has been handed down, 3 Fed. Rep. 2nd Series 771, under the name of Page et al v. United Fruit Co., decided in the Circuit Court of Appeals. The plaintiff, while a passenger on the defendant's railroad operating in Costa Rica, Central America, was seriously injured through the negligence of the defendant's agents, for which injuries he instituted an action in the United States District Court of Massachusetts and there received a favorable verdict. On motion to set the verdict aside, a hearing was had, and the court sustained the motion. The plaintiff died at this point in the proceedings, and the case was thereafter continued by the administrators. This writ of error was brought by the latter for setting aside their verdict and assigned three errors for reversal. The court after thoroughly reviewing the case decided that the points were well taken and reversed the lower court's holding. On petition of the defendants for rehearing, the principal ground urged in support was that under the law of Costa
Rica the right of action did not survive, and consequently the administrators of the plaintiff's estate were improperly admitted to prosecute the cause. The petition was denied, the court saying: "The right to revive the action is not affected by the fact that the plaintiff received his injuries in Costa Rica. The action having been brought in the Massachusetts district, the right to revive it is governed by the law of Massachusetts, and not by that of Costa Rica."

This at first glance may seem to be an incorrect statement of the principle of Conflict of Laws. The paramount question presented here is, which law of revivorship applies, that of Costa Rica or that of Massachusetts, the forum of the action. It is well settled that the place where a tort is committed is the only jurisdiction competent to determine the nature and extent of rights and liabilities to be attached thereto, while the lex fori alone may control the remedies for those rights. *Hoadley v. Northern Transportation Co.*, 115 Mass. 187; *Male v. Roberts*, 3 Espinassee 163; *Millikin v. Pratt*, 125 Mass. 374. This is fundamental in the common law and universally recognized. Says Story in his "Conflict of Laws," page 747: "The doctrine of the common law is so fully established on this point that it would be useless to do more than to state the universal principle which it has promulgated; that is to say, that in regard to the merits and rights involved in actions the law of the place where they originate is to govern; 'in ius quae spectant decisoria causae, et litis decisorium, inspiciuntur statuta loci ubi contractus fuit celebratus.' (Boullinois Observ. 46 p. 462.) But the forms of remedies and the order of judicial proceedings are to be according to the law of the place where the action is instituted without any regard to the domicile of the parties, the origin of the right, or the country of the act." Reiterating this doctrine are eminent foreign jurists: Bartolus, Comm. ad Cod. Lib. 1 tit.; Strykins; Demoulin, 1 Des Emergion Traite des Assur.; Rodenberg, De Dio Stat. tit. 2; Hertius, 1 Herti Opera de Collis.; Voet, and innumerable cases, among which are *De la Vega v. Vianna*, 1 B. & Ad. 284; *Bullock v. Caird*, 10 Q. B. 276; *Le Roy v. Beard*, 8 How. 451; *Hamilton v. Shoeberger*, 47 Iowa 385; *Mineral Point R. R. v. Barron*, 83 Ill. 355; and *Townsend v. Jemison*, 9 How. 407, in which Mr. Justice Wayne reviews the authorities.

While this proposition, as such, is unquestioned and universally established in our courts, the difficulty arises in its application. To determine precisely whether the particular matter in question is a matter of right, or one of remedy is sometimes difficult. Judge Story in the work before referred to cites the case of *Milan v. Fitz-James*, 1 Bos. and Pall. 138, in which a delinquent contractor was discharged from arrest in England—where the arrest of delinquent contractors was permitted—because by the law of the place of contract (France) such party was not liable to arrest and imprisonment. In that case Lord Chief Justice Eyre, while recognizing the general principle that the lex fori governed
matters of remedy, yet deemed this arrest for breach of contract as of "the nature of the obligation," part of the substantive rights under the contract, and therefore controlled solely by the lex loci contractus. This decision was specifically overruled by the later case of De la Vega v. Vianna, 1 Barnwall & Adolphus 284, where the same practical situation arose, and Lord Chief Justice Tenderden laid it down that this was a matter of remedy over which the forum is supreme.

General statutes of limitations on rights previously existing have been considered matters of remedy to be governed by the forum, McElmoyle v. Cohen, 13 Peters 312; Townsend v. Jemison, supra, whereas if the right did not previously exist at common law "and the statute giving the right also fixes the time within which it may be enforced, the time so fixed becomes a limitation or condition upon the right of action and will control no matter in what forum the action is brought. (Word on "Limitations," Vol. 1 p. 63. "The Harrisburg," 119 U. S. 199.) By the same reasoning, if no action or right existed at common law, and no statute has given such a right, then limitation or non-existence of a right inheres in every transaction of that jurisdiction and no other forum can create one for the parties.

As to the right of survivorship to actions for personal injuries resulting in death, the rule at common law was expressed in the Latin maxim, "Actio personalis moritur cum persona." No right whatever existed in anyone but the tort feasee, and it was to give a new right to the representatives that Lord Campbell's Acts were passed in 1846. (23 Mich. Law Review No. 2, p. 114, Dec. 1924; Davis v. N. Y. & New England R. R., 143 Mass. 301.) But that statute is not part of our common law, the rule here being unless changed expressly by statute in the particular jurisdiction, that a tort action dies with its possessor. It is a limitation on the substantive law of the State, over which that State, as heretofore noted, has exclusive jurisdiction. That point was decided in Davis v. N. Y. & N. E. R. R., 143 Mass. 301. There the administrator of the deceased, who died as a result of injuries sustained while a passenger on the defendant's line in the State of Connecticut, sues the defendant in Massachusetts to recover damages for the tort, relying upon a statute in Massachusetts similar to Lord Campbell's Act. It appears that there was no legislation in Connecticut on the subject. Plaintiff insisted that the right of survival of an action was a matter of remedy to be determined by the forum. The court, however, ruled otherwise, saying:

"It must certainly be the right of each State to determine by its laws under what circumstances an injury to a person will afford a cause of action. If this is not so a person who is not a citizen of the State or who resorts to another State for his remedy if jurisdiction can be obtained, may subject the defendant to entirely different rules and liabilities from those which would
control the controversy were it carried on where the injury occurred. . . . The design of our statutes is primarily to provide for survival of those actions of tort, the cause of which occur in this State. . . . The statute creates a new right, a new liability. What the new liability shall be, by what conditions it shall be controlled, must be determined by the law of the State where the injury occurred unless the legislation of other States is to have extra-territorial force and govern transactions beyond their limits. . . . By the decease of the intestate the cause of action at common law which she once had in Connecticut has there ceased to exist. . . . Our statute permitting survival does not apply."

This decision is conclusive of the fact that a survivorship statute is not a matter of remedy for the forum, but its absence in the State where the injury occurred is a matter of substance to govern wherever action is brought. The facts of this case are almost identical with our instant decision—whose holding was the other way. The only variation between the two is that in the former the tort-feasee died without ever having instituted an action, while in the latter he had instituted action and even recovered a verdict. In this variation lies the only means of reconciling the two cases. For the continuation of the action after verdict is not by virtue of any "Survival Act" which gives a new right—but is simply the revival of the same right,—and there is a legitimate distinction between these two. As the court said of "Revival" in Heavens v. Seashore Land Co., 41 Atl. 755 (N. J.): "The revival of a suit which is either abated or made defective by the death of the party interested is not a new suit, but is still the same suit in which both parties are entitled to the benefits of all the former proceedings." The Costa Rican law, in the instant case, while giving a right to the tort-feasee for injuries sustained while a passenger on a vehicle of transportation (Section 1048 of Civil Code of 1906), did not permit that right to survive. But the administrators by continuing the action already instituted by the deceased, were not "surviving" but "reviving" the action by virtue of their official capacities. And revival in that sense is a matter of remedy for the forum. The gist of the case is summarized in the concluding paragraph, as follows:

"In Baltimore & Ohio R. R. v. Joy, (Admr.), 173 U. S. 226, the Court of Appeals for the Sixth Circuit certified the following question to the Supreme Court: 'Does an action pending in the Circuit Court of the United States sitting in Ohio, brought by the injured person as plaintiff to recover damages for injuries sustained by the negligence of the defendant in Indiana, finally abate upon the death of the plaintiff in view of the fact that had no suit been brought at all, the cause of action would have abated both in Indiana and Ohio, and that even if suit had been brought in Indiana, the action would have abated in that State?' The answer was that it did not."
The ease is perfectly sound and supported by the authorities. Martin v. R. R., 142 Fed. 650, 73 C. C. A. 646; Van Choate v. General Electric Co. (D. C.), 245 Fed. 120; Wing v. McCaulum, 292 Fed. 816.

CONSTITUTIONAL LAW—Pardoning Power of the President in Contempt Cases.

Article II, Section 2, Clause 1, of the Constitution of the United States, dealing with the powers and duties of the President, closes with these words:

"and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment."

A pardon is defined by Lord Coke to be "a work of mercy, whereby the king, either before attainder, sentence or conviction, or after, forgiveth any crime, offense, punishment, execution, right, title, debt or duty"; Blackstone says the effect of a pardon is to make the offender a new man; to acquit him of all corporal penalties and forfeitures annexed to the offense for which he obtains the pardon; and not so much to restore his former, as to give him a new, credit and capacity.3

Chief Justice Marshall, speaking for the United States Supreme Court, in U. S. v. Wilson,4 said: "As this power has been exercised from time immemorial by the executive of that nation whose language is our language, and to whose judicial institutions ours bear a close resemblance, we adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it."

The United States Supreme Court, speaking through Mr. Justice Wayne, in Ex Parte William Wells,5 goes into an exhaustive examination of the common law authorities,6 approves the definitions of Coke and Blackstone and follows Marshall's statement that the meaning of "pardon" in American law is to be derived from the meaning of that term at common law.

The recent decision of the Supreme Court rendered by Chief Justice Taft in Ex Parte Grossman, decided March 2, 1925,7 approves these former holdings of the court, and approves as well this statement of Mr. Justice Wayne in the Wells case:

"We still think so (i. e. that the English precedents must control in the matter of pardons) and that the language used

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1 3 Inst. 233, adopted in Ex Parte Wells, 18 How. 307, 311.
3 7 Pet. 150, 160.
4 18 How. 307.
5 Page 311 et seq.
6 69 L. Ed. 377.
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in the Constitution, conferring the power to grant reprieves and pardons, must be construed with reference to its meaning at the time of its adoption. At the time of our separation from Great Britain, that power had been exercised by the king, as chief executive. Prior to the Revolution, the colonies, being in effect under the laws of England, were accustomed to the exercise of it in the various forms as they may be found in the English law books. They were, of course, to be applied as occasions occurred, and they constituted a part of the jurisprudence of Anglo-America. At the time of the adoption of the Constitution, American statesmen were conversant with the laws of England and familiar with the prerogatives exercised by the crown. Hence, when the words "to grant pardons" were used in the Constitution, they conveyed to the mind the authority exercised by the English crown, or by its representatives in the colonies. At that time both Englishmen and Americans attached the same meaning to the word "pardon." In the convention which framed the Constitution, no effort was made to define or change its meaning, although it was limited in cases of impeachment."

The occasion for the decision in the Grossman case was as follows: In November, 1920, the United States was granted a temporary order by the United States District Court for the Northern District of Illinois against Grossman, restraining the sale by him of intoxicating liquors in violation of the National Prohibition Act. An information was filed against him in January, 1921, for disobeying the order, and he was arrested, convicted of contempt, and sentenced to pay a fine of $1,000 and to serve one year in the Chicago House of Correction. An appeal to the Circuit Court of Appeals resulted in an affirmation of the decree of the District Court. In December, 1923, the President issued a pardon in favor of Grossman, commuting the sentence to the $1,000 fine only, and remitting the imprisonment upon condition that the fine be paid. Grossman accepted the pardon and paid the fine. The District Court, however, ignored the pardon, and conceiving Grossman unpurged of his contempt of its order, committed him to the Chicago House of Correction to serve the imprisonment part of the sentence. Grossman then filed in the United States Supreme Court his original petition for a writ of habeas corpus against the Superintendent of the Chicago House of Correction. The only question raised by the petition and answer was that of the power of the President to grant the pardon.

It was argued for the defendant, inter alia, (1) that the constitutional power of the President extends only to offenses against the United States, and that a contempt of court is not such an offense; (2) that to construe the pardon clause to include contempts of court would be to violate the fundamental principle of the Constitu-

* 280 Fed. 683.
* 1 Fed. (2nd) 941.
tion of the United States in the division of powers between the legislative, executive and judicial branches, and to take from the Federal courts their independence and the essential means of protecting their dignity and authority.

The Court did not acquiesce in any of these contentions, and the validity of the President's pardon was upheld.

In State v. Sauvinet, the Louisiana Court held contempt of a State court to be an offense against the State and not an offense against the judge personally, and it was decided that in such a case it belongs to the State, acting through another department of its government, to pardon or not to pardon, at its discretion, the offender.

In the case of In re Mullee, it was held that a contempt of a United States court is an offense against the United States. There are many cases in the books holding that an assault upon a judicial officer for performing his judicial duty is an attack on the court for what it has done in the administration of justice.

A portion of the opinion of the Chief Justice, in which he ably answers the contention of the defendant, is quoted here:

"Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases. To exercise it to the extent of destroying the deterrent effect of judicial punishment would be to pervert it; but whoever is to make it useful must have full discretion to exercise it. Our Constitution confers this discretion on the highest officer in the nation in confidence that he will not abuse it. An abuse in pardoning contempts would certainly embarrass courts, but it is questionable how much more it would lessen their effectiveness than a wholesale pardon of other offenses. If we could conjure up in our minds a President willing to paralyze courts by pardoning all criminal contempts, why not a President ordering a general jail delivery. A pardon can only be granted for a contempt fully completed. Neither in this country nor in England can it interfere with the use of coercive measures to enforce a suitor's right. The detrimental effect of excessive pardons of completed contempts would be in the loss of the deterrent influence upon


10 Fed. Cas. 9, 911, 7 Blatchf. 23.

11 See Ex Parte MacLeod, 120 Fed. 130.
future contempts. It is of the same character as that of the excessive pardons of other offenses. The difference does not justify our reading criminal contempts out of the pardon clause by departing from its ordinary meaning confirmed by its common law origin and long years of practice and acquiescence.

“If it be said that the President by successive pardons of constantly recurring contempts in particular litigation might deprive a court of power to enforce its orders in a recalcitrant neighborhood, it is enough to observe that such a course is so improbable as to furnish but little basis for argument. Exceptional cases like this if to be imagined at all would suggest a resort to impeachment rather than to a narrow and strained construction of the general powers of the President.”

A. H. K.

EVIDENCE—Judicial Notice of Human Nature.

In Chicago, I. & L. Railroad Co. v. Clendelin (No. 11,885), 143 N. E. 393, decided by the Appellate Court of Indiana, April 3, 1924, a car inspector sued the mill owners, his employers, for injuries sustained when he was struck by a stone thrown by a fellow-workman upon a car for the purpose of frightening him, the action being prompted by a spirit of fun. The court declared that “It is a matter of common knowledge to employers of labor that men working together, or in near proximity to other workers, will indulge in moments of diversion from work to play pranks on each other; and where the duties of the employment require that an employee perform his work in a factory or a mill, with or near to other workers, whether such workers are co-employees, or not, the risk from accident is thereby, to some extent at least, necessarily increased, and this increased risk is a risk of the employment.”

Playing pranks on one another while at work side by side is a human trait in mankind. If human nature, certainly it is a subject of judicial notice, for human nature constitutes part of the evidence in every case. Ricks v. Broyles, 78 Ga. 610, 3 S. E. 772; Chappell v. Elts, 123 N. C. 259, 31 S. E. 709; Green v. Harris, 11 R. I. 5. It would seem then that such common knowledge is not necessarily possessed by employers alone, as the court appeared to say. Purely local customs are not judicially noticed, but if the custom or usage is of universal prevalence, the court will take judicial notice. Munn v. Burch, 25 Ill. 35. This is clearly established in the early English case of Hodges v. Steward, 1 Salkeld 125, decided in 1691, where the court refused to take judicial notice of a local custom among the merchants of London. In other words, if the custom or usage is limited to a particular body or group, it is not of such common knowledge as will bring it within the domain of judicial notice.

Judicial notice or knowledge, the first expression being preferable, is defined as the cognizance of certain facts that may properly be
taken and acted upon by the judges and jury without proof because they already have knowledge of them. But this definition is only a general statement. The true test is notoriety. Is the fact commonly known to every prudent man, to even the man on the street, as one judge put it? If so, it falls within the circle of judicial knowledge.

Judicial notice is taken for the practical reason of convenience and expediency. It is not deemed necessary either in a criminal or a civil case to allege any fact of which the court will take judicial notice. Nor is judicial notice obtained by the use of evidence. It is a matter appertaining to the judicial function and its existence, not unlike that of an admission, stipulation, or rule of presumption, dispenses with evidence as to the particular matter comprehended. Counsel in his argument to the jury may well and properly use whatever is judicially known as a fact in the case; and it is the right and duty of the court to charge the jury in the trial of the cause as to the existence of facts of which judicial cognizance is taken. Though not required in every instance, it is prudent to suggest or present to the court in some way a fact that is within the realm of judicial knowledge, for the court is not bound sua sponte to take cognizance if not intimated by the party seeking to avail himself of it. Even if a matter is one of judicial cognizance, there is still no error or impropriety in requiring or receiving evidence. Where prima facie proof of a particular fact has been made, the court need not, nor is it required, take judicial notice of such fact. But where the matter of judicial cognizance is one of law, the court is then compelled to take judicial notice of it. It is also well settled that the personal knowledge of the judge is not comprehended within the scope of judicial knowledge. State v. Horn (1870), 43 Vt. 20; Wheeler v. Webster (1850), 1 E. D. Smith, N. Y.; Brown v. Lincoln, 47 N. H. 468.

In some jurisdictions, statutes enumerate those matters of which the courts may or shall take judicial notice, and Federal courts sitting in those jurisdictions abide by such statutes. The general course of business and the usual methods employed to transact it are all judicially noticed. Moreover, the ordinary mercantile business within the particular jurisdiction or community is taken judicial notice of, as is the fact that the business hours of a trader differ from those of a banking institution. Banking hours are universally known, and therefore are subject to judicial knowledge. A distinction must be made between what is commonly known to the people of a particular community and a custom of a certain body or group within a particular community. The former is within the scope of judicial notice, the latter is not. Mechanics Nat. Bank v. Hall, 83 N. Y. 338 (1881).

That judicial cognizance will be taken that railroads are engaged in interstate and intrastate commerce as common carriers for hire, both of passengers and freight, there can be no question. Even the particular established routes generally known are brought within judicial notice. Hobbs v. Memphis C. R. R. Co., 56 Tenn. 373. Judicial notice will also be taken of the general duties and character
of occupations universally classed as professions, such as the legal and medical professions.

It is an interesting question whether or not State courts will take judicial notice of the location of cities outside of the State. If the cities outside of the particular State are located in a contiguous State and near the boundary line or if they are well known centers, their location will be judicially noticed. Riggin v. Collier, 16 Mo. 568; King v. American Transp. Co. (1859) Fed. Cases Nos. 7, 787 (1 Flip. 1).

If a foreign government is recognized by this country, such recognition is a political act so binding upon the courts that they must of consequence take judicial notice of such foreign country. However, no judicial cognizance can be taken of the solvency of a foreign State, though where parties in one country take on the status of belligerents with a political end in view, then the courts of this country will take judicial notice of them. Underhill v. Hernandez, 168 U. S. 250; 18 Sup. Ct. 83 (1897); Calhoun v. Ross, 60 Ill. App. 369.

There would seem to be no reason why courts should not take judicial notice in one case of their records in another; yet, it is settled that courts, including those of probate, cannot in one case take judicial cognizance of their own records in another and different case. Even though the trial judge in fact knows or remembers the contents of them, where there is no statute to the contrary, State courts do not take judicial notice of the records of other courts in the State or of Federal courts. Likewise, Federal courts do not take judicial notice of the records of other Federal courts, except in special circumstances, as, for instance, where the contents of the record are of general notoriety.

Where the Federal courts are exercising original jurisdiction or appellate jurisdiction from another Federal court, they will judicially notice the laws of every State and Territory of the Union and of the District of Columbia, whether consisting of constitutions, public statutes, or judicial decisions. But where the United States Supreme Court is reviewing a judgment of a State court, it is limited in its judicial knowledge to that of the courts whose judgment it is reviewing; that is to say, it takes judicial cognizance of the law of that particular State, but not of the laws of another State, unless the courts of the State in question are authorized or required by its local law to do so. Further, if the laws of another State are required to be proved in the trial court, those laws must be proved as a fact and inserted in the record brought up to an appellate court of the United States. Fauntleroy v. Hannibal, Fed. Cases 4,691 (1 Dill. 118).

Although the courts of one State do not take judicial notice of the laws of another State, they will presume that the common law of the latter State is the same as their own. Lane v. Sargent (1914), 217 Fed. 237. Of course, the courts of the several States take judicial notice of the laws of the United States. Some State courts have gone so far in their anxiety to give full faith and credit to judgments of
another State, as required by the Constitution of the United States, that they will take judicial notice of the laws of such other State; but this line of reasoning is not in accord or harmony with the general rule, and has been repudiated by the Supreme Court of the United States.

Neither State or Federal courts take judicial notice of the written or unwritten laws of a foreign country. Municipal and city courts will take judicial notice of their city ordinances or by-laws, but there is a conflict of authority, it seems, on the question of whether on appeal from a municipal court and trial de novo the appellate court will judicially notice the municipal ordinances of which the court below was at liberty to take such notice. *State v. Leiber*, 11 Ia. 407 (1860); *City of Anderson v. O'Donnell*, 29 S. C. 355 (1888); *Downing v. City of Miltondale*, 36 Kan. 740, 14 Pac. 281 (1887).

V. J. C.

EVIDENCE—Previous Crimes.

The case of *State of Connecticut v. Gerald Chapman*, 103 Conn. 453, decided by the Supreme Court of Errors of Connecticut in November, 1925, presents some interesting questions bearing on the admissibility of evidence tending to show commission by the accused of crimes other than and unconnected with that for which he is being tried.

The case came before the Supreme Court on appeal from a verdict and judgment of murder in the first degree. The ground of error assigned was that the lower court allowed the State to introduce irrelevant testimony of other crimes, which had no relation to the crime with which the accused was charged in the case before the court, and which testimony was not offered to impeach the credibility of witnesses. The accused was charged with having shot and killed Patrolman Skelley, when he was discovered by that officer in the act of robbing a safe in the store of Davidson & Leventhal, in New Britain, Connecticut. Shean, a witness for the State, testified that he and the accused left Springfield in the latter's automobile on Saturday afternoon, spent the night in Meriden, and proceeded to New Britain early Sunday morning, where they both broke and entered the department store of Davidson & Leventhal; that the accused blew open one safe, and was preparing to blow open another safe when he (Shean), fearing to take further part in the crime, left the scene.

At the trial Shean was permitted to testify that he heard Chapman admit, during their trip from Springfield to Meriden, participation at other times in crimes of safe-blowing, counterfeiting, and bootlegging. Allison, a witness for the State, offered testimony to show that the car used by the accused was stolen by him from a garage in Muncie, Ind. Hance, also a witness for the State, identified certain safe-blowing tools as the same implements which the accused had in
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his possession while he was staying at the Hance farm some months previous to the trial.

It was the contention of counsel for the accused that to permit this testimony of Shean, Allison, and Hance would be to violate the rule of policy which forbids the State initially to attack the character of the accused, and also the rule of policy that bad character may not be proved by particular acts.

The court, however, held that the evidence was permissible under the circumstances; "that to corroborate the testimony of Shean, and to prove the presence of the accused in the department store on the morning of the homicide, it was permissible for the State to show the origin and history of the relations between them, to trace the accused's acquisition and possession of the automobile in question, and to identify as belonging to the accused numerous articles found in the automobile and on the premises of Shean in Springfield, even though the evidence offered for these purposes also tended to prove that the accused was an automobile thief, a professional safe-blower, and had engaged in commission of various other crimes."

In the case of State v. LaPage, 57 N. H. 245, 24 Am. Rep. 69, Cushing, C. J., sums up the general rule upon the subject as follows:

"I think we may state the law in the following propositions:
(1) It is not permitted to the prosecution to attack the character of the prisoner unless he first puts that in issue by offering evidence of his good character. (2) It is not permitted to show the defendant's bad character by showing particular acts. (3) It is not permitted to show in the prisoner a tendency or disposition to commit the crime with which he is charged. (4) It is not permitted to give in evidence other crimes of the prisoner, unless they are so connected by circumstances with the particular crime in issue that the proof of one fact with its circumstances has some bearing on the issue on trial other than such as is expressed in the foregoing three propositions."

In the case at hand, the court based the admissibility of the evidence introduced through the witnesses Shean, Allison and Hance, upon the qualification enunciated in the last of the four propositions set out above. In the application of the principle to the facts of the case, the court was of the opinion that the testimony of the three witnesses for the State was relevant, material, and admissible under the circumstances inasmuch as (1) it tended to corroborate Shean's story which the State had to put forth to offset the alibi offered by the accused, and (2) it was relevant and material evidence to establish the fact that the accused was in New Britain and in the store in question on the morning of the homicide, and was engaged in blowing the safes in that store. In this connection, it was said by Wheeler, C. J.: "The evidence tending to show that the accused stole the Lincoln car, that he was a professional safe-blower and connected with other crimes, was not offered and was not ad-
mitted for the mere purpose of proving the accused's commission of crimes other than that with which he was charged. The facts were admitted, and properly so, because they were relevant and material in proving the accused guilty of the crime charged. That they also tended to prove the commission of other crimes by the accused was no reason for the exclusion of relevant and material evidence."

In the case of State v. Gilligan, 92 Conn. 526, 109 Atl., 649, Wheeler, J., said of this kind of evidence: "Such evidence, when offered in chief, violates the rule of policy which forbids the State initially to attack the character of the accused, and also the rule of policy that bad character may not be proved by particular acts. . . . On the other hand, evidence of crimes so connected with the principal crime by circumstance, motive, design, or innate peculiarity, that the commission of the collateral crime tends directly to prove the commission of the principal crime, or the existence of any essential element of the principal crime, is admissible."

The court in the Chapman case also cited State v. Ferrone, 97 Conn. 258; 116 Atl. 336. In that case the defendant faced a charge of carrying burglary tools in violation of a statute which provided punishment for possession of such "without lawful excuse." The tools in question were two iron bars which, it was charged, were carried for purposes of breaking and entering. It was shown in evidence that (1) a gasoline pump was pried open and gasoline stolen therefrom by the accused on the night of his arrest, and (2) that such prying open was accomplished by means of the iron bars in question. Since the mere possession of two ordinary iron bars did not in itself constitute a violation of the statute, proof of an absence of "lawful excuse" is indispensable to a conviction for the crime charged. Therefore the "intent" is a necessary element of the offense, and the ruling favoring the admissibility of the evidence was a necessary and logical conclusion, if the court was to adhere to the proposition set forth by Cushing, C. J., in State v. LaPage, cited above.

From the point of view of "motive" and the "doctrine of chances" (see 92 Conn. 526), or on the "intent" theory as illustrated in State v. Ferrone, supra, the evidence tending to show commission of other crimes by the accused in the Chapman case would clearly be inadmissible, for the question of motive or intent does not enter into the case. Consequently, it becomes interesting to consider in this connection the theory which text-writers and the cases assign in justification of the admission of such evidence in a case like the present.

Wigmore, in his treatise on the Law of Evidence (see Vol. I, §215 et seq.), characterizes this sort of testimony as evidence of "conduct independently usable evidentially for other purposes than to show character (design, motive, intent, etc.). The question presented is: Is the criminality of conduct a reason for excluding that conduct (when offered against an accused person) if it would otherwise be relevant and material? The author gives much attention to the ever-recurring efforts of counsel to secure the exclusion of such evidence, because,
as he says, “the effort to secure it and the inclination to ask for it seems to be persistent and so common at the Bar; and not because the validity of such efforts has ever been recognized or implied. That the question does still crop up again from time to time is apparently due in part to the inherent difficulty of distinguishing between conduct as showing character and conduct as showing other things; but also to the failure to appreciate that the rejection of past misconduct by the character rule is never due simply to the incidental circumstance that it is misconduct, but to the fact that it is offered to show character and that herein consists its impropriety. If there is any other material or evidential proposition for which it is relevant, and if it is offered for that purpose, it is receivable, and its quality as misconduct or crime does not stand in the way.” The courts in the following cases repudiate the “persistence and utter lack of foundation of the fallacy”:

In State v. Witham, 72 Me. 531, Peters, J., said: “It is no objection that, in attempting to prove one offense by the respondent’s answers, another offense is proved or confessed by him, if the connection is such that the proof is relevant to the issue. That is unavoidable.”

In State v. Adams, 20 Kan. 319, it is stated by the court that “whatsoever testimony tends directly to show the defendant guilty of the crime charged is competent, though it also tends to show him guilty of another and distinct offense. A party cannot, by multiplying crimes, diminish the volume of competent testimony against him.”

A case which, perhaps better than any thus far cited, brings out the principle in its application to the case at hand, and which Wigmore cites as fairly illustrative of the rule in such cases, is Walker’s Case, 1 Leigh, 576. The court there said: “It is proper that the chain of evidence should be unbroken. If one or more links of that chain consist of circumstances which tend to prove that the prisoner has been guilty of other crimes than that charged, . . . there is no reason why the criminality of such intimate and connected circumstances should exclude them, more than other facts apparently innocent. Thus, if a man is indicted for murder, and there be proof that the instrument of death was a pistol, proof that that instrument belonged to another man, that it was taken from his house on the night preceding the murder, that the prisoner was there on that night, and that the pistol was seen in his possession on the day of the murder just before the fatal act was committed, is undoubtedly admissible, although it has the tendency to prove the prisoner guilty of a larceny. Such circumstances constitute a part of the transaction; and whether they are perfectly innocent in themselves, or involve guilt, makes no difference as to their bearing on the main question which they are adduced to prove.”

Although the cases of State v. Gilligan and State v. Ferrone, mentioned above, were the only cases cited by the court in support of its ruling favoring the admissibility of the evidence in the present case, it is to be presumed that the principle of the immateriality of a
criminal aspect which conduct otherwise relevant may have, led the court to decide as it did in the matter.

W. B. H.

EVIDENCE—Sufficiency of Dying Declaration.

A dying declaration is one of the exceptions to the hearsay rule, admissible only when certain circumstantial guaranties of trustworthiness exist, of which the court is to judge.

Many reasons have been advanced to explain why the admission of a dying declaration in evidence is not a violation of the constitutional guaranty that the accused is entitled to meet the witness "face to face." The most reasonable seems to be that they were admitted at common law before the adoption of the United States Constitution, although the right to have the witness against the accused examined in his presence was practically secured by Magna Charta in 1215, and "it is remarkable, that in all the commentaries it underwent in England, it was never supposed that the rule was a violation of the rights of the subjects as thereby secured." Hill v. Commonwealth, 2 Gratt. (43 Va.), 594. It is settled beyond question that the admission in evidence of the dying declaration of the person who died as the result of the wrongful act of the defendant is not an infraction of the constitutional right of the accused to be confronted by the witnesses against him. (30 C. J. 253.)

Dying declarations were admitted in evidence as early as 1692 without objection in Mohun's Trial, 12 How. St. Tr. 949. The reasons for their admission are variously stated by the text writers on evidence. Greenleaf says: "The general principle on which they (dying declarations) are admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced, by the most powerful considerations, to speak the truth. A situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by the positive oath in a court of justice:"

In Sullivan v. State, 102 Ala. 135, it was said: "Dying declarations are exceptional testimony, and are received from the necessity of the case; the circumstances and the solemn surroundings being treated as supplying the sanction and restraining force over the declarant, which a solemn oath imposes in ordinary cases:"

"It is the abandonment of hope, the expectation of certain and immediate death, and the belief of the law that, at such an awe-inspiring time, a man about to be called to account before his Maker, will tell the truth, that alone have justified the reception of such statements against a defendant who is thus deprived of his most valuable right of confrontation of witnesses and cross-examination." People v. Smith, 164 Cal. 451.
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The admissibility of the declaration does not depend on the length of time that intervenes between the declaration and the time of death. In People v. Palletto, 202 N. Y. 494, more than twenty-four hours intervened, and in various jurisdictions practically all intervening periods have been covered up to a period of five months as the case of State v. Craine, 120 N. C. 601.

Dying declarations may be admitted against or in favor of the prisoner; must be made in extremis, under a sense of impending death, excluding all hope or expectation of recovery; may be oral or written; under oath or not; witnessed or not; and may be replies to leading questions. 1 R. C. L. 542. Such declaration may be communicated by signs. In State v. Thompson, 79 Tex. Cr. 478, it was said: "If the injured party had but the action of a single finger, and with that finger pointed to the words 'yes' and 'no', in answer to questions, in such a manner as to render it probable that he understood . . . it is admissible evidence." In Jones v. State, 71 Ind. 66, the declarant was wounded in the mouth, but got up out of bed, went to the window and explained the situation by signs. This evidence was received as a dying declaration.

One of the prime requisites for the admission of a dying declaration, as has been stated above, is that it be made when the declarant has abandoned all hope of recovery and believes that death will be the result of the wrongful act and that death is near at hand. In Bell v. State, 72 Miss. 507, it was declared by the court that the mere fact that the declarant stated that he would die does not necessarily establish that he was without hope, and expected a speedy dissolution, and the statement "he believed he would have to die" was held improperly admitted as a dying declaration in Vaughn v. Com., 86 Ky. 431. A belief that the declarant will not recover is not in itself sufficient unless there be also the prospect of "almost immediate dissolution." Greenleaf, 15th Ed., 229.

The declarant's consciousness of impending death may be established by other evidence, such as a conversation about funeral arrangements (State v. McMullen, 170 Mo. 608), or that he gave directions regarding his funeral, his will, the care and custody of his children, or took leave of his relatives and friends, and the like (30 C. J. 267).

The following expressions have been held insufficient to convey the thought that the declarant had abandoned all hope of recovery: "That he would die," Titus v. State, 117 Ala. 16; "I am done for," People v. Hayes, 9 Cal. A. 301; "I will die if you do not do something for me," Howard v. State, 144 Ga. 169; "I have to die, and any hour or day I might die," State v. Knoll, 69 Kan. 767; "I do not feel that I will ever get well and have little hope," State v. Gianfala, 113 La. Ann. 463.

In the case of Edwards v. State, Supreme Court of Nebraska, 204 N. W. 780, decided July 1, 1925, the accused, a practicing physi-
clan of Omaha, was indicted, tried, and convicted of homicide, as the result of a criminal operation. A motion for a new trial was denied and the defendant claims error. The one proposition with which we are here concerned is the admission in evidence of a statement under oath made nine days prior to the date of the death of the declarant.

The declaration which was admitted was a written statement, and contained in all more than six hundred words, which fully, and in order, set out all the relevant facts concerning the wrongful act complained of, and it concluded thus: “The above statement bearing my signature was read to me, and I, knowing that I am dying, do solemnly swear that it is the truth.” (Signed by the declarant.) The declaration was admitted in evidence by the court.

In order to determine whether, by the weight of authority, the admission of the declaration was justified, it is necessary to determine the meaning of the phrase “I, knowing that I am dying.” Do the words convey the thought that all hope of recovery had been abandoned and there was the prospect of almost immediate dissolution, or do they mean that the declarant was dying but had not yet abandoned all hope?

E. D. L.


Since the Immigration Act of 1924, Congress has been flooded by bills, resolutions, and petitions to modify and to attenuate the undue stringency of the Act, discovered after its application to specific instances. Two cases, Chang Chan et al v. Nagle, Commissioner of Immigration for the Port of San Francisco, and Charles Sum Shee et al. v. Nagle, 69 L. ed. 642, and 69 L. ed. 640, respectively, both decided on May 25, 1925, by the Supreme Court of the United States, best summarize the situation.

In Chang Chan et al v. Nagle, Chang Chan and three others were native born citizens of the United States of Chinese parentage, permanently domicilled here. They had returned to China, and had lawfully married wives of their nationality prior to July 1, 1924, the date when the Immigration Act took effect. On that day, the young wives were on the high seas as passengers on board an American vessel bound for San Francisco. Arriving in port on July 11th, without immigration visas as provided for by Section 9, Immigration Act of 1924, c. 190, 43 Stat. 153, they sought and were finally denied permanent admission. After hearing the case, the United States Circuit Court of Appeals for the Ninth Circuit certified this question to the Supreme Court: “Should the petitioners be refused admission to the United States either, (a) because of the want of a vise; or (b) because of want of right of admission if found to be Chinese wives of American citizens?” The Supreme Court, neglecting the delinquency of the petitioners as to the requirements of the
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Act in respect of vises, answered the question certified that "The applicants should be refused admission if found to be Chinese wives of American citizens." Later they were deported.

By coincidence, on the same vessel carrying the petitioners in the foregoing case, there were alien Chinese wives and minor children of resident, alien Chinese merchants lawfully domiciled within the United States. Upon arrival, they also sought permanent admission. The Secretary of Labor denied their applications, and the matter, Cheung Sum Shee et al. v. Nagle, was also brought up in the United States Circuit Court of Appeals for the Ninth Circuit, which court certified the following inquiry to the Supreme Court: "Are the alien Chinese wives and minor children of Chinese merchants who were lawfully domiciled within the United States prior to July 1st, 1924, such wives and minor children now applying for admission, mandatorily excluded from the United States under the provisions of the Immigration Act of 1924?" The question was answered in the negative, and the petitioners were permanently admitted to the United States.

The combined effect of these decisions amounts to this: (1) Wives, and minor children of aliens, even of aliens ineligible to citizenship, may enter the United States for permanent residence as, "non-quota" immigrants, if such aliens were lawfully domiciled within the United States prior to the date of the Act of 1924; but (2) alien wives ineligible to citizenship, even though they be wives of American citizens permanently domicilled within the United States, shall not enter this country, being excluded by the Act of 1924.

Let us investigate the reasons for these conclusions. As to (1), Cheung Sum Shee Case, supra, applicable provisions of the Act of 1924 read:

"Section 13. (c) No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of Subdivision (b), (d), or (e) of Section 4, or (2) is the wife or the unmarried child under 18 years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, or (3) is not an immigrant as defined in Section 3."

"Section 3. When used in this Act the term 'immigrant' means any alien departing from any place outside the United States destined for the United States, except . . . (6) an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation."

"Section 5. When used in this Act the term 'quota immigrant' means any immigrant who is not a non-quota immigrant. An alien who is not particularly specified in this Act as a non-quota immigrant or a non-immigrant shall not be admitted as a
non-quota immigrant or a non-immigrant by reason of relationship to any individual who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration."

The present existing treaty of commerce and navigation with China, dated November 17, 1880, 22 Stat. 826, 827, the terms of which are in many respects similar to the treaty with Japan, provides:

"Article II. Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation."

Mr. Justice McReynolds stated: "An alien entitled to enter the United States 'solely to carry on trade' under an existing treaty of commerce and navigation is not an immigrant within the meaning of the Act, Section 3 (6), and therefore is not absolutely excluded by Section 13.

"The wives and minor children of resident Chinese merchants were guaranteed the right of entry by the treaty of 1880 and certainly possessed it prior to July 1st when the present Immigration Act became effective. United States v. Mrs. Gue Lim, 176 U. S. 459, 466, 468 (the case which decided that a wife or minor child of a Chinese merchant lawfully domiciled within the United States are such person or persons who come 'solely to carry on trade'). That Act (the Immigration Act of 1924), must be construed with the view to preserve treaty rights unless clearly annulled, and we cannot conclude that, considering its history, the general terms therein disclose a congressional intent absolutely to exclude the petitioners (the appellants in the Cheung Sum Shee Case, supra), from entry.

"In a certain sense it is true that the petitioners did not come 'solely to carry on trade'. But Mrs. Gue Lim did not come as a 'merchant'. She was nevertheless allowed to enter, upon the theory that a treaty provision admitting merchants by necessary implication extended to their wives and minor children. This rule was not unknown to Congress when considering the Act now before us.

"Nor do we think the language of Section 5 (Act of 1924) is sufficient to defeat the rights which the petitioners had under the treaty. In a very definite sense they are specified by the Act itself as 'non-immigrants'. They are aliens entitled to enter in pursuance of a treaty as interpreted and applied by this court twenty-five years ago." Cheung Sum Shee Case, supra.

But as to (2), the Chang Chan Case, supra, the ground of decision needs statutory retrospection. The excluded wives were alien Chinese ineligible to citizenship. This matter was elaborately and decisively
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determined by Mr. Justice Sutherland in Ozawa v. United States, 43 S. C. Rep. 65, in which case Rev. Stat. 2169; Act of May 6, 1882, c. 126, Section 14, 22 Stat. 58, 61, the act providing for naturalization of aliens, was interpreted as not including Orientals so as to enable them to become citizens of the United States. However, in both cases now under discussion, wives seeking admission were alien Chinese.

Notwithstanding their marriage to citizens of the United States in the Chang Chan Case, the wives did not become citizens and remained incapable of naturalization.

Prior to September 22, 1922, Rev. Stat. 1894 applied. It provided:

"Any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen."

Since that date c. 411, 42 Stat. 1021, 1022, has been in force. It provides:

"That any woman who marries a citizen of the United States after the passage of this, or any woman whose husband is naturalized after the passage of this Act, shall not become a citizen of the United States by reason of such marriage or naturalization; but, if eligible to citizenship, she may be naturalized upon full and complete compliance with all requirements of the naturalization laws . . . ."

Section 13 (c), Immigration Act of 1924, declares:

"No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of subdivision (b), (d), or (e) of section 4, or (2) is the wife, or the unmarried child under eighteen years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, or (3) is not an immigrant as defined in Section 3."

Subdivisions (b), (d), and (e) of Section 4, Act of 1924, pertain to immigrants previously lawfully admitted, and to immigrants who seek to enter as members of the non-quota class, such as religious ministers or professors, and students, and, of course, are not material to this case. An immigrant is "any alien departing from any place outside the United States destined for the United States," Section 3, Act of 1924. The foregoing section makes certain exceptions, none of which describes the petitioners in the Chang Chan Case. In view of these statutes germane to the case, and also in deference to the intention of the legislature to positively exclude all aliens ineligible to citizenship, who do not fall within the classes specified in the Act of 1924, the court ruled that the petitioners in the Chang Chan Case must be excluded. It may also be noted that the petitioners in this case were not guaranteed the right of entry by virtue of any treaty between China and the United States; and they were not such aliens.
entitled to enter the United States "solely to carry on trade," which differentiates this case from the Chewung Sum Shee Case, supra.

The result and consequences of the Immigration Act are too obvious for mention. If aliens ineligible to citizenship, permanently domiciled within the United States, are allowed to bring in their wives and minor children who are also ineligible to citizenship, there is sound reason to believe that citizens of the United States ought to be accorded at least the same privilege. The Chang Chan Case necessarily applies to American citizens of Japanese or other Oriental parentage, or in fact to any American citizen, irrespective of race or nationality, who may have an alien wife who should come under the unfortunate class of those "ineligible to citizenship."

G. Y.

INTERNAL REVENUE—When Taxes Accrue.

In their income tax returns for 1917, certain munition manufacturers claimed a deduction from gross income for sums paid the government in January, 1917, as a tax on their making of munitions during the preceding year. The books of these companies were kept on what accountants call the "accrual system," as distinguished from the somewhat antiquated receipts and disbursements methods. Section 13 (d) of the Revenue Act of 1916, on which the case turned, provides: "A corporation . . . keeping accounts upon any basis other than that of actual receipts and disbursements, unless such other basis does not clearly reflect its income, may, subject to regulations by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, make its return upon the basis upon which its accounts are kept, in which case the tax shall be computed upon its income as so returned."

The Government insisted that, since the books of the companies were kept on the accrual basis as to all other items, their entire income tax return must be based on that system, and the deduction for the munitions tax could only be claimed for the year in which the tax accrued, claimed by the Government to have been 1916.

The contention of the Government was accepted by the United States Supreme Court in the cases of U. S. v. Anderson, and U. S. v. Yale & Towne Mfg. Co., — U. S. ——, decided January 4, 1926. Mr. Justice Stone, writing for the court, thus disposes of the contention that the munition tax did not accrue until 1917:

"In a technical legal sense it may be argued that a tax does not accrue until it has been assessed and becomes due; but it is also true that in advance of the assessment of a tax, all the events may occur which fix the amount of the tax and determine the liability of the taxpayer to pay it. In this respect, for purposes of accounting and of ascertaining true income for a given accounting period, the munitions tax here in question did not stand on any different footing than other accrued expenses ap-
pearing on appellee's books. In the economic and bookkeeping sense with which the statute and Treasury decision were concerned, the taxes had accrued."

U. S. v. Woodward, 266 U. S. 632, where the Supreme Court in determining net income permitted an estate tax to be deducted when it came due, though not paid until later, was principally relied upon by the companies. Mr. Justice Stone attached little importance to it in this connection, declaring that it did not in that case appear whether the accrual system was in use, or whether, as here, events occurring before the tax became due had fixed the amount of it. The cases are not, certainly, very closely parallel, and the holding in the instant case seems faithfully to interpret the legislative will back of the statutory provision in question.

The holding of the Supreme Court in the Anderson and Yale & Towne Cases is attracting the interest of accountants and tax specialists chiefly because of its possible influence upon the recent ruling of the Board of Tax Appeals in the Appeal of the Guaranty Construction Company, — B. T. A. —, reversing the Commissioner of Internal Revenue and deciding that there is nothing in the excess profits provisions which require that the invested capital of a taxable year be reduced on account of the payment of income and profits taxes for the preceding taxable year. This ruling is certain to be taken to the Circuit Court of Appeals and possibly to the Supreme Court of the United States, and a discrimination between companies based on whether or not they use the accrual system is already foreseen if the rule of the instant cases is applied when the court comes to consider invested capital.

E. E. R.

PARENT AND CHILD—Right to Custody of Minor.

Children's Aid Society v. Davis et ux., Supreme Court of Alabama, 100 So. 325, was a petition by the Society for custody of a male infant about one year of age, for the purpose of restoring the child to its natural parents. It appeared that the child had been abandoned shortly after birth, which occurred some five months after its parents' marriage, and had been placed by appellant in the custody of appellees. The latter provided a good home and conceived an affection for the child, and now seek by cross-petition to retain him in their custody. The Court considered the general responsibility and fitness to rear the child, of the natural parents on the one hand and of the foster parents on the other, concluding from the comparison that the natural parents were quite youthful and financially somewhat improvident, while the foster parents were more mature, highly respected and well-to-do people. But these defects in the showing made by the parents, the Court made haste to say, could not serve as ground for depriving the parents of their right to their child. Such ground was, however, found in the circumstances of its birth, its abandon-
ment two months afterwards and its continued neglect by the parents up to the time of the present action. In the language of the Court, "thereby appellants sinned away their rights to the child." Custody of the infant was therefore given to the foster parents, over the dissent of Gardner, J., who was of opinion that the facts shown were insufficient to forfeit the parents' right to their child, that their wrongdoing should be condoned, and that they should be given another opportunity to demonstrate their worthiness to provide for their offspring.

In Vanover v. Johnson, 256 S. W. 422, decided by the Supreme Court of Kentucky in 1924, the Court appears to have decided more in accord with Judge Gardner's dissent than with the majority decision of the Alabama court outlined above. The Vanover Case was a contest between the paternal grandparents and the mother of a child, for its custody. The mother had been divorced and had remarried, and it was shown that she had been guilty of adultery during the first marriage. But the Court was satisfied that her subsequent conduct showed complete reformation, and therefore would not withhold her child from her.

The decision of the Alabama court, first above, though perhaps severe and premised upon circumstances which do not place its propriety entirely beyond question, is, on the whole, in accord with the great weight of authority: In any contest for custody of a minor child the welfare of the child is the consideration of chief importance, (Chapsky v. Wood, 26 Kan. 650, 40 Am. Rep. 321, and note), whether the contest be between father and mother (Miller v. Miller, 38 Fla. 227, 20 So. 939, 56 A. S. R. 186), or between either or both parents and a third party (Jones v. Darnall, 103 Ind. 569, 2 N. E. 228, 53 Am. Rep. 545), and a fortiori between strangers. (Kelsey v. Green, 69 Conn. 291, 37 A. 679, 38 L. R. A. 471.)

At common law the father's right to the custody of his children was virtually supreme. The rule was quite early relaxed in favor of the mother, whose right in this respect was held to be equal to that of the father. Of late years the rights of both have been attenuated almost to the vanishing point, so that today the parents' rights are scarcely superior to those of third persons. The chief weight given to the natural claim of a parent seems to be that the natural affection of the parent for the child is taken as an indication that the child will receive better care at the parent's hands than at those of strangers. Any natural right of the parent is unimportant; the child's welfare is paramount. (Buchanan v. Buchanan, 93 Kan. 613, 144 P. 840; Chapsky v. Wood, supra.)

The grounds for refusing parents custody of their children have been many and varied. In Peese v. Gellerman, 51 Tex. Civ. App. 39, 110 S. W. 196, a subsequent marriage by the father to a woman of questionable reputation was held proper ground for declining him custody of an 8-year-old daughter then being cared for by an aunt of good reputation. And in that case the Court said in effect that
where it appears that the father has voluntarily parted with the custody of his child, has contributed little or nothing to its support, and has allowed another to do what he should have done, any presumption of fitness to rear the child would be destroyed and he would be required to establish a superior fitness before he could be awarded its custody, for there is no basis for a presumption that the promptings of parental affections will cause a father to tenderly care for a child in the future where he has failed to do so in the past.

It seems that, other things being equal, the parents' right to the child will prevail. But so solicitous is the law that every advantage be given the infant, that the natural right of the parents has been held to be destroyed by an acquiescence in the child's remaining with relatives, together with an expressed intention of obtaining custody of it in order that the child might be raised in the same stratum of society with its brothers and sisters and be made to "rough it" as they had to do. (Wood v. Wood, 77 A. 91, 77 N. J. Eq. 593.)

The fairly recent decision of In Re Green, Supreme Court of California, 1924, 221 P. 903, adds to the rule that in order to constitute such failure to maintain a child as will forfeit the parent's right to its custody, the reasonable qualification that there must have been also an ability to maintain the child.

As is to be expected from the nature of these controversies, there is presented by the decisions a great variety of circumstances which have been held sufficient or insufficient to divest parents of their right to care for their children. Disposition of the child has no doubt been many times more or less determined by the sympathies of the Court and the impression made thereon by the successful claimant.

A. H. K.


The last half of the nineteenth century has witnessed a marked tendency toward the formation of associations which embody all the benefits and privileges of corporations without at the same time assuming their liabilities and obligations. In order to appreciate the significance of this movement, it must be remembered that prior to the passage of incorporating statutes, there was a well founded and reasonable desire on the part of the business world to form companies that would not subject the associates to the unlimited personal liability so characteristic of the law of copartnership, and it was to remedy this situation that incorporating statutes were enacted. In substance, these statutes provided that on compliance with certain mandatory provisions, a charter would be granted by the sovereign, creating a new and distinct legal entity. The individuals were merged in the new artificial creature, with the result that the shareholders were no
longer identified as the company, but the company was recognized as a thing separate and apart from its constituent members.

The popularity of the statute together with the added stimulus it gave to industries proved its justification. It was not long, however, before the legislature sensed in these new legal entities another source of revenue. The taxes assessed on corporations became so great that the stockholders were led to seek new avenues of escape. The result was the attempt to form associations which would embody the essential features of both corporations and copartnerships without at the same time being classified as either. So it was that the idea of a joint stock company was evolved. In England these associations were at first held illegal, but this illegality was for the most part due to the "Bubble Act," 6 Geo. I. C. 18, g. 18, then in force. This act was later repealed, 6 Geo. IV v. 9, and with its repeal all the opposition of the courts to joint stock companies vanished. Cook on Corporations, 8th Ed., Vol. II, page 1736. The above premise is sustained by Judge Lindley in his work on "Company Law," where he comes to the conclusion, after an exhaustive review of the English authorities, that unincorporated associations were legal at Common Law. For an extensive note see Cook on Corporations, 8th Ed. Vol II, page 1736, note 3.

The courts seem never to have developed an intermediate status between partnerships and joint stock companies. The associations have been either one or the other. A failure to form a joint stock company creates a copartnership relation regardless of the express intention of the parties not to form a partnership. This interpretation was followed by the court in the case of Liverpool Insurance Company v. Massachusetts, 10 Wall. 566, where the parties, and even a legislative act, expressly stated that the association was not a corporation but a joint stock company. The court held that it was the objective status that governed and not the subjective intent of the parties, and that since the company had all the requisites and essential characteristics of a corporation, it would be considered as such and not as a joint stock company.

In the United States, joint stock companies were generally accepted as legal. They nevertheless found some opposition. Ricker v. American Loan & Trust Co., 140 Mass. 346; Wells v. Gates, 18 Barb. 554; McFadden v. Leeka, 48 Ohio St. 513; Ashley v. Dawling, 203 Mass. 311.

This opposition continued in Illinois until about 1905 when in the case of People v. Rose, 219 Ill. 46, the state Supreme Court took a distinct step toward their recognition. Today, unincorporated associations are undoubtedly legal in Illinois. Hossack v. Ottawa, etc. Assoc., 244 Ill. 274. Louisiana, however, still holds them illegal and of no standing before the law. In State of Louisiana v. American Cotton Oil Trust, 1 Ry. & Corp. L. J. 509, the court laid down in unequivocal terms the proposition that "a joint stock company is not known to the laws of Louisiana."
In this form of unincorporated association is found many characteristics of a corporation and partnership, but it may be distinguished from either to such a degree as to place it on a separate plane.

The difference between a joint stock company and a corporation is often elusive and the lines of demarcation are all but completely obliterated by the courts and legislatures. The latter have recognized unincorporated associations as having legal rights, by the very act of enacting laws either limiting or enhancing their legal powers. The former have gone so far as to say that "a deed to a joint stock company is a deed to a distinct entity." *First National Bank v. Vandem Brooks*, 172 N. W. 582. To call it an entity is to attribute to it practically the same nature as a corporation, although the court in this case did not state it quite so broadly.

But there are still fundamental and inherent differences between a joint stock company and a corporation. A joint stock company derives its existence from the contracts of individuals and the other from the sovereignty of the state. *People v. Coleman*, 133 N. Y. 279. It further differs from a corporation in that the shareholders do not enjoy personal limited liability. *Robbin v. Butler*, 24 Ill. 347. A corporation alone is primarily liable for its debts, because it alone contracts them, while in a joint stock company the members are jointly liable with the company. It cannot sue or be sued in the name of the association, as can a corporation, except as otherwise provided by statute.

These differentiations are even more marked between partnerships and joint stock companies. The latter have been characterized as partnerships with some of the powers of a corporation. *Van Aerman v. Bleistein*, 102 N. Y. 360. A joint stock company may issue shares and is not dissolved by a transfer of stock, or the death of a member. However, a shareholder does not possess the same powers of transacting business and disposing of the assets as in a partnership. *Cox v. Bodfish*, 35 Me. 302; *Spotwood v. Morris*, 86 Pac. 1094. A point of similarity is the fact that all the members are personally liable to an unlimited extent. *Wadsworth v. Duncan*, 164 Ill. 360. To illustrate the extent to which there is personal liability in joint stock companies, a Mississippi court held that members who sign a note for an unincorporated association are personally liable, even though the names are followed by the words, "Secretary and Treasurer." *Evans v. Lilly & Company*, 95 Miss. 58. This rule seems to be the law only if there was no notice of the limitation of liability on the part of the creditors. The fact that the Company had a secretary and treasurer does not in itself raise the presumption of a corporation and limit the liability of the shareholders. *Clark v. Jones*, 87 Ala. 474. The rule is now well settled that if the members of an association contract against personal liability and this limitation is known to the creditors or the circumstances are such that they should have known it, the members cannot personally be held for unlimited liability. *Western, etc. Co. v. Helvetia Co.*, 163 Fed. 644; *Imperial, etc. Co. v. Jewett*, 169 N. Y. 143.
The courts even went so far as to say that where a note was given for a debt, which contained a reference to the articles of association of an unincorporated joint stock association, providing that the members would not be personally liable, the holder of the note could not sue personally any member on the note. *Bank of Topeka v. Eaton*, 100 Fed. 8. By slow degrees the courts were developing a form of association which gave the shareholders the same immunity from personal liability as a corporation, but which was not considered a corporation for the purposes of taxation.

But it was not until the case of *Hibbs v. Brown*, 190 N. Y. 167, that all doubts were swept aside and the doctrine specifically laid down that for most purposes a joint stock company is a quasi-corporation. This rule had been advocated by an eminent writer, but he did not set it out as unequivocally as the court in the case cited. He said, "Joint stock companies may be cited as quasi-corporations of a private character. They are associations having some of the features of an ordinary common law copartnership, and some of the features of a private corporation." I. Morawetz, g. 6. In that case the appellant owned a certain bond, with coupons attached, of the Adams Express Company, which was stolen from him, and sold to the respondents. The respondents claimed they were protected as *bona fide* purchasers of a negotiable instrument. The appellant denied that the bond was negotiable. The Adams Express Company was an unincorporated voluntary association, a joint stock company organized under the laws of New York for the purpose of carrying on an express business, and having a president and other officers, and issuing certificates of stock which represented and were the means of transferring the rights of the respective shareholders.

The bond was issued by the Express Company in and under its association name and was one of an issue of twelve million dollars, secured by a certain trust indenture conveying and pledging for its payments, a large amount of securities and property. The bond provided that "no present or future shareholder, officer, manager or trustee of the Express Company shall be personally liable as partner or otherwise in respect to this bond or the coupons pertaining thereto, but the same shall be payable solely out of the assets assigned and transferred to the said Trust Company, the trustee for the bond holders, or out of other assets of the Express Company."

The court held that a joint stock company may make a valid negotiable instrument payable out of a particular fund. Formerly if such a note restricted the holder to payment out of the assets of the company, it was in substance the note of an individual limiting his liability to a particular fund and therefore non-negotiable. It is now said that since there were cases allowing notes to be negotiable, although limited to certain funds, the conception of a Joint stock company was not violated by holding the instrument negotiable. The court held that for the purposes of this case the difference between a joint stock company and a corporation was not material.
This case was decided more on the exact status of joint stock companies than on principles of negotiable instruments. It is well settled that instruments drawn on a particular fund are non-negotiable. *Tradesman Bank v. Green*, 57 Md. 602; *National Savings Bank v. Cable*, 73 Conn. 568. But it is equally well settled that indication of a particular fund out of which reimbursement is to be made, or a particular account to be debited does not render a note non-negotiable. *Schmittle v. Simon*, 101 N. Y. 554; *Union Bank v. Spies*, 151 Iowa 178.

The true test is that cited in *S. J. 123*, note 89, whether the drawee is confined to the particular fund or whether, though a specified fund is mentioned, he would have the power to charge the bill to the general account of the drawer if the designated fund should turn out to be insufficient. In the final analysis of each case, it must appear that the alleged bill of exchange is drawn on the general credit of the drawer.

In *Hibbs v. Brown* the court said, *obiter*, "I do not think that we should transgress any proper limits, if we assumed that the public in dealing with the present bonds did so solely upon the faith and credit of the association, the entity which issued them, and without knowledge or thought of the individuals who composed it or their financial responsibility." Yet the effect of that one sentence would be to obliterate one of the inherent differences as laid down by the court in *People v. Coleman*, 133 N. Y. 279, referring to the cases of *Supervisors of Niagara v. People*, 7 Hill 512, and in *Gifford v. Livingston*, 2 Den. 380, that the incorporators lose their individuality and merge their individual characters into one artificial existence. Upon these authorities a corporation is defined as "an artificial person created by the sovereign from natural persons and in which artificial person the natural persons of which it is composed become merged and non-existent."

The Circuit Court of Appeals of the United States in *Beal et al. v. Carpenter*, 235 Fed. 273, citing the decision of *Hibbs v. Brown*, speaking of joint stock associations, said: "Their analogy to corporations is much closer than to ordinary partnerships."

It may truly be said that the joint stock company of today may increasingly serve the purposes intended to be subserved by the corporation and the ordinary partnership in combining into one a more serviceable and agreeable medium for the transaction of business and commerce than either possesses in itself. "

E. A M.

**WILLS—Other Instruments Distinguished.**

Whether a particular instrument is a will is to be determined, not by the presence or absence of expression therein declaratory of testamentary character, nor by the fact that the paper is or is not under seal, but by the dispositions which it makes. The distinguishing feature of a will is that it is not to take effect except upon the death of
the testator, and until then it is ambulatory and revocable. An instrument which passes no present interest and is to take effect on the death of the testator is testamentary in character and can be operative only as a will, and as such, only when it is executed with the formalities necessary to the execution of a will. In Adams v. Lansing, 17 Cal. 629, the Court said that an instrument which passes a present interest is not a will and that this is so even though the enjoyment of such interest is postponed until after the death of the grantor of the interest.

Whenever possible, the Court will construe the document in question to be a will. Otherwise it will give it effect as a deed or some other valid transfer of property. The distinction between wills and deeds is one most frequently before the courts, and it is in this class of cases especially that full criteria are laid down and applied. In the case of Elmore v. Mustin, 28 Ala. 309, it was said that the essential difference between a deed and a will is that in the former there must pass a present interest and in the latter no present interest must pass, the interest passing after the death of the maker. Another controlling element is the manifest intention of the maker as to the character of the estate conveyed. On the other hand, in Kenney v. Parks, 125 Cal. 146, the Court held that irrevocability constituted the distinguishing characteristic between a grant and a testamentary disposition, which is always revocable and passes no present interest.

Where the only proof of intention to make a will is that the maker told the draftsman that he wished to make a will, an instrument purporting on its face to be a deed and delivered will be held to be a deed. Griswold v. Griswold, 148 Ala. 239. The general rule would seem to be that an instrument which is partly or wholly in the form of a deed is not a deed when its purpose is testamentary in that it is not to become operative until the maker's death, but is a will, if executed in conformity with the statutory requirements relating to wills.

While delivery of an instrument in the form of, and otherwise sufficient as a deed makes it operative as such, want of delivery of an instrument prevents it from taking effect as a deed. But it was held in the case of Bogan v. Swearengen, 199 Ill. 454, that delivery of a deed by the grantor to a third person to be held by him and delivered to the grantee upon the grantor's death is a valid delivery, where the grantor reserves no control or power of recall over the instrument. Where the attestation is sufficient for a deed but not for a will, the courts will in doubtful cases construe the power to be a deed.

A lease taking effect from and after date is not a will. In re Ople, 97 Wis. 56. If there is a provision in a lease which attempts to dispose of the reversion or the rents accruing after the death of the lessor, it is not converted into a will unless executed with the formalities necessary to the execution of a will.

The question whether any given writing is a will or a contract must be determined by the character of its contents, rather than by its title or any formal words with which it may begin or conclude. They are
essentially unlike. In a contract there is an agreement between the parties for the doing or not doing of some particular thing deriving its binding force from the meeting of the minds of the parties; in a will there is a binding force only at the death of the testator and then only from the fact that it is his last expressed purpose.

Kimball v. Baker, 12 Ind. 158, held that an antenuptial agreement is not a will, while in Savage v. Bon Air Coal Co., 2 Thur. Chanc. App. 594, it was said that an indenture or contract providing that the title to land in question was to pass and the conveyance to become effective on the performance of certain conditions made precedent by the terms of the instrument is not a testamentary paper. The case of Bessy v. Doremus, 30 N. J. L. 399, held that an agreement made in consideration of a deed of land to pay a debtor of the grantor a certain sum of money per annum after the latter's death is not an attempted testamentary disposition. In Swann v. Housman, 90 Va. 816, a paper read in part: "This article is to signify that if Smith survive me, I bequeath to him one thousand dollars of my property." Here the Court said the paper had no element of contract about it, but that it was a will. A mortgage arises out of the agreement of two or more parties, whereas a testamentary disposition of property involves the act of a single individual. The case of Patterson v. Mills, 69 Iowa 755, decided that an absolute mortgage executed on an oral understanding that it should be assigned at the death of the mortgagor to his son is not testamentary in character. In Fiscus v. Wilson, 74 Neb. 444, there was a mortgage providing for payment of interest on the principal during the life of the mortgagee, and that on payment of such interest and the death of the mortgagee the obligation was to become void and the principal to remain to the mortgagor and his heirs. This was pronounced not an attempt at testamentary disposition.

Wills and gifts are distinguished on the ground that in the case of a will no interest or title passes until the testator's death, while in the case of a gift inter vivos the title passes immediately and irrevocably, and as to a gift causa mortis, the title passes subject to the donor's revocation. It therefore follows as to instruments without consideration that they operate as gifts when the title passes presently (Reed v. Copeland, 159 Conn. 472) and as wills when the title is to pass on the maker's death (Coffin v. Otis, 111 Metc. (Mass.) 156), and as neither when insufficient as gifts and not executed with the formalities necessary for a will. The reservation of a life interest does not convert a deed or a gift into a will.

The case of Martin v. Stone, 87 N. H. 367, is authority for the proposition that the fact that an ordinary promissory note is made payable at or after the maker's death does not affect its validity nor give it a testamentary character.

A will takes effect in the future upon the death of the testator. A declaration of trust takes effect in praesenti, during the life of the settlor. Therefore, instruments which convey the legal title and sufficiently declare trusts to take effect during the lifetime of the settlor
will be construed to create trusts and not wills—although some of their provisions contemplate a postponement of distribution and enjoyment of the interest granted until after the death of the settlor, or although the trust was created in contemplation of death. In *Dexter v. Witte*, 138 Wis. 74, the Court held that although a deed of trust had never been delivered and never had any vitality as a deed, it cannot be probated as a will where it purported to convey a present interest. This does not mean that a trust cannot be created by a will. An instrument in the form of a trust deed or power, but whose purpose is purely testamentary, may be probated and treated as a will when it is executed as such. The retention of full control over the property by the settlor during his lifetime makes the instrument testamentary in nature, and unless it is executed according to the wills statutes it is inoperative. *Stevenson v. Earl*, 65 N. J. Eq. 721.

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