EQUITY PRIOR TO THE CHANCELLOR'S COURT
WILLIAM F. WALSH

THE ORIGIN OF THE PATENT AND COPYRIGHT
CLAUSE OF THE CONSTITUTION
KARL FENNING

JAMES MADISON AND THE FEDERAL CITY
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THE FIRST LEGAL EXECUTION FOR CRIME IN
UPPER CANADA
WILLIAM RENWICK RIDDELL

and

NOTES     RECENT DECISIONS     BOOK REVIEWS

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EQUITY PRIOR TO THE CHANCELLOR'S COURT

By WILLIAM F. WALSH

I. THE PERIOD PRIOR TO THE THIRTEENTH CENTURY

ANY definition of equity must necessarily be incomplete and therefore misleading, or so general and vague as to be of no real value. The content and nature of equity can be understood only by a study of its historical development and of the principles and practices which it comprehends.¹ We think of equity as that system of remedial law administered by Chancery in England and by courts in the United States which exercised like powers and administered a like system of law. But from the beginning of English law, during the Saxon period down through the early Norman period, equity was administered by the king and witan during the Saxon time, by the king and the great court of the nation which succeeded the witan after the Norman Conquest. The king's prerogative included the power to do justice in any case between his subjects brought to his attention by petition or otherwise. He was the fountain of all justice, and in him, acting with the advice and consent of his witan, court and council, resided the final power to do what justice and right required.²

¹ "Equity is that body of rules which is administered only by those courts which are known as Courts of Equity. . . . This you may well say is but a poor thing to call a definition. . . . Still I fear that nothing better than this is possible. The only alternative would be to take a list of the equitable rules and say that equity consists of these rules. . . . Therefore for the mere purpose of understanding the present state of our law some history becomes necessary." Maitland, Equity 1, 2; 13, 14.

Ordinary law and justice for the people generally, down to the latter part of the twelfth century, was administered by the courts of the hundred and the shire in the Saxon time, by the courts of the manor and the county during the early Norman period. These courts, made up of a considerable body of men fairly representative of the average of the people, uneducated and entirely lacking in anything like legal knowledge or training in the modern sense, administered an extremely rude kind of law, unwritten, made up of the customs of the people, varying from time to time and in different communities, and handed down from generation to generation by word of mouth. The forms of trial were, for the most part, appeals to the supernatural. It was an exceedingly crude law which, however, seems to have met the needs of the crude society of the time. Another and superior kind of justice was administered in controversies where the king on his thegns or lords were involved, by the king and witan before the conquest, by the king and his court thereafter. This, however, was a regular system of law administered for the very great, distinct from the king's justice in special cases affording relief not available in the regular courts. Nevertheless this regular administration of law by the Curia Regis was royal law, based on the same ultimate and supreme power in the king to do justice as was the special relief in exceptional cases through the king's prerogation of grace which later came to be called equity.

II. EQUITY ADMINISTERED AS PART OF THE COMMON LAW

The common law as distinguished from the customary law of the popular courts described briefly in the preceding paragraph originated in the establishment by Henry II of a national court administering a law for the entire nation.

9 WALSH, op. cit. supra note 2, at 4, 18, 19, 20; GLANVIL, lib. XII, cap. 6, and lib. XIV, cap. 8; 1 POLL. & MAIT., op. cit. supra note 2, at 66 et seq.; DIGBY, HIST. L. REAL PROP. (5th ed.) 62-68.

4 WALSH, op. cit. supra note 2, at 70; 1 POLL. & MAIT., op. cit. supra note 2, at 85, 87; 1 HOLDSWORTH, HIST. ENG. L. 40.
By means of the assize of novel disseisin, the grand assize, the assize of mort d'ancestor and other writs resulting in reasoned verdicts of juries instead of trial by oath helpers and by battle, he secured for this new form of royal justice control over all cases involving ownership of freehold estates in land, by far the most important part of the law of the time. By the process of presentment or indictment through accusing juries he secured for his judges jurisdiction over the more serious crimes. This work required a law court in the modern sense made up of a small number of judges of education and ability skilled in the law which sat regularly term after term, generally at Westminster, often at the Exchequer. The king's law was brought directly to the people by judges in eyre who traveled throughout the country holding sessions of the king's court in the different counties usually in connection with special sessions of the county court in each county, and by other judges acting on special commission to try at first assizes of novel disseisin and other assizes in the locality where the property involved was situated, and therefore called justices of assize, these judges finally acting under general commissions with powers and functions differing little from those of the court at Westminster. Thus at the end of the reign of Henry II we find established a Curia Regis, court of the king, which was a true court of law in the modern sense, administering a national law, common to the entire country, and which has largely displaced the customary laws of the different parts of the country, particularly with respect to the law of land and of the more serious crimes. The measure of this accomplishment is found in Glanvil's Treatise, our first real law work, which is the very beginning of the written record of the English

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*Walsh, op. cit. supra note 2, at 81-85; 1 Poll. & Mait., op. cit. supra note 2, at 125-127; Dibby, op. cit. supra note 3, at 110, 111.
*1 Poll. & Mait., op. cit. supra note 2, at 130, 131; Thayer, Prelim. Treatise on Evidence 69 et seq.; Walsh, op. cit. supra note 2, at 85.
*Walsh, op. cit. supra note 2, at 85, 86.
common law. The details of this development belong elsewhere. This continued during the thirteenth century, so that by its close we find the common law definitely established as the law of the nation, displacing the customary law and the local courts which were limited to local petty matters or relatively unimportant survivals. The law of Curia Regis, which had been the law of the very great, scarcely touching the mass of the people, had been extended and adapted to the needs of the people so as to become the common law of the nation.

From the standpoint of our study of equity the important fact to appreciate is that this law was the king’s law, to be purchased and paid for by the plaintiff seeking a writ from the king’s secretary, the Chancellor. It was not to be had for the asking as a natural right. It rested on the power of the king, acting with the advice and consent of his great court, to do justice; upon his power and authority as the fountain of all justice. In other words, it rested on the power of the state. The king, acting with the advice and consent of his general court, was the state in action. The supreme power of the state was in him and his court, principally, almost exclusively at this time, in him. The judges of his law court, the Curia Regis, acted with all the power of the state, so far as that power had been delegated to them. In the last years of the twelfth century and during the first half of the thirteenth, relief was granted in the freest way in all sorts of cases. The Chancellor was then the king’s secretary, and Chancery was the secretariat of the state. Writs, like all other state papers, were prepared there, and the clerks in Chancery issued writs starting the various

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8 Walsh, op. cit. supra note 2, at 86-88; 1 Poll. & Mait., op. cit. supra note 2, at 134-137.

9 Adams, The Origin of English Equity, 16 Col. L. Rev. 87. He said: “In this new legal evolution, (of the common law) the following principle is fundamental from the very beginning: the new procedure and the new machinery of the state to which any individual may appeal in his personal need, as he might to the shire or hundred court.” See also citations in supra notes 5 and 8.
actions above referred to, and many others which had become a matter of course, whenever a complainant applied for the writ based on facts which brought his case within the limits of the action which the writ initiated. Bracton describes a class of writs, breve magistralia, which were very freely issued in the first half of the thirteenth century to meet new cases where justice seemed to require that an action be allowed. Professor Holdsworth says that the use of these writs was "the immediate and effective cause of the rapid development of the law during this period." 10

With so flexible a power to issue writs to meet any situation which seemed to require relief, followed by the granting of the appropriate relief by the king's judges, there must have been little or no occasion to appeal to the king for relief under his prerogative of grace. The king's justice was being dispensed by his judges and without unreasonable restriction. We find, therefore, as we would expect, that many forms of relief, distinctly of an equitable character according to the later classification, were administered by the king's judges as part of the common law in Bracton's time. 11 Thus a use, or opus, of land might possibly be enforced at law in the thirteenth century in favor of the beneficiary by a remedy similar to the writ of detinue by which a third person could enforce a bailment made by the bailor with the bailee for the benefit of such third person. 12 Many forms of specific relief, as distinguished from

10 2 Holdsworth, op. cit. supra note 4, at 245.
11 Adams, loc. cit. supra note 9; Barbour, Some Aspects of Fifteenth Century Chancery, 31 Harv. L. Rev. 834. Prof. Barbour says: "It is now more than thirty years since Justice Holmes in a brilliant and daring essay set on foot an inquiry which has revealed the remote beginnings of English equity. Equity and common law originated in one and the same procedure and existed for a long time, not only side by side, but quite undifferentiated from each other. Their origin is to be found in the system of royal justice which the genius of Henry II converted into the common law. . . . There was no equity as a separate body of law; for the king's justices felt themselves able to dispense such equity as justice required."

12 2 Holdsworth, op. cit. supra note 4, at 245, 246; Holmes, Early
damages, could be had in the King's Court at this time. One of the most striking instances was the right of a tenant to enforce specific performance of the landlord's covenant to give the tenant the possession and enjoyment of the leasehold property during the term by suing out a writ of covenant. Professor Holdsworth says that similar relief was given by the writ of *Quare ejecit infra terminum.* But the two cases were very different. The tenant could not maintain covenant against anyone but the landlord. He did not recover the land as his property; he recovered it in a personal action of covenant based on the landlord's promise under seal, in specific enforcement of that promise. The writ *quare ejecit* was issued about 1235 to give the tenant an action to recover the land as owner from the landlord's grantee who had ousted the tenant. There was no question of enforcing the covenant, as the defendant had made no covenant. He was simply a wrongdoer who had ousted the owner from the land and under this writ and later under the writ of *ejectio firmae* the tenant's ownership of an estate in the land was definitely established. But prior to these writs he had no estate. He had merely a

*English Equity, 1 L. Q. Rev. 162, 2 Sel. Essays Anglo-Am. Legal Hist. 705; Ames, Origin of Uses & Trusts, 21 Harv. L. Rev. 261, 2 Sel. Essays, Etc. 737 et seq.* Holdsworth cites Bracton's Note Book, cases 1683, 1851, as tending to show that such a remedy might be had. Ames insists that uses as enforceable rights as distinguished from mere moral rights in the *cestui* had no existence until enforced by the Chancellor. He says: "It must have been all the easier for the Chancellor to allow the subpoena against the feoffee to uses because the common law gave a remedy against a fiduciary who had received chattels or money to be delivered to a third person, or, as it was often expressed, to the use of a third person, or to be redelivered to the person from whom he had received the chattels or the money," citing many cases from the Year Books. This indicates that the remedies at common law against trustees to uses were definitely established where personal property was involved, but interposition by the Chancellor became necessary in corresponding uses of real property because the remedy attempted in Bracton's time failed eventually to become established at law.

13 2 Holdsworth, op. cit. supra note 4, at 247.
personal right of covenant enforceable against the landlord, the covenantor, alone, not against any third person who might oust him.\textsuperscript{14} Professor Holdsworth gives us several other cases taken from Bracton's \textit{Note Book} in which specific relief of the same kind was given. Thus, a defendant was required to transfer seisin as provided for in a fine by which he had bound himself.\textsuperscript{15} Specific fulfillment of the duty of warranty by a donor, of a mesne lord to perform feudal services so that his tenant should not be disturbed by the overlord,\textsuperscript{16} of a tenant to repair,\textsuperscript{17} are some of the more striking of these cases, in which performance was enforced either by distraint, forfeiture of the land or the taking of security.

We find similar cases of specific relief suppressing the continuance of nuisances.\textsuperscript{18} The writ of prohibition was used to prohibit the commission of waste by tenants for life and for years, including tenants in dower and curtesy and guardians in chivalry.\textsuperscript{19} The writ of estrepment was used to prevent waste pending a real action, and after judgment therein, operating very like injunctions \textit{pendente lite} of later times.\textsuperscript{20}

Why did not this equity of the King's Court develop so that we might have been spared the spectacle of two com-

\textsuperscript{14} \textit{Walsh, op. cit. supra} note 2, at 129-131; 3 \textit{Poll. & Mait.}, op. cit. \textit{supra} note 2, at 108-109; \textit{Digby, op. cit. supra} note 3, at 177.

\textsuperscript{15} \textit{2 Holdsworth, op. cit. supra} note 4, at 247, citing \textit{Bracton's Note Book} case 1579.

\textsuperscript{16} \textit{Supra} note 15, \textit{Bracton's Note Book}, cases 594, 390.

\textsuperscript{17} \textit{Supra} note 15, \textit{Bracton's Note Book}, case 1165.

\textsuperscript{18} \textit{2 Holdsworth, op. cit. supra} note 4, at 248, \textit{Bracton's Note Book}, cases 1162, 1253.

\textsuperscript{19} \textit{Supra} note 18, \textit{Bracton's Note Book}, cases 461, 527, 540, and several other cases cited in \textit{2 ibid.} notes 14 and 18. See also \textit{Hazel-tine, Essays in Legal Hist.} (1913) 269-284.

\textsuperscript{20} Prof. Holdsworth says Bracton's Note Book affords many instances of these writs operating before judgment \textit{pendente lite}, as well as after judgment. \textit{2 Holdsworth, op. cit. supra} note 4, at 249 n. 4.
peting and in many important respects conflicting systems of law existing in the same state? The answer is found in the hardening of the common law into a rigid system limited narrowly to fixed forms of action, giving relief in the form of damages for wrongs after their commission, to the exclusion of specific relief apart from real actions for the recovery of land.

Specific relief was the rule rather than the exception under the ancient customary law of the shire and manorial courts. The owner recovered his chattel by the appeal of larceny, not its value in damages. The recovery of unliquidated damages came into the law as an incident of the assize of novel disseisin, hence, the plaintiff recovered not only his land but damages for its unlawful detention. When trespass became a writ of course about 1250, the recovery of unliquidated damages was a well-known practice, and was adopted as the exclusive remedy in trespass actions arising out of the wrongful taking of chattels, which took the place of the appeal of larceny, as well as in actions for trespass to land and to the person. The subsequent development of personal actions was the development of trespass, through actions on the case, and the remedy in all these cases was limited to money damages. The real actions for the recovery of land all involved specific relief, the recovery of the land itself, not damages; but apart from cases of the recovery of land or the enforcement of specific interests in land, specific relief could not be secured under the different forms of action which took shape during the latter half of the thirteenth century and thereafter.

The hardening process which reduced the common law of the King’s Court to restricted forms of action eliminating specific relief, therefore ending the possibility of the development of equity as part of the common law system, re-

20a Walsh, op. cit. supra note 2, at 77, and authorities there cited.
21 Ames, Hist. of Trover, 3 Sel. Essays, etc., 423 et seq.; Walsh, op cit. supra note 2, at 313-327, as to development of personal actions in tort.
sulted primarily from the Provisions of Oxford, 1258, which expressly forbade the Chancellor to frame new writs without the consent of the King and Council. The great freedom which existed prior to this statute in the issuance of new writs, and the consequent flexibility in the law permitting a remedy in any case where justice required it, was extinguished by it. The existing writs which had become de cursu, together with such new writs as were made thereafter by direction of the King and his Council on Parliament, fixed the limits of the remedies which could be secured at common law. The situation was improved by the famous 24th Chapter of the Statute of Westminster II, which provided that: "Whenever from henceforth it shall fortune in Chancery that in one case a writ is found, and in like case falling under like law is found none, the clerks of the Chancery shall agree in making a writ or shall adjourn the plaintiffs until the next Parliament, and the cases shall be written in which they cannot agree, and be referred to the next Parliament; and, by consent of the men learned in the law a writ shall be made, that it may not happen that the King's Court should fail in ministering justice unto complainants."

Professor Holdsworth makes clear that the decay of equity in the common law courts was a gradual matter, not completed until, after the middle of the fourteenth century, when jurisdiction in equity had definitely been taken over by Chancery. The methods of proof and of procedure in Chancery were so much more effective than were the narrowed methods of the law courts to accomplish the results required in equity cases that relief of this kind ceased altogether at law, and could be had only in Chancery. He refers to cases in the reign of Edward I, and as late as 1313, 1314, in which relief of an equitable nature was given by common law courts. The Bills in Eyre, discovered by

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22 Kerly, op. cit. supra note 2, at 9.
23 Kerly, op. cit. supra note 2, at 9, 10.
24 2 Holdsworth, op. cit. supra note 4, at 334-347, 448, 449.
25 2 Holdsworth, op. cit. supra note 4, at 335, 336, citing, among
Mr. Bolland, show a remarkable survival of equity at common law, administered by the justices in eyre from about 1274 to 1331, possibly somewhat later. These were very similar to bills in equity, viz., petitions to King and Council referred to the Chancellor as hereafter described, or petitions to the Chancellor direct. They probably originated in instructions by the king to the Commissioners who held the inquest of 1274 to hear quereiae, and the practice of hearing quereiae by bill was established through similar instructions given to the judges in eyre in 1278 and thereafter. Relief was given without a writ. The bill was generally in simple form, without formality, and free from the technical rules which applied to writs. In some cases the judges corrected defects in them by examining the complainant and thus getting at the real matter complained of. The remedy sought was sometimes specific relief, sometimes damages. As to the matters complained of Mr. Bolland says: "We see that no misfeasance or non-feasance was too slight or too grave to be the subject of complaint by a bill in eyre. The recovery of debts, large and small, and the enforcement of contracts were sought for by them. Damages were claimed by them for detinue, breach of contract, trespass, negligence, ... conspiracy to deceive the court and pervert the course of justice, and for almost every other tortious act or omission by which a man might be endangered." No doubt they were introduced to fill a

other cases, Y. B. 30, 31, Edw. I (R. S.) 324, writ of prohibition made to act as an injunction to stay the cutting of timber; Y. B. 30, 31, Edw. I (R. S.) 194. Berwic, J.: "We command you that under penalty of one hundred pounds you have the infant here before us on such a day"; Y. B. 2. 3, Edw. II (S.S.) XIII, XIV. 58, relief against penalties; Eyre of Kent (S.S.) 91, an order to restore a road; ibid. iii 129, an order to restore a stream "to its proper and ancient channel."


SELECT BILLS IN EYRE, (S. S.) XI. See ibid. XIX, XX, XXII, XXV, XXXIV, and other references: 2 Holdsworth, op. cit. supra note 4, at 337, 338 notes.
gap left by the elimination of the appeals of the customary law before trespass had developed sufficiently to take their place, but under them justice was administered in many cases where no relief otherwise could be had, mostly in favor of poor complainants, and much of it of a distinctly equitable character. But the disappearance of justices in eyre and the establishment of justices of the peace to administer local criminal law around the middle of the fourteenth century ended bills in eyre. Chancery as a court of equity was taking form at about this time, administering in a direct way the prerogative of grace belonging to the king, with an infinitely superior machinery with which to get at the truth and to give specific relief, and the last survivals of the equity administered by the king's judges of the thirteenth century disappeared.  

It has sometimes been said that if the common law judges had taken advantage of the power given them by the Statute of Westminster II there would have been no need or occasion for the development of equity in the Chancellor's court.  But the reasons why this had become impossible without further action of King and Council are apparent. By the middle of the fourteenth century the granting of specific relief by way of specific performance, or by way of preventing nuisances or other wrongs had been definitely lost through the triumph of the principle of damages as the basis of relief. Damages is relief by way of substitution, in many instances inferior to specific relief. In many other respects the law as it developed failed to give adequate relief, and equity was called on to fill these gaps. In none

**2 Holdsworth, op. cit. supra note 4, at 345, 347, 448, 449. There can be no doubt, as Prof. Holdsworth states, that bills in equity had their origin in bills or petitions to king and Council, not to bills in eyre. The procedure under bills in eyre was, after the bill was received and the proceeding started, in accordance with the common law, in no way according with procedure in Chancery as it later developed.

**See 3 Bl. Comm. 51; Austin, Jurisprudence 635.
of these cases could relief be given under the Statute of Westminster II, in accordance with the forms of relief and of procedure which the common law had developed.\textsuperscript{30} It is another and entirely different question why the King and Council did not give to the judges of the King's Court power to act \textit{in personam} to the end that they might give specific relief, instead of sending petitioners seeking such relief to the Chancellor, thus avoiding the development of an anomalous dual and competing system of law in Chancery. That question belongs to a discussion of the development of equity in Chancery in the period immediately following.

\textsuperscript{30} 2 Poll. & Mait., \textit{op. cit. supra} note 2, at 523, 595; Huston, \textit{Enforcement of Equitable Decrees} 72, 73. See Kerly, \textit{op. cit. supra} note 2, at 11, 12; Ames, \textit{Lect. Legal Hist.} 443, 444, stating in reference to Blackstone's observation: "Such an opinion betrays a singular failure to appreciate the fundamental difference between law and equity, viz., that the law acts \textit{in rem} while equity acts \textit{in personam}."
THE ORIGIN OF THE PATENT AND COPYRIGHT CLAUSE OF THE CONSTITUTION

By KARL FENNING

THE patent statutes and the copyright laws of the United States are based on a section of the Constitution which does not employ either of the words "patent" or "copyright" but reads thus1:

"The Congress shall have power * * * to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

This provision of the Constitution is said by George Ticknor Curtis2 to have originated with Charles C. Pinckney, although in making this statement he cites no authority. Pinckney was a member of the Constitutional Convention from South Carolina, and is generally given credit for being the author of this clause, but what foundation there is for this belief is not indicated.

Lest there might be aroused jealousy of authorship or some opposition because of antagonism of one State to another, the members of the Constitutional Convention agreed to keep secret their proceedings. Consequently we find no contemporary publications crediting Pinckney or anyone else with originating the provision in which we are interested.

Several plans for a Constitution were submitted to the Constitutional Convention, and Pinckney's Plan, sometimes known as the South Carolina Plan, was given to the public in pamphlet form some time after the close of the Convention.3 In this pamphlet Pinckney proposed to give author-

1 Art. I, § 8, cl. 8.
2 Curtis, Constitutional History 340; 2 Watson, Constitution (1910) 660.
ity to Congress "to secure to authors the exclusive rights to their performances and discoveries." These words appear also in the pamphlet as reprinted in Professor Ferrand's *Records of the Constitutional Convention*. It is probable that this pamphlet is the thing which has caused Pinckney to be given credit for this Constitutional provision, it being supposed that he actually presented it to the Convention on May 28.

It clearly appears, however, from the Journal of the Constitutional Convention itself, that there was no such clause included in Pinckney's Plan as originally presented to the Convention. The State Department published between 1894 and 1900, a five volume "*Documentary History of the Constitution of the United States of America.*" The Childs' Pamphlet is discussed on pages 420 to 423, in volume V of that work, and the clear conclusion is reached that the quotation made above was not included in the Pinckney Plan as actually submitted to the Convention on May 28, 1787. Likewise, the volume published by the Government in 1927, *Documents Illustrative of the Formation of the Union of the American States* (69th Congress, First Session, House Document No. 398), reprints the Pinckney South Carolina Plan as submitted to the Convention, giving the date as May 29, 1787, but we find therein no reference to patents or copyrights. The same fact appears evident from the statement in the American Historical Review.

The House Document No. 398, *supra*, also prints three variant texts of the Virginia Plan presented by Randolph to the Convention, three texts of the New Jersey Plan presented by Paterson, and five texts of the Plan presented by Hamilton. In none of these is there any foundation for

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*Id.* 26.


7 *Id.* 967-970, 971-974, 975-978.

8 *Id.* 979-980, 981-982, 983-984, 985-986, 987-988.
the portion in the Constitution in which we are interested. The same volume includes the journals of Yates, of King, of Paterson, of Hamilton, and of MacHenry, containing their notes of the proceedings of the Constitutional Convention, but in none of these is there any reference to the patent and copyright clause.

The most elaborate existing record of the debates in the Constitutional Convention was kept by Madison, and by him turned over to Washington to be kept secret. After the Constitution had been adopted by the States and Washington had been elected President he placed this in the State Department of the new Government. We turn then to this journal of Madison for light on the development of this clause.

It will be remembered that the Constitutional Convention met on May 14, 1787, but organization was not perfected until the 25th of May. Various plans for the Constitution were submitted to the Convention. Meetings were held almost daily and as a result of debates various general principles were established by resolutions. On July 24, a committee was appointed to draft and report a Constitution conformable to the resolutions already passed by the Convention. On July 26 the several resolutions were handed to this committee together with new propositions then offered by Mr. Pinckney and by Mr. Paterson. None of these made any reference to inventions, patents, or copyrights. Indeed, all details were vague. The resolution relating to the legislative powers, merely provided that:

"The National Legislature ought to possess the legislative rights vested in Congress by the confederation; and moreover, to legislate in all cases for the general interests of the union, and also in those to which the states are separately incompetent, or in which, the harmony of the United States may be interrupted by the exercise of individual legislation."

This Committee reported a draft Constitution on August

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* Id. 746-843, 844-878, 879-912, 913-922, 923-952.
* Madison, Debates in the Federal Convention (Scott's ed.).
* Id. 445, Resolution No. 6.
6th. Although those things over which the National Legislature should have power cover nearly a page of the text, there is no semblance of the paragraph in which we are interested, and indeed, it does not appear until Madison's minute of August 18, after debate of substantially two weeks on the Committee's draft.

As printed in House Document No. 398, Madison's journal for August 18 recites that "Mr. Madison submitted, in order to be referred to the Committee of detail," a number of powers as proper to be added to those of the General Legislature, including: "to secure to literary authors their copy rights for a limited time." The journal also states that on the same day Mr. Pinckney suggested for reference to the Committee of detail, the power "To grant patents for useful inventions; to secure to authors exclusive rights for a certain time." On this we might give Pinckney credit for the first suggestion of patents but not of copyrights which are suggested by Madison also.

On the other hand, however, from the State Department publication referred to above, it appears, under date of August 18, 1787, that the following additional powers for the Legislature were referred to the Committee: "To secure to literary authors their copy rights for a limited time. To encourage by proper premiums and provisions the advancement of useful knowledge and discoveries." There is nothing to indicate who originated these proposed powers. Volume III of the State Department publication, however, on pages 555 and 556 under date of "Saturday, August 18, in the Convention" shows that Mr. Madison proposed the following to be referred to the Committee: "6. To secure to literary authors their copyrights for a limited time. 7. To secure to inventors of useful machines and implements, the benefits therefore, for a limited time." Another minute

\[13\] Supra note 6, at 563 et seq.
\[12\] Vol. 1, p. 130.
\[14\] This is also credited to Madison by Ferrand. Ferrand, Records of the Constitutional Convention (1911).
on the same day indicates that Mr. Madison submitted for the Committee, "To secure to literary authors their copyrights for a limited time. To encourage by premiums and provisions the advancement of useful knowledge and discoveries." And that on the same day General Pinckney proposed, for the Committee, "to grant patents for useful inventions; to secure to authors exclusive rights for certain ['limited' stricken out] time." From these references it would seem that Madison certainly is entitled to as much credit as Pinckney for having originated the patent as well as the copyright provision.

Certainly with respect to the copyright phase of it Madison may be entitled to priority since Volume IV of the State Department publication contains Madison's "Observations, April, 1787, on the Vices of the Political System of the United States." This is apparently an address Madison made to the Constitutional Convention in April, in which he says that instances of inferior movement are the "want of uniformity in the laws concerning naturalization and literary property." He was referring here to the fact that the Articles of Confederation which held the states together before the Constitution was adopted, had no provision for national protection to authors and we shall see later that Madison was well aware of this.

At any rate, with the matters submitted to it on August 18th the Committee of Detail proceeded to deliberate. On August 22, the Committee made a partial report on the proposals of Madison and Pinckney, but that report contains no reference to the matter in which we are interested.\textsuperscript{15} It was not until Wednesday, September 5, 1787, that Mr. Brearley of the Committee of Eleven, made a further report\textsuperscript{16} as follows: "To promote the progress of Science and useful arts by securing for limited times to authors & inventors the exclusive right to their respective writings and discoveries." (A foot note in the journal here says that the word

\textsuperscript{15} Supra note 6, at 595
\textsuperscript{16} Id. at 666.
"the" is inserted in the transcript between "and" and "useful.") On the same day this clause was "agreed to nem con:" Thus the words employed originated in the Committee but we have no way of finding out through what individual.

All the matter adopted by the Convention was referred to the Committee of "Stile and arrangement," which, on September 12, 1787, reported to the Convention the Constitution containing this clause without change and, as so phrased, it was finally adopted and signed by the Delegates of the States on September 17, 1787.17

Curtis, in his Constitutional History, is right in saying that there was no debate in the Constitutional Convention with reference to this provision, and that there was no minute in the Committee with reference to it.18

The matter, on its merits, apparently aroused substantially no controversy either in the Convention or among the States adopting the Constitution. The Federalist which treated all phases of the Constitution apparently contains nothing relating to the patents and copyright clause excepting the following, written by Madison:19

"The utility of this power will scarcely be questioned. The copyright of authors has been solemnly adjudged in Great Britain to be a right at Common Law. The right to useful inventions seems with equal reason to belong to the inventors. The public good fully coincides in both cases with the claims of individuals. The States cannot separately make effectual provision for either of the cases, and most of them have anticipated the decision of this point by laws passed at the instance of Congress."

Madison's reference here is to a resolution which had been adopted May 2, 1783, by the Congress established under the Articles of Confederation on a Committee report offered by Mr. Madison himself, reading as follows:

"Resolved, that it be recommended to the several States to

17 Id. at 706, 745.
18 Supra note 2.
19 The Federalist, No. XLIII (Lodge's ed. 1888) 267.
secure to the authors or publishers of any new books not hitherto printed, being citizens of the United States, and to their executors, administrators, and assigns, the copy right of such books for a certain time not less than fourteen years from the first publication * * * such copy or exclusive right of printing, publishing, and vending the same, to be secured to the original authors, or publishers, their executors, administrators, and assigns, by such laws and under such restrictions as to the several States may seem proper."

In view of this it is not surprising to see Madison suggesting national copyright powers in the Constitutional Convention.

Curtis, in his Constitutional History,\(^2\)\(^0\) says that all of the States had copyright acts but none had patent laws, but that patents were granted by special acts of the legislatures of the States prior to the Constitution. He is not entirely accurate in that statement. It is true that as a result of this resolution of the Congress under the Articles of Confederation, and of the efficient urging of Noah Webster, all of the original states passed copyright laws except the state of Delaware and the state of Connecticut, which had passed a copyright act several months before the resolution of Congress.

But the state of South Carolina went even further, and included a provision for protecting inventions. The Act of March 26, 1784, in that state, after providing for copyright protection of books, said:

"The inventors of useful machines shall have a like exclusive privilege of making or vending their machines for the like term of fourteen years, under the same privileges and restrictions hereby granted to, and imposed on, the authors of books."

Remembering that Pinckney came from South Carolina and assuming that he was familiar with this act, it is not at all strange that he did propose to the Constitutional Convention that Congress be authorized to give protection to both authors and inventors.

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\(2\)\(^0\) Curtis, Constitutional History 340.
Of course, copyright and invention patent protection was extended to the colonies by the English Laws, and the meaning of the words “patent” and “copyright” were more or less fixed. The laws of five of the States, namely, Connecticut, Georgia, New York, and North and South Carolina, had definite requirements for publication of copyrighted books in sufficient numbers and at a cheap enough price to satisfy the public demands. Those requirements were, of course, impressed upon the patent clause of the South Carolina Statute and apparently became a requirement to manufacture the patented device and to sell it at a reasonable price. Some of the State laws provided that if these requirements for publication and sale were not carried out a tribunal might grant a license to someone else to publish. It is interesting to note, in passing, that the Massachusetts copyright law provided that two printed copies of everything copyrighted had to be presented “to the Library of the University of Cambridge.”

It is significant, therefore, that in framing the Constitution in its final form, the words “patent” and “copyright” were not used, possibly lest the power be limited to the particular forms of conditional exclusive rights which were at that time known as copyrights and patents. The words finally chosen for the Constitution seem to allow no limitations on the “exclusive” right such as requirements for working or compulsory licenses. It seems clear that it would be unconstitutional for Congress to endeavor to provide for either type of limitations in either patents or copyrights.

Section 1(e) of the present copyright statute, to be sure does provide for compulsory licenses, but its constitutionality has never been passed on by the courts. There is no such provision in any of the patent statutes, and the patent profession generally, when such legislation has been pro-

22 Act of March 4, 1909, c. 320, § 1 (e); 35 Stat. 1075; 17 U. S. C. A. § 1 (e).
posed, have insisted that the Constitution prohibits any limitation on the "exclusive" patent right, and the proposition seems to be supported by the reasoning of the Supreme Court in *Continental Paper Bag Company v. Eastern Paper Bag Company*:\(^23\)

"It has been the judgment of Congress from the beginning that the sciences and the useful arts could be best advanced by giving an exclusive right to an inventor * * * The language of complete monopoly has been employed."

It seems impossible to fix definitely on whose brow the laurel wreath should be placed either for the general suggestion or for the specific phraseology of the patent and copyright clause of the Constitution. But there will probably be no great injustice in giving glory to both Pinckney and Madison for furnishing the foundation on which the Congress has wisely erected such a helpful and important tower of legislation for the upbuilding of our unparalleled industrial age.

\(^23\) *210 U. S. 405, 52 L. Ed. 1122, 28 Sup. Ct. 748 (1908).*
JAMES MADISON AND THE FEDERAL CITY

By FRANK SPRIGG PERRY

JAMES MADISON, the fourth President of the United States, has enduring fame in history for his labor in planning the original framework of the Constitution of the United States and his efforts in securing the adoption of that instrument. Rightly has he been named the "Father of the Constitution" and the greatest democratic government the World has known owes its existence largely to this modest and retiring Virginia planter.

Born at Port Conway, King George County, Virginia, on March 16, 1751, the greater part of his life was spent at Montpelier in Orange County, Virginia. It was his love for his native state, and his desire to aid her in securing a stable government after the Revolutionary War that started him on his road to assist in a larger and greater achievement, the formation of a government for all of the States.

This great Revolutionary statesman has a peculiar claim to eminence in the hearts of the residents of the District of Columbia.

No statue stands in the Federal City in honor of James Madison and yet it was his influence and masterly political strategy that secured the present site of the District of Columbia on the Potomac River. While our Capital City properly bears the name of Washington, it is in great measure a creation of James Madison. It was to this man, more than to any other, with the exception of General Washington, that we are indebted for its present location and the form of its government.

There was no permanent seat of government during the war of the Revolution. In those early days Congress moved from place to place as necessities required, and the nominal seat of government was the City of Philadelphia. The Articles of Confederation, under which the United States
functioned until the adoption of the Constitution, made no provision for a Federal City. The constant change of location was a great hardship on the early legislators and a permanent site was greatly needed.

CONGRESS AT PRINCETON

As conditions became more stable the minds of the people turned to the selection of a particular place from which the Government might function. On June 4, 1783, a resolution passed the Continental Congress, then sitting in Philadelphia, to assign “the first Monday in October next” to consider a site for the permanent Federal residence. Before that date arrived, however, the incident occurred which gave rise to the flight of Congress from Philadelphia. It was this incident which suggested to the leaders the advisability of having the seat of government located in a district exclusively under the control of the Federal Government. The purpose was to enable the newly formed and weak Federal authority to protect itself and to be independent and free from the influence of any particular State. Madison was a member of this Congress and has left in his letters a vivid account of this much exaggerated “uniting”.

On June 19, 1783, word reached the Continental Congress at Philadelphia that some 80 soldiers of the Revolutionary Army, who would probably be joined by others, were on their way from Lancaster to demand justice in the matter of their overdue pay. On June 21 the mutineers presented themselves drawn up in the street before the State House where Congress was assembled. President Dickinson of the Pennsylvania Executive Council came to the State House and explained to Congress that the State Militia could not be depended on to suppress the mutiny until the mutineers committed some outrages on persons or property. No physical violence had been offered to the members of Congress, but, as they could secure no adequate guarantee of protection from the City or State authorities of Pennsylvania, they adjourned to Princeton, New Jersey,
rather than submit to any further insults. Philadelphia from this time lost its chance of becoming the permanent seat of the Federal Government.

The final phase of this mutiny so far as the actors were concerned, was reported by Madison to Thomas Jefferson in a letter from Princeton, N. J., dated September 20, 1783:

"The investigation of the Mutiny ended in the condemnation of several Sergeants who were stimulated to the measure without being apprized of the object by the two officers who escaped. They have all received a pardon from Congress. The real plan and object of the mutiny lies in profound darkness."

A reader of the present day must be astonished that dissatisfaction of some 80 troops should have been designated a "mutiny" and their presence drawn up in front of the State House should have caused the Continental Congress to flee from the City of Philadelphia. No other incident could so clearly illustrate the utter incapacity of the Continental government. The Continental Congress could not levy taxes on the people, but was dependent upon "requisitions" to the States for money and soldiers. These requisitions were rarely honored by the States. The Continental Congress was chronically bankrupt and the army pitifully inadequate. There was no Executive head or President but only a Committee of the Continental Congress to see that the laws were carried out. The Continental Congress had no troops of its own and there was no regular army, although it professed to pay the State troops while in the field. The Revolutionary War was fought and won by troops enlisted in the several States and largely under the control of the State authorities. It was only the personal popularity of General Washington and the other leaders that enabled the several Colonies to remain united for the common purposes of the war.

This incident of the "mutiny" served its purpose in bring-

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1 Hunt, Writings of Madison 22.
ing home to the people of the several States the absolute necessity for a stable and efficient central government. To be stable that government should have a permanent location. It was not exclusive jurisdiction over the seat of Government that was needed; the need was for some strong central authority over the whole country. This need has been met by our present form of Government under the Constitution and the Federal Government has a strength today greater than the armed force of any one State. Congress does not have to call out the militia of a State to suppress disorders as it has the regular army and ample means to protect itself and to enforce its laws.

The "mutiny" and the consequent uncomfortable quarters at Princeton hastened the consideration by the Continental Congress of some suitable arrangements for the residence of that body. The inconvenience of the members of Congress is set out by Madison at Princeton in a letter to Edmund Randolph, August 30, 1783:

"During this contest among the rival seats (for the Government), we are kept in the most awkward situation that can be imagined; and it is the more so as we every moment expect the Dutch Ambassador. We are crowded too much either to be comfortable ourselves or to be able to carry on the business with advantage. Mr. Jones (Joseph Jones of Virginia) & myself on our arrival were extremely put to it to get any quarters at all, and are at length put into one bed in a room not more than 10 feet square."

Of the thirteen states then on the Atlantic seaboard, the central point was in Maryland or Virginia. The choice of Madison and of the other Virginia statesmen was for a location on the Potomac River near Georgetown and they urged the members from Maryland to join with them in securing this site. On July 28, 1783, Madison wrote in a letter to Edmund Randolph a summary of the political situation on the question of the selection of a residence for Congress:

2 Hunt, op. cit. supra note 1, at 13.

2 Hunt, op. cit. supra note 1, at 4.
"It is not improbable that when the urgency of the scanty accommodations at Princeton comes to be more fully felt, with the difficulty of selecting a final seat among the numerous offers, N. Y. in case of its evacuation may be brought into rivalship with Philada for the temporary residence of Congress. My own opinion is that it would be less eligible as removing everything connected with Cong, not only farther from the South but farther from the Center, and making a removal to a Southern position finally more difficult than it would be from Philada. Williamsburg seems to have a very slender chance as far as I can discover. Annapolis I apprehend wd have a greater number of advocates. But the best chance both for Maryland & Virg, will be to unite in offering a double jurisdiction on the Potowmack. The only dangerous rival in that case will be a like offer from N. J. & Pa. on the Delaware; unless indeed Cong sd be carried to N. York before a final choice be made in which case it would be difficult to get them out of the State."

Coupled with this selection of a site there was involved the question of the jurisdiction to be exercised by the Continental Congress over the place so selected. In this same letter of July 28, 1783, a reference occurs to an inquiry made by Williamsburg, Virginia, on the question of jurisdiction. The Continental Congress postponed the consideration of the selection of a seat of Government until the following October to give time for proper consideration of the various offers. During the summer of 1783 the Continental Congress appointed a committee to consider particularly this question of jurisdiction and Madison became one of its members.4

FIRST DISTRICT OF COLUMBIA COMMITTEE REPORTS

Madison took great interest in the various phases of the question dealing with the Federal seat of government and participated actively in the deliberations of the committee. Perhaps the locality was paramount in his mind as he wished to secure for Virginia whatever benefits could be obtained out of it. But there was also involved the problem of procuring a suitable and fixed locality within which

1 Bancroft, Constitution 129.
to set up the Capital City of the new Nation. Madison's chief correspondents and advisers on these subjects were General Washington, Thomas Jefferson, and Edmund Randolph. In writing from Princeton to Jefferson on September 20, 1783, Madison stated:5

"Another still more puzzling (question) is the precise jurisdiction proper for Congress within the limits of their permanent seat. As these points may possibly remain undecided till Novr, I mention them particularly that your aid may be prepared."

This question of jurisdiction had been suggested in the tender of the localities from the several states. Kingston, New York, agreed to give Congress an "exempt jurisdiction". Annapolis, Maryland, offered such power and authority to Congress over their city, if selected, "as necessary for the Honor, Dignity, Convenience and Safety of the Body."6

The report of this committee to the Continental Congress was entered as read on September 5, 1783. This first official report of any Congressional Committee on this question of the seat of government is as follows:7

"Two Points seem to be necessary for the consideration of your Committee—

"The extent of the District which will be necessary for the Residence of Congress.

"The powers to be exercised by Congress within that District.—Whereupon it is

"I Resolved that it is the opinion of this Committee that the United States in Congress assembled ought to enjoy an exclusive jurisdiction over the District which may be ceded, and accepted, for their permanent Residence—

"II Resolved that it is the opinion of this Committee that the District so to be ceded and accepted for the permanent Residence of Congress ought not to exceed the contents of six miles square nor to be less than three miles square."

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5 2 Hunt, op. cit. supra note 1, at 22.
6 45 Papers of Continental Congress 5, 15.
7 25 Papers of Continental Congress 603.
The report itself is in the handwriting of its chairman, James Duane, but an interlineation in the text of Resolution I is apparently in the handwriting of James Madison, who was a member of the Committee. The words inserted are “the United States in Congress Assembled”, and they appear very clearly in the original paper in the Library of Congress. The consideration of the question of jurisdiction was postponed and referred to the Committee of the Whole House.

Accompanying the report of this Committee in the Journal are two motions dealing with the jurisdiction of Congress over the ceded area. One was submitted by Madison and the original, in his handwriting showing numerous changes and alterations, is among the manuscripts of the Library of Congress, Washington, D. C. This motion is as follows:

“That the district which may be ceded to and accepted by Congress for their permanent residence, ought to be entirely exempted from the authority of the State ceding the same; and the organization and administration of the powers of Gov't within the sd district concerted between Congress and the inhabitants thereof.”

The other motion was submitted by Arthur Lee of Virginia and it was in substantial accord with that of Madison. The Lee motion went somewhat more into detail providing that Congress should appoint the judges in the ceded district, but that the people therein should enjoy the right of trial by jury and of being governed “by Laws made by Representatives of their own election.”

There were many debates in the Continental Congress on the location of the temporary and permanent seats of Federal authority. On December 23, 1784, an “ordinance” was passed appointing three commissioners to lay out the district on the banks of the Delaware River, “not more than eight miles above or below the falls thereof, for a

*23 Papers of Continental Congress 161.
*46 Papers of Continental Congress 93.
federal town." This decision, however, was not considered as final and the subject of providing a seat of government was subsequently deferred to the consideration of the new Congress under the Constitution.10

THE POTOMAC RIVER

The Potomac River played a very considerable part in the early history of Virginia and Maryland. The charter of Lord Baltimore for Maryland had defined the southern or Virginia shore of this river as its boundary.11 On the other hand, patents to the Colony of Virginia covering the Northern Neck had placed the whole river within the government of Virginia. The title of Maryland to the river was confirmed by Virginia in 1776, reserving, however, for Virginia the free navigation and use of the river.12 Some evasions of these rights were brought to the attention of James Madison, then a member of the Virginia House of Delegates, and he introduced in that body a bill for joint commissioners with Maryland to regulate the navigation of the Potomac. On June 28, 1784, the bill passed and Madison was appointed one of the commissioners.13 The commissioners from the two states met at Mount Vernon, but they desired to secure the cooperation of Pennsylvania before any final action was taken. A joint letter was written to the President of the Executive Council of Pennsylvania inviting cooperation on this subject.

The necessity for some general agreement between the states, particularly along commercial lines, was becoming every day more apparent. Not only was the Continental Government bankrupt and without authority, but the several states were each imposing duties on goods and ship tonnage and passing laws interfering with commercial intercourse between themselves and foreign nations.14 Some

10 Resolution of Continental Congress, Aug. 6, 1788.
11 2 Hunt, op. cit. supra note 1, at 60, note.
12 2 Hunt, op. cit. supra note 1, at 41.
13 2 Hunt, op. cit. supra note 1, at 100.
14 2 Hunt, op. cit. supra note 1, at 181.
of the statesmen looked for a remedy by increasing the
powers of the Continental Congress, but a few of the more
farsighted realized that a new form of Government would
have to be established. The appointment of the Commis-
sioners to regulate the navigation of the Potomac and their
agreement naturally led to other conferences of wider
scope.

In a letter to General Washington, December 9, 1785,
from Richmond, Va., Madison writes:15

“It (i. e. appointment of general Commissioners) seems nat-
urally to grow out of the proposed appointment of Comsrs. for
Virg; and Maryd concerted at Mount Vernon, for keeping up
harmony in the commercial regulations of the two States. Maryd
has ratified the report, but has invited into the plan Delaware and
Pens, who will naturally pay the same compliment to their
neighbors, &c., &c.”

In this way and as a logical sequence to the adjustment
of the navigation question of the Potomac River, came the
resolution of the General Assembly of Virginia of January
21, 1786, appointing representatives and inviting those of
other States to meet and consider a uniform system of com-
mercial regulation. James Madison was one of the Com-
mmissioners of Virginia and met with those from the States
of New York, New Jersey, Pennsylvania and Delaware at
Annapolis, Md. This was the famous Annapolis Convention
and on September 14, 1786, these Commissioners re-
commended that a general convention of the States be con-
vened:16

“to take into consideration the situation of the United States,
to devise such further provisions as shall appear to them neces-
sary to render the constitution of the Federal Government ade-
quate to the exigencies of the Union.”

This call was met by the assembly in Philadelphia,
Penn., of the Constitutional Convention on May 14, 1787.

15 2 Hunt, op. cit. supra note 1, at 198.
16 Hunt, Debates in Federal Convention li.
THE CONSTITUTIONAL CONVENTION

The whole life of James Madison has been aptly said to have been "incorporated, as it were, into the Constitution". Madison was primarily responsible for the Annapolis Conference, out of which grew the Constitutional Convention. The Constitutional Convention used the plan for a federal government drawn up by Madison as its basis for their discussions. This plan is commonly called "The Virginia Plan", and was presented to that body on May 29, 1787, by Edmund Randolph, the Governor of Virginia and a delegate. The proceedings of the Constitutional Convention have been preserved for us in the writings of Madison, a record which outranks in importance any writings of the other founders of the Republic.

No provision for a seat of the Federal Government was in the original Virginia plan. Nor was any clause dealing with this subject contained in the draft of the Constitution as submitted on August 6, 1787, by the Committee of Detail. Madison submitted a resolution on August 18 and Charles Pinckney of South Carolina on the same day also offered a clause to fix the seat of Government and to give Congress exclusive jurisdiction over the place selected.

The resolution submitted by Madison is as follows:

"To exercise exclusively legislative authority at the seat of the general Government, and over a district around the same, not exceeding —— square miles; the consent of the Legislature of the State or States comprizing the same, being first obtained."

In the Constitutional Convention on August 11, 1787, there occurred a discussion of the location of the seat of government. It was suggested by Rufus King of Massachusetts, that the "mutability of place had dishonored the federal Govt. and would require as strong a cure" as could be devised. Madison took this lead and again urged a "cen-

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17 Webster's Works 202 (Speech in New York City, March 10, 1831).
18 3 Hunt, op. cit. supra note 1, at ix.
19 Hunt, Debates in Federal Convention 420.
tral place of the seat of Government” from which “it could contemplate with the most equal eye, and sympathize most equally with, every part of the nation.” As the central point was within the limits of Virginia or Maryland, this argument was an appeal to the Convention on behalf of the Potomac site. There was little additional discussion, the clause was adopted substantially as proposed by Madison, and became Clause 17, Section 8, Article I of the Constitution.

THE VIRGINIA CONVENTION

The work of Madison in framing the outline of the Constitution and the conspicuous part he took in the Constitutional Convention and his part in publishing the Federalist are the best known achievements of this Revolutionary Statesman. Apart from General Washington himself, no individual contributed more to our liberty within the law as contained in the Constitution. And yet great as his labor was in this respect, his greatest personal victory was in conducting the Constitution to a favorable issue through the Virginia Convention organized to consider this instrument.

This Convention assembled at Richmond, Va., on June 2, 1788. Virginia at that time was politically under the domination of Patrick Henry, one of the greatest orators and political leaders our country has produced. Henry and many other distinguished Virginians had opposed the adoption of the Constitution by that State, contending that the frame of government so created would too greatly centralize power. Henry argued:\(^{21}\)

“It will destroy the state governments, and swallow the liberties of the people, without giving previous notice.”

Particularly he “entertained strong suspicions that great dangers must result” from the grant of the power of exclusive legislation over the Federal district.\(^{22}\)

\(^{20}\) Hunt, op. cit. supra note 19, at 381.
\(^{21}\) 3 Elliott, Debates 156.
\(^{22}\) 3 Elliott, op. cit. supra note 21, at 436.
One of the principal points of attack by Patrick Henry against the scheme of Government was in the creation of the Federal district. Madison was driven at times to plead the smallness of the district to be ceded and its comparative insignificance and to urge that no harm could come to the great states from so circumscribed an area. So important did this provision become during the course of debate that when the Virginia Convention proposed amendments to the Constitution, the majority of which were later to be included in the Bill of Rights, a separate amendment was proposed and submitted to Congress that the exclusive power of Congress over the Federal town "shall extend only to such regulations as respect the police and good Government thereof". This amendment, however, was not ratified by the States and failed to become a part of the Constitution.

Today this District still remains under the exclusive power of Congress, its inhabitants are without political rights and dependent upon the whims and caprices of a Congress often hostile to its development. The prophetic vision of Henry might well be applicable to the present condition of the Federal District. There is no question that the ever increasing centralization of Federal activities is due in large measure to the paternal protection of its instrumentalities at the Capital of the Nation made possible by an exclusive Federal control.

The decision of this Virginia Convention was vital to the destinies of our country. The Constitution had provided that the instrument should go into effect upon the ratification by the people of nine states. The population of Virginia was almost double in size that of Pennsylvania and more than twice exceeded the population of New York and the other States. Not only was it the largest but it was probably the most influential State among the thirteen. At the time the Virginia Convention assembled eight states had adopted the Constitution and the remaining states waited

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23 Hunt, op. cit. supra note 19, at 663.
for the action of their large and powerful sister state. Had Virginia declined to ratify the Constitution it is extremely improbable that the instrument would ever have been adopted. And the Virginia Convention ratified the instrument only after a long and bitter struggle.

The importance of the State of Virginia at the time of the Revolution is strikingly set out by Bancroft in his *History of the Constitution*:

"His (Washington's) native state, reaching to the Mississippi and cutting off the mass of the south from the north, held, from its geographical place, its numbers, and the influence of its statesmen, a power of obstructing union such as belonged to no other state."

The great champion of the Constitution in this Virginia Convention was James Madison, ably supported at times by John Marshall, Governor Randolph and others. Long after the members of the Virginia Convention had passed away, it was remembered for the magnificent exertions of intellectual power and the eloquence of its members. In 1857 there was still living a man who in his youth had been a spectator of this tremendous struggle.

"But the impressions made by the powerful arguments of Madison and the overwhelming eloquence of Henry can never fade from my mind. I thought them almost supernatural. They seem raised up by Providence, each in his way, to produce great results; the one, by his grave, dignified, and irresistible arguments to convince and enlighten mankind; the other, by his brilliant and enrapturing eloquence to lead whithersoever he would."

**THE FEDERALIST**

Treading close upon the prominence which had attended Madison's efforts in the Philadelphia Convention there was another labor for the Constitution which was most effective. Many noble documents have been lost through ignorance of their value, and the people of the Continental United States were not apprised of the great and salutary provisions of

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24 Vol. 1, p. 20.
25 2 RIVES, LIFE OF MADISON 610.
that instrument. The fame of Madison as co-author with Hamilton and Jay of the series of essays on the Constitution now collected in *The Federalist* will endure as long as the principles upon which that instrument is founded.

These essays were published in the latter part of 1787 and early in 1788. They were circulated generally throughout the States and served to bring clearly before the people the basic principles of sound government and the reasons for the several clauses of the instrument. While it may well be said that the "constitution they undertook to defend was wiser than themselves," yet the great need at that time was to bring before the general public the utility and sufficiency of the completed instrument. The writers of these articles, whose names were carefully concealed at the time under the cognomen of "Publius," performed the great and signal public service of apprising men's minds of the meaning of the several clauses and of convincing them of the necessity for a strong Federal Government.

The clause relative to the district to become the seat of Government was discussed by Madison in Article 43. He gave as the reasons for the erection of a Federal district the protection needed by Congress and that it should be free from the influence of any particular state. The inhabitants of the district to be ceded were expected to be satisfied with the financial inducements arising out of the increase of the value of their property and a "municipal legislature for local purposes, derived from their own suffrages, will, of course, be allowed them." Apart from the wording of the Constitution itself, there is no instrument which has the importance that this Article possesses for the District of Columbia. While the wording of the Constitution controls, yet the *Federalist* is the supreme authority on its construction.

In passing, it may be proper to call attention to the fact that the Federal Government has grown so powerful there

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is no longer need of protection by isolation in a Federal district either from open enemies or too interested friends. The reasons for the creation of an isolated Federal city have passed away.

An Act of Congress can create the State of Columbia, with perhaps the consent of the legislature of the State of Maryland. The founders of our government did not attempt to provide for the national political rights of the small number of inhabitants of the ceded district, then but 14,000 persons, but left the status of the district to be determined in the future by Congress.

THE PENNSYLVANIA SITE

The first session of the new Congress under the Constitution was held on March 4, 1789, in New York City, and Madison feared that this start in New York would prevent the permanent seat of government from being placed as far south as the Potomac River. Thus in a letter to Edmund Pendleton from New York, September 14, 1788, before the assembly of Congress, Madison says:

"In the last place, I consider the decision in favor of N. York as in a manner fatal to the just pretensions of the Potowmac to the permanent seat of the Govt. This is unquestionably the light in which many of the advocates for N. York view the matter."

And again in a letter to Thomas Jefferson September 21, 1788, Madison discussed the decision of the Continental Congress that the new body should hold its first session in New York, and writes:

"Another consideration of great weight with me is that the temporary residence here (New York) will probably end in a permanent one at Trenton, or at the farthest on the Susquehannah. A removal in the first instance beyond the Delaware would have removed the alternative to the Susquehannah and the Po-

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29 5 Hunt, op. cit. supra note 1, at 261.
30 5 Hunt, op. cit. supra note 1, at 265.
The best chance of the latter depends on a delay of the permanent establishment for a few years, until the Western and South Western population comes more into view. This delay cannot take place if so eccentric a place as N. York is to be the intermediate seat of business.”

In May, 1789, the representatives of Virginia and Maryland in the House of Representatives offered ten miles square of any portion of their territory for a Federal district. Intermittently the question of a permanent seat of government was brought up. Only the Northern States were contented to meet in New York. A location on the Susquehanna River was favored by many. Again and again on the floor of the House of Representatives Madison urged the superior advantages of a site on the Potomac River. It was needful that convenience of access to the Western country be considered as well as a central location on a navigable river, and the Potomac site filled both of these requirements. On one occasion the debate became so bitter that the House adjourned in an exceedingly angry mood.

Madison announced that those favoring a site on the Potomac River faced “a determined and silent majority,” and that the Southern members were being “disposed of.” Burke of South Carolina declared “A league has been formed between the Northern States and Pennsylvania.” Wadsworth of Connecticut wanted to finish the business, otherwise “He feared that the whole of New England would consider the Union destroyed.”

On September 22, 1789, the House passed the bill establishing the permanent seat of Government on the Susquehanna, in Pennsylvania. Madison wrote to Edmund Pendleton from New York September 23, 1789, that:

“Some of the Southern members, despaired so much of ever getting anything better, that they fell into the majority. Even some of the Virginians leaned that way.”

Madison, however, did not lose hope as he added:

31 Hunt, Life of Madison 194.
5 Hunt, op. cit. supra note 1, at 424, note.
“The bill, however, is by no means sure of passing the Senate in its present form. It is even possible that it may fall altogether.”

And it was well for the present location of the Capital City that Madison still remained watchful at his post. He had lost the first throw but was not despairing. The influence of Philadelphia was sufficiently strong in the Senate to have the site selected in this bill changed to Germantown. This amendment necessitated a return of the bill to the House of Representatives. Apparently it was assured of passage on its return on September 26th, as no one was sufficiently interested to oppose the change, both of the sites being in Pennsylvania. However, Madison made one last cast. On September 28th on the floor of the House when the Senate amendment was about to be concurred in, Madison suggested the necessity for incorporating in it a provision for the continuance of the operation of the laws of Pennsylvania in this district, otherwise, it would be without laws until Congress should act. This amendment was agreed to and the bill was returned to the Senate. Congress, however, adjourned on September 29th before there was a chance for further action by the Senate.

Thus, it was in dramatic fashion that Madison prevented the choice of the Susquehanna or Germantown district as the seat of Government. Would this delay prevent similar action at the next session of Congress? There was some glimmer of hope as appears from his letter to President Washington from Orange, Va., November 20, 1789:

“A day or two after I got to Philada I fell in with Mr. Morris. He broke the subject of the residence of Congs, and made observations which betrayed his dislike of the upshot of the business at N. York, and his desire to keep alive the Southern project of an arrangement with Pennsylvania.”

As it was the influence of Pennsylvania which had enabled the bill fixing the seat of government to pass at that

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33 5 HUNT, op. cit. supra note 1, at 424.
34 5 HUNT, op. cit. supra note 1, at 426.
session of the House and as Robert Morris was one of the most influential of the Pennsylvania representatives, this overture bolstered up the waning hope of Madison. At the beginning of the succeeding session of Congress the former bill for the site on the Susquehanna was not pressed and then arose the matter of the “assumption of State debts” which became inextricably interwoven with the selection of the site of a Federal district.

HAMILTON’S ASSUMPTION PLAN

The location of the Federal city had occasioned much bitterness but it was nothing to the storm which arose over the “assumption plan.” Alexander Hamilton, as Secretary of the Treasury, had submitted to Congress a plan for “funding”, that is, providing a method for the payment of the debt of the nation. No one objected to that part of the “funding” plan dealing with foreign loans. There was, however, great and increasing opposition to the assumption by the Federal Government of the debts incurred by the individual States during the War. It happened that the Northern States, as creditors, favored the “assumption of State debts” so that they would be repaid from the funds of the general government. And it was the Southern States who fought the “assumption plan”. The States were lined up in similar groups on the location of the Federal district, the Northern States wished a location on the Susquehanna or Delaware rivers and the Southern States united in favor of a site on the Potomac. The stage was set for a “compromise” of gigantic proportions, and it was vital that some adjustment be made. In Hunt’s Life of Madison, p. 197, the author says of this time:

“When the House rejected the assumption scheme, so bitter were the feelings of the two parties that they could not do business together and Congress adjourned from day to day.”

The integrity of the Union was seriously threatened and Hamilton was in despair. Jefferson used his good offices and brought together Hamilton and some of the opponents of the assumption plan. These agreed “the preservation of
the Union and of concord among the States was more important" than the views of any individuals. And so the "trade" was made; the Federal district was located on the Potomac River to placate the Southern States, and the debts of the States, amounting to about twenty million dollars, were assumed by the general government.

The account of this agreement as left by Thomas Jefferson uses the name of Madison as one of those at the dinner with him when the agreement was effected with Hamilton:35

"Jefferson also relates that he had Hamilton and Madison to dine with him, and that Madison there agreed that if the assumption bill came up again he would leave it to its fate and while opposing it would not obstruct its coming to a vote. Perhaps this conference is a mistake of recollection on Jefferson's part; but if it occurred it was after the fateful feast when the real bargain was effected."

The last cast of James Madison had won and his beloved Virginia received the honor of having the Federal district for the seat of Government located partly in that State on the Potomac River. The Act of Congress accepting the cessions of Virginia and Maryland was signed by President Washington on July 16, 1790.

James Madison full of years and honor died in his home at Montpelier on June 28, 1836. In a speech in the Senate on February 20, 1837, when the purchase of the Madison papers was under consideration and before their contents were known, Daniel Webster said:36

"That gentleman (Mr. Madison) was more connected with the Constitution than almost any other individual. He was present in that little assemblage that met at Annapolis in 1786, with whom the idea of the Convention originated. He was afterwards a member of the Convention of Virginia which ratified the Constitution. He was next a member of the first Congress, and took an important lead in the great duties of its legislation under the Constitution in the formation of which he had acted so conspic-

35 Hunt, op. cit. supra note 31, at 426.
36 4 Webster's Works 302.
uous a part. He afterwards filled the important station of Secretary of State, and was subsequently for eight years President of the United States. Thus, his whole life was intimately connected, first with the formation, and then with the administration, of the Constitution."

CONCLUSION

The connection of James Madison with the Capital City was as intimate as his connection with the Constitution. He was a member of the Continental Congress which first took up the location of a permanent seat of Government. Madison was present at the time of the "mutiny" which led the Continental Congress to adjourn from Philadelphia to Princeton. As a member of the first Committee of the Continental Congress on the District of Columbia he was instrumental in bringing in a report favoring exclusive authority by Congress over its place of residence. In the Constitutional Convention Madison was one of two who offered motions to create a Federal District. The Federalist afforded Madison an opportunity to again explain the purpose of the creation of a district exclusively under Federal control. In the Virginia Convention Madison supported the Constitutional provision for an exclusive authority over the seat of the newly formed government. And it was Madison in the first session of the first Congress under the Constitution who, in dramatic fashion, defeated the Germantown site. Finally Madison enters into the closing scene as a passive, if not an active, participant, in the bargain of the assumption of State debts for the location of the city on the Potomac.

The "founders and fathers of the Constitution were great men." When a native of the Federal District looks back upon its early history, there must arise in his breast a feeling of loyal and patriotic pride. The city of his residence created by the Constitution is coupled with the name of his country's first President, and with the names of its earliest and most profound statesmen. It is rightly named after Washington, the greatest of all Americans. But the form of this Federal City and its character and location were shaped and moulded by the hand of James Madison.
THE FIRST LEGAL EXECUTION FOR CRIME IN UPPER CANADA

By WILLIAM RENWICK RIDDELL

THE well known Quebec Act of 1774 extended the limits of the Province of Quebec as far south as the Ohio, and as far west as the Mississippi; the Treaty of Paris of 1783 gave all the territory to the right of the Great Lakes and connecting waters to the new Republic; but for a time Britain held possession of the border posts, Michillimackinac, Detroit, Niagara, etc., ostensibly, at least, as a pledge for the United States implementing the contract in the Treaty that there should be no legal impediment to the collection of the debts owed by citizens of the United States to British subjects—a contract notoriously not carried out, nor was the United States able to carry it out.

Accordingly, when by the Canada or Constitutional Act of 1791, the immense Province of Quebec was divided into the two Provinces of Upper and Lower Canada, the former Province, de facto, included what is now Detroit as well as much other territory now part of the United States. A supposed suggestion, that the Detroit people should be considered in any different position from those in what the British territory, de jure as well as de facto, was received by Lieutenant Governor Simcoe with the utmost indignation; and, in fact, until the delivery to the United States in 1796, under the provisions of Jay’s Treaty, no distinction was made between those in the anomalous position of belonging to two nations and those in admittedly British territory, except that the former had no vote for Members of the Legislature, and were consequently subject to the injustice of which the Colonies had complained, “Taxation without Representation”.

1 14 Geo. III, c. 83 (1773).
2 31 Geo. III, c. 31 (1790).
Detroit was no more free from crime than the rest of the world; and it had the fortune to furnish the victim of the first execution for crime in the new Province of Upper Canada.

The story goes back to Boston and Montreal before Upper Canada was born. On February 18, 1785,

"Elijah Cooper of Williams-town-bay-State, or Boston-State in North America, Farmer & Shoemaker, for and in Consideration of the Sum of Thirty two Pound, ten Shillings of lawful Money of the Province of Quebec [about $130 of our money] and one gray Horse",
sold to John Turner, a merchant of Montreal,

"a certain Negro-Man, of the Age of Twenty-two Years or thereabouts, called Josiah Cutten".

An Imperial Act of 1787\(^3\) had placed Negroes in the same category as "Houses, Lands . . . and other Hereditaments"; that is, made them Real Estate, and consequently in the conveyance the seller "granted and confirmed" the Negro, as though he was a farm. The purchaser did not long keep his purchase; we find him on March 29, 1785, selling him to David Rankin, of Montreal, merchant, and making a similar deed,—the purchase money was fifty pounds of lawful money of Quebec [say, $200].

How the slave got to Detroit is wholly unknown; but we find, January 13, 1787, the Detroit firm of merchants, William St. Clair & Co., selling him to Thomas Duggan, of Detroit, for

"the sum of One Hundred and Twenty Pounds, New York Currency [say, $300], payable on or before the first day of May next in Indian Corn & Flour."

These transactions are evidenced by extant deeds copied in the recent publication: *The John Askin Papers*.\(^4\)

Thomas Duggan transferred him to John Askin, a merchant of Detroit, March 28, 1791, for

\(^3\) 5 Geo. II, c. 7 (1731).
"a farm at the River Tranch [now the Thames, Ontario] of Nine acres in front more or less," but there does not appear to be more than a memorandum of the sale extant.\(^5\)

In some way that does not appear, one Arthur McCormick, who had been a teacher in Kingston, but had come to Detroit, became half owner of the slave.

All this took place before Upper Canada came into existence on December 26, 1791.\(^6\)

The negro, whose name was variously spelled Cutten, Cuttan, Cutan and Cotton, had very hard luck; on the 18th of October, 1791, he was caught stealing rum and some furs from the shop of Joseph Campeau in Detroit, was taken before John Askin as Justice of Peace, and committed for trial.

The English practice prevailed, as it did for long in this Province, that Courts of Oyer and Terminer and General Gaol Delivery were constituted from time to time for the trial of criminal cases. At that time the territory, afterwards Upper Canada, was divided into four Districts, of which the furthest west, the District of Hesse (afterwards, the Western District) contained Detroit; this continued after the formation of the new Province. In each District, a Court of Oyer and Terminer and General Gaol Delivery sat from time to time; and, before the unhappy negro could be tried, Upper Canada had come into existence.

On September 3, 1792, "His Majesty's Court of Oyer and Terminer and General Gaol Delivery . . . in and for the District of Hesse, in the Province of Upper Canada," sat at L'Assomption, now Sandwich, Ontario; the Court was presided over by William Dummer Powell, First and only Judge of the Court of Common Pleas in and for that District, who lived at Detroit, but, on the erection in 1794 of

\(^{5}\) *Op. cit. supra* note 4, at 287.
\(^{6}\) *Supra* note 2.
the Court of King's Bench for Upper Canada, was appointed its first Puisne Justice, becoming later Chief Justice of Upper Canada.

The negro had a fair trial; but his case was hopeless, and he was rightly convicted. At that time the punishment was death; and this dread sentence was pronounced by Mr. Justice Powell, who said to the unhappy man:

"This Crime (of Burglary) is so much more atrocious and alarming to society as it is committed by night when the world is at repose and that it cannot be guarded against without the same precautions which are used against the wild beasts of the forest, who, like you, go prowling about by night for their prey. A member so hurtful to the peace of society, no good Laws will permit to continue in it, and the Court in obedience to the Law has imposed upon it the painful duty of pronouncing its sentence, which is that you be taken from hence to the Gaol from whence you came, and from thence to the place of execution, where you are to be hanged by the neck until you are dead . . ."

And it was done, and the young Province paid £2 Halifax Currency for the job. The full account of this trial appears in the records of the Court in the Ontario Archives; and I, in my Michigan under British Rule, have given some account of it.

The John Askin Papers, already referred to, have a concomitant circumstance, which will bear mentioning—while the slave was in prison awaiting his trial, a deal was entered into between his co-owners, whereby Arthur McCormick sold his half-interest in him, being "now in Prison for Felony", to Askin for £50 New York Currency [say, $125], "which Negro man should he suffer death . . . I am not answerable for", May 16, 1792.8

Hanged he was, and McCormick was not answerable for him.


BANKS AND BANKING—Liability of Bank, for Accepting Agent’s Check on Principal’s Account for Deposit to Agent’s Personal Credit.

Where an agent, with unlimited power of attorney to draw checks upon the principal’s bank account in fact draws to his own account and misappropriates the money, should the bank be held liable to the principal for such misappropriation by the agent?

Decisions upon this point are in conflict. The cases holding the bank liable are based upon the strict doctrines of agency, which involve the question of notice, actual or constructive, to the bank.1

The courts view the act of the agent in transferring the funds to his own account as an act which of itself must be scrutinized.2 A bank does not stand in any peculiar relation exempt by it from the duty to inquire into the authority possessed by an agent.2 Since the agent, even though a general agent, as a matter of fact, acts beyond the power conferred upon him, and since the courts impose this strict duty of investigation upon banks, the banks become liable to the principal in such cases.4

On the other hand, those courts which have decided in favor of the banks do so on the theory that to imply constructive notice of the lack of power of the agent, would unjustly burden the banks, which in turn would hamper business transactions in general.5 These courts recognize the duty of the banks to protect the principal where they have knowledge, or in the ordinary course of business should have obtained knowledge. The bank must exercise reasonable care and diligence in making payments,6 but no higher degree of care should be imposed, because to do so would burden the banks to such an extent that their business could not be conducted without inconvenience to the banks and the depositors alike.7 Where an agent, having general power, withdraws money from the bank, the latter cannot know the intention of the agent, whether he withdrew the money for the purpose of furthering the agency or whether he did so for his own personal gain. The bank, therefore, cannot be held liable when the agent acts beyond his authority, provided there are no suspicious circumstances connected with the transaction. The

5 For full treatment of this doctrine, see 16 CAL. L. REV. 524 (1928).  
7 Kelly v. Buffalo Savings Bank, 180 N. Y. 171 (1904), "The only practical general rule to which banks can be held in dealings with those wishing to withdraw money is the rule of ordinary care, leaving it to be applied in the light of special circumstances that characterize each separate case."  
8 Whiting v. Hudson Trust Co., 234 N. Y. 394 (1923), "The transactions of banking in a great financial centre are not to be clogged, or their pace slackened, by overburdens or restrictions."
Mercy of Kings Bench in Reckitt v. Barnet applied this doctrine.
The same reasoning applies when the agent, instead of withdrawing
the money, merely transfers it to his own account.

The Supreme Court, in the case of the Empire Trust Co. v. Cahan, decided in accord with the second view, namely, that the bank was not liable for misappropriation of funds by a general agent because the bank could not be charged with notice. The case has been cited as supporting the non-liability of banks for reasons of public policy, but it is submitted that the non-action of the principal in discovering the fraud was a major factor in the decision of the court. After declaring that the bank could not be charged with notice, the court said, "But we do not place our decision upon this narrow ground. For in addition to what we have said, the transactions went on for over two years and the petitioner (bank) fairly might expect the respondent (principal) to find out in a month or two if anything was wrong. Careful people generally look over their accounts rather frequently."

Courts formerly followed the rule that a depositor had no duty to examine pass books and accounts, but that he had the right to assume that the bank would inquire into the genuineness of transactions, of checks and endorsements. The weight of authority has now shifted, so that today the depositor has the duty to make some examination, at least, of his account in order to discover any irregularity. The duty imposed upon the depositor is the duty to use reasonable care to discover mistakes or fraud. The Supreme Court in the case of Leather Mfrs. Nat. Bank v. Morgan, summed up the duty in the following language, "While no rule can be laid down that will cover every transaction between a bank and its de-

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8 (1928) 2 K. B. 244: principal gave agent power of attorney to conduct business and later wrote a letter to the bank instructing them that the agent was to have power to draw checks without restriction. The agent drew a check and paid a personal debt. Held, in view of the letter authorizing the power of the agent to draw checks, the bank could not be charged with notice of the agent's misconduct.

9 For full treatment of this doctrine, see 40 HARV. L. REV. 1077 (1927).
10 274 U. S. 473, 71 L. Ed. 1158 (1927).
11 Weisser v. Denison, 10 N. Y. 68 (1854).
14 117 U. S. 96, 29 L. Ed. 811 (1885).
positor, it is sufficient to say that the latter's duty is discharged when he exercises such diligence as is required by circumstances of the particular case, including the relations of the parties, and the established or known usages of the banking business."

The examination by the depositor to fulfill the requirement of reasonable diligence, must be made within a reasonable time, which time depends upon the facts in each case.16

Banks have afforded depositors means by which they can maintain an accurate check upon their accounts. This system which affords great protection for the depositor imposes upon him a correlative duty to use these means to find mistakes and to notify the bank of them. If he does not, his silence is an admission of their correctness. This duty, however, is not to find the mistakes, but rather to exercise a reasonable effort toward that end.17

In applying these principles of the doctrine of examination by depositors to the Cahan case,17 the court gave much consideration to the fact that the fraudulent act by the agent, the son, went on for two years, during which time the father, the principal, did not discover it, although he had the opportunity. The question of reasonable time is always one of fact to be viewed from the surrounding circumstances. In this case two years could not be considered a reasonable time. In fact, the Supreme Court in delivering the opinion stated that the bank might fairly expect the principal to find out in a month or two if anything was wrong. Hence, we see that the decision of the Court in this case was based upon the delay of the principal, as well as upon the doctrine of the non-liability of banks where they have no notice, actual or constructive, of the misconduct of the agent.

J. H. W.

PATENTS—Commercial Success as Evidence of Invention.

The commercial success of an article manifests invention to the average person. By the same subconscious reaction the courts, too, are influenced by extensive use of an article in determining whether it is an invention and patentable. It may be well to review the rules admitting evidence of commercial success, and the judicial accuracy of allowing it to be a determinate factor in proving invention.

In England, the fact that a process or the subject matter of a patent has gone into general use and is new proves that it is an

17 Supra note 9.
invention. In the United States, the statute limits patents to inventions which are both new and useful. When the alleged invention is without patentable novelty, commercial success and popularity of an article are of no weight in determining whether in fact there is invention. The reason for this rule is that if commercial success does show invention and novelty, the fact that a commodity went into immediate public favor and supplanted similar articles would create thereby a doubt as to its patentability, and yet it would also resolve that doubt in favor of invention because commercial success is sufficient to prove invention in a case of doubt. Consequently, where there is no novelty in a thing, extensive use is not a safe guide or criterion in establishing invention.

When the other facts in the case leave the question of invention in doubt, but only then, the fact that the subject of the patent has gone into general use and displaced other articles of similar use is entitled to weight in determining whether there is novelty, invention or patentability. The weight of the evidence of commercial success sufficient to turn the scale in favor of invention will vary in degree with the facts of each case. As against paper patents wide adoption

1 Statute of Monopolies, 21 Jac. I. c. 3, § 6 (1623), provided "any manner of new manufacture" is patentable, but judicial decisions based on other words of the Statute have added as requisites of good subject matter, a quality called "utility". Morgan v. Seaward, 1 Web. P. C. 197 (Eng. 1837); Edgebury v. Stephens, 1 Web. P. C. 35.


6 Magowan v. N. Y. Belting & P. Co., 141 U. S. 332, 342, 35 L. Ed. 781, 785 (1891); Brunswick Balke Collender Co. v. Seamless Rubber Co., 27 F. (2d) 925 (D. C. Conn. 1928); Bodische Anilin und Sode Fabrik v. Levinstein, 12 App. Cas. 719, 720 (Eng. 1887); Walker, Law of Patents (1917) § 40.

by the public of a later and similar manufactured article or process
will usually balance the scale in favor of the manufactured article in
a case of doubt as to invention. But commercial success is only
evidence of utility, and not conclusive even to that, much less of patent-
able novelty.

Because extensive mercantile success often results from clever ad-
vertising, good business methods, commissions to dealers, and the
like, the causes of the success must be scrutinized with the utmost
cautions before accepting the fact of general usage as proof of meri-
torous invention. Thus, in the case of Eskimo Pie Corporation v.
Honeymoon Pie Corporation, there is no doubt that much of the
tremendous success of Eskimo Pie was due to advertising, good or-
anization, an attractive name, and perhaps even to the desire of
the people for ice cream. Extensive sale would be of no weight in
verifying invention if due to the cheapness of the article, to the
beauty of the product, or to adaptability to do its work. Therefore,
commercial success is considered as evidence of invention only

(persuasive of invention); Forchheimer v. Franc Co., 20 F. (2d) 553
(C. C. A. 6th, 1927) (evidence of invention); Dowagiac Mfg. Co. v.
Minn. Maline Plow Co., 118 Fed. 136 (C. C. A. 8th, 1902) (not
controlling but entitled to consideration).
Throne v. Nash Engineering Co., 25 F. (2d) 267 (C. C. A. 1st,
9 McClain v. Ortmayer, 141 U. S. 419, 35 L. Ed. 800 (1891); Allis-
Chalmers v. Electric Power Co., 19 F. (2d) 860 (C. C. A. 5th, 1927);
1928); Locklin v. Buck, 159 Fed. 434 (C. C. A. 2d, 1908); Johnson v.
11 25 F. (2d) 154 (E. D. N. Y. 1928); Eskimo Pie Corporation v.
Levou, 24 F. (2d) 599 (D. C. N. J. 1928); for further discussion of
these cases, see RECENT DECISIONS, infra, p. 160.
Cf. Stillwell v. McPherson, 207 Fed. 837 (1913); Epstein v. Dry-
foos, 229 Fed. 756 (D. C. N. Y. 1914); Bonnie-B Co. v. Giguet, 289
Fed. 272 (D. C. N. Y. 1919); Peoria Target Co. v. Cleveland Target
Co., 47 Fed. 725 (D. C. Ohio 1890); Crown Cork Co. v. Standard
1913), aff’d 213 Fed. 1021 (C. C. A. 6th, 1914).
13 Stedman v. Puritan Rubber Co., 11 F. (2d) 278 (D. C. N. J.
1926), aff’d, 16 F. (2d) 742 (C. C. A. 3d, 1927); Globe-Wernicke v.
1928).
in the absence of evidence to show that the success was due to any other cause than that of the merits of the devise.\textsuperscript{15} It must also be spontaneous and of some duration.\textsuperscript{16} A large majority of users rather than a large number must be shown before commercial success can be considered in establishing invention.\textsuperscript{17}

While the law is well established that commercial success will be of weight only when there is a question of doubt as to patentability, this is saying in reality that whether a thing in itself, intrinsically, is novel or an invention may depend on extraneous factors. The fallacy of this reasoning is obvious. It seems that the true test of patentability should be solely the intrinsic merit and invention of the article; that when there is doubt, invention should be determined by acute discrimination between such differentiating features thus arising as are merely formal and those which exhibit novel functional characteristics.\textsuperscript{18} An article inherently is either an invention or it is not; and to say that it is an invention where there is extensive use, and not an invention where there is none, is simply illogical. Also, to admit commercial success, which is dependent on so many extraneous and incalculable circumstances, to show invention where there is a question of doubt is to allow one doubt to be solved by another very dubious one. This merely multiplies the uncertainties.\textsuperscript{19} Admitting evidence of general use works both ways.\textsuperscript{20} The long list of formally new contrivances entitled to protection of patent laws contain numerous examples of highly useful and extensively adopted things which were deprived of the right to a patent because there was a doubt as to invention and at that time they were without com-


\textsuperscript{17} Sperry Mfg. Co. v. J. L. Owens Co., 111 Fed. 388 (C. C. A. 8th, 1901); Talfree v. Wetzler, supra note 16.

\textsuperscript{18}1 Roberts, Patentability of Inventions (1927) 243; Houghton v. Whitin Mach. Works, 163 Fed. 740 (C. C. A. 1st, 1907): "Every patent so far as the fact of invention is concerned, is to stand, if it stands at all, upon its own inherent merit."

\textsuperscript{19}1 Roberts, op. cit. supra note 18, at 182, where this statement is discussed in relation to Krementz v. S. Cottle Co., 148 U. S. 556, 37 L. Ed. 558 (1893).

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mercial success.¹ This list is as long as the one containing articles whose novelty was in doubt but commercial success turned the scale in favor of invention. Thus, general and wide use is an unreliable test. The true test is whether by the exercise of the creative faculty the inventor produced an article which is new and capable of being used for a good purpose.² It remains to be seen whether the millennium will come when judicial acumen of the bench, aided by sagacious counsel who can lucidly present a patent case in court, can perceive whether there is intrinsic merit in a doubtful invention without having to resort to dubious extraneous factors.

C. F. O'S.

TAXATION—Constitutional Limitations on the State Power to Tax Intangibles.

The Supreme Court has clearly limited a state's power to tax to objects within the jurisdiction of that state.¹ This is simple in the case of tangibles: if they have acquired a situs they are taxable


¹ "The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state." Mr. Justice Field, State Tax on Foreign-Held Bonds, 15 Wall. 300 (1872).

² "It is essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power." Brown, J., Union Transit Co. v. Kentucky, 199 U. S. 194 (1905).

³ Situs must be distinguished from mere presence. The former involves presence with some degree of permanence. It may perhaps best be likened to domicile. That mere presence is insufficient: see, Hays v. Pacific Mail Steamship Co., 17 How. 596 (1855).
there; and only there; if not, the fiction of *mobilia sequuntur personam* still applies and they are taxed at the owner's domicile. In the case of intangibles the matter is not nearly so simple, however. There, although the same rules apply, namely, that they be taxed at their situs, if possible, one question nevertheless remains: where is the situs of such intangibles? It may be pointed out, that a debt, properly speaking, is merely a relationship, and in no sense of the word is it wealth; therefore it can really have no situs. That is not the generally accepted doctrine of the courts, however, it allows a tax wherever it feels the debt has acquired a situs.

The development of present doctrines on the taxation of intangibles dates back very largely to the decision of the Supreme Court in *State Tax on Foreign-Held Bonds*. It was there held that debts, which in that case consisted of bonds, had acquired no situs within the state by reason of the domicile of the debtor being within that state. Although later cases try to restrict the holding it seems clear from the opinion that the court was proceeding on the theory that debts generally can have no situs apart from the domicile of the owner. The purpose and intent which prompted this decision was, no doubt, to insure single taxation on intangibles as far as was constitutionally possible for that court. The result was quite the contrary, however, instead of insuring single taxation it made possible triple taxation.

Gradually we see a breaking down of the principal holding of the *Foreign-Held Bonds Case*, namely, that a tax levied by the debtor's

* Pullman's Car Co. v. Pennsylvania, 141 U. S. 18 (1891); Adams Express Co. v. Ohio, 166 U. S. 194 (1897).
* Southern Pacific Steamship Co. v. Kentucky, 222 U. S. 63 (1911).
* Beale, *Jurisdiction to Tax* (1918) 32 Harv. L. Rev. 587.
* *State Tax on Foreign-Held Bonds, supra* note 1.
* *Supra* note 1.

10 "Personal property, consisting of bonds, mortgages, and debts generally has no situs independent of the domicile of the owner."

"This right has no locality independent of the party in whom it resides. It may undoubtedly be taxed by the state when held by a resident therein, but when held by a nonresident, it is as much beyond the jurisdiction of the state as the person of the owner." Opinion by Mr. Justice Field, *State Tax on Foreign-Held Bonds, supra* note 1.

11 *Supra* note 1.
domicile is unconstitutional. Twenty-five years after that decision a case arose testing the validity of a tax levied by the State of Oregon on a non-resident mortgagee's interest in Oregon land.\(^12\) The court held the tax valid. The case was differentiated from the previous case on the ground that in the Foreign-Held Bonds case\(^13\) the tax was on the bonds as such and not strictly on the mortgagee's interest. There is but little difference between the facts of the two cases—in both there was a debt secured by a mortgage—and it seems safe to say that the Court was beginning to reverse itself in fact without doing so in theory.

A few years later the case of Blackstone \emph{v. Miller}\(^14\) again raised the problem. In that case the state of New York levied a succession tax on money deposited in a New York bank by a man who died domiciled in Illinois. Mr. Justice Holmes, in giving the opinion of the court, upheld the right of New York on the principle that the debt was properly situated at the domicile of the debtor, since that is the jurisdiction to which the creditor must look for the enforcement and preservation of his right. However, rather than overrule the holding of the Foreign-Held Bonds case\(^15\) he distinguishes the case on the ground that that case applies only to bonds and not to simple debts. The theory of his holding seems to be that bonds are more than mere evidence of debt; they merge the debt and are the obligation itself.\(^16\)

This doctrine, distinguishing between tangible and intangible choses, stood till the case of Blodgett \emph{v. Silberman}\(^17\) came before the Supreme Court last spring. In that case a Connecticut statute provided for the levy of a succession tax on "all property owned by a resident of this state at the time of his decease, which shall pass by will or inheritance under the laws of this State." The Court of Appeals of Connecticut held that insofar as the statute referred to purely intangible rights the statute was valid and constitutional, and allowed the tax; but so far as the tax applied to tangible choses represented by a symbol permanently situated in another state the

\(^{12}\) Multnomah County \emph{v. Savings Society}, \textit{supra} note 9.

\(^{13}\) \textit{Supra} note 1.

\(^{14}\) \textit{Supra} note 9.

\(^{15}\) \textit{Supra} note 1.

\(^{16}\) "The taxation in that case (Foreign-Held Bonds) was on the interest on bonds held out of the state. Bonds and negotiable instruments are more than merely evidences of debt. The debt is inseparable from the paper which declares and constitutes it, by tradition which comes down from more archaic conditions."—Mr. Justice Holmes.

\(^{17}\) \textit{Supra} note 9.
tax was unconstitutional. The court assumed that, in view of the explanation of *State Tax on Foreign-Held Bonds*\textsuperscript{18} in *Blackstone v. Miller,*\textsuperscript{19} bonds were to be treated as inseparably connected with the paper evidencing them, and were to be considered as tangibles; and further, in accordance with the holding of *Frick v. Pennsylvania,*\textsuperscript{20} were to be taxed only at the situs of the paper. On appeal to the Supreme Court the decision was reversed on that point, the Court holding that on tangible and intangible choses alike a tax could be levied by the state of the creditor's domicile. Chief Justice Taft, in giving the decision of the Court, entirely refuted the distinction which Mr. Justice Holmes had drawn on the previous occasion.\textsuperscript{21} With that distinction discarded, how can it be any longer denied that *Blackstone v. Miller*\textsuperscript{22} entirely overrules *State Tax on Foreign-Held Bonds,*\textsuperscript{23} and that now the state of the debtor's domicile may levy a tax on debts, be they mere simple debts or more formal, and represented by a symbol?

Since, however, in both the *Blackstone* case\textsuperscript{24} and in the *Blodgett* case\textsuperscript{25} a transfer tax was involved, it might be argued that only in such cases would the Supreme Court hold that the tax might constitutionally be levied at the domicile of the debtor. This, it is submitted, is not so for the following reasons:

First, although the Supreme Court in deciding cases involving transfer taxes always stresses the fact that such a tax is in question, we find on reading the cases that authority established in the one class of cases is followed in the other with two possible exceptions.\textsuperscript{26}

\textsuperscript{18}Supra note 1.
\textsuperscript{19}Supra note 9.
\textsuperscript{20}Supra note 4.
\textsuperscript{21}"Bonds * * * are nevertheless in their essence only evidences of debts * * * . They are choses in action * * *, and this characteristic remains, and shows itself by the fact that their destruction physically will not destroy the debt which they represent. They are representative and not the thing itself." Frick v. Pennsylvania, supra note 4. Compare to language used by Holmes, supra note 16.
\textsuperscript{22}Supra note 9.
\textsuperscript{23}Supra note 1.
\textsuperscript{24}Supra note 9.
\textsuperscript{25}Supra note 9.
\textsuperscript{26}Although a state may not directly tax the right to exercise federal franchises, California v. Central Pac. Ry. 127 U. S. 1 (1888); or federal securities, Weston v. Charleston, 2 Pet. 449 (1829); nevertheless an inheritance tax may be levied on such securities, Plummer v. Coler, 178 U. S. 115 (1900).

The other exception is set forth in the discussion of taxation at situs of symbol, *infra.*
So the *Frick* case 27 followed the limitations laid down in the *Union Transit Co. v. Kentucky*, 28 although the former was a case involving transfer tax, while the latter dealt with a property tax. It is there pointed out that to levy either tax, jurisdiction over the object is required. 28 It may also be noted that in distinguishing the *Blackstone* case 29 from the *Foreign-Held Bonds* case, 30 Mr. Justice Holmes makes no mention of this difference.

Secondly, on logic and principle it seems hard to deny, to the debtor's domicile, the right to tax such debt either by a transfer or a property tax. Its very validity depends upon the laws of that jurisdiction. 28 Moreover, that the right really follows the person of the debtor, is shown by the garnishment or trustee process: the only intangible something which exists is in the power and possession of the debtor, over him or over some of his possessions must you get jurisdiction before you can collect. 30 Furthermore, it would be exceedingly unfair to deny the right to the debtor's domicile to tax. It was in recognition of this fact that the so-called "business situs" doctrine grew up, 34 holding a tax on credits constitutional whenever such credits were employed in business within the state. It is submitted, however, that this principle is properly not limited to cases where the creditor is actively engaged in the business of lending money within the state, but applies to all debts, so long as the debtor is domiciled within the state. To illustrate, let us assume that A and B, both living in a jurisdiction where the tax rate is very low, go into X state with a capital of $1,000,000 each which they decide to put to work. A opens an office and lends his money in

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27 Supra note 4.
28 Supra note 4.
29 "The tax which it (the state) imposes is not a property tax but one laid on the transfer of property on the death of the owner. This distinction is stressed by counsel for the State. But to impose either tax the State must have jurisdiction over the thing that is taxed, and to impose either without such jurisdiction is mere exortion and in contravention to due process of law."—Brown, J., *Frick v. Pennsylvania*, supra note 4.
30 Supra note 9.
31 Supra note 1.
32 "What gives the debt validity? Nothing but the fact that the law of the place where the debtor is will make him pay."—Mr. Justice Holmes, in *Blackstone v. Miller*, supra note 9.
33 It has been objected that if this is so then any jurisdiction through which the debtor passes could tax, but it must be remembered that presence is not synonymous with situs, *supra* note 2.
34 *New Orleans v. Stempel*, 175 U. S. 309 (1898); *Bristol v. Wash-
small sums, while B lends his entire sum to one individual. Although both are regulated by the same maximum rate of interest, B's capital would be subject only to the low rate of his domicile, while A would be held for taxes in both jurisdictions. Furthermore, B, being free from the tax of state X, would hold an unfair advantage over residents of that state who might also have money to put out on loan. Out of fairness then, a tax would have to be upheld in all cases at the debtor's domicile.

In view of those premises and the decisions upholding both property 42 and succession 43 taxes at the domicile of the debtor it would seem safe to assume that the Supreme Court now regards such constitutional.

By necessary construction, however, of the Foreign-Held Bonds case 44 there was established one other jurisdiction at least which could tax intangibles, namely, the domicile of the creditor. A property tax by that jurisdiction was held constitutional in Kirtland v. Hotchkiss, 45 and that holding reaffirmed in Fidelity Trust Co. v. Louisville. 46 Bullen v. Wisconsin 47 established the propriety of a succession tax levied by that jurisdiction, and this doctrine is accepted as a foregone conclusion by the Blodgett case. 48 Beside being justified by the reasoning in the Foreign-Held Bonds case 49 this tax was often supported on the ground that it was really not a property tax at all but rather a personal tax—taxing the person of the creditor commensurate with his ability to pay. 50 Such a ground would seem rather nebulous when we find it established beyond doubt that such a tax is not allowed on realty 51 or chattels 52 located in another state, although it cannot be denied that the ownership of such would enable him to pay as well as the ownership of intangibles. But, regardless

150	43
150	Tappan v. Merchants National Bank, 19 Wall. 490 (1873); Multnomah County v. Savings Society, supra note 9.

150	44
150	Blackstone v. Miller, supra note 9.

150	Supra note 1.

150	100 U. S. 491 (1879).

150	245 U. S. 54 (1917).

150	240 U. S. 625 (1915).

150	Supra note 9.

150	Supra note 1.

150	This view is set forth with much detail by Prof. Beale in 32 Harv. L. Rev. 587 (1918).

150	42
150	Union Transit Co. v. Kentucky, supra note 4.

150	44
150	Union Transit Co. v. Kentucky, supra note 4; Frick v. Pennsylvania, supra note 4.
of the weight or soundness of argument to the contrary, it is firmly established that the creditor's domicile may tax intangibles.

When Mr. Justice Holmes, in deciding Blackstone v. Miller, differentiated between tangible and intangible choses, he opened the way for taxation by a third jurisdiction—the state where the symbol has acquired a situs. In Wheeler v. New York, a succession tax was upheld in such a case. The symbol, in that case, a note, was in a safe deposit vault in New York, although neither debtor nor creditor were residents of the state. The court had difficulty reconciling that decision with Buck v. Beach, in which, a few years earlier, a transfer tax had been denied under similar circumstances. Two grounds on which to distinguish between the two cases are pointed out. First, in Buck v. Beach there was no situs established in the taxing state; and secondly, that case is to be regarded only as authority in cases involving transfer taxes. The court continues, however, that if they cannot be distinguished on these grounds then the Wheeler case must be regarded as overruling Buck v. Beach. Although the Chief Justice uses strong language in the Blodgett case in refusing to recognize any distinction between tangible and intangible choses it is doubtful whether it could be held to go so far as to deny a tax such as levied in Wheeler v. New York.

Looking back then, it would seem that so far as the power of the state is concerned, both transfer and property taxes may certainly be levied by two jurisdictions, the debtor's and the creditor's domicile, and probably even by a third, if the debt is represented by a symbol, namely, the place where the symbol has acquired a situs.

G. C. G.

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46 Supra note 9.
44 233 U. S. 434 (1913).
47 206 U. S. 392 (1906).
48 Supra note 21.
49 Supra note 46.
RECENT DECISIONS

AGENCY—Irrevocable Powers—Power Coupled with an Interest.

The San Joaquin Valley Hotel Corporation secured the services of the plaintiff, investment bankers, to enable it to effect a lease upon certain land. The Hotel Company erected a building upon the land and gave the plaintiff a lease for the second floor, rent free, the plaintiff agreeing to finance the construction of the building. As a part of the same transaction the plaintiff was appointed sole and exclusive agent in the management of the building, having authority to perform for the Hotel Company certain acts, accomplishment of which was compulsory under penalty of forfeiture of the lease. The agency was expressly declared to be irrevocable. The lease and the building was later assigned to the defendants, who took with full knowledge and subject to the contract with the plaintiff, but they proceeded to disregard the contract and refused the plaintiff the management of the building. Held, the contract gave the plaintiff a power coupled with an interest, the attempted revocation of which would be enjoined. Lane Mortgage Co. v. Crenshaw et. al., 269 Pac. 672 (Cal. 1928).

It is a general rule of the law of agency that the authority of an agent may be revoked by the principal at his pleasure at any time. Hartley's Appeal, 53 Pa. St. 212 (1866). And this is true even though the exercise of the power to revoke may subject the principal to responsibility in damages for breach of a contractual obligation. Clark v. Marsiglia 1 Denio, 317 (N. Y. 1845). The mere fact that the parties expressly declare an authority "irrevocable" will not of itself change the rule. Chambers v. Seay, 73 Ala. 372 (1882); Blackstone v. Buttermore, 53 Pa. 266 (1867); Todd v. Superior Court, 181 Cal. 406, 184 Pac. 684 (1919). However, there are cases in which the agent has obtained something more than a mere contract and an authority to act for the benefit of the principal alone, in which the loss occasioned by a revocation of the authority cannot be adequately recompensed by a mere action for damages. Hence, where money has been advanced, or an obligation incurred, for the principal, and the latter has given the agent some power, as to sell property or collect rents and pay himself out of the proceeds, for his protection; 1 Meachem, Agency (2d ed. 1914) § 576; Stevens v. Sessa, 50 App. Div. 547, 64 N. Y. Supp. 28 (1900); and again where the power is a condition of the contract and is designed as security for one of the parties, the agency is deemed irrevocable by act of the principal. Hunt v. Rousmanier, 8 Wheat. 174 (U. S. 1823). And when a power is coupled with an interest it is not only irrevocable by act of the principal, but survives his death. In Hunt v. Rous-
manier, supra, the leading case on the subject in the United States, Chief Justice Marshall defines a power coupled with an interest as a power which accompanies a legal estate or title in a thing real or personal over which the power is to be exercised, and renders the power capable of execution in the name of the agent. It is a power "engrafted on an estate in the thing itself." The decision, while asserting the rule as to the survivability of such powers, carefully circumscribes the meaning of the requisite interest. The hardship and disappointment to be encountered in the rigid application of the doctrine of this case has influenced the courts, while maintaining the shell of the doctrine as advanced by Chief Justice Marshall, to avoid its effect through construction of the term "interest". The result has been, in some jurisdictions, the eradication of the distinction there drawn between powers merely irrevocable inter vivos and powers irrevocable by the death of the principal. This has been accomplished through the process of drawing within the class of powers designated, powers coupled with an interest, those cases in the former class. *Knapp v. Alword*, 10 Paia 205 (N. Y. 1843); *Stevens v. Sessa, supra; Mulloney v. Black*, 138 N. E. 584 (Mass. 1923); 37 HARV. L. REV. 253 (1923). So flagrant is this disregard of the distinction that the term has frequently been used where this view has been unnecessary to support the decision of the court, and the case could have been supported on the principle in *Hunt v. Rousmanier, supra*, without declaring the power to be coupled with an interest, as in revocation inter vivos. *Hynson v. Noland*, 14 Ark. 710 (1854); *Sphier v. Michael*, 229 Pac. 1100 (Ore. 1924).

The court in the instant case, while paying homage to the decision of Chief Justice Marshall, which, it says, "has come down through the years, remaining today the leading and accepted announcement of the legal doctrine of a power coupled with an interest," boldly proceeds to ignore the limits within which Marshall's definition encompassed that term, and, observing that the law of agency has undergone some change throughout the years, defines a power coupled with an interest in the identical language employed in *Hunt v. Rousmanier, supra*, to designate powers irrevocable inter vivos, which Marshall stated not to be powers coupled with an interest. "Concretely," says the court in the instant case, "a power is said to be coupled with an interest when the power forms part of a contract, and is a security for money or for the performance of any act which is deemed valuable, and is generally made irrevocable in terms, or, if not so, is deemed irrevocable in law." Seavey, *Termination by Death of Proprietary Powers of Attorney* (1922) 31 YALE L. J. 283. The law on this subject is in an unsettled state, and while the courts are to be commended for the adroitness with which they have avoided the injustice of the strict application of the rule as to survivability, it
would seem that in situations such as in the present case, where the issue is as to revocability *inter vivos*, and might have been decided consistently with the decision in *Hunt v. Rousmanier*, *supra*, without declaring the power to be coupled with an interest, it would perhaps be better, for the sake of clarity, to rest the decision on a ground on which unanimity exists, declaring the power to be one given by way of security. 1 MEACHEM, AGENCY (2d ed. 1914) § 588. J.S.

DOMICILE—Meaning of “Residence” in the Naturalization Statute.

In 1920 the petitioner came to the United States and formally declared his intention to make his residence here permanently. He was employed in a responsible position by a large corporation which sent him to Manchuria for several years on business. Neither before he left nor since his return was he physically residing here for five years. As to his character and other qualifications he was worthy of citizenship. He petitioned for naturalization, and the only question was whether “for the continued period of five years next preceding his admission he has resided within the United States”, as provided by R. S. § 2170, 8 U. S. C. A. § 361. *Held*, he continuously resided within the United States for five years, as continuity of residence or domicile is not broken by a temporary absence on business no matter how prolonged. Petition granted. *In re Kalpachnikoff*, 28 F. (2d) 288 (E. D. Pa. 1928).

In the Naturalization Statute the term “resided” has been construed to mean “domiciled”. *In re Deans*, 208 Fed. 1018 (D. C. Ark. 1913); *Petition of Oganesoff*, 20 F. (2d) 978 (D. C. Cal. 1927). However, it is apparent from the purpose of the statute, and an examination of the decisions that this is not an accurate statement of its true meaning.

The purpose of the residence requirement in naturalization statutes is twofold. First, to put the applicant for citizenship on a reasonable probation to enable him to get rid of foreign and acquire American attachments, and learn our principles and customs, so that at the end of five years we may be sure he wants to cast his lot with us. *In re Vasiczek*, 271 Fed. 326 (D. C. Mo. 1921). Second, to allow us a sufficiently long time to observe the applicant so that we may be sure we desire him as a citizen. *In re Giovine*, 242 Fed. 741 (D. C. N. Y. 1917). It was not the intention of Congress to grant citizenship, with its concomitant rights and duties, to an alien who has not by actual physical residence with us imbibed the spirit of our government, nor given us an opportunity to see if we want him as a fellow-citizen.

The decisions show that actual and substantial residence within the United States is required. *U. S. v. Ginsberg*, 244 Fed. 209 (D. C. Mo. 1914), rev’d on other grounds, 247 Fed. 1006 (C. C. A. 8th, 1917);
given the word "continued" in the statute by the courts clearly shows
that mere "domicile", in its technical sense, alone is not sufficient.
this does not mean that the alien must be physically here every day
of the five year period. In re Schneider, 164 Fed. 335 (C. C. N. Y.
1908); U. S. v. Dick, 291 Fed. 420 (D. C. N. Y. 1923). The continuity
of residence once established is not interrupted by temporary absences
unless there is an intention to change or abandon domicile. U. S. v.
Jorkenson, 241 Fed. 412 (D. C. Mich. 1917). It has often been held that
absence even for a considerable period does not as a matter of law
break the continuity of the residence. U. S. v. Dick, supra; In re
Rowland, 179 N. Y. Supp. 120, 109 Misc. 65 (1919). But the prevailing
view is otherwise. U. S. v. Griminger, supra; Larquie v. Larquie,
40 La. Ann. 45, 4 So. 335 (1888).

What constitutes a protracted absence sufficient to break the resi-
dence period will depend on the circumstances of each case, but the
alien's intention will be given the most weight. U. S. v. Ginsberg,
supra; In re Barron, 26 F. (2d) 106 (D. C. Mich. 1928). Unless
unavoidable because of business, sickness or duress, generally over
two years absence is justification to refuse naturalization. U. S. v.
Krummer, 300 Fed. 106 (D. C. N. Y. 1924); Hatzopoulos v. U. S., 2 F.
(2d) 146 (D. C. N. C. 1927); Application of Piastru, 18 F. (2d) 147
(D. C. Cal. 1927). However, the adoption by the courts of a fixed
rule as to the time of absence sufficient to deprive an alien of citizen-
ship, would be both inconsistent and illogical, and would be constitu-

Thus, we see that "residence" as used in the statute means not
only domicile, but also bona fide residence, actual physical presence.
The decisions saying domicile and residence are synonymous are
misleading statements of the law. As Judge Hand said of these terms
in naturalization cases, "There is a much needed clarification of the
relative meanings of the words "residence" and "domicile". New-
berger v. U. S., 13 F. (2d) 541 (C. C. A. 2d, 1926), rev'd, In re New-
berger, 6 F. (2d) 387 (D. C. N. Y. 1925). It is hoped that the courts
in the interests of precise terminology will make these distinctions,
and thus avoid in the future a confusion of principles which so often
results from inaccurate legal expression.

W. G. McG.

MECHANICS LIENS—Lien of Laborers and Material Men on Public
Buildings.

A lumber company, having furnished some materials which were
used in the construction of a school building and being unpaid,
sought to foreclose the lien upon the building expressly con-
ferred upon it by statute. Held, that the statute was unconstitutional. Even though the constitution of the state of Idaho imposed upon the legislature the duty of enacting a general mechanics lien statute, other provisions limiting the power of municipalities to contract debts or to pledge their credit were held to determine the public policy of the state to be adverse to the creation of a lien upon public property even by legislative act. Boise-Payette Lumber Co. v. Challis School District, 268 Pac. 26 (Idaho, 1928). This decision is supported by a similar ruling in California. Mayrhofer v. Board of Education, 26 Pac. 646 (Cal. 1891).

The decisions have held with marked unanimity that, in the absence of express statutory authority, property belonging to the public and used for public purposes is not subject to a lien in favor of laborers or material men, and in the absence of express inclusion, public buildings are held to be exempt from general mechanics lien statutes. School District v. Fidelity Co., 9 S. W. (2d) 103 (Mo. 1928); Maryland Casualty Co. v. Fowler, 27 F. (2d) 421 (D. C. N. C. 1928). The earlier authorities are collected and reviewed in Hutchinson v. Krueger, Ann. Cas. 1914C 98. There are a few sporadic decisions to the contrary but the reasoning in them has had little effect upon the current of authority. The instant case goes so far as to hold that such a lien cannot be created by legislative act, and the only state which has upheld such a statute is Kansas. Huttig Millwork Co. v. Randall, 266 Pac. 106 (Kan. 1928).

If a lien could be acquired upon public property, such property would, in case of default in the payment of the debt, be liable to levy and sale by a foreclosure of the lien. It is clearly against public policy for the instrumentalities employed in conducting the government to be subject to seizure and sale for debt. Accordingly the rule denying the right to a lien on public property rests on the principle that the public good requires that property needed for the proper administration of local government affairs shall not be taken from the local authorities, lest the due administration of such affairs be so much disturbed as to cause the public to suffer.

J. B. H., JR.

PATENTS—Right to Patent Denied because of Prior Publications.

The patentee of "Eskimo Pie" brought suit for infringement against the defendant for making a similar frozen confection called "Honeymoon Pie". A previously published book and also a German patent showed the method of making this product. The plaintiff contended that the great commercial success of his product was sufficient to sustain his patent. Held, the prior published book and German patent showed there was no invention; also, commercial success alone does not prove invention, but is to be considered only where the ques-

In the law of patents it is axiomatic that a previously published book describing the method of making a certain article or process sought to be patented is sufficient ground to deny the application for a patent. 1 *Robinson*, *Law of Patents* (1890) § 325. The Patent Law provides that one may patent “an article, process or subject matter of a patent . . . not known or used by others in this country before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country before the invention or discovery thereof, or more than two years prior to his application . . .” 29 Stat. 692 (1897), 35 U. S. C. § 31, R. S. § 4886.

Knowledge of an invention may be made accessible to the public in three ways, any of which is sufficient reason for denying the right to a patent: (1) by prior use, (2) by previously granted patent, (3) by prior publication. *Hindmarch*, *Patents* (1st ed. 1846) 33; 1 *Robinson*, *Patents* (1890) § 316. We are here concerned only with the last of these.

publication must describe the invention so as to enable one skilled in the art to which it belongs to construct or use it without assistance of the patentee. Victor Talking Mach. Co. v. Am. Graphophone Co., 140 Fed. 860 (C. C. S. D. N. Y. 1905), aff'd, 145 Fed. 350 (C. C. A. 2d, 1906). If further experiment is necessary the prior published description is not sufficient to defeat patentability or to invalidate a granted patent. General Electric Co. v. De Forest Radio Co., 17 F. (2d) 90 (D. C. Del. 1927).

The instant case clearly conforms to these rules, and the patent was properly declared invalid. In view of the familiar receipt for making frozen confections in books on cookery, the German patent, and the “snowballs”, “frozen baseballs” and the like offered for sale by ice cream manufacturers for many years in this country, it is rather surprising that a patent was ever granted for “Eskimo Pie.”

For discussion of the point concerning commercial success involved in this case, NOTES, supra, p. 145.

C. F. O'S.

RAILROADS—Presumption of Negligence from Emission of Sparks from Locomotives.

Plaintiff Insurance Company under claim of subrogation to the rights of one Agor brings action against the defendant Railroad Company for damages, claiming negligence in the construction and operation of the defendant's locomotives. A warehouse owned by Agor and insured by plaintiff, filled at the time with wool and sacks, was discovered ablaze some twenty minutes after a locomotive had passed on the track alongside the warehouse. The warehouse and contents were totally destroyed. There was no direct evidence as to how and exactly when the fire started. The lone witness testified that the fire appeared to have started from the ground, that at the time he saw it, it was burning towards the roof and the whole building was quickly consumed. He further testified that on some previous occasions he had seen much smoke and sparks coming from locomotives as they passed along the nearby tracks. Held, proof that sparks from locomotives hauling train set building on fire does not raise presumption of negligent construction or operation of locomotives. General Insurance Co. of America v. Northern Pacific Ry. Co., 28 F. (2d) 574 (1928).

In determining the question of railroad liability for such fires there are two lines of reasoning entertained by the courts in deciding whether negligence is to be presumed in the construction and operation of the locomotives. The decided weight of authority is in favor of holding that, the origin of the fire being fixed upon the railroad company, it is presumably chargeable with negligence and must assume the burden of proving that it used all precautions necessary for confining the sparks and cinders. Bass v. Chicago, Burlington &
Quincy Ry. Co., 28 Ill. 9 (1862); Illinois Central Ry. Co. v. Mills, 42 Ill. 407 (1866); Sherman & Redfield, Negligence § 876 et seq. This is the common law in England. Piggot v. Eastern Counties Ry. Co., 3 C. B. 229 (1846). The same rule has been followed in the Federal courts in the case of Eddy v. Lafayette, 163 U. S. 456 (1895), though, however, Judge Taft in a case much like the instant case was of the opinion that the case is one of general law and that it cannot be said that the mere ignition by sparks is prima facie evidence of negligence of the railroad company. Garret v. Southern Ry. Co., 101 Fed. 102 (1900). In the case of Taylor v. Pennsylvania & Schuylkill Valley Ry. Co., 174 Pa. 171, 34 Atl. 475 (1896), the court held that a fire started upon a right of way is insufficient to prove negligence on the part of the railroad company. Indiana holds to the same doctrine in Chicago & Eastern Illinois Ry. Co. v. Ostrander, 116 Ind. 259, 15 N. E. 227 (1888), where it is said that no presumption of negligence arises by the fact that the fire was set by sparks. Perhaps the rule which best supports the doctrine of these latter cases is the one laid down in the Nitroglycerine Case, 15 Wall. 524 (U. S. 1872). There the principle is invoked that one who charges negligence must prove it by showing that the defendant by his act or omission has violated some duty incumbent upon him which has caused the injury complained of.

These two contrary views have been before the courts for many years, yet no apparent progress seems to have been made in solving the ever present problem of liability. Which side of the question is the better law would be only answered by a judicial Solomon, but if we are to judge from the reasoning presented in the multitude of cases in point it would seem that perhaps the more logical view is that the gravamen of an action for loss of property by fire communicated by sparks is negligence, and that “inasmuch as a railway company may lawfully use locomotives it cannot be made liable for a loss from sparks emitted unless plaintiff shows sparks to have been negligently emitted”. The burden of showing negligence is upon him who affirms it. Toledo, St. Louis & W. Ry. Co. v. Star Flouring Mills Co., 146 Fed. 953 (1906). This case is in direct harmony with the case under discussion and also with Cincinnati, N. O. & T. P. Ry. Co. v. South York Coal Co., 139 Fed. 528, 1 L. R. A. (N. S.) 533 (C. C. A. 6th, 1905); and Louisville & Nashville Ry. Co. v. Bell, 206 Fed. 395 (C. C. A. 6th, 1913). This conclusion we draw with all due respect to the weight of authority which is to the contrary, but to whose holding we cannot in reason or justice subscribe.

SEARCH AND SEIZURE—Search Warrant for Fight Films Strictly Construed.

H. A. Rose, who operated a motion picture theater in Lynchburg, Va., advertised the public exhibition of a film depicting the Dempsey-
Tunney fight, on the afternoon and evening of April 21, 1928. At the afternoon performance the United States Marshal appeared with a search warrant issued by the United States Commissioner for the District, under authority of which he seized the films. No warrant for the arrest of any of the parties involved was either asked for or issued, and it seems that this was simply an indirect method to prevent the exhibition of such films.

The search warrant under which the films were seized was issued pursuant to Act of June 15, 1917, c. 30, tit. 11, § 2, subd. 2. This act authorizes a search warrant when the property sought "was used as the means of committing a felony". The felony in question was a conspiracy to violate the Act of July 31, 1912, c. 263, prohibiting the interstate transportation of fight films. Although the violation of the latter act constitutes merely a misdemeanor, a conspiracy to violate it is a felony under the U. S. Criminal Code § 37.

Rose filed a petition to require the restoration of the films seized. Held, the search and seizure statute must be strictly construed; that the felony was the conspiracy to transport the films, not exhibiting the films themselves or their presence in the state; that the means of transporting and conspiring, and not the films were the things "used as a means of committing the felony"; and that therefore the films must be restored. The court, also, found as a matter of fact that there never was any intention to prosecute anyone under the statutes in question; that the sole purpose of the seizure was to prevent the exhibition of the films; that since Congress perhaps could not, or at any rate, did not prohibit such exhibition, the court would not allow prohibition by indirection on a matter which the statute did not directly prohibit. Petition granted. 

Although the court expressly states that the propriety or impropriety of seizure as incidental to an arrest of a person is not involved in its decision, it intimates in all its reasoning that these films could not be used as means of committing the felony and therefore could not be seized. In this the court seems opposed by a wealth of argument and reasoning in three cases in which such seizures are upheld: Atlanta Enterprises v. Crawford, 22 F. (2d) 884 (N. D. Ga. 1927); In re Film, etc., of Dempsey-Tunney Fight, 22 F. (2d) 837 (N. D. Ga. 1927); U. S. v. Wilson, 23 F. (2d) 111 (N. D. W. Va. 1927). In all these cases the search and seizure was preliminary to any personal prosecution, the court upholding the seizure as a reasonable means of gathering evidence to obtain a conviction in such cases where a crime had undoubtedly been committed. It seems hard to deny that such seizures of films which constitute the most important link in the chain of evidence against the felon was not within the purpose and spirit of the search and seizure statute,
passed undeniably to aid in effectuating the apprehension and conviction of felons.  

G. C. G.

SPECIFIC PERFORMANCE—Contracts Made Illegal by Statute.

The lessor agreed to lease for five years a restaurant and the apartment above it. One of the provisions of the lease was that the tenant should have the privilege to go through the hall of the house. The parties contemplated that this right of passage would be made possible by making an opening in the wall between the restaurant and the apartment. However, the tenement house department refused permission to make the necessary alterations. The lessee prays for specific performance of part of the agreement to lease the restaurant alone since the apartment is useless without right of egress. Held, the lessor cannot be compelled to carry out the provision of the lease which violates the law, and equity will not decree specific performance of part of the contract when to do so would make a new contract for the parties. Bill denied. Palombi v. Volpe, 249 N. Y. 194, 163 N. E. 607 (1928), aff'd, 222 App. Div. 119, 226 N. Y. Supp. 155 (1928).

Legality of contract is absolutely essential in order to bring it within the equitable jurisdiction of specific performance. Bispham, Principles of Equity (10th ed.) 606. As a general rule, specific performance will be denied when subsequent events, which cannot reasonably be supposed to have been “in contemplation” of the parties when the contract was made, would make it unjust or inequitable to enforce it. Willard v. Tayloe, 8 Wall. 557, 19 L. Ed. 501 (1869). If a statute makes the contract illegal, equity will certainly not decree specific performance. Louisville & Nashville Ry. Co. v. Mottley, 219 U. S. 467, 55 L. Ed. 183 (1911); Atkinson v. Ritchie, 10 East 530 (1809); Pomeroy, Contracts § 280. Thus in Bullard v. Northern Pacific Ry. Co., 10 Mont. 168, 25 Pac. 120, 11 L. R. A. 246 (1890), it was held that rebates upon shipments, under a contract fixing the price of carriage and providing for a rebate equal to the difference between the contract price and the regular schedule of freight rates upon like articles, could not be recovered after the enactment of the Commerce Law of Feb. 4, 1887, 24 Stat. 379, U. S. Comp. St. 1901, 3154. In Cowley v. Northern Pac. Ry. Co., 68 Wash. 555, 123 Pac. 998, 41 L. R. A. (N. S.) 559 (1912), specific performance was refused of a contract giving a free pass on a railway when the Commerce Act later prohibited free passes. Cf. Louisville & N. R. Co. v. Crowe, 156 Ky. 27, 160 S. W. 759 (1913), in which the facts were identical. If the condition of a contract has been performed, the obligation on that contract is discharged; and it is equally discharged if, instead of the condition having been performed, its performance has been prevented by the act of God or the act of law. Brown v. Mayor, 9 C. B. (N. S.) 726 (1861); Libman

If the performance of a condition in a lease is forbidden by law, specific performance of the lease will be denied. 

Doe, on Demise of Marquis of Anglesea v. Church Wardens of Rugeley, 6 Q. B. 107 (1844). In Anderson v. Steinway & Sons, 221 N. Y. 639, 117 N. E. 575 (1917), aff'g, 178 App. Div. 507, 165 N. Y. Supp. 178, a zoning ordinance enacted after the contract was made rendered it illegal for the defendant to use the property for the business purposes which he had in mind when the contract was made, and which purpose the plaintiff knew at that time; specific performance was denied. Lincoln Trust Co. v. Williams Bldg. Corp., 229 N. Y. 313, 128 N. E. 209 (1920). Cf. Biggs. v. Steinway & Sons, 229 N. Y. 320, 128 N. E. 211 (1920). Daniell v. Shaw, 166 Mass. 582, 44 N. E. 991 (1896), held that specific performance would be refused when the property was incumbered by a restriction of the legislature even though the statute might be unconstitutional. The instant case is in accord with these cases, and is undoubtedly correctly decided.

This case also affirms the proposition that specific performance will not be decreed against an unwilling vendee where the defect or deficiency is material, since that would be to force a new contract upon the parties. 5 Pomeroy, Eq. Jur. § 2254 et seq. This rule applies to contracts for the sale of land in which the vendor is unable to fully perform due to some defect in his title. A substantial deficiency in amount or title is cause for refusing specific performance. Drewes v. Corporation, 9 Ves. 368 (1804); Chi. M. & St. Paul R. R. v. Durant, 44 Minn. 361, 46 N. W. 676 (1890). In Perkins v. Ede, 16 Bevan 193 (1852), a bill for specific performance was defeated because the vendor could not give title to a strip of land that lay between the house and the road. The following cases have sometimes been cited as contrary to this rule, but in reality they are not since the defect was only a minor one. Lowles v. Round, 5 Ves. 508 (Eng. 1800) (easement of footpath across meadow); Halsey v. Grant, 13 Ves. 73 (1806) (encumbrance of rent charge); Howland v. Norris, 1 Cox. C. C. 59 (1784); Peers v. Lambert, 7 Beavan 546 (1844); Bailey v. Piper, L. R. 18 Eq. 683 (1874). In these cases specific performance was granted, and compensation allowed to the vendee for the deficiency.

By analogy, the same rule is applicable in leases. The original agreement was for the lease of both the restaurant and the apartment in the instant case. If the court decreed the specific performance asked by the plaintiff, it would be forcing the defendant to execute a lease for the restaurant alone which would be equivalent to making a new contract which neither party intended.
BOOK REVIEWS


It is a noteworthy fact that in the matter of trade association activities the traditional repressive anti-trust policy of the United States has given way in recent years to a more liberal attitude by the courts. The decisions in the Maple Flooring ¹ and the Cement ² cases in 1925 marked the turning point, where, as the author observes (p. 24), "the rigor of the entire anti-trust system has been relaxed to an unprecedented degree; and unless courts and administrative officers are rigidly bound by settled precedents, special circumstances and particular facts are now being weighed in the final determination of the legality of cooperative trade association activities under review." The explanation for this change on the part of the courts is to be found in the fact that "the law of restraint of trade is not of fixed material content, but adjusts itself flexibly and elastically and changes with the economic and social views of our industrial order."

As regards the latter, the past decade has witnessed structural changes in business life of basic importance, brought on by such new developments as mass production and large-scale marketing, newer forms of economic concentration, standardization, business forecasting, etc. Accordingly legal concepts formulated under totally different surroundings are found out of alignment with the exigencies of present-day business. It is the recognition of these new situations, of the fact that commerce and trade are not static, but subject to a constant process of evolution, that has caused the courts "to shift the emphasis in legal inquiry from a search for a technical violation of the anti-trust laws to proof of the presence of substantial economic benefits. A large portion of trade association activities is now being regarded by the law with a view toward their

constructive possibilities and the economic and social advantages of their cooperative functions, in promoting economy, efficiency and stability in the processes of manufacturing and distribution." (p. 32).

In these days where trade associations honeycomb industry and trade, it is a matter of vital importance to American business men to know just where they stand, and to have reasonable assurance that what they are doing or planning to do will not bring them into conflict with the anti-trust laws. It is here where this book meets a real need and performs a valuable service. The author takes up all the leading problems with which trade associations are concerned under the Sherman Act, Federal Trade Commission Act, Clayton Act, Export Trade Act, and other anti-trust laws, and in each instance, on the basis of a searching analysis of the court decisions involved, states what is permissible or prohibited in clear and succinct language.

Among the subjects of current interest discussed in separate chapters are the following: statistical services, uniform cost-accounting methods, credit bureaus, collective purchasing functions, uniform basing point systems, standardization, commercial arbitration and codes of business ethics. As these topics indicate, legal and economic problems are here closely intertwined, and we regard the author's method of always considering the respective legal problems in their proper economic setting as a special feature of this book. In this way he has succeeded in extracting a wealth of practical information out of the source material available and correlating it in handy form.

Ever since the world war, when the trade association movement began to take on momentum, statistical reporting and uniform cost accounting proved vexatious stumbling blocks. Their legal validity was seriously questioned. Efforts to procure clarifying rulings from the Department of Justice and the Federal Trade Commission were unsuccessful. All this has changed since the authoritative views
of the Supreme Court, as laid down in the leading decision, the Maple Flooring case, have become known. The far-reaching importance of that decision may be gauged by the fact that the number of associations gathering statistics at the present time is upward of a hundred. It is with special interest therefore that one turns to the author's treatment of these topics in Chapters 2 (Trade Association Statistics) and 3 (Uniform Cost Accounting Methods of Trade Associations).

In both chapters the author first gives a comparative critical analysis of the main cases, including the Hardwood, Linseed, Cement, Maple Flooring and Trenton Potteries decisions and then, in seven groupings, lists significant features noted by the courts. As any one familiar with the cases knows, it is a difficult matter to state the permissible and prohibited practices in terse formulas, but the author has succeeded admirably in avoiding undue generalizations and qualifications, so that one here finds a very helpful and up-to-date guide of conduct.

Certain trade associations have used their statistical machinery and uniform cost accounting systems to establish unlawful agreements in the form of uniform basing point systems. The famous Pittsburgh Plus case several years ago centered popular attention on this practice. A separate chapter (VIII) is devoted to the legal phases of this subject, in which the legitimate practices are clearly set forth over against concerted efforts which would subject associates to the common will of an organized group for the purpose of making possible arbitrary overcharges and exploitation of the consumer.

In Chapter VI the foreign trade functions of trade associations are discussed, particularly in their relation to the Export Trade Act (Webb-Pomerene law). The scope and application of this unique Act and the rulings made thereunder by the Federal Trade Commission as to the legality of price agreements, arrangements between American export associations and foreign cartels and combines, are
given careful consideration. Incident thereto the author takes up the wider subject of international trade compacts and their bearing on American public policy in foreign trade and commerce. The reader will note with interest the illuminating analysis of the recent sisal, quinine and potash cases, in which for the first time sections 73, 76 and 77 of the Wilson Tariff Act of 1894 as amended February 12, 1913, have been successfully applied to foreign monopolies engaged in importing goods into the United States.

Here as elsewhere in this book one will find not merely court decisions paraphrased or digested but rather an analytical examination of the principles laid down by the courts with regard to trade associations and a practical application of the same.

Copious references, in footnotes, to collateral reading material add greatly to the value of the book, the use of which is enhanced also by a table listing 132 cases, and a serviceable index.

WILLIAM F. NOTZ.
Georgetown University School of Foreign Service.


This is the fourth edition of one of the most favorably known of the Hornbook series of texts. Since 1910, when the third edition was published, there have been violent changes in our constitutional system. Merely to mention a few of the outstanding alterations in the fundamental law, this period has seen the popularization of the United States Senate; the enlargement of the federal tax power by the Sixteenth Amendment; the incorporation of sump\n\ntuary legislation into the Constitution; and the steady erosion of the Bill of Rights. In view of all this "progress" (characterized in harsher terms by some reactionary minded persons) it is interesting to compare the third and fourth editions of Mr. Black's work.

The chapter on "The Powers of Congress" is much extended; necessarily, in view of the un\np\n\nparalleled enlargement
of those powers since 1910. A section on "The Constitution in time of war" is added in the present edition. So also at page 252 under the title "Prosecution of War", there is an interesting treatment of the plenary war power of Congress, as illustrated by its exercise during the recent hostilities, with a review of some of the great war enactments and the decisions thereunder. This material, of course, is new. Chapters 19 and 20, Equal Protection of the Laws and Due Process of Law, respectively, have been added in this edition. Part of the subject matter of these new chapters was formerly included in Chapter 18, Civil Rights and Their Protection. A new section has been added on "Zoning Laws and Ordinances," in the chapter on Police Power. This interesting question has become of importance since the third edition, and most of the cases referred to are of comparatively recent date.

The section on "Regulation of Public Utilities" adds little to the treatment of that subject in the third edition, despite the growth of this branch of the law in the interim. Particularly is this noticeable in the discussion of the principles underlying the determination of reasonable rates. The author confines himself to the generalities of Smyth v. Ames, and although several of the recent Supreme Court cases affecting the rate base are cited, they are not discussed.

In some instances subdivisions of the topics do not appear to be quite logical, closely related topics being occasionally found grouped in diverse sections. For example, at pages 215-218, under the title "Power to Regulate Commerce" is found a section on railroads, in which there is a discussion of several of the acts regulating interstate carriers, e. g., the Hepburn Act, the Employers' Liability Act, and the Transportation Act of 1920. At page 237 there is a section styled "The Interstate Commerce Act", which includes a treatment of the powers and functions of the Interstate Commerce Commission. These two sections might profitably have been treated in one. So also at page 371 there is a discussion of the constitutionality of laws for the
suppression of sedition and syndicalism, while this subject is elaborated in almost identical manner at page 654 under the title "Incitement to Crime, Anarchy and Revolution."

A serious omission from the fourth edition is a table of cases, this being especially unfortunate in view of this work's unusual availability as a supplemental text in casebook courses. A table of cases affords valuable aid to the student in coordinating his supplementary reading with his case studies.

As in the third edition, the author appears somewhat distrustful of the modern tendency to extend the police power to cover almost every conceivable legislative vagary. Thus he says of that power (at page 370):

"Even when properly defined and limited, it is so far-reaching in its importance and so paramount in its sway, even as against guaranteed private rights, that its enlargement, by continual loose applications of the term to cases where it is neither needed nor appropriate, is a serious menace to personal freedom."

In regard to certain other recent constitutional developments, the following comment of the author is significant:

"The provisions of a constitution refer to the fundamental principles of government and the establishment and guaranty of liberties, instead of being designed merely to regulate the conduct of individuals among themselves. But the tendency towards amplification in modern constitutions derogates from the precision of this distinction."

In general it may be said that Mr. Black has here produced a concise, accurate statement of the fundamental principles of American constitutional law, well buttressed with authorities, and eminently readable. That the revision has been painstaking is evidenced by the presence of very recent cases in almost every footnote, and by the frequent rewriting of paragraphs and whole sections to conform to the law as enunciated therein. The value of a text of such merit extends in several directions. In schools where the
case system is not used, it affords an excellent vehicle for the course in constitutional law; in others, the student will find it helpful to supplement his casebook. To the practitioner it should be useful as a starting point for his investigation of constitutional questions with which he is not familiar.

The prime importance of constitutional law in our jurisprudence renders a text on that subject a necessary part of the library of every lawyer, public officer, and law student. It is believed that Mr. Black has furnished a volume which adequately fills that need.

Henry L. Walker.


In this revised edition, which was made in order to bring the text in accord with the Federal Appeals Act of February 13, 1925, there are 379 pages of text and 250 pages devoted to reprinting the rules of the Supreme Court and the various Circuit Courts of Appeals. The equity rules are not printed and the futility of placing a collection of rules in a textbook is shown by the fact that while this book was in press the Supreme Court amended and revised its rules making the book inaccurate the day it came from the press. The book, however, includes excellent forms and an admirable index as well as a table of 2600 cases.

The content and arrangement of the book is such that the practitioner is carefully led through the intricacies, which sometimes seem a maze, involved in perfecting an appeal in a federal court. How antiquated some of our procedure is and how highly technical is indicated by the following: "In the Federal courts, bills of exceptions are required to be drawn as at common law under the statute of Westminster 2nd (13 Edw. I, Chap. 31) passed in the year 1285, and they must be sealed by the judge as therein
required.” One of the difficulties is indicated by the statement: “None of the Federal courts have any inherent appellate jurisdiction, their jurisdiction depending wholly upon statutory provisions . . . On every writ of error or appeal, the first and fundamental question is that of jurisdiction, first of the appellate court, then of the court from which the record comes.” It is rather surprising to find the statement that “in order to obtain a review in the Supreme Court or in a circuit court of appeals, it is imperative that the judgment or decree appealed from be final and complete in its nature,” when later in the book the matter of appeals from interlocutory orders is taken up.

The author laboriously endeavors to fix the time for appealing from the district courts to the circuit courts of appeals and cites and argues the cases. He does not, however, call attention to the fact that the act of February 13, 1925, fixed the time by the date of the “petition for appeal,” whereas the previous law had fixed it by “taking an appeal.” This distinction makes many of the old cases of no importance and clearly fixes the act which makes the appeal on time.

The author avoids the temptation too prevalent in textbooks of being too sure of his position: With respect to the act of January 31, 1928, he says: “Until the question is authoritatively decided by the courts, it seems safer to follow the old procedure on this point.” Frequently throughout the book attention is called to cases which seem to validate unusual procedure with the caution that it is safer to follow the usual course. In general if the advice of the author is followed the practitioner will find little trouble in appealing a federal case.

Karl Fenning.

Washington, D. C.


The book is divided into several sections, the first being devoted to the Sherman Act. There is given a history of
trusts, monopolies and contracts in restraint of trade, a
statement of the Congressional proceedings which led up
to the enactment of the Sherman Act, and the Constitu-
tional authority for the Act. This is followed by an an-
alysis of the Act and a consideration of contracts, monopo-
lies, conspiracies and the agreements on which they are
based, indicating which are legal and which are illegal.
This is followed by an outline of the court proceedings in
government equity suits, criminal cases and private actions
for damages. The second part relates to the Clayton Anti-
trust Act and includes chapters on the purpose of the Act
and various things inhibited by the Act such as price dis-
crimination, patent arrangements, and agricultural and
labor associations as well as interlocking directorates and
associated corporations including common carriers. Next
is considered the methods of enforcing the Clayton Act, in-
cluding injunctions and contempt proceedings. Part III
relates to the Federal Trade Commission Act and gives a
history of the law, the organization of the Commission, a
discussion of unfair methods of competition considered by
the Commission, followed by a detailed statement of the
proceedings before the Commission and before the courts
to review or enforce the Commission’s orders. Part IV
deals with the Webb-Pomerene Export Trade Act, the Pack-
ers and Stockyards Act, together with certain portions of
the Panama Canal Act, the Judicial Code, and the Tariff
Act relating to unfair competition. The Appendix also
contains the rules of the Federal Trade Commission and a
number of Congressional reports relating to the various
acts as well as syllabi of recent decisions of the Commission
and stipulations approved by it.

The method of preparing the book causes a good deal of
repetition since some matters treated in Part I under the
Sherman Act are very closely allied to similar matters
treated in the other parts of the book under other statutes.
Cross-referencing from section to section is not always
done so that unless care is exercised the reader may be led
to take as final what is certain in one place although it is
overruled or considerably modified in another place. At page 670 the author says: "The fact that a retail dealer sells a copyrighted book, in violation of the terms for selling it he entered into with the publisher when he purchased it, is not an infringement of the publisher's copyright." While on page 896 he says: "Whether a resale restriction may be placed upon a copyrighted book has not been decided;" and the same case is cited to support both statements.

The author treats patents, trade-marks and copyrights in the section relating to the Sherman Act and again in the section relating to the Clayton Act and finally in the section relating to the Federal Trade Commission. The subject is thus well and fully covered if all the references are read together. "Generally where there has been an infringement of a trade mark the Federal Trade Commission will not consider the matter; but leave the complaining party to his suit in equity for an injunction and an accounting, and the same is true of copyright violations, and infringements of patents." With respect to agreements under patents the author says: "It is not a violation of the statute for an agreement to be so drawn and with the intent as to keep up or maintain the monopoly given by the patent. . . . But if the agreement transcends what is necessary to protect the use of the patent or the monopoly which the law confers upon it, then it is void; and if in restraint of interstate commerce, they pass to the purpose accomplished in a restraint of trade condemned by the Sherman Law."

Unfortunately the United States Code is cited by page rather than by titles so that reference must be made to the particular edition of the code to which the author refers although there is no indication of which edition he used.

Washington, D. C.

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