REPORT

OF THE

TWELFTH ANNUAL MEETING

OF THE

WEST VIRGIINA

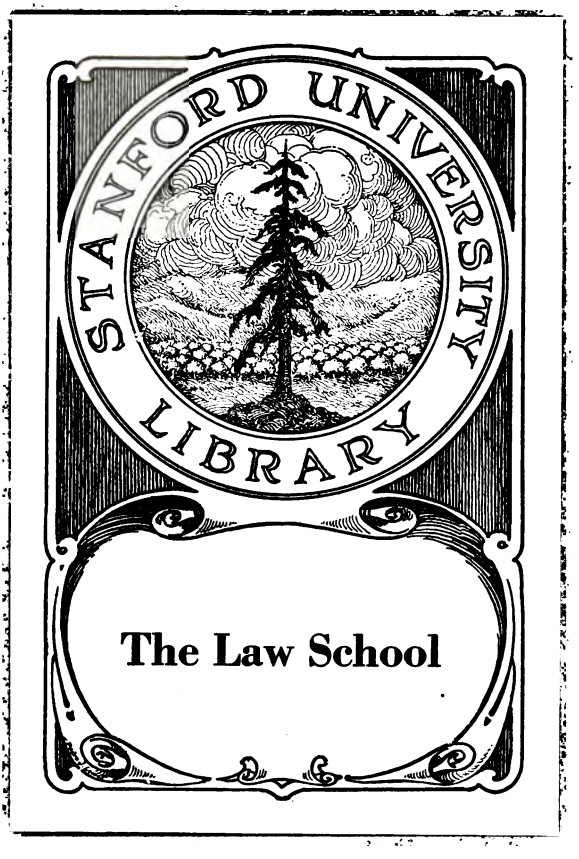
STATE BAR ASSOCIATION,

HELD AT

MORGANTOWN, W. VA.,

NOVEMBER 3D AND 4TH, 1897.

ST. LOUIS:
NIXON-JONES PRINTING CO.,
215 PINE STREET.
1898.



Bar Association

FOREWORD

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REPORT

of the

TWELFTH ANNUAL MEETING

of the

WEST VIRGINIA STATE BAR ASSOCIATION

Held at

Morgantown, West Virginia

November 3rd and 4th, 1897

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March, 1942

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OFFICERS AND STANDING COMMITTEES, 1897-8.

OFFICERS.

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Martinsburg.

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Benj. Trapnell, Charleston.
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Sam'l V. Woods, Philipi.

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OF THE WEST VIRGINIA STATE BAR ASSOCIATION, 1897-8.

Allen, G. R. C .....Wheeling.
Ambler, B. M..... ... Parkersburg.
Archer, V. B.....Parkersburg.
Arnett, U. N.....Fairmont.
Atkinson, G. W.....Wheeling.
Atkinson, J. H.....Fairview.
Allison, B. S.....Wheeling.
Ayers, B. F..... .....Harrisville.

Barrett, Thos. W.....Parkersburg.
Baker, G. C.....Morgantown.
Baker, N. D..... .....Martinsburg.
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Brooke, St. George Tucker.....Morgantown.
Boyd, George E..... .....Wheeling.
Bassel, John ..... Clarksburg.
Bailey, B. F ....Grafton.
Burlew, A .....Charleston.
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Barron, J. F.....St. Marys.
Beard, Wm. S.....Elizabeth.
Brannon, W. W .....Weston.
Bennett, W. G.....Weston.
Berkshire, R. L .....Morgantown.
Blair, J. V.....Morgantown.
Boggess, S. E.....Spencer.
Braddock, J. R.....Wellsburg.
Broun, T. L..... ....Charleston.
Brown, J. F.....Charleston.
Brown, C. L ....Ravenswood.
Brown, Wm. G.....Kingwood.
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Bullock, T. O ..... Parkersburg.

Burdett, S. C.....Charleston.
Butcher, B. L.....Fairmont.
Buttrick, E. L.....Charleston.
Byrne, W. E. R.....Charleston.
Brown, James H.....Charleston.

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Caldwell, C. T.....Parkersburg.
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Campbell, Aug. M.....St. Marys.
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Clifford, J. Philip.....Clarksburg.
Cox, Frank.....Morgantown.
Crogan, P. J.....Kingwood.
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Caldwell, George B.....Wheeling.
Coniff, John J.....Wheeling.
Campbell, O. A.....Morgantown.

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Dillon, C. W.....Fayetteville.
Dayton, A. G.....Philippi.
Dailey, Benjamin.....Keyser.
Daily, C. W.....Elkins.
Dailey, R. W.....Romney.
Davis, John J.....Clarksburg.
Dent, W. R. D.....Grafton.
Dent, M. H.....Grafton.
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Dorr, C. P.....Webster, C. H.
Dovenor, B. B.....Wheeling.
Davis, J. W.....Clarksburg.

Edmiston, Andrew.....Weston.
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Ewing, J. D.....Wheeling.
Ewing, James W.....Wheeling.
Ewing, J. Alex.....Moundsville.
Enslow, F. B.....Huntington.

Fortney, Neil J.....Kingwood.
Fast, R. E.....Morgantown.
Faulkner, Charles J.....Martinsburg.
Faulkner, E. Boyd.....Martinsburg.
Fleming, G. M.....Buchannon.
Flesher, H. C .....Welch.
Flick, W. H. H.....Martinsburg.
Flournoy, S. L.....Charleston.
Freer, Romeo H.....Harrisville.
Fuller, Alfred M.....Charleston.
Flick, Cyrus P.....Wheeling.

Gallaher, D. C.....Charleston.
Garvin, T. M.....Wheeling.
Gilkeson, H. B.....Romney.
Gibson, B. D.....Charles Town.
Green, S. S.....Charleston.
Gaines, J. H.....Fayetteville.
Gilchrist, George R. E.....Wheeling.
Glasscock, S. F.....Morgantown.

Hoke, J. T.....Kingwood.
Hamill, James L.....Welch.
Hagans, J. M.....Morgantown.
Houston, Thomas D.....Charleston.
Hall, S. B.....NewMartinsville.
Henritz, T. L.....Welch.
Hamilton, J. M.....Grantsville.
Haymond, W. S.....Fairmont.
Hearne, W. H.....Wheeling.
Hedrick, Charles.....Charleston.
Higginbotham, C. C.....Buchannon.
Holt, John H.....Huntington.
Howard, John A.....Wheeling.
Howard, H. R.....Pt. Pleasant.
Hubbard, W. P.....Wheeling.
Hutchison, John A.....Parkersburg.

Herndon, I. C.....Welch.
Hyde, H. Clay.....Kingwood.
Harris, John W.....Lewisburg.
Hervey, H. C.....Wellsburg.
Handlan, J. B.....Wheeling.
Holliday, O. L.....Moundsville.
Hogg, Charles E.....Pt. Pleasant.
Hall, W. McG.....NewMartinsville.
Harvey, T. H.....Huntington.
Holt, J. Howard.....Moundsville.
Hood, O. A.....Bayard.

Isbell, L. D.....Huntington.

Jackson, M.....Charleston.
Jacobs, Thomas P.....New Martinsville.
Johnson, Okey.....Morgantown.
Johnson, Dave D.....Parkersburg.
Jordan, L. S.....Wheeling.
Jackson, W. W.....Parkersburg.
Johnson, James L.....Charleston.

Keck, L. V.....Morgantown.
Kennedy, J.....Charleston.
Knight, E. W.....Charleston.
Keller, B. F.....Bramwell.
Kenney, A. E.....Grantsville.
Kramer, C. W.....Piedmont.
Kelly, S. P.....Huntington.

LaFollette, L. M.....Grafton.
Laird, J. F.....Parkersburg.
Lucas, Daniel B.....Charles Town.
Logan, J. D.....Union.

Middleton, H. O.....Charleston.
McCluer, J. G.....Parkersburg.
McClintic, G. W.....Charleston.
McCorkle, W. A.....Charleston.
McCoy, J. W.....Fairmont.
McEldowney, Robt.....New Martinsville.
McCreery, J. W.....Raleigh, C. H.
McGraw, John T.....Grafton.
McWhorter, H. C.....Charleston.

McWhorter, L. E.....Charleston.
Mann, W. C.....Moundsville.
Meighen, B. F.....Moundsville.
Martin, L. A.....Charleston.
Mason, John W.....Fairmont.
Melvin, Thayer.....Wheeling.
Menager, J. B.....Pt. Pleasant.
McGary, W. B.....Weston.
Meyer, W. C.....Wheeling.
Martin, Fred T.....Fairmont.
Morris, C. E.....Wheeling.
Matheny, C. W.....Sistersville.
Merrick, C. D .....Parkersburg.
Miller, W. N.....Parkersburg.
Mollahan, W.....Charleston.
Moreland, Jos.....Morgantown.
McDonald, W.....Keyser.
McWhorter, J. C.....Buckhannon.

Nash, James H .....Charleston.
Nesbitt, Frank W.....Wheeling.

Oxley, Benjamin. .....Charleston.

Payne, Dallas W.....Charleston.
Parsons, A. B.....St. George.
Patton, George W.....Charleston.
Paull, J. R.....Wheeling.
Payne, J. M.....Charleston.
Peck, Henderson.....Parkersburg.
Price, George E.....Charleston.
Poundstone, A. M.....Buckhannon.
Palmer, John C., Jr.....Wellsburg.
Post, Melville D.....Wheeling.
Parsons, T. J.....Moundsville.
Parsons, B.....Parsons.
Peterkin, W. G.....Parkersburg.

Quarrier, Russell G.....Charleston.

Reynolds, F. M.....Keyser.
Riley, T. S.....Wheeling.
Ruffner, Joseph.....Charleston.
Russell, H. M .....Wheeling.

Robinson, Ira G .....Grafton.
Reynolds, Frank C.....Keyser.
Rucker, E. P.....Welch.
Reay, D. C.....Morgantown.

St. Clair, J. W.....Fayetteville.
Stealey, T. P.....Parkersburg.
Stewart, James H .....Winfield.
Spencer, J. S.....Pt. Pleasant.
Smith, Leven.....Parkersburg.
Smith, J. Rufus .....Berkeley Springs.
Stifel, L. F.....Wheeling.
Sommerville, J. B.....Wheeling.
Smith, S. G.....Wheeling.
Scott, C. H .....Beverley.
Sturgiss, George C.....Morgantown.
Smith, Harrison B .....Charleston.
Sperry, M. G.....Clarksburg.
Strader, J. F.....Beverly.
Smith, H. F.....Clarksburg.
Stewart. E. B.....Morgantown.
Smith, E. G.....Clarksburg.
Showalter, E. H.....Fairmont.
Simms, H. C.....Huntington.

Trapnell, Benjamin .....Charleston.
Thompson, J. Speed.....Hinton.
Turner, Smith D.....Parkersburg.
Thompson, W. R.....Huntington.

Umstead, George H.....New Martinsville.

Vandervort, J. W.....Parkersburg.
Van Winkle, W. W .....Parkersburg.

Wiley, W. S.....New Martinsville.
Wilson, W. G .....Elkins.
Wade, L. M .....Sutton.
Walker, Stuart W.....Martinsburg.
Waters, J. T., Jr.....Charleston.
Watts, C. C.....Charleston.
Westenhaver, D. C.....Martinsburg.
White, Robert.....Wheeling.
Wiley, Rankin, Jr.....Pt. Pleasant.

Willey, W. P.....Morgantown.
Wilson, E. W.....Charleston.
Woods, J. J .....Wheeling.
Woods, Frank.....Baltimore.
Woods, Sam'l V.....Philippi.
Woods, J. Hop .....Philippi.
Worley, W. G.....Kingwood.
Wotring, D. M.....Kingwood.
Wilson, John B .....Wheeling.
Woods, H. B.....Harrisville.
Wehrle, John.....Charleston.
Wilgus, T. B.....Morgantown.
White, W. J..... .....Morgantown.

Yeaton, W. C.....Parkersburg.
Yost, Z. F .....Morgantown.
Yates, Thos. G.....Grafton.

CONSTITUTION AND BY-LAWS.

CONSTITUTION

OF THE WEST VIRGINIA BAR ASSOCIATION.

1. This Association shall be known as "THE WEST VIRGINIA BAR ASSOCIATION."

OBJECT.

2. The Association is formed to advance the science of jurisprudence; to promote reform in the law; to facilitate the administration of justice; to uphold integrity, honor and courtesy in the legal profession; to encourage thorough liberal education, and to cultivate cordial intercourse among the members of the bar.

MEMBERSHIP.

3. The members of the legal profession attending this convention this 8th day of July, 1886, are hereby declared to be members of this Association, provided, they shall, during this present session, pay the admission fee hereinafter mentioned.

Any member of the legal profession of West Virginia, of good standing, residing therein, may become a member of the Association upon nomination and vote, as hereinafter provided.

ELECTION OF MEMBERS.

4. All nominations for membership shall be made by the Committee on Admissions, and must be transmitted in writing to the President and by him reported to the Association, and the Association shall thereupon vote by ballot. Several nominees may be voted for upon the same ballot, and

in such case, placing the word "no" against any name or names upon the ticket, shall be deemed a negative vote against such name or names, and against those only. One negative vote in every five shall suffice to defeat an election. No member of the bar, residing in a county where there is a local Bar Association shall become a member of this Association unless he shall also be a member of such local Association.

OFFICERS.

5. The officers of the Association shall be a President, who shall be ineligible to re-election on the expiration of his term; one Vice-President from each Congressional district represented by membership in the Association; a Secretary and Treasurer. All of these shall be elected at the annual meeting and hold their offices till the next annual meeting of the Association and until their successors are elected. A majority of votes shall be necessary to the election of officers, including the election of the Executive Council. Such election shall be by ballot.

COMMITTEES.

6. At the annual meetings the Association shall elect an Executive Council, to be composed of five members and the President and Secretary.

The President shall, with the approval of the Executive Council, appoint the following standing committees, to-wit:—

A Committee on Admissions.

A Committee on Judical Administration and Legal Reform.

A Committee on Legal Education.

A Committee on Grievances.

A Committee on Legal Biography.

A majority of the members of every committee who may be present at a meeting of the Association shall constitute a quorum of such committee, for the purpose of such meeting.

Every committee shall, at each annual meeting, report in writing a summary of its proceedings since the last annual report, together with any suggestions deemed suitable, and appertaining to its powers, duties or business. A general summary of all such annual reports, and the proceedings of the meetings, shall be prepared and printed by and under the direction of the Executive Council, together with the constitution, by-laws, names and residences of officers, standing committees and members of the Association, as soon as practicable after each annual meeting.

FINAL ACTION.

7. No action of this Association of a permanent nature or recommending changes in law or the administration of justice, shall be had until the subject-matter thereof shall have been reported upon by the appropriate committee to which the same shall have been referred, unless this regulation shall be suspended by a two-thirds vote of the members voting thereon.

PRESIDENT.

8. The President, or in his absence the Vice-President, senior in years, shall preside at all meetings of the association, and the President shall deliver an address at the opening of the annual meeting next after his election.

THE EXECUTIVE COUNCIL.

9. This Council shall manage the affairs of the Association, subject to the provisions of the constitution and by-laws, and shall be vested with the title to all its property as trustees thereof, and shall make by-laws for the Association subject to amendment by the Association.

COMMITTEE ON ADMISSIONS.

10. The proceedings of this committee shall be deemed confidential and shall be kept secret so far as written or printed reports of the committee shall be necessary and officially made to the Association.

COMMITTEE ON JUDICIAL ADMINISTRATION AND LEGAL REFORM.

11. It shall be the duty of the Committee on Judicial Administration and Legal Reform to take notice of all proposed changes in the law, and to recommend such as may be in their opinion entitled to the favorable influence of the Association; and, further, to observe the working of the judicial system of the State, to collect information with reference thereto, and to recommend such action as they may deem advisable.

COMMITTEE ON LEGAL EDUCATION.

12. It shall be the duty of the Committee on Legal Education to examine and report upon any proposed changes in the system of legal education and of admission to the practice of the profession in the State of West Virginia.

COMMITTEE ON GRIEVANCES.

13. The Committee on Grievances shall receive all complaints which may be made in matters affecting the interests of the legal profession, the practice of the law and administration of justice, and report the same to the Association with such recommendations as they may deem advisable.

The proceedings of this committee shall be deemed confidential and kept secret, except so far as reports of the same shall be necessarily and officially made to the Association.

COMMITTEE ON LEGAL BIOGRAPHY.

14. The Committee on Legal Biography shall provide for the preservation among the archives of the Association of suitable written or printed memorials of the lives and characters of deceased members of the West Virginia Bar.

SECRETARY.

15. The Secretary shall keep a record and conduct the correspondence of the Association and perform the usual duties of such office.

TREASURER.

16. The Treasurer shall collect, and by order of the Executive Council disburse, all funds of the Association, and keep regular accounts, which at all times shall be open to the inspection of any member or members of the Executive Council.

ANNUAL MEETING.

17. This Association shall meet annually at Parkersburg or such other place and at such time as shall be fixed at each session of the Association. It shall be the duty of the Secretary to mail to each member a written or printed notice of the time and place of each annual or special meeting at least four weeks in advance of each meeting. Those present at such a meeting shall constitute a quorum.

DUES.

18. The admission fee will in all cases be five dollars. The annual dues of members shall be three dollars, to be paid yearly on or before the first day of the annual meeting of the Association, and no person shall be qualified to exercise any privilege of membership who is in default.

AMENDMENTS.

19. This constitution may be altered or amended at any annual meeting on the recommendation of the Executive Council, by a vote of the majority of the members present, or without such recommendation by a vote of two-thirds of the members present.

EXPULSION.

20. Any member may be expelled by a majority vote of this Association at any annual meeting.

BY-LAWS

OF THE WEST VIRGINIA BAR ASSOCIATION.

1. The Executive Council, at its first meeting after each annual meeting of the Association, shall select some person to make an address at the next annual meeting, on the life and service of any deceased members of the bench or bar of West Virginia of eminence, or other subjects; and also not exceeding five members of the Association to read papers.

2. The order of business at the annual meeting shall be as follows:—

a. Annual address of the President.

b. Report of Committee on Admissions and election of members.

c. Report of the Secretary.

d. Report of the Treasurer.

e. Report of Standing Committees:

Executive Council.

On Judicial Administration and Legal Reform.

On Legal Education.

On Grievances.

On Legal Biography.

f. Report of Special Committees.

g. The Nomination of Officers.

h. The Appointment of Standing Committees:

i. Miscellaneous Business.

j. The Election of Officers.

The address to be delivered by a person invited by the Executive Council, shall be at the morning session of the second day of the annual meeting, and the reading of papers by the members appointed by the Executive Council shall be on the same day, unless the Executive Council shall designate some other time for the address and reading of papers. After the reading of each paper an opportunity shall be given for discussion on the topic of the paper.

The Executive Council shall publish at least four weeks in advance of each annual meeting a statement of the name of the person who is to deliver the annual address, and the names of those who are to read papers, and the subject of each; and the Secretary shall forthwith transmit a copy to each member.

3. No person taking part in a discussion shall speak more than ten minutes at a time or more than twice on one subject.

A stenographer shall be employed at each annual meeting.

4. At any of the meetings of the Association, members of the bar of any foreign country or of any State other than West Virginia, who are not members of the Association, may be admitted to the privilege of the floor during such meeting.

5. All papers read before the Association shall be lodged with the Secretary. The annual address of the President, the report of committees and all proceedings of the annual meetings shall be printed; but no other address made or papers read or presented shall be printed, except by order of the Executive Council. Extra copies of reports, addresses, and papers read before the Association may be printed for the use of their authors, not exceeding one hundred copies to each of such authors. The Executive Council, as a committee on publication, shall meet within one month after each annual meeting, at such time and place as the Chairman shall appoint.

6. The term of office of all officers including the Executive Council, elected at an annual meeting, shall commence at the adjournment of such meeting; but the term of office of the members of the several committees appointed by the President shall commence immediately on their appointment.

7. Each committee shall elect its officers, whose term of office shall commence on their election and continue until

the appointment of a new committee; and each standing committee shall continue until its successor shall be appointed.

8. All standing committees shall meet on the day preceding each annual meeting at the place where the same is to be held, at such hour as the respective chairmen shall designate.

9. Special meetings of any committee shall be held at such times and places as the chairman thereof may appoint. Reasonable notice shall be given by him to each member by mail.

10. The Treasurer's report shall be examined and audited annually, before its presentation to the Association, by two members to be appointed by the chairman of the Executive Council.

11. No resolution complimentary to an officer or member for any service performed, paper read or address delivered shall be considered by the Association.

12. Any charges of unprofessional conduct against any member of the Association, if made in writing and signed by the person preferring them, shall be investigated by the Committee on Grievances, who shall recommend to the Association such action as they may deem proper, but no action shall be taken by said committee or this Association without due notice to and the service of the charges upon the accused.

ADDRESSES DELIVERED

AND

PAPERS READ

PRESIDENT'S ADDRESS.

BY HON. P. J. CROGAN.

As an association for the advancement of the science of jurisprudence you have now for twelve years labored earnestly and faithfully, and with a degree of success at once commendable and encouraging.

The imprint of the intelligent labors of the association shows itself upon our laws where they were much in need of editing and has stamped its individuality indelibly as a factor both constructive and critical.

With no interest to subserve but that of the people in general, and no hope of reward but that of self-satisfaction in well doing, and in bringing about a better system of laws and a purer administration of government, with no creed but right and justice to promulgate, no factional or party lash to urge to undue speed, no follower to reward, and no foe to punish except the advocate of vicious laws and the supporter of bad government, your deliberations must be, and are wholly unbiased, unrestrained, unselfish and totally independent of a master, clique or cabal. Independent, wholesome and pure results can alone emanate from such an association.

Permitted as we are, however, to move in any circle of thought we may select, with no fixed groove or channel through which we are directed to go, how easily we gravitate into self-appointed critics, with more or less fault finding as reviewers. How much easier to act the role of an iconoclast than of an architect, to tear down than to build up, to be a passive, than a constructive statesman. And yet, are we not in part assembled for the purpose of reviewing that which has been done by the law-making powers, of suggesting, criticising, and pointing out errors that they may be corrected, and dangers that they may be

avoided, as well as for the purpose of promulgating new and untried doctrines?

When it was recently discovered that the name of one of the composers of sweetest verse, was omitted from the list of famous literary personages adorning the corridors of the new Congressional library, for the reason, as alleged, that the poet had unjustly criticised our country and our people, a more thorough investigation brought to light the fact that in after years the author thus ignored, had made ample apology for his early rashness, and took occasion to state, that our lives are long enough in which to make many mistakes, but not long enough in which to correct those mistakes.

We may at least in our lifetime seek to point out the mistakes of others, even if our lives are too short to attempt a correction of our own, and thus may the mistakes of all be corrected by their contemporaries.

Napoleon's test of a great man was in the answer that might be given to the question, "What has he done?" Applying a somewhat similar test, but more with a view of ascertaining results than of seeking for individual greatness, the law-maker's work of the year which has elapsed since last we met, might profitably come under our notice and our review for a few moments under the interrogatory, "What have they done?"

Within the past year our highest judicial tribunal has not been idle, and we have much food for thought in the result of the arduous labors of that Court. Over 130 cases have been heard in which opinions have been handed down, covering over 700 pages of our Reports. To attempt to give even a resumé of all those decisions would sorely tax your patience, without a corresponding degree of profit on this occasion.

What a pleasure it is, however, for the lawyer on such an occasion as the present one to be in a position to have the last word, and, if need be, read his "dissenting opinion."

Many decisions of vast importance, showing arduous labor, wise discrimination, and deep thought, will we find

among those decided cases. Statutes have been expounded, some disfigured, and others totally annihilated, while many others were permitted to stand, which many of us think should in some way be censured severely for ever appearing at all, if not condemned utterly. Old laws have been affirmed, vexed questions settled, and questions supposed to have been settled, have become either unsettled or wholly reversed. Withal there is much to admire and little to criticise in the year's decisions. Let us review briefly.

Now may we, with equal protection from the inquisitorial grand jury, indulge either in the luxurious meerschaum or the much abused and alleged deadly cigarette, and by the grace of the legislative branch we are no longer, as formerly, required to even keep an eye on the "original package."

No longer is it necessary for the sheriff to hold the writ of fi.fa. till the actual expiration of its ninety day life, but upon the fact made known to him that no property can be found or money made, he may forthwith say so, and thus hasten the happy hours when the hungry lawyer may pocket his coveted docket fee and commissions in chancery.

Unhappily for all parties concerned (except the pettifogger), the Court has said in a many-hued opinion, that one new trial may be granted *each* of the parties in an action before a justice of the peace. This prolongs the agony, enriches the justice, makes the litigants poor, and no doubt will receive loud applause and high praise from the shyster, and from him who cannot pass the Rubicon of the University law faculty. Would that some power might arise saying with authority, that henceforth and forever, no trial, new or otherwise, of a contested matter should ever again take place before a justice of the peace, except in extremely petty cases.

Again, more securely than ever before may we take our "ease at our inn." For though flagons of malt may have played havoc with our intellects, and the night's potations may have lulled us for all practical purposes of self-protection into a state of "innocuous desuetude," yet if while

in such self-inflicted comatose condition we are relieved in the nighttime of our worldly goods by a guest or servant while under the roof of "mine host," we point with pride and safety to the doctrine of Cunningham against Buckey, and remember that the landlord must respond in damages.

And thus while by common law our bibulous habits do not militate against us, while under the "protecting aegis" of the landlord, and are not considered acts sufficient to show contributory negligence on our part in such cases, the statutory law, sanctioned and strengthened by the court's decision, and the very constitution itself being brought to the aid of both, lays down the rule, can it be called sumptuary, that no matter what we may drink or smoke, nor whatever else we may eat, yet like certain fashionable teas, we shall legally be served with our oleomargarine only when it is of the shade of pink.

These and like decisions of apparent light vein, sometimes settle very important questions, and the humorous side is often overbalanced by graver results which follow.

While as before stated there is little to criticise in the year's decisions, it cannot but be noticed that our Supreme Court as well as the courts of last resort in various other States, is taking liberties with the doctrine of *stare decisis*, that but a few years ago would be viewed with more serious apprehension than in these progressive days. A tendency seems to prevail to disturb well settled principles by frequent overruling opinions and decisions, and thus lay the court open to attack on the ground of assuming legislative functions, and to criticism more or less just of promulgating "court made law." In my opinion this is to be regretted. The law which the court announces to-day should be the law to-morrow, unless changed during the night by the Legislative power. The law as pronounced by the court in your case on yesterday should be so pronounced in my case to-day. And when the same court has for years in repeated decisions, announced and fixed and settled a principle of law upon which parties are expected to act, are bound to act, and do act in the most important

business affairs of their lives, a sudden and uncalled for reversal of that fixed principle is very much to be deplored.

Ever since the question was first presented to our Supreme Court, the doctrine of "superior servant," or "vice-principal," has been firmly fixed and adopted in this State. Employer and employé have alike contracted with regard to, and acted upon, that settled doctrine.

The departure from this settled principle, as now announced by the court in the case of Jackson *v.* Norfolk & Western Railroad Company, overruling at least half a dozen prior well considered cases, and thus changing a well settled principle, is greatly to be regretted, as a tendency towards confusion, towards unstableness, and towards, may we say, an usurpation of legislative functions.

No decision of recent years has so utterly and totally unsettled a well fixed principle as in this instance, and no decision handed down by our court within the year, is deserving, in my opinion, of such adverse criticism, and solely, it is here urged, on the ground of abandonment of the doctrine of *stare decisis*.

The very question before the court was fully discussed and entirely settled as late as 1893, in the case of Haney *v.* R. R. Co., as it had been previously settled in Daniels *v.* Railway Co., and in other cases even prior to that. And little less than a year before the decision in the Jackson Case, the same question, notwithstanding frequent rulings by the court, was again presented, and pressed by counsel upon the attention of the court, and the court was asked to reverse its former position. This appeal to the court to change its ruling was made in the case of Flannegan *v.* Railway Co., reported in 40th W. Va. The court refused to disturb its former rulings, and again held to the doctrine of vice-principal and superior servant as the settled law in West Virginia. We might not all agree that the principle announced was as good policy as that held in some other States, but we were guided by it, and respected it as the law, and were governed by it.

It is insisted here that if a change in the law were desir-

able, the appeal for such change should have been made to, and action taken by, the legislative branch of our government and not the judicial.

This course has been pursued elsewhere. In England they have the "Employers' Liability Act," which defines the duty of a master toward his servant, and affirms the master's liability for injuries to the servant by reason of the negligence of a vice-principal, and the act defines who *is* a vice-principal, and adopts the law as formerly announced by our Supreme Court.

The Legislature of Pennsylvania many years ago defined who were fellow-servants, enacting in effect that railway mail agents were fellow-servants as to their right to recover for injuries, with employés on a train on which they traveled.

The State of Ohio has recently passed a statute defining vice-principals, and holding the master liable for injuries to servants caused by the negligence of such vice-principal, and adopting the rule as formerly laid down by our Supreme Court.

Is it not sound doctrine announced in the dissenting opinion in the case of Jackson *v.* Railway Co., now under consideration, that "it is better to have the law settled, even though it operate harshly, than to have a state of confusion produced by a continual abandonment of former maturely considered principles?"

And if the law so fixed and settled does operate harshly, should we not appeal to the assembled representatives of the people and ask to have the harsh law modified or changed? Disturbing "former maturely considered principles," as the decision in the Jackson case does, is what leads us here to repeat: "The rule of *stare decisis* applies with impregnable force in this instance, and from which there is no way of escape, even if the court were so inclined, unless by an utter and reprehensible disregard of all precedent."

My brethren, this may appear strong language; it *is* strong language, but it is not my language. It is the language of our own Supreme Court in the Flannegan case

above referred to, in reply to the argument of counsel, asking for a change of the old rule.

In criticism therefore of this disturbing decision, I borrow thus much from the court, and say, that the departure in the Jackson Case from the old rule is "an utter and reprehensible disregard of all precedent." The Legislature and not the court should have made the change, if a change was demanded and desirable. And that a change was either demanded by the people, or the best interest of the State, or was desirable, is a debatable and extremely doubtful proposition.

The legislative branch of our government has also held a session since our last meeting, and the laws adopted by that body some nine months ago, and just now being promulgated from the mysterious dark room of the public printer, are proper subjects for our consideration.

Outside of those acts of an administrative, economic and a benevolent character, the written laws enacted are fewer, perhaps, than usual. A legislative session which did not deal largely with the Game and Fish Law, Delinquent Land Laws, the County Roads and the School Book Question, would be regarded as not equaling its predecessors, and so to prevent such reflection upon its reputation, the recent session gave us a new edition upon each of those subjects. "Too frequent handling will wear out silver," was an old copy from which we learned to write. Many chapters of our statute law are being severely tested by that same process, and none perhaps more sorely, than those embracing the questions just mentioned.

Many provisions enacted by the last Legislature have found a place in our laws which in time, if not now, will be acknowledged by us all to be of much good. Among them we might mention those to prevent lobbying, extending the time within which to complete railroads, regulating the practice of dentistry, permitting executions to issue on judgments of justices within ten years, regulating the granting of licenses to practice law, of which this association is the proud mother, the compulsory school law and

others. It may be suggested that perhaps the act providing for a punishment for lobbying on the floor of the legislative halls, while the Legislature is in session, was intended to catch within its meshes some overzealous member or committee of this association, too assiduous in the performance of a duty, and in pointing out to the average legislator the error of his ways. Nevertheless, whatever or whoever may have been the object sought or aimed at, the end to be attained is a good one. The law is to be commended, will wear well, and is a tree that will bear good fruit.

Nor are we to be outdone by the enacting of laws that the press and our legal periodicals see fit to collate under the head of "freak laws," and "crank legislation."

While we are not so far advanced in that particular science of statesmanship as some of our sister States are credited with being, yet we have at the last meeting of the legislative body placed ourselves on record as willing to start a nucleus for further advancement.

While a legislator of a certain State is charged with having introduced a bill to prevent the wearing of "bloomers," we have thus far contented ourselves with taking from the cities and towns the power of regulating the running of bicycles on the streets and sidewalks, where the power obviously belongs, and giving the power mainly, to the State authorities, where it is a misfit in many particulars. We may yet go a step farther, as is alleged was proposed in a neighboring State, by adopting as a part of our statute law the ten commandments, with an amendment, to be called section 11, no doubt, reading, "Thou shalt not covet thy neighbor's bicycle."

We have not yet proposed, as it is said a certain other legislator did, a bill making it a misdemeanor to play football, which would seem to be a direct attack on the higher institutions of learning in this country, but we have adopted another chapter to our criminal law, regarding the regulation of the altitude of headgear at certain places of amusement. However much it may be claimed that this high hat law applies to all persons, "regardless of age,

sex, or previous condition of servitude," it may as well be admitted, that it contains within its provisions a well-directed thrust at woman's rights, so that she no longer has even the right bestowed on a member of the English Parliament, the right to wear her hat. Where *will* the dear woman wear her best bonnet if not at the opera? Verily the freak has entered the field of statesmanship.

Let us suggest that our next Legislature "conclude the evening's entertainment" by adopting the bill proposed by a recent Western law maker, placing a ten dollar tax on chin whiskers. It is not yet agreed whether this bill was in the interest of the tonsorial artist, or was projected as a means for destroying the identity of the Populist spellbinder.

Gentlemen, however ludicrous the foregoing list of proposed laws may seem, they are vouched for by a reputable legal journal as having been actually introduced in various legislative assemblies, during the past year.

It is somewhat surprising and a matter of regret that when an effort was made by the last Legislature to amend the law regulating the removal of county and district officers, a law unfortunately for our good reputation abroad and our better judgment at home, which seemingly is much in evidence nowadays, the ruling of the Supreme Court of Appeals in the case of Arkle *v.* The Board of Commissioners of Ohio County, was apparently forgotten or ignored, and that some provision was not made for the removal of justices of the peace and other officers by a proper tribunal, that could act without violating the constitution. The decision in the Arkle Case having been handed down in December, 1895, it would seem that it was the solemn duty of the Legislature of 1897 to place in the hands of the circuit courts the duty of removing from office all county officers, instead of fixing the county court as it did, as the tribunal for removing certain of the officers in the face of the court's decision, rendered a year before, determining that the county court had no such jurisdiction under the constitution.

As we now see it, there is no tribunal in West Virginia with power to remove for any cause, clerks of the county court, superintendents of free schools, assessors, justices or constables, at least so far as provided by any statute.

But of what practical utility are our statute laws anyway? To know the law, to know where to find it, and to know how to apply it, are said to be three essentials in the make-up of a good lawyer. If we are granted no opportunity to know the law, and there is no place to find it, it is impossible to try to apply it. And so it seems to be with the recent acts passed by the Legislature. After nine long months of weary watching and waiting, they have at last appeared. No language is strong enough to condemn this intolerable state of affairs. It is simply monstrous and outrageous, and has nearly always been so, and in my opinion will be so, so long as the law relating to the public printing remains in its present confused, chaotic and complicated condition. There are too many heads to the department, too many loopholes by provisos enabling an evasion of the law, and the printing of the *laws*, which should be most speedily done, is thrown into the general hotchpot of other printing where it should not belong. No reason can exist why those now entitled to copies of the laws, and others who should be entitled to them, should not have, by plain direction of statute, advance sheets of each act passed, immediately as the same is approved by the Governor, or as it may become a law without his signature. Nor can there be any reason why there should not be designated a superintendent of public printing of the *laws*, whose duty, under heavy penalty, it would be to have the entire body of acts passed, printed and bound and distributed within a reasonable *fixed* time after the adjournment of the Legislature with no loopholes or provisos for escape. As the law regulating the printing of the acts now stands, we whose duty and interest it is to know the law immediately it goes into effect, and whose duty it is not, are, as to our statute laws, like the Cuban patriots in Havana prison, in a dire state of *incommunicado*.

I am glad to be able to say that it is reported on good authority that the uncalled for and unaccountable delay of printing the last acts (for bad as the law is, the delay is unaccountable) is to be investigated by the commissioners of public printing. Nothing short of a thorough, systematic overhauling of chapter 16 of the Code, by a competent commission, will go to the root of the evil, and the time is overripe for such overhauling. The matter of public printing is an important one to the State. The law regulating the public printing is necessarily extensive, and any revision or amendment should be made after considerable time and thought upon the subject. A suggestion that this association appoint a competent committee to draft a bill revising the law upon this subject, would be appropriate at this time.

A bar association meeting would be considered anything but a success at which no speech was made, address delivered, paper read or resolution offered, touching upon the vexed question of the laws relating to married women. This association in the past has done justice to the subject by its efforts, and still more remains to be done. Mainly through the work of this association, and of its active individual members has it come to pass that with some degree of independence, and without losing her self-respect, a married woman can acknowledge her deed, and with a further tardy admission by the law as to her sanity, can she, under certain conditions, transact business, make contracts, and sue and be sued. Might we not go a step further, and permit her to dispose of her real estate, at least as the husband is permitted to dispose of his, "without the aid or consent of any other nation on earth." And thus we might gradually place her on the legal footing where she belongs, and to which she is entitled, and where all women are by law, so long as they remain spinsters. Why she should in this day be classed as of a lower intelligence, immediately she marries, can only be conjectured by reason of the choice of a husband that some of them make. Might we not also take a step in advance by giving

her same respectful attention on the death of her so-called liege lord and master? If any valid reason ever existed for the present difference in value between the dower of the wife and the curtesy of the husband, no such reason can at this day be called to the aid of such injustice. Why at this day the wife should be endowed for life in but one-third of her husband's land, while the husband's estate in curtesy is in all of the wife's lands, is beyond comprehension. The husband and oldest son are no longer supposed to go to the wars, while the wife and younger sons toil to supply the army, and by reason thereof, she must at the death of the husband have her life estate to the extent of her toil, and to that extent only. Neither do the alleged reasons for estates "by the curtesy of England," or "by the courts of England" exist in this country. The husband has no "Lord's Court" to attend as vassal in right of his wife. The reason of the law having ceased, the law in its present form by virtue of that reason should cease. Dower and curtesy, as defined at common law, might be abolished, and a reasonable, consistent, nineteenth-century provision under the Chapter of Descents and Distributions, might take their place, whereby the woman bereft of her support, and oftentimes left with helpless children to maintain and educate, should be placed on an equal footing, at least, with a man who survives his wife as to their respective interests in each other's land.

But why, my brethren, do those things longer by piecemeal at all? Has not civilization so far shed its light on West Virginia soil that with one fundamental act we can emancipate the married woman, giving her the same rights and privileges under the law that she had before her marriage? And why should we not now suggest and propose to the State Constitutional Committee now existing, or to the Legislature that will pass on those proposed constitutional amendments, an additional amendment, borrowing from the language of the constitution of the sister State of Mississippi, as follows: —

"The legislature shall never create any distinction

between the rights of men and women to acquire, own, enjoy and dispose of property of all kinds, or their power to contract in reference thereto. Married women are hereby emancipated from all disability on account of coverture."

Is any argument needed to show or to see the entire expediency, eminent propriety, and eternal fitness of this? Do we not all know it is right, and that the relic of a by-gone, semi-barbarous age, which we have, and call a law, is not right?

If the influence of this association could ingraft into our constitution some such provision, future generations, in my humble judgment, would proclaim that for and on account of this influence as well as for other reforms inaugurated the West Virginia Bar Association had not lived in vain.

SOME PROFESSIONAL IMPROPRIETIES.

BY HON. JOSEPH MORELAND.

Human beings, as a rule, have no other end in life but happiness, either for themselves or for others. Morality and religion accord with this universal object of pursuit. It is true that in past and existing ethical precepts men have been much influenced and guided by sentiment, but whether guided by sentiment or utility, in all their actions, the presence of considerations of utility is obvious, if not paramount. Even the will of the Deity is enforced by future rewards and punishments, and gain seems to be the impelling motive to duty. I submit this unpretentious performance, with a view to the betterment of my chosen profession and of myself.

I shall not attempt a sentimental oration, condemning or approving for the sake of pleasing popular opinion. I desire rather to submit some thoughts, about matters pertaining to our every-day life-matters which I think are the source of annoyance and ill to every member of this Asso-

ciation. I do this with the hope that the members of the Association may be constrained to give the matter their attention in a business way, and that ultimately some good for the profession in West Virginia may be accomplished.

I have read somewhere, that, once upon a time, down South, there was a colored debating club, and they seriously debated the question, as to which was "the greater evil to society, the lawyers, or the buzzards," and what is worse, after arguing the question pro and con, the decision of the judges was in favor of the buzzards. It would seem from this that the profession are not always held in the very highest esteem. And I infer that there must be some reason for the disrepute into which the lawyer has fallen. What are the causes that have wrought upon the popular mind to suggest a contrast so damaging to a body of men, who in their own estimation are of paramount importance?

But popular opinion is not always correct, though it is undoubtedly formed and made up from facts, as they exist, or as presented to the popular gaze. The popular mind, I venture to say, does not always grasp the whole situation.

I assert that lawyers are as a rule neither better nor worse, by nature, than other people. Their education, and habits of study and thought, should enable them, at least, to make an appearance before the world, which would command respect, and which I assert does command the highest admiration.

It is in the Forum especially that the lawyer makes his impress upon the public, yet how often is that impress different from what it ought to be. I venture to assert that in many instances the "*ad captandum*" speeches of the shyster win more applause than the solid reasoning of the learned jurist.

It ought to be true that splendid power of intellect will ever win respect and applause, but splendid power of intellect is sometimes directed in vain, while false logic and misrepresentation are used with telling effect.

In the Forum, as elsewhere, a gentleman is a gentleman, and a ruffian is a ruffian, and yet I have my grave suspicions

that the public sometimes mistakes the ruffian for the gentleman.

In the Forum, as elsewhere, good morals imply good manners, and I sometimes suspicion that bad manners are mistaken for good morals.

In the Forum, as elsewhere, courteous and polite behavior ought to be rewarded and I fear it often happens that courtesy is practiced at a sacrifice. The yielding disposition of the attorney who attempts to be courteous and polite, is sometimes taken for weakness, while aggressive impudence and brass are taken for native ability.

Clients, as a rule, are pleased with exhibitions of ill temper, not being in a very amiable frame of mind themselves, and even the learned judge upon the bench is sometimes apparently moved by dint of noise and bluster more than by law or logic.

When a perjured and obdurate witness is rebuked or castigated, he gets no more than he deserves, but even this privilege of the attorney ofttimes had better be omitted.

It is a maxim of the law that it is better that ninety and nine rogues should escape punishment than that one innocent person should suffer, and this maxim would seem to apply in such case. Yet so it is, that the "brow-beating" of an unoffending witness sometimes wins the applause of bystanders, while at another time a deserved reflection on a dishonest one is branded as ruffianism.

I have known lawyers who won their cases always by their abuse of witnesses, and were unable to succeed otherwise. This is wrong. Witnesses sometimes expect abuse and in order to avoid it they will conceal the truth, or driven to desperation they will tell more than the truth.

The display of oratorical power by the advocate is sometimes amazing.

> "In many looks the false heart's history
> Is writ, in moods, and frowns, and wrinkles strange,"

or, as Pope would say, he is

> "Forever in a passion or a prayer."

He has a varied style.

Out of a labyrinth of sunshine, the advocate plunges suddenly into a storm that is awful in its fury. And then from the blackest cloud of abuse, he drops as suddenly into the serenest calm. As he touches evidence that is favorable to his side of the case, he is serenely placid; as he passes to that which is not favorable, his rage is uncontrollable.

There is the attorney who argues his cases, however, with so much amiability and kindness, that the closest attention would not disclose which side was being advocated, and this is as much an impropriety as the other.

There is a difference between deserved and moderate rebuke in a proper case, and in indiscriminate abuse in a wrong case, so there is a difference between decided reasoning tending directly to the establishment of a proposition and a conglomerated string of neutralizing statements from which no logical conclusions are reached favorable to one side or the other. The Law is of the learned professions, and its members should discountenance extravagant sayings and all bluster as well as meaningless chatter.

The gyrations of a real quixotic lawyer in court are most wonderful. When under restraint he is pantomimical to an extent that would be amusing if he were not offensive. When the court instructs favorably to his side of a case, he nods his approval frantically to make an impression on the jury. And to each opinion of the court rendered he signals the jury so as to impress them with the idea that the learned judge has or has not grasped the situation. Sitting in the rear of counsel arguing on the other side, he wags his head so that the jury may know just how much of his antagonist's statements to believe or disbelieve.

> "Oh! what a tangled web we lawyers weave,
> When we practice to deceive."

But professional improprieties are in some cases more culpable than in others. Some of them are real misdemeanors and some border on to felonies.

Innocent foibles are easily tolerated, but when an act is

criminal, its commission is even more a crime in a lawyer than in any common person.

In the manipulation of witnesses the lawyer enters upon precarious ground.

The temptation to persuade or dissuade witnesses in relation to the testimony which they are to give under the sanctity of an oath, is often strong, but the attorney should always bear in mind the importance of dealing fairly and acting conscientiously in relation to a matter in which the vengeance of heaven is imprecated and God himself is called to witness its truth. It is a privilege conceded to the attorney to talk with his clients' witnesses in order that he may know how to approach them in their examination. There is no impropriety in his inquiring of witnesses as to their knowledge on a particular subject, but the upright attorney should not allow himself to fall into the vice of "coaching."

To persuade or dissuade a witness to speak or not to speak certain things on oath may amount to subornation of perjury.

The matter of taking and reducing to writing the testimony of witnesses is one deserving of much consideration. The taking of depositions is never a pleasant task and the disagreeableness of this business is perhaps somewhat the result of neglect or carelessness.

Taken in some law office or shop or store or secluded room, before an unimportant functionary, there is not the awe and reverence surrounding the occasion that is inspired by a higher tribunal. The witness is not so much impressed nor is the lawyer so much restrained. There is danger of the witness forgetting the solemnity of his oath and becoming flippant, which impels the attorney to indulge in improprieties wholly unbecoming a member of the great profession to which he belongs. Wrangles between opposing solicitors spring up and men ordinarily dignified and complacent become, through exasperation, senseless rowdies.

One personality calls out another and I have actually

seen men for whom I had the highest respect engage in a brawling fight over the taking of depositions.

> "*When* civil like dudgeons they first grow high
> And then fall out they know not why,
> *When* hard words, jealousies, and fears
> Set them together by the ears."

The lawyer more than any other man ought to be law-abiding, for it may be said that where the lawyers, the judges and the prosecuting attorneys abide, certainly there abides the law.

It always seemed to me that the *modus operandi* of taking depositions might be reformed so as to remove some of the unpleasant features. For example, when a question is objected to, the rules ought somehow or other to restrain the objector from at the same time arguing his case and instructing the witness. The rules ought not to permit a witness when about to be corraled on cross-examination to be there leased and set scot-free by suggestions injected into the belly of an objection to the question. It is such improprieties as these that lead to riot and breach of the peace in the very presence of the law.

It must be admitted that lawyers have tempers and have not much more ability to control them than have other people. I would recommend in this behalf a modified version of the old thread-bare verse:—

> "But Lawyers, you should never let your angry passions rise,
> Your little hands were never made to tear each other's eyes."

There is another impropriety I shall mention, in which no reputable lawyer ever engages, and that is drumming for business.

The empiric in the profession of medicine by means of ethical rules has been relegated to his proper position, and the shyster should be held in the same estimation. By means of regulations adopted and enforced by the Law Associations, the quack lawyer should be discountenanced if not blacklisted. Quack advertising is no more to be tolerated in the legal profession than in the medical.

There is the appearance of Scriptural authority to justify the lawyer (?) who appends to his professional card this: "Seek me early as your counsel, for know ye, that even the righteous cannot be saved without an advocate," but it is not professional.

In the law, as in the gospel, those wishing salvation should seek it rather than that the other members of so honorable a profession should go about like venders of patent nostrums.

Diligence, love of the science and its lore, and a desire to elevate the profession, should and will bring clientage, without either quack advertising or paid editorials.

No man can attain success in his profession unless his heart is in his work. Lawyers, love your profession for its own sake; on that commandment hangs all the law, as well as the gospel.

Drumming for business is not alone an impropriety. It is often an offense against right and justice. Let me instance: Suppose A. B. to be engaged in some useful business, and, like many business men have done, he has loaded himself with property, and in order to conduct his operations, has placed some incumbrances on his property and he is struggling against a current. Capital is always timid and panicky and A. B.'s creditors are not exceptions to the rule. The shyster is alert for business; his eye is on the generous docket fees and luxuriant commissions that appear to him ripe and ready to gather. He winks approvingly at the contemplation of his own meanness, and sallies forth to alarm the creditors, and felicitating himself upon his ability to arrive at results "by ways that are dark and tricks that are vain," he breaks up a useful business, he hastens the ruin of a good citizen, he sends a wife and helpless children to the poor-house.

Do not understand me as condemning the profession and justifying the verdict that "the lawyers are worse than the buzzards." I recognize the fact that the profession is composed, as a rule, of the greatest intellects and the purest minds of every nation on the earth. That lawyers ar

more trusted and less frequently betray trusts, even, than men of any other business or profession.

But in the proportion that one is confided in and trusted, in that proportion is the meanness of that individual who betrays the great trust reposed in him.

It is on account of the isolated cases of unrighteous drumming and shystering that lawyers as a class come into undeserved disrepute.

It is, therefore, that the shyster is characterized in the strongest terms.

A North Carolina magistrate, as I read in the *Bar*, has thus sized up the modern product. He says: "So far as I have observed our modern shyster, he has one striking peculiarity; each one seems to be *sui generis;* he organizes himself, operates a system of his own invention, and has no sense whatever of ethical propriety. The highest ambition of each shyster seems to be to out-shyster every other shyster, and to be a shyster unlike any other shyster. Indeed each one seems to be a specimen without a group, a type without a class, a species without a genus, an offspring without a parent, a fountain without a source, a *nullius filius* in social economy, a hermit in the solitude of his own infinite littleness, a full bullet in the woods of moral incertitude, an anomalous retarding force that we must reckon with as we advance along the highways of progress."

Thank fortune there are not many real shysters.

The punishment inflicted by society is in part by public opinion. By attaching a stigma to certain conduct that will inspire no less dread than the civil authority.

Popular sanction is often more effective to cure an evil than any punishment that the civil law could inflict. And it is on this account that in many instances conduct truly reprehensible is unpunished by law, the loss of public esteem and the disgrace inflicted being relied upon to work all needed reform in the premises.

By the laws of nature it pays to work up to a high standard of morals and manners.

It is said that there is an eternal and intrinsic fitness in the things considered right and unfitness in things considered wrong.

The will of God always chooses in regard to this eternal fitness, and rational men are happier, more prosperous, in proportion as they approach to the likeness of the Deity. In proportion as they determine their actions in accordance with the eternal and intrinsic fitness of the Almighty will.

Aside from ethical or moral considerations in the profession as in other things, it pays to do right. When members of the Bar once come to know that they can make money by being courteous, polite and upright, they will govern themselves accordingly.

It is not always apparent, at first sight, that self-interest requires obedience to the rules of professional ethics.

If your associates can with impunity be demagogues or shysters, it seems a doubtful case if you can afford to be otherwise.

Law is defined to be a rule of action, and is to be applied indiscriminately to all kinds of action. And in morals and manners there must be laws to govern all cases. Those who profess the law and who vouchsafe to practice it, should know the higher laws of ethics and should apply them in every case.

As the law teaches obedience to the law, so the members of the great profession should yield a willing obedience to every precept.

"It is business."

As illustrating how "business" is sometimes obscured by other matters and the difficulty of its discernment under certain circumstances I beg to read the following, said to be an actual occurrence in the noted breach of promise case brought against the Elder Cameron, while in the U. S. Senate: —

The plaintiff, a sprightly, vivacious young woman, called on more than a score of reputable lawyers, before she succeeded in securing counsel. The defense being made aware of her long search, decided to place some of the refusing lawyers on the stand to prove

that the woman had no standing. One of these was the famous Ned Hay, Washington's tireless entertainer, bon vivant and wit. Hay was asked if he knew anything of the case; he replied that he had refused to act as counsel for the young woman because he had seen a business letter from her to Senator Cameron. On the cross-examination, the letter referred to was produced by the plaintiff's counsel. Hay identified it, and the lawyers began to read it through. It was love, love, love, from beginning to end—"deary," "honey," "darling," "angel," sweetheart," etc.

"I believe you said this was a business letter?" said the lawyer, looking quizzically at Hay.

"That is what I said," Hay replied.

The reading was continued, and from time to time the same remark was made to Hay, who invariably returned the same answer. At last, just about when the court was beginning to believe that Hay had been mistaken, the lawyer reached the last sentence, which was an appeal for money. When he read it Hay shouted:—

"That's business!"

When this law association, with all the learning and erudition of its members, shall have considered the law and lawyers of West Virginia: When the law, with its profound learning, its intricacies, its quirks, for that matter, has been dwelt upon at length: When its symmetry and beauty as a science have been admired and praised, and its practical utility considered: When government by injunction and the right of the married woman to dower or to hold their own or her husband's property, except from their husband's debts and other kindred questions are settled: When the lawyer and his many excellent traits have been discussed, but not "cussed," and the long train of illustrious examples of noble men who have graced the profession with their advanced scholarship, oratorical power, etc., have been passed in review: and sentimental ethics shall have been discussed to the entire satisfaction of everybody—no doubt the members of this body will have a higher appreciation of the importance of elevating and maintaining the standard of professional morals for the sake of the profession. But when I drop the unvarnished suggestion

that, aside from any sentimental considerations, it will be gain for the individual members of this body — in other words that it will be money in our pockets — I think I hear the distinct and emphatic response, "that is business."

"GOVERNMENT BY INJUNCTION."

BY WM. G. PETERKIN, ESQ.

The phrase "Government by Injunction," of late become so familiar, applies to a subject, the consideration of which opens up a field of thought and investigation so broad and far-reaching that it is practically impossible, within the necessary limits of such a paper as this, to treat it with anything like the thoroughness which it deserves.

Although there have arisen in the various State courts cases involving injunctions similar to those in the Federal courts which have attracted such universal attention, yet it has been against the decisions of the latter courts that the criticisms to which we shall allude has been chiefly directed, and it has been chiefly as descriptive of them that the phrase which forms our title has been coined. Jealousy of the enlargement of Federal power is older than the constitution itself, and even in those States and among those people who most favored the expansion of the power of the central government there has been a generally expressed and very grave apprehension lest what is assumed to be a new and usurped jurisdiction of the Federal equity courts should result in seriously undermining the foundations of personal liberty in the United States.

The particular manifestation of Federal equity jurisdiction which has excited such adverse ctiticism has been seen in the application of the injunction to strikes, and difficulties arising from strikes.

The feeling of distrust of, and opposition to, all courts and particularly to the Federal courts, resulting from the

hasty conclusion that they have in these matters arbitrarily assumed an authority which does not belong to them, and through sheer love of power and desire to favor the rich have conspired to oppress the people, is widespread enough to constitute a grave danger to our institutions. These sentiments have been fostered, through the press and otherwise, by many men of many minds; some carried away by the natural sympathy excited by the distressed condition of many laboring men, and assuming that the courts have unconscionably allied themselves together to further oppress the oppressed; some doubtless influenced by no higher motive than the desire to gain votes for their own political party and to score a point against their political opponents; some, assuming the usurpation which they have heard so often charged, have joined in the clamor on general principles, as it were; others, sincerely convinced of the illegal and inequitable character of the acts complained of, join in opposing what they conceive to be a very dangerous attack on the liberties of the people.

It is astonishing to read in reputable newspapers such attacks on the courts and judges as have appeared in some of them during the last few months; in unreasoning and unreasonable violence they have put to blush the veriest anarchist of them all.

It would well become us then to investigate carefully and impartially the origin and growth of that jurisdiction, the exercise of which in certain instances has given rise to the feeling of which we have spoken; the particular application of that jurisdiction to labor troubles; the proceedings for the punishment of contempts; the dangers threatened thereby; and the means whereby those dangers may be best and most honorably averted; time forbids, however, anything but a cursory examination of these very important and interesting questions.

While it has been a maxim even from the earliest times that the equitable jurisdiction of chancery extended only to such matters as were not remediable by law, yet for many years after this already permissive jurisdiction was perma-

nently established by Edward III, there was the greatest latitude in determining its extent, and the chancellors seem to have been governed largely by their own consciences, their own ideas of right and justice, rather than by the fixed rules or well defined regulations. As a result of the enlargement of the jurisdiction of equity we find from the reign of Richard II through that of Henry VI, numerous petitions from the House of Commons to the king protesting against the chancellor's deciding upon matters which were remediable at common law. It is unnecessary here, however interesting it might be, to trace the gradual delimination of the jurisdiction of the courts of equity, and the processes by which their latitude was restricted. Lord Nottingham in 1676 laid down the rule that a chancellor was to be governed by a legal conscience (*civilis et politica*) rather than by a personal conscience (*naturalis et interna*), and even before his time the multitude of precedents already collected had resulted in certain defined rules by which the courts of equity were guided. The principle which governs equity jurisprudence as finally settled, is thus stated by Mr. Adams: "It does not create rights which the common law denies, but it gives effectual redress for the infringement of existing rights, where by reason of the special circumstances of the case, the redress at law would be inadequate." Mr. Pomeroy, however, distinguishes certain rights which the doctrines of equity jurisprudence alone create and recognize. It is well said that the central principles of equity being founded upon the "eternal verities of right and justice" rather than upon "arbitrary customs and rigid dogmas" it is far more elastic and more capable of expansion and extension than the common law, it therefore continually grows and expands, not arbitrarily, but in the direction of what have long since become well-defined and established principles. Lord Chancellor Cottenham observed: "that it is the duty of the courts of equity (and the same is true of all courts and of all institutions), to adopt its practice and course of proceedings, as far as possible, to the existing state of society, and to

apply its jurisdiction to all those new cases which, from the progress daily making in the affairs of men, must continually arise, and not from too strict adherence to forms and rules established under very different circumstances, decline to administer justice and to enforce rights for which there is no other remedy" * * *

The constitution and laws of the United States have recognized equity as a part of the national jurisprudence. The equitable jurisdiction of the Federal courts extends throughout the Union, however State laws may affect the various State courts, and is "identical or equivalent in extent with that possessed by the English High Court of Chancery at the time of the Revolution 'excepting those' peculiar administrative functions held by the Chancellor as representative of the crown in its character of *parens patriae*."

The remedy by injunction was borrowed by the early chancellors from the Roman Law. Mr. Pomeroy (in his great work on Equity Jurisprudence) states as a general principle that "Whenever a right exists or is created by the ownership of property or otherwise, cognizable by law, a violation of that right will be prohibited, unless there are other considerations of policy or expediency which forbid a resort to this prohibitive remedy," these considerations are governed by, and depend upon, that fundamental principle which marks the limits of equitable jurisdiction generally, namely, the inadequacy and insufficiency of the legal remedy; in the concise language of Mr. Adams, therefore, we say: "Whenever damage is caused or threatened to property, admitted or legally adjudged to be the plaintiff's, by an act of the defendant, admitted or legally adjudged to be a civil wrong, and such damage is not adequately remediable by law, the inadequacy of the remedy at law is a sufficient equity, and will warrant an injunction against the commission or continuance of the wrong."

An ounce of prevention is worth a pound of cure, and in restraining the breach of contracts, in proper cases; in abating nuisances; in restraining *ultra vires* or illegal acts

on the part of corporations; in preventing waste; in preventing irreparable torts, and in many other ways the remedy by injunction has come to be one of the most useful in our jurisprudence, and its practical abolition, as is threatened in some States, would be a very serious blow to the administration of justice between man and man.

It is generally said that equity will not restrain the commission of a crime, and so far as it goes this is true, that is, equity will not restrain the commission of a crime merely because it is a crime, the punitive remedy at law being deemed adequate; on the other hand, equity will not refuse to restrain an act which would be a nuisance or an irreparable injury to property or civil rights simply because that act is a crime. The punishment of the wrong-doer is no compensation to the victim, and when adequate damages cannot be recovered at law, or when no damages can compensate for the injury, a man would be left without any protection unless equity interpose and prevent the commission of the act. "The penalty for the contempt in violating an injunction is no substitute for, and no defense to, a prosecution for criminal offenses committed in course of such violation." The functions of the injunction are preventive merely. Many State statutes make special provisions for the abatement by injunction of certain disreputable places as nuisances, notwithstanding the fact that the keeping of these places is a crime. The principle itself seems so plain and the result of its exercise so beneficent that it is a surprise that any should question or oppose it, and yet we hear judges inveighed against, for "presuming" to enjoin the commission of acts which constitute irreparable injuries to property and are at the same time confessedly violations of the law. The pertinent question presents itself: "Should a man be heard to plead his own crime in order to oust the jurisdiction of a court of equity?" We can see but one answer to such a question.

Says the Court of Civil Appeals of Texas in State *v.* Patterson (37 S. W. R. 478): "In extending such protec-

tion (by injunction) it (equity) may prevent a crime; but, as no one has a right to commit crime, no one should be heard to complain that he is restrained from its commission, when such restraint has been exercised in the jurisdiction of a court for the purpose of preventing him from irreparably injuring another in his property or civil rights."

A well considered case on this subject is Columbian Athletic Club *v.* State, 143 Ind. 98 (40 N. E. Rep. 914; 28 L. R. A. 727; 2 Am. & Eng. Dec. in Equity, 340), where is laid down the principle that, "Injunction will lie at the suit of the State against a corporation when it is misusing and abusing the corporate franchise and privileges, and is maintaining its property as a nuisance, though its acts also constitute a crime," and where numerous authorities are cited in its support.

Many similar instances might be cited showing the manifold and manifest usefulness of the injunction as to restrain the obstruction of navigable rivers; to restrain a railroad company from taking land for purposes not within its power; or from taking land contrary to the provisions of its charter, or from obstructing a highway, or from illegally constructing or extending its tracks; to restrain a municipal corporation from making illegal appropriations or payments, from negotiating an illegal loan or from issuing unauthorized bonds; to restrain the keeping of a house of ill fame (Cranford *v.* Tywell, 128 N. Y. 341); to restrain the pollution of the waters of a stream (Barrett *v.* Mt. Greenwood Cem. Assn., 159 Ill. 385); to restrain the principals from proceeding with a contemplated prize-fight; (In re Corbett, 35 Am. L. Reg. 100), etc., etc.

In the cases above mentioned the peculiar and exclusive advantages of the remedy by injunction are seen readily and at once, and, although many of the acts enjoined were punishable as crimes, we have not heard that outcry against the interference of the courts of equity which has greeted what may be called the "labor cases," although the use of the injunction in the one class of cases deserves as much to be called "government by injunction" as it does in the other.

There have been few more conspicuous instances of this use of the injunction than the successful endeavor of the Arkansas authorities to prevent the Corbett-Fitzsimmons prize-fight from taking place in that State. Few legal proceedings have in years attracted so much attention as did those to prevent this much advertised fight, and I do not remember ever having heard the Arkansas court attacked and abused for having used the equitable writ of injunction to accomplish in the premises what the law was powerless to do, for it was universally admitted that to place the expected participants and their aiders under the highest peace bond allowed by law, would have been utterly futile as a preventive measure.

Said Chancellor Martin in overruling the demurrer in the Corbett-Fitzsimmons case: "The very objects of government are to restrain man's passions, to bridle improper and illegal impulses, to protect them in their civil and political rights of life, limb and property, to subserve the general welfare, and to induce or make them, if necessary, respect the rights of others, 'Tis true, a court of equity, under our system of laws, cannot administer punitive justice, except for contempts, but it may administer preventive justice in proper cases, and I feel sure that if there were more preventive justice administered, a vast deal of misery would be spared the innocent, * * * conceding that courts of equity have no power to enforce the criminal statutes of the State, and no jurisdiction to enjoin the commission of crimes ordinarily, yet where the crime arises from, or is a constituent part of a public nuisance, they should not fail to exercise their extraordinary powers to abate the nuisance, and in doing this they may by proper orders prevent the commission of the crime." The principle that equity will enjoin an act, for the commission of which the actor could be punished, when the injury from the commission of the act would be irreparable, was recognized by Chief Justice Marshall in 1824, in the case of Osborn *v.* Bank of U. S., Wheat. 738, 843–5.

It appears to be now well settled that equity at the suit

of a public officer has jurisdiction to restrain an individual or a corporation from committing acts which are "injurious to the rights of the public or contravenes public policy, even though they may constitute a crime, and be cognizable by the courts of law as such." Such relief will also be granted to a private person who alleges and proves a special injury to himself.

This doctrine has long been recognized by the Federal courts, as may be seen from the following cases decided by the Supreme Court of the United States.

Georgetown *v.* Alex. Canal Co., 12 Pet. 97 (1838).
Penna. *v.* W. & B. Bridge Co., 13 How. 518.
Miss. & Mo. R. R. Co. *v.* Ward, 2 Black, 485.
Corsaw Min. Co. *v.* So. Car., 144 U. S. 550.

In the last case Mr. Justice Harlan quotes the Massachusetts court as "observing that the preventive force of a decree in equity, restraining the illegal acts before any mischief was done, would give a more efficacious and complete remedy than an indictment or proceedings under the statute for the abatement of the nuisance," and speaking by the same justice the court says: "Proceedings at law or by indictment can only reach past or present wrongs done by appellant and will not adequately protect the public interests in the future."

This question is well considered in the able opinion of Mr. Justice Brewer in the Debs case, 158 U. S. 564.

Other cases in which similar conclusions are reached could be cited from Alabama, Illinois, Iowa, Massachusetts, New Hampshire, New Jersey, New York, Texas, and, perhaps, other States.

It appears, therefore, that the interference of a court of equity to enjoin acts which are crimes when those acts threaten the destruction of, or irreparable injury to, property or civil rights, is not only reasonable, but is sanctioned by abundant authority, both State and Federal.

It is said sometimes, with great bitterness, that the

application of the injunction to strikes is an innovation; this, of course, is true in so far as strikes, as we know them now, are themselves innovations, and it is true only so far, for the courts have applied old established principles to new conditions; for instance, the first American case in which the word "boycott" is used seems to be State *v.* Glidden, 55 Conn. 46 (8 Atl. Rep. 890), decided in 1887, yet it was in accordance with well-settled principles that the injunction was granted in that case.

There have been some score or more of cases in the Federal courts in which the injunction was used against strikers, and, although it does not come within our purpose to examine these cases in detail, yet a reference to several of them will be of interest.

It was held in 1887, by the Circuit Court of the United States for the Southern District of New York, in Old Dominion Steamship Co. *v.* McKenna, 30 Fed. Rep. 48, that for outsiders to procure workmen employed upon terms satisfactory to them to quit work in a body in order to inflict injury upon the employer until he should accede to their demands, constitutes in law a malicious and illegal interference with the employer's business, which is actionable. This comes very near fitting the recent cases in West Virginia. Often the destruction of a man's business cannot be measured in damages, and we may safely say that in all these cases damages could not have been made even after being awarded, the defendants being invariably insolvent; the remedy at law (by an action for damages) being thus totally inadequate, the old first principle applies and equity takes hold and by an injunction prevents the commission of the threatened act.

See also Coeur D'Allene Consolidated & Mining Co. *v.* Miner's Union (1892), 51 Fed. Rep. 260.

In Casey *v.* Typographical Union (1891), 45 Fed. Rep. 135, it was held that a combination to boycott a newspaper for refusing to unionize its office is illegal and unlawful and will be enjoined; surely no action at law could compensate for the injury following from such a "boycott,"

and the granting of the injunction was in accordance with long established principles.

This case was followed in the exhaustively considered one of Barr *v.* Essex Trades Council (N. J.), 30 Atl. Rep. 881.

Nor were the cases arising during the recent miner's strike new in that the strikers were enjoined from congregating near the works of an employer in pursuance of a combination or conspiracy for the purpose of intimidating and threatening his employees and exposing them to jeers and contumely and so "persuading" them to leave their employment; not only were the acts resulting from such combinations or conspiracies ofttimes nuisances in themselves, but if unimpeded they would doubtless have led to the compulsory cessation of the employer's business and to the infliction of irreparable injury upon him, and therefore were properly enjoined (supposing that in each case a proper showing of facts was made and proper proceedings had).

A large number of cases from the various State courts bearing upon this phase of the question are collected and commented upon in the case of

Steel & Wire Co. *v.* Murray, 80 Fed. Rep. 811,

which shows that abundant precedent exists for what has been condemned as a very recent innovation.

Nor can we believe that the constitutional right of free speech was abridged or endangered when there was prohibited, not the peaceable assembling of men for the discussion of grievances, but the congregating and marching of a crowd upon the public thoroughfare near the property of another, or upon that other's property, for the very purpose of interfering with his business and of forcing themselves and their arguments upon his employees, unwilling listeners though they be, and practically coercing them to leave their employment. It would seem almost farcical, if it were not so serious a matter, to claim for such acts as these, the protection of the constitutional guarantee of "free speech."

On the general question of obstruction of highways, Justice Brewer pertinently remarked in his opinion in the Debs' case: "It surely cannot be seriously contended that the court has jurisdiction to enjoin the obstruction of a highway by one person, but that its jurisdiction ceases when the obstruction is by a hundred persons."

Under the act of Congress of July 27, 1890 (under which the anti-railroad pooling decision was rendered), declaring illegal and punishing combinations in restraint of commerce among the States and conferring jurisdiction on the United States Circuit Courts to prevent violations of the act, those courts have jurisdiction to restrain such violation by injunction, see

U. S. *v.* Alger, 62 Fed. Rep. 824;
U. S. *v.* Elliott, 64 Fed. Rep. 27;

in which, with a number of other cases, the injunction was used in pursuance of this act.

The matter of interstate commerce is one intrusted by the constitution to the care of Congress, and yet, even when acting under the express provisions of the act above mentioned, Federal judges have been attacked as unprincipled "usurpers."

It is a well-established principle that in some cases of trespass and in some cases of nuisance an individual is permitted by the law to prevent the one and abate the other by force, and surely no one should complain if the individual or the government prefer the peaceful process of a court of equity. We venture to say that the terrible tragedy enacted in Pennsylvania a short time ago would have been avoided had a court of equity been appealed to; certain it is that no such difficulty occurred in any place where the aid of the courts, State or Federal, was invoked.

The use of injunctions in labor cases seems to have been restricted rather than expanded since 1868, when, in England, in Spinning Co. *v.* Riley, E. L. R. VI. Eq. 551 (the first reported labor case in which the injunction was

used), the publication of a libel was enjoined, an extent to which our courts have refused to go, as not being sanctioned by principle.

To sum up in the language of Judge Wm. A Woods: "No decision of the Supreme Court, or of any of the United States Circuit Courts of Appeals, touching the subject of injunction, can be said to be founded on or to involve any new doctrine, or any application of established principles which was new save in the circumstances and conditions brought under consideration, and with two or three exceptions the same is true of the recent Circuit Court decisions."

An examination of the cases decided in the Federal courts bearing upon this question will show that the courts have clearly recognized the individual and collective right of the employees to cease work when they saw fit, undeterred by judicial process. This is after all but a recognition of the old rule that equity will not specifically enforce a contract for personal service, and therefore will not enjoin the breach of such a contract; this rule seems to have been violated by the United States Circuit Court for the Eastern District of Wisconsin in Farmer's Loan & Trust Co. *v.* Northern Pac. R. R. Co., 60 Fed. Rep. 803, but to that extent the decision has been annulled by the Circuit Court of Appeals for the 7th Circuit in Arthur *v.* Oaks, 24 U. S. App. 239; 11 C. C. A. 209. This is but an example of what has been so well said by Judge Woods, that the scope of equity jurisdiction "has been enlarged and modified to meet the changing conditions of business and civilization, and it is only natural that there should have been instances in which jurisdiction has been exercised in excess of rightful power, but when error of that kind has occurred it has been promptly corrected, either by direct appeal or by force of contemporary and more authoritative decision, and it is safe to say that no essential departure from recognized principles has become abiding or permanent."

Objections have been made to the summary punishment

of contempts committed in the violation of injunction orders.

Again this is no new exercise of jurisdiction.

The power of courts to punish disobedience of their orders has existed from time immemorial, it has been co-existent with the courts themselves and is absolutely necessary to their existence; it is further within that "due process of law" required by the constitution, which has been well defined as "such an exertion of the powers of government as the settled maxims of law sanction and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs."

The Supreme Court of Mississippi has said: "The power to fine and imprison for contempt from the earliest history of jurisprudence, has been regarded as a necessary incident and attribute of a court, without which it could no more exist than without a judge. It is a power inherent in all courts of record, and co-existing with them by the wise provisions of the common law. A court without the power effectually to protect itself against the assaults of the lawless, or to enforce its orders, judgments or decrees against recusant parties before it, would be a disgrace to the legislation, and a stigma upon the age which invented it." (Watson *v.* Williams, 36 Miss. 331.)

So the Massachusetts court says: "The summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice is inherent in Courts of Chancery and other superior courts, as essential to the execution of their powers and the maintenance of their authority, and is part of the law of the land, within the meaning of Magna Charta, and of the twelfth section of our Declaration of Rights." (Cartwright's Case, 114 Mass. 230.)

In his opinion in the Debs case Justice Brewer cites numerous Federal cases, as stating the same principle, which is really too axiomatic to need any authority in its support.

If contempts were made triable by a jury the courts would be paralyzed, or suppose, as Judge Woods suggests, the jurors summoned should refuse to attend, it would be necessary to summon other jurors to try them, and if they should refuse others must be summoned to try them, and so on *ad infinitum*; a court of equity having no jury its contempt cases would have to be sent to a law court, for trial when they could be reached in the course of business, pending which, proceedings in the court of equity must be suspended.

But after these legal difficulties and objections are considered, other practical objections present themselves, which demand that all reasonable restrictions and safeguards be placed upon the use of the injunction, in such cases as those to which we have addressed ourselves.

The power reposed in the courts of chancery is very great, and, such is the weakness of human nature, it is liable to be sometimes abused, and when abused to work great oppression. This abuse should be guarded against with the most sedulous care, not only on account of the injustice in the particular case but because of its affording a handle for those who, for one reason or another, are always ready to attack the courts and judges, and to stir up discontent among the people. It may sound superfluous to say that the law should be followed and adhered to with the greatest strictness, but in such cases as we have been considering it is of vast importance that the judges should see that every requirement of the law is complied with, with the most scrupulous exactness. They should avoid even the shadow of the appearance of overstepping the limits set to their jurisdiction by principle and by law.

For example the United States Circuit Courts are given authority by Act of Congress to grant preliminary injunctions in certain extreme cases without notice; here is a provision, useful and necessary as it sometimes is, which may be made an instrument of oppression and injustice unless the judges act with the greatest care and circumspection, in

such cases they should consider themselves in peculiar charge of the interests of the absent defendants, and should never grant an injunction without notice unless the required "irreparable injury from delay" is clearly shown beyond a doubt, and the day set for hearing should never be postponed beyond the earliest date.

We have too much confidence in our courts of last resort to feel apprehension that there will ever be a permanent enlargement of the jurisdiction of the courts of equity, uncontrolled by law and unsanctioned by principle; but there is at all times a chance that in the mistaken acts of individual judges the proper jurisdictional limits may be overstepped; while ordinarily such mistakes even if uncorrected by an appellate court, might have no result beyond the particular case in which they occurred, yet in some states of popular opinion even an isolated mistake would go far to increase those bitter feelings of which we spoke at the outset, and might aid in undermining that perfect confidence in the integrity and fairness of our courts which is one of the chief foundation stones of our government, and which among a large class of our people now seems to be seriously threatened.

The fact that the injunctive process has in so many cases issued from the Federal courts has made the cry of "government by injunction" more potent than it would otherwise have been in exciting the fears of conservative men. There are not wanting cases however in which the State authorities themselves have been responsible for the resort to the Federal courts, the complainants often having no confidence in the ability and willingness of the local authorities to effectually cope with the difficulties, and sometimes, as for instance in the Chicago riots of 1894, this lack of confidence would seem to have been justified. It has been said that the so-called "usurpations" of the courts are but blazing the way to revolution, but I do not believe that in the sober second thought of the American people any such result is contemplated or threatened. There is danger, however,

that some State legislature, in an effort to restrict the power of the courts, may practically abolish the useful writ of injunction and so necessitate a still more frequent resort to the Federal courts; a result to be deplored by those who, like the writer, believe that Federal assistance, even in courts, should be sought only as a last resort. In this as in all cases when a people, greatly stirred up, attempt to right real or imaginary wrongs, there is danger lest in the methods they may be tempted to try for relief there may lurk greater dangers than are apparent in the *status quo*.

Efforts have been made to have some legislation by Congress limiting the jurisdiction of the Federal equity courts in matters involving injunctions, but it may well be doubted whether Congress has any authority to do this, as Art. 111, Sec. 2, of the Constitution provides that the judicial power of the Federal courts shall extend to "all cases in Law and Equity" arising under the constitution, the laws and treaties of the United States.

Changes could, however, be made in the law in regard to the punishment for contempts. The incongruity of a trial by jury in such cases has already been alluded to. However, those proceedings might well be made compulsory which even now should be followed in all courts, and so far as the writer knows have been generally followed; that is, "that in case of a contempt committed out of the presence of the court there should be a formal procedure upon affidavit showing the facts supposed to constitute the contempt, to which the defendant should be allowed to make answer, and that the trial should proceed upon evidence adduced in open court;" moreover an appeal might be allowed in all cases, and a limit set upon the punishment to be inflicted.

As to the so-called "blanket" or "omnibus" injunctions, it stands to reason that no man can be in contempt by violating an order, notice of the existence of which has not been brought home to him, and if any man has been punished for so doing he has been unjustly punished, the

court had no jurisdiction of him, and if imprisoned he was entitled to his release on *habeas corpus*.

Sec. 16, Act of 1789 (Rev. Stat., Sec. 723) provides that "suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate and complete remedy may be had at law." It has been held (Baker *v.* Biddle, 1 Baldwin, 405) that this was an absolute limitation on the jurisdiction and that any decree beyond this jurisdiction was void. Disobedience of a void injunction order is no contempt, and an examination of the validity of the order, as depending upon the jurisdiction of the court, when the question is brought before the higher court, as may even now be done by *habeas corpus* is a valuable safeguard against injustice committed by a transgression of jurisdiction.

In the famous case of In re Ayers, 123 U. S. 443 (1887), the Supreme Court, speaking by Mr. Justice Matthews, declared it to be well settled that while "the exercise of the power of punishment for contempt of their orders, by courts of general jurisdiction, is not subject to review by writ of error or appeal to this court," yet "when a court of the United States undertakes by its process of contempt to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction is void," and that "when the proceedings for contempt in such a case result in imprisonment this court will, by its writ of *habeas corpus*, discharge the prisoner."

In time of riot or disorder, when property and civil rights are threatened or endangered, it is of course the duty of the authorities to restore order, regardless of cost, and to remove the threatened danger by whatever means are in their power, which being done they should consider the cause which provoked the passions of the people, sometimes unreasonable though they be.

There can be no doubt that much of the discontent which seems to smoulder among our laboring men is caused by the

seemingly insatiate and pitiless greed of some great capitalists and corporations. The tales of the vast, and sometimes very rapidly accumulated fortunes, of these later days, sound strangely on the ears of men who are struggling on scanty wages to support their wives and children; and when organized labor inaugurates a struggle for the betterment of its conditions, and the men, in the effort to compel a compliance with their demands, too often stirred up by unscrupulous agitators, commit acts which bring them within the restraining jurisdiction of a court of equity, it is hardly unnatural that they should believe, especially when encouraged so to do by many who should know better, that the strong arm of the law which compels them to cease is guided by, and is but a creature of, the very power against which they are struggling.

We cannot afford to allow this belief to grow, it appears to be already too widespread, unreasonable though we may believe it to be.

Therefore it seems that the best solution of this entire question is offered by what has been so often suggested, namely a compulsory arbitration of all disputes arising between employers and employed. The use of the strictly legal, but to so many obnoxious, remedy by injunction would thus be generally avoided in labor disputes, and with it the apparently most prolific cause of the bitter feelings spoken of.

This plan is open to the objection that by it certain men will be required to surrender, to a greater or less degree, their personal right to manage their own affairs as seems best to them, but it may well be asked whether the time has not come when, in this particular, a measure of this right must be surrendered for the common good.

Time forbids us to go into this question which might lead us far from our subject, suffice it to say that in such a critical period as that through which we are passing, it becomes every patriotic man to yield somewhat of that which is strictly his right, when his adhering to it too

closely might result in seriously endangering the social fabric.

It may be added that matters would be very much helped if a greater sense of responsibility was felt, and more care exercised by those whose duty it is to disseminate and comment upon the news. The instance here under our own observation last summer has not been the only one, when an untrue and misleading report of facts, and the expression of a too hasty opinion thereon, has stirred up feelings and excited animosities which no amount of subsequent correction could atone for.

I am conscious that this has been a very imperfect and incomplete discussion of a very large subject, but such as it is it has not been without avail if it has aided in any degree in showing that the so-called "usurpations" of the judges have not been usurpations at all, but that the application of the injunction to prevent violations of law and the consequent irreparable injury to property and civil rights, incident to strikes, has been in accordance with well known principles of equity jurisprudence; and that if any defects are inherent in that system or if any objections are properly applicable to it, they should be met and corrected in some other way than by that unreasoning abuse and, I may say, villification, of the judiciary which in these latter days seems to have become a favorite pastime with so many.

ANNUAL ADDRESS.

By Hon. Seymour D. Thompson.

JUDICIAL SUPREMACY.

I. Debate in the American Bar Association on Judicial Supremacy.

At the sixth annual meeting of the American Bar Association, held at Saratoga Springs in the year 1883, a paper was read by Mr. Robert G. Street, of Texas, on the subject of "How Far Questions of Public Policy may Enter into Judicial Decisions." It was forcibly written, and contained apt historical illustrations, but did not advance any hitherto unknown doctrine. The central ideas which it promulgated were that, under the constitution of the United States, each of the three departments of the government — the Legislative, the Executive, and the Judicial — has the right to interpret the constitution for itself, and is not bound by the interpretation put upon it by either of the other two departments; and, secondly, a proposition which he formulated in this language: —

"No question of the grant or prohibition of sovereign power or declaration of public policy should ever be considered settled until uniformity of opinion and action has been reached by the several departments; and not then until the people have made known, under circumstances and conditions favorable to its exercise, and through such time as to assure deliberation, their approval of such concurrence. And this concurrence itself, to be binding, must be reached under the free exercise of the right of independent opinion and action, and not through the influence of gross delusion that the courts speak on the subject 'with the voice as of one having authority.'"[1]

Among other ideas which Mr. Street combated was the hallucination, which in recent times has taken hold even of the minds of judges, that when the highest judicial court declares a law

[1] Report of the Sixth Annual Meeting of the American Bar Association, pp. 179, 192.

unconstitutional and refuses to enforce it, the law is thereby repealed or annulled. He pointed out the absurdity of this proposition by showing that, if it were well founded, and if the highest court should hold a statute bad this year, and hold it good next year, the Legislature would have to re-enact it, since the first decision had the effect of annulling or destroying it. This, it is perceived, would erect the judicial branch of the government into a Third House of the Legislature, with a negative legislative power, consisting in the power of repealing existing statutes. Some years after this address was delivered, the judicial craze of setting aside statutes had progressed so far that two learned Federal judges actually expressed the opinion that, the Supreme Court of the United States having, by its decision in Leisy *v.* Hardin,[1] annulled the prohibitory laws of the States so far as they operated upon importations from outside their borders, and Congress thereafter having, by an act passed in compliance with a suggestion in the opinion of the court in that case, given the States the power to extend their prohibitory laws to importations from other States or foreign countries,—it became necessary for the States to re-enact their prohibited laws; since as they had been repealed or annulled by the judicial decision in question, and the subsequent act of Congress was not, in its terms, retroactive.[2] Mr. Street also pointed out that, outside of the operation of the rule of *stare decisis*, a judgment declaring a statute unconstitutional had merely the effect that the court refused to enforce it in the case under consideration, and the decision bound only the parties to the immediate litigation. The court was not even bound to follow its own decision, though it would probably do so; but was at liberty to reconsider it and overrule it in any other case, upon becoming convinced of its error.

I have said that there was nothing new in the doctrine which Mr. Street put forth. He merely promulgated the doctrine of Jefferson, of Jackson, and of Lincoln. These three great statesmen, each in his turn, had admitted that the Supreme

[1] 135 U. S. 100.

[2] Re Rahrer, 43 Fed. Rep. 556.

Court had the power to refuse to enforce the act of Congress which the court believed to be opposed to the constitution, and had admitted that its decision was binding on the parties before the court; but denied the right of the court to impose its interpretation of the constitution upon the executive branch of the government, and to restrain the President from enforcing the same statute.

On this subject Mr. Jefferson's expressions of opinion, chiefly in his published letters, were numerous. Perhaps his clearest expression of the doctrine is found in his letter to Judge Roane in 1819:—

"My construction of the constitution," said he, "is that each department is thoroughly independent of the others, and has an equal right to decide for itself what is the meaning of the constitution in the cases submitted to its action; and especially where it is to act ultimately and without appeal." Then he gave examples of his position, among which was that he himself had pardoned persons convicted under the Sedition Law, on the ground that the law was "unauthorized by the constitution, and therefore null." "These," added he, "are examples of my position that each of the three departments is equally to decide for itself what is its duty under the constitution, without any regard for what the others have decided for themselves under a similar question." [1]

On the same subject General Jackson, in his celebrated message vetoing the bill to recharter the Bank of the United States,— a message which re-elected him, and by an enormously increased majority,— gave the following expression of opinion:—

"If the Supreme Court of the United States covered the whole ground of this act, it ought not to control the co-ordinate authorities of this government. The Congress, the Executive, and the Court, must each for itself be guided by its own opinion of the constitution. Each public officer, who takes an oath to support the constitution, swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President, to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or

[1] Jefferson's Letters, Randolph's ed., Vol. 4, pp. 317, 318.

approval, as it is of the Supreme Judges when it may be brought before them for judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress over the judges, and on that point the President is independent of both. The authority of the Supreme Court must not, therefore, be permitted to control the Congress or the Executive, when acting in their legislative capacities, but to have only such influence as the force of their reasoning may deserve."

On the same subject Mr. Lincoln, in his first inaugural address, anticipating that, in his task of saving the Union, he might encounter the opposition of the court which had rendered the Dred Scott decision, said :—

"I do not forget the position assumed by some that constitutional questions are to be decided by the Supreme Court; nor do I deny that such decisions must be binding in any case upon the parties to a suit, as to the object of that suit, while they are also entitled to a very high respect and consideration in all parallel cases by all other departments of the government; and while it is obviously possible that such decision may be erroneous in any given case, still the evil effect following it, being limited to that particular case, with the chance that it may be overruled and never become a precedent for other cases, can better be borne than could the evils of a different practice. At the same time, the candid citizen must confess that if the policy of the Government upon the vital questions affecting the whole people is to be irrevocably fixed by the decisions of the Supreme Court, the instant they are made, as in ordinary litigation between parties in personal actions, the people will have ceased to be their own masters, unless having to that extent practically resigned their government into the hands of that eminent tribunal. Nor is there in this view any assault upon the Court or the judges. It is a duty from which they may not shrink, to decide cases properly brought before them; and it is no fault of theirs if others seek to turn their decisions into political purposes."

Long before this, Alexander Hamilton, the heart and soul of American Federalism, had said :—

"The accumulation of all powers, legislative, executive and judiciary, in the same hands, whether of one, or a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. * * * The preservation of

liberty requires that the three great departments of power should be separate and distinct."

Nor did these three great Presidents, each in his turn, hesitate to act upon the doctrine thus announced. Jefferson successfully resisted the untenable judicial fulmination in *Marbury* v. *Madison*[1] under which an inferior Federal court subsequently attempted, by its writ of *mandamus* against the Secretary of State, to compel the delivery of a commission which Jefferson's predecessor had made out, appointing a justice of the peace; and the commission was never delivered. Jackson refused to assist in the execution of the mandate of the Supreme Court of the United States in *Worcester* v. *Georgia*,[2] and the decision went for nothing. In another case an Indian named Tassels was hung by the State of Georgia under a judgment to review which the Supreme Court of the United States had sent its writ of error. Mr. Lincoln, at the very outbreak of the war, saw that he must make an issue with a judiciary in whose loyalty he could not wholly confide, and he accordingly resisted the execution of a writ of *habeas corpus* issued by Chief Justice Taney to enlarge a military prisoner confined in Fort McHenry.[3] If he had yielded in that case and had adopted the policy of yielding in every other such case, there is no telling where judicial encroachments upon the military powers vested in him by the constitution would have ended. Sentinels might have been taken from their posts by writs of *habeas corpus;* the march of armies might have been delayed by the arrest of the commanding generals under process of contempt.[4] Nay, the modern use of the writ of injunction might have had an earlier development, and generals might have been enjoined in equity from invading unconquered territory, or from

[1] 1 Cranch (U. S.), 137.

[2] 6 Peters (U. S.), 515. See also Cherokee Nation *v.* Georgia, 5 Pet. (U. S.) 1.

[3] Ex parte Merryman, Taney, Dec. 246.

[4] It will be recalled that, in the war of 1812, Chief Justice James Kent, of the Supreme Court of New York, issued an attachment for the arrest of General Lewis, commanding a military post in time of actual war, for disobeying a writ of habeas corpus which he, Kent, had issued to inquire into the legality of the enlistment of a soldier in Lewis' army, — an inquiry wholly outside the jurisdiction of any State judge. Martin *v.* Stacy, 10 Johns. (N. Y.) 328.

capturing cities, on the ground of protecting property and business.[1]

Mr. Street evidently did not expect the storm of dissent which his paper raised. He may have forgotten that one of the presidents of the body before whom he read it, himself a Democrat, had, at the meeting held the year before, delivered one of the most eloquent eulogies upon John Marshall that had ever been pronounced from human lips. He had possibly forgotten that, in the process of evolution upon this subject, Republicans had become Federalists, and Democrats had become Whigs. The most forceful dissent came from Mr. Charles C. Bonney, of Chicago, himself a modern Democrat, who opened the assault upon Mr. Street's essay by saying:—

"Believing, as I do, that the doctrine of Judicial Supremacy is the rock on which constitutional government rests, a sense of duty constrains me to protest against any attempt, in a body of which I am a member, to impair that foundation stone of the superb superstructure that rests upon it." [2]

After some further introductory remarks, he followed with an eloquent vindication of the new doctrine, from which I make the following extract:—

"All the judicial powers are granted to, and wholly vested in the one Supreme Court, and such courts, inferior thereto, as the Congress may establish. No such powers are reserved, no exception is made; hence we must conclude that no power of final construction, interpretation, and definition has been given to the Executive and Legislative Departments. That power, so wholly conferred upon the Judiciary, must be exercised by them for all departments and agencies of the Government. Executive and political officers may, in the first instance,— and, indeed, must — form opinions of their powers and duties in relation to the matters upon which they are called to act; but they have no jurisdiction

[1] It will be remembered that unsuccessful attempts were made to enjoin the President of the United States, General Grant, General Ord, and other Federal officials, from executing the Reconstruction Acts: Mississippi *v.* Johnson, 4 Wall. (U. S.) 475; Georgia *v.* Stanton, 6 Wall. (U. S.) 50.

[2] Report of the Sixth Ann. Meeting Am. Bar Asso., p. 14.

and authority finally to determine the extent and limits of their powers under the constitution. The supreme and final authority so to decide is vested in the courts, and, when exercised, binds all the agencies of the government. The President and Congress are bound by their official oaths to support and uphold the constitution of the United States. What that constitution requires can be conclusively determined only by the judicial tribunals. If this were not the law, we should have the strange spectacle of the Purse and the Sword determining for themselves the extent of their obligations and powers. What patriotic executive or legislator would wish it so? Who would not rather desire to have some disinterested and impartial arbiter discharge that solemn responsibility?" [1]

He concluded his remarkable address in the following words: —

"For the reasons, thus briefly given, I must dissent from the argument of our learned brother, that the Legislative and Executive departments of the Government have the right to determine for themselves the extent of their powers and duties under the constitution, and must hold that those departments are, and of right ought to be, bound and concluded by the judgments of the Judiciary on all questions of constitutional authority. Let us encourage, rather than retard, the work of judicial evolution. Let us acknowledge and honor, rather than decry and seek to remove, that golden crown of constitutional government, JUDICIAL SUPREMACY." [2]

Mr. Stevenson Burke, of Ohio, followed in a similar strain and concluded by saying: —

"The courts established by the constitution are of necessity the final arbiters as to whether, in any given case, either the Legislative or Executive departments have transcended the limits of the constitution."

Judge Charles S. Bradley, of Rhode Island, said: "Ditto to Mr. Burke." He dwelt upon the practical phases of the question: —

"Government," said he, "is essentially a practical matter. Let us look at the theory advanced, from a practical point of view. To take an

[1] *Ibid.*, p. 15. [2] *Ibid.*, p. 20.

illustration which occurs to me. Congress once passed a law taxing the salaries of State judges. The Supreme Court declared the law to be unconstitutional and void. Now, should the officers of the executive collect this tax, and the marshal of the United States court protect the incumbent of the State office from such collection? Can the officers of one and the same government be engaged in such a direct conflict of duties? What would become of the highest officer, it may be, of a State court between such antagonism? One department certainly must yield to the other. They can not be co-equal practically, and remain a government. Chaos would reign. The common sense of the American people has acted upon the idea that, in such cases, the Judicial is paramount to the Executive or the Legislative department. It is such common sense in the affairs of government which has carried us through a hundred years of successful experiment — through even the Niagara of civil war. By this common sense we now float tranquilly on the waters of Ontario, as before on those of the upper lakes. By it we shall go through rapids without danger, to the ocean of the future." [1]

Concluding his remarks, Judge Bradley said:—

"In no government in the world has such power been vested in the judicial department as in ours. It is, like all power, especially when new and untried, liable to abuse. It has been abused. It is also true that the decision of a court does not close discussion, even in that forum. Witness the jurisdiction over corporations, and the admiralty jurisdiction of the United States courts, and the decisions on the Legal Tender acts. Still less does a judicial decision close discussion in the legislative bodies and before the people. The Judiciary is like a dam; it holds back public action for a time, but for a time only. The great current of human life and thought is paramount to it, and must sooner or later have its course. With these and such concessions to the thought of the writer [Mr. Street], we must still maintain that, rightfully at times, and often, the Judicial department is supreme." [2]

Mr. Emory A. Storrs, of Chicago, delivered a short speech, original and unique. It reminded one of the style of Emerson. It consisted in a succession of detached sentences, each having more or less relation to the general subject, and every sentence containing a germ of truth. In his opinion, judicial legislation

[1] *Ibid.*, pp. 29, 30. [2] *Ibid.*, p. 33.

was much worse than legislative legislation. He did not believe that we ought to veneer that practice by the convenient phrases of "judicial evolution," or "judicial development." He was as reluctant and averse to a judge legislating as he was to a legislator adjudicating. Among other things, he said: —

"Take the whole history of civil liberty in this country and in Great Britain together; the lawyers have done a great deal for its advancement, and in the main the judges but very little. I think it may be said with absolute truthfulness, that, taking the whole history of the common law together, and of the judges under that system, the judges have inflicted more serious injuries upon civil liberty than generals. The judges never gave us the liberty of the press, or of speech, or of the pen. The lawyers did fight for it, and in the main it was lawyers, aided by legislators, who secured it."[1]

It is possibly remarkable that two of these able debaters, Judge Bradley advocating, and Mr. Storrs opposing, the doctrine of "judicial supremacy" demolished that doctrine, the former by his admissions, the latter by his assertions. Judge Bradley admitted that judicial decisions could do no more than dam up and hold back for a time the tide of public opinion and action. Mr. Storrs pointed out that the two greatest decisions which the Supreme Court of the United States had ever rendered, the Dartmouth College decision and the Dred Scott decision, had been reversed, not by the Court itself, but by public opinion and action. The Dartmouth College case had to be explained or qualified, or else "a revolution;" and the Dred Scott decision "was reversed — who reversed it?"

II. Legislative Power Advancing in Europe and Receding in America.

If an intelligent foreigner, not familiar with our institutions, had listened to that debate, his mind would have been filled with extraordinary reflections. The thought would have struck him at once that legislative power, which, in recent times, has been steadily advancing in Europe, has been steadily declining in America. He would have recalled that, in the country from which America inherited her free institutions and laws, the progress of freedom for two hun-

[1] *Ibid*, p. 36.

dred years has taken the form of legislative supremacy, curtailing at once the power of the Executive and the power of the judges, who, in most cases, were subservient tools of the Executive. He might have regarded it as extraordinary that a people, supposing themselves to be free, had vested in their judges, — who, in the course of history, had done so little for popular liberty and so much for tyranny,— a supremacy over all the other branches of the Government, consisting of the power to annul the work of the Legislature and to send coercive writs against the officers of the executive department. He would have recalled the fact that, three hundred years ago, the kings of England exercised the power to set aside acts of Parliament by refusing to enforce them, called "the dispensing power;" and it might have struck him as remarkable that the American judges had shown themselves possessed of so much superior wisdom and virtue that the people had intrusted them with the power to do the same thing. But if he had been told that the people never intrusted them with that power, but that they had seized it, and that the people had acquiesced in the seizure, he would have been further amazed. And if he had been told that the judges who had seized this power were not elected by the people as are the other branches of the Government, he would have begun to doubt whether our boast of being a free people is justified by our actual condition.

III. Rise of the Judge and Decline of the Jury.

If the same intelligent foreigner could have remained on our shores for fourteen years thereafter, he would have witnessed a still more remarkable "judicial evolution" in the gradual decline and suppression of the right of trial by jury, and the gradual absorption by the judges of the functions of juries. He might have recalled that the progress of freedom in Europe during the present century has been co-existent with the growth of the right of trial by jury; and he might have deplored the fact that, while the subjects of kings and emperors have been pleading for an enlargement of this right, the free citizens of America have been putting it aside and neglecting it, and substituting for it trial by judge — trial by the legal scholar upon the bench, and by him alone. He might have contrasted the rise of jury trial in England with its decline in America. He

might have recalled the time when in England the king, by a recognized legal process, punished the jurors for bringing in a verdict against him;[1] and he might have contrasted this with the modern jury trial in England in criminal prosecutions for libel and in other criminal cases, where the jurors are judges of the law as well as of the facts, in the sense of not being bound by the instructions of the Court. And then he might have stood amazed at seeing an institution which has so greatly expanded with the growth of freedom in England, giving way in America, to that exotic of the civil law, the chancery writ of injunction, followed up by process of contempt, where there is no trial by jury, but where the accused is dragged before the judge and compelled to answer interrogatories in accordance with an inquisitorial system of trial prevailing upon the Continent of Europe and borrowed from the Roman law. He would have witnessed with amazement the steady growth of this foreign exotic; and he would have seen how, in Kansas, in Iowa, and possibly in other States, the writ of injunction is used to enforce the criminal laws against persons keeping dram shops; and how in the Federal courts everywhere this writ is used to restrain unlawful acts of striking laborers injurious to property and business, although such acts come within the purview of the criminal laws of the States. And he might have soliloquized thus: "In the reign of the Tudors in England, the kings dispensed with acts of Parliament; in free America, the judges dispense with acts of the Legislature. In England, in the times of the Tudors, the king punished the jury for bringing in a verdict against the charge of the king's tool, the judge; in free America, they are doing better, by dispensing with the inconvenience of juries altogether."

IV. The Decision of Political Questions by the Judges.

It is certain that the framers of our Federal constitution never intended to remit the decision of political questions to the judges. All that has been preserved to us of the debates in the Constitutional Convention of 1787 upon the Judiciary Article of the constitution indicates that it was the purpose of the framers of that instrument to confine the judicial

[1] Bushell's Case, Vaughan, 135.

branch of the government to "judiciary matters," [1] and to the trial and decision of "cases." Nevertheless, the power to decide political questions has been assumed by the Federal judiciary and has been greatly extended, and generally with the public approbation. The highest national court has, indeed, more than once disclaimed jurisdiction to decide such questions; [2] but it has frequently departed from this rule. There has been a natural tendency on the part of the politicians to run to the judges with their controversies; and so we have seen the Federal court of last resort deciding such questions as the boundary between States of the Union,— thus extending the scope of its granted jurisdiction of "all cases in law and equity" to questions of sovereign right.[3] We have seen the President of the United States refuse to enforce a law for the expulsion of Chinese aliens who have come unlawfully upon our shores, until he could get up a case and invoke the decision of the Supreme Court upon the question of the validity of the law, earnestly desiring, but without his desire being gratified, to have them hold it unconstitutional.[4] We have seen the Federal Supreme Court deciding such questions as the power of a State to extend its municipal laws over an Indian reservation, Congress and the executive not opposing; [5] the question which of two contestants has been

[1] In the convention which framed the Federal constitution, on Aug. 6, 1787, a committee reported a draft of a constitution. Section 3, of Art. 9, read as follows: "The jurisdiction of the Supreme Court shall extend to all cases arising under the laws of the United States," etc. When motion was made to insert the words "the constitution," objection was raised, because "it was thought going too far to extend the jurisdiction of the courts generally to cases arising under the constitution, and that it ought to be limited to cases of a judiciary nature." The motion was agreed to *nem con.*, "it being generally understood that the jurisdiction was, constructively, limited to cases of a judiciary nature." 5 Elliott's Debates, 433.

[2] See for example Cherokee Nation *v.* Georgia, 5 Pet. 1, 29, 30; Georgia *v.* Stanton, 6 Wall. (U. S.) 50; Luther *v.* Borden, 7 How. (U. S.) 1. See also Smith *v.* Good, 34 Fed. Rep. 204.

[3] Rhode Island *v.* Massachusetts, 12 Pet. (U. S.) 657; Florida *v.* Georgia, 17 How. (U. S.) 478; Virginia *v.* West Virginia, 11 Wall. (U. S.).

[4] I allude to the case of Fong Yue Ting *v.* United States, 149 U. S. 698, which was notoriously gotten up in this way. See 28 Am. Law Rev. 289. The court rightly held it to be a political question, following Neshimura Ekiu *v.* United States, 142 U. S. 651, 659.

[5] Worcester *v.* Georgia, 6 Pet. (U. S.) 515.

rightfully elected to the office of governor of a State,— a question which from its very nature eludes Federal jurisdiction and Federal interference.[1] It declined to decide the question which of two rival State governments is the rightful one;[2] it declined to pass upon the constitutionality of the reconstruction acts,[3] and it declined to permit a bill in equity to be filed to enjoin the President of the United States from enforcing them.[4] But, on the other hand, in a case which was probably concocted and collusive, it laid its hand upon Congress and the Executive, and undertook to superintend them in the mode of raising revenue — a matter vital to the existence of the Government — and said to them, overruling two of its previous decisions, you shall not raise revenue in a mode which, in time of war, with our ports blockaded, might become absolutely necessarily to the National existence.[5] A more unpatriotic decision was never pronounced in a court of justice. I solemnly protest against the doctrine that, in a matter essential to the very life of the nation, the judiciary can rightfully handcuff the Legislature of a free people.

V. International Arbitration by Judges.

Not only have politicians found it expedient to submit their differences to the decision of the judges, but civilized governments, and notably Great Britain and the United States, have found it cheaper, juster, and more humane, to submit international controversies to the decision of lawyers and judges, than to settle them by the shock of armies and the bombardment of cities. Within the memory of those who sit before me, two great controversies between Great Britain and the United States have been settled in this way, and a third is in process of settlement. In the last case the world witnessed the sublime spectacle of a tribunal composed of four judges and an umpire elected by those four, being created to settle a question of strictly sovereign right, the question of the boundary between two contiguous

[1] Boyd v. Nebraska, 143 U. S. 135.
[2] Luther v. Borden, 7 How. (U. S.) 1.
[3] Georgia v. Stanton, 6 Wall. (U. S.) 50.
[4] Mississippi v. Johnson, 4 Wall. (U. S.) 475.
[5] Pollock v. Farmers' Loan &c. Co. v. 157 U. S. 429, and 158 U. S. 601.

sovereign States. No greater tribute was ever paid by the political to the judicial departments of those governments. The meaning is that judges, who are trained to settle controversies between private parties in accordance with law and justice, can best be trusted to settle great public questions depending upon the weighing of evidence and the application of the principles of international law.

VI. Coercion of the Executive by the Judicial Department of the Government.

The doctrine of Judicial Supremacy necessarily and avowedly involves the proposition that the judicial department of the government has the right, not only to interpret the constitution and the laws for the other departments, but also to enforce its interpretation by its coercive process directed against the officers of such departments. In the beginning of this century Chief Justice Marshall, in the case of *Marbury* v. *Madison*,[1] advanced this doctrine, holding that a Federal Circuit Court might issue its *mandamus* to a cabinet officer to compel him to perform an act which the President had directed him to perform, where he had afterwards recalled his direction, commanding him not to perform it. This was very much as though the President should order the Marshal of the Supreme Court to execute a process which the Supreme Court had issued, but afterwards recalled, ordering him not to execute it. President Jefferson resisted this attempt on the part of the judicial branch of the government to coerce the executive branch and to compel him to deviate from his own conceptions of law and right in the performance of his sworn duties; and the court which had made the attempt was abolished by Congress. Afterwards, in Burr's trial, Chief Justice Marshall issued a *supœna duces tecum* to President Jefferson, commanding him to produce a letter written to the President by General Wilkinson. Mr. Jefferson made no return to the impudent writ, but lodged the document with the United States District Attorney, with instructions to produce such portions of it as might be disclosed without detriment to the public interests. Subsequently, in the trial of Burr for misdemeanor, Burr renewed his application and actually argued that

[1] 1 Cranch (U. S.), 137.

the President of the United States was in contempt!" [1] If Jefferson had yielded, the precedent would have been set that the judicial department of the government can send compulsory process against the President of the United States himself.[2] The Dred-Scott decision, which was a mere political fulmination, was never executed; no mandate was ever sent down after the decision was rendered; and it was reversed amid the thunder of cannon. I have already pointed out how Jackson refused to assist the Supreme Court of the United States in preventing the State of Georgia from extending its municipal laws over the Indian country within that State, and how the court failed in its attempt; and how Lincoln resisted the *habeas corpus* issued by Chief Justice Taney to enlarge a military prisoner held in Fort McHenry. These examples show that the judiciary possess no more than a moral power, and that they are powerless to enforce their judgments and decrees in the face of executive opposition. If a small Federal court in the District of Columbia continues to send its writs of mandamus to cabinet officers commanding them to perform those acts which the judge decides to be *ministerial* merely, it is only because the Congress does not take away the power, and because the executive department of the government tolerates the abuse.

VII. The Moral Power of the Judiciary.

But whilst this is so, it is to be observed that a moral power, when exercised with uniform rectitude, is, in the end, the greatest of all power. In general, the Federal judiciary have exercised their powers in a manner which has commanded the confidence and secured the assent of the people. The President knows full well the extent to which the judicial branch of the government is entrenched in the public confidence. He knows that he can not resist the judgments of the courts unless he can make sure that he has the weight of public opinion and of public conscience at his back. The Popes of Rome may be said to possess, in a sense, only a moral power; but what a tremendous and enduring power it is! Nations crumble beneath the tramp of

[1] 25 Federal Cases, 190.

[2] I have already noted the failure of attempt to enjoin the President from enforcing the reconstruction acts.

invading armies; "empires melt from power's high pinnacle;" the map of the world changes from age to age; but that majestic edifice, depending upon moral and spiritual power alone, stands like a rock — the rock of Peter — untouched by the mutations of time and the upheavals of physical force. So it is with the American judicial establishment. The judgments and decrees of the courts are obeyed by the Executive because they receive the assent of the people, and because the Executive well knows that he would not be sustained by public opinion if he resisted them. The Federal judiciary are not elective; those judges are appointed during good behavior, which means during life, or until they choose to retire. They are in no practical sense responsible to the people, not even for good conduct in office; for the difficulty of impeaching a Federal judge is so great that, in the language of Mr. Jefferson, "impeachme has long since ceased to be a scarecrow." And yet nearly all their work commands the confidence of the people, and nearly all they do escapes public criticism. They are rightly supposed to be impartial as between suitors and to have no other motive than to administer justice according to law. The law, to the mass of the public, is a far off, mysterious thing; hence laymen do not consider themselves capable of criticising judicial decisions. If those decisions reach results which seem opposed to natural justice, the lay mind acquiesces in them, under the supposition that the court is administering the law as it finds it, and that the fault is not the fault of the judges, but the fault of the law. The lawyers, who alone have the ability to criticise judicial decisions, are *courtiers* in an almost literal sense, and are afraid to offend the power before whom they must, day by day, appear in the work of earning their daily bread. Thus it is that, while all other public functionaries find themselves the targets of criticism, and even of abuse and ridicule, the judges escape criticism even more than do the ministers of religion. The idea is often advanced that they are not to be criticised even though they are known to do wrong; since the confidence of the people in their judges is the only remaining ligament that holds our institutions together. But I submit that the truth concerning public men and measures in whatever de-

partment of government, when clearly ascertained, ought to be told under all circumstances. But so it is that the courts of justice are entrenched in an affectionate loyalty on the part of the bar and the people, and especially on the part of the bar. To a right-thinking lawyer, the court room is a sanctuary. When he enters it, it seems to be filled with an atmosphere of sanctity like a temple of religion. He feels a reverence for the judge and a sense of allegiance to him; and, although he can not quite analyze the feeling, he would not divest himself of it if he could. And to a large extent this feeling extends beyond the bar and permeates the mass of the people.

VIII. What this Moral Power has Achieved.

This moral power has placed the judiciary in a position where it superintends all other departments of the government. It is true, as pointed out by the venerable Mr. Justice Field in his retiring address, that it operates negatively. Its restraining power upon the other departments of the government may be summed up in the words "this law shall not be executed." The Federal judiciary have pushed their power forward, not without some retrocessions and abnegations, until we see such spectacles as this taking place under the eye of the public and without dissent: — that the sergeant-at-arms of one of the houses of the sovereign Legislature of the United States, who has obeyed the order of the House in imprisoning a witness who has refused to testify before a committee of the House, without claiming any constitutional privilege, the order of the House being absolutely legal under a previous decision of the same court,[1] is condemned to pay twenty thousand dollars in damages, which damages are afterwards paid out of the public Treasury of the United States![2] That both Houses of the Sovereign Legislature of the United States must bow down to, and ask the consent of, a judge of a small local court of the District of Columbia to compel recusant witnesses, who do not claim any constitutional immunity, to testify in an investigation necessary to ascertain the truth concerning certain charges of corruption on the part of their own members.

[1] Anderson v. Dunn, 6 Wheat. (U. S.) 204.

[2] Kilbourn v. Thompson, 103 U. S. 168. This was the preliminary decision; the result of the case was as stated in the text.

That the same small local court, constantly issues its writ of *mandamus* to cabinet officers of the United States, saying to them, "you must do this, or you must do that" in relation to their sworn duty of executing the laws of the Union, not for the District of Columbia merely, but for the whole United States.[1] It is true that this jurisdiction is disclaimed except where the act is merely *ministerial*, and does not involve the exercise of judgment and discretion; but as the court asserts the power to decide what acts are ministerial and what discretionary, the court possesses the whole power in the premises.[2] In view of this and other like instances, we must conclude that, according to the modern doctrine of Judicial Supremacy, every department of government lies at the feet of an appointive judiciary, not in any practical sense responsible to the people. Sovereign power, which must in every government rest somewhere, no longer rests in three co-ordinate departments of government, according to the original conceptions, but rests in the judiciary alone. Such is this modern doctrine. To use an English expression, government has "gone into commission." The Supreme Court is the Sovereign. It is not a "Council of Ten," but a Council of Nine. Its enrobed judges are commissioners vested with the ultimate responsibility of government. Its Chief Jus-

[1] See Kendall *v.* United States, 12 Pet. (U. S.) 524; United States *v.* Shurz, 102 U. S. 378; Butterworth *v.* Hoe, 112 U. S. 50.

[2] United States *v.* Black, 128 U. S. 40; Brashear *v.* Mason, 6 How. (U. S.) 92; Decatur *v.* Paulding, 14 Pet. (U. S.) 492; United States *v.* Guthrie, 17 How. (U. S.) 284; United States *v* Boutwell, 3 McArthur (D. C.) 172 In his dissenting opinion in Decatur *v.* Paulding, 14 Pet. (U. S.) 497, 518, Mr. Justice Catron said: "Between the Circuit Court of this District and the Executive Administration of the United States there is an open contest for power. The court claims the power to coerce by *mandamus* in all cases where an officer of the government of any grade refuses to perform a ministerial duty; and of necessity claims the right to determine in every case what is such duty; or whether it is an executive duty when the power to coerce performance is not claimed. Where the line or demarcation lies the court reserves to itself the power to determine. Any sensible distinction, applicable to all cases, it is impossible to lay down, as I think. Such are the refinements and mere verbal distinctions as to leave an almost unlimited discretion to the court. How easily the doctrine may be pushed and widened to any extent, this case furnishes an excellent illustration."

tice is an enrobed, but uncrowned king. Supported, as he is, by the undoubted confidence of the people, he is like another monarch, described in majestic verse, who —

> "Sat on his throne, upheld by old repute,
> "Consent or custom."

A philosophical cynic, doubting the soundness of his pretensions, might add: —

> "As if his senseless sceptre were a wand,
> "Full of the magic of exploded science."

IX. The Possibilities of Judicial Supremacy.

If some of the able participants in the memorable debate in the American Bar Association could have taken a look forward into the possibilities of the new doctrine of Judicial Supremacy, their hearts would have been filled with unspeakable joy. It would have occurred to them that the power of the Judiciary to superintend all the other departments of Government is capable of indefinite expansion. The Judiciary can, by its writs of *mandamus* and mandatory *injunction*, say to the executive officers of the government, "You must do this." It can by its ordinary writs of *injunction* say to them, "You must not do this." The judges of England never supposed that the writ of *habeas corpus* was an appellate writ; but the Supreme Court of the United States long ago made this discovery,[1] and has been using it ever since in virtue of its appellate jurisdiction; for, with certain limited exceptions, that court has no original jurisdiction under the constitution. The possibilities of this writ of *habeas corpus*, in the hands of courageous judges, are great. By its use, sentinels may be taken from their posts, armies disbanded, and the progress of unjust wars stayed. Then, to think of the possibilities that lurk in the writ of *certiorari*, which is in the nature of an appellate writ, in the judicial superintendence of executive action. Why cannot the President and his cabinet be superintended by means of this writ? Why cannot a proclamation made by the President declaring war to exist between the

[1] Ex Parte Bollman, 4 Cranch (U. S.), 75, 101.

United States and a foreign country be, by means of this writ, ordered *up* and quashed? How easily might the field orders of the President, as Commander-in-Chief of the army, or those of his generals, be overhauled in this way.

Under the advice of the Supreme Court of the United States, an inferior Federal court sent its writ of *mandamus* to the Secretary of State in the cabinet of President Jefferson, commanding him to issue a commission to a justice of the peace which had been made out by Jefferson's predecessor, but which Jefferson determined to recall. This decision barely gives us a glimpse of the possibilities of the writ of mandamus in furthering an actual judicial supremacy in the hands of a courageous judiciary and directed against timid executives. The possibilities of the writ of *injunction* are still greater. When Wat Tyler marched with his rabble upon London to demand something from the King, he and his rabble undoubtedly were, according to the ideas of that day, trespassers upon the property of the King, that is to say, upon the King's highway, as much as Debs, Ratchford, and other strikers were trespassers on the lands of the coal mining company here in West Virginia. But, great as his alarm was, it never occurred to the King to have his Attorney-General sue out a writ of injunction in his Court of Chancery, and restrain Wat and his gang from prosecuting their onward march. That expansion of the use of the writ of injunction has come in our day, illustrating the beneficial flexibility of our judge-made law. It will require but another expansion of the use of this beneficial writ to enable a Federal district judge, by this means, to arrest the march of an army on the theater of actual war. If the march of a mob can be thus arrested, why not that of an army? In both cases the foundation of the jurisdiction is the well-known ground of protecting property or business. Why did not Mr. Jefferson Davis think of this great preventive remedy, and sue out, from some convenient Federal court, an injunction directed to General McClellan restraining him from marching on Richmond? And how gladly would that redoubtable general have obeyed the writ! It would not have been necessary, under those circumstances, for him to delay his march until the roads should get dry.

General Butler might have been restrained in this way from the trespass upon private property committed by him in digging the Dutch Gap canal; and he would have obeyed the writ with equal alacrity, even if it had been served upon him on Sunday; though doubtless he would have demurred to a bill for a mandatory injunction requiring him to tear down his observation tower. In case of the disobedience of such a writ, issuing from a tribunal supreme over all other departments of the government, nothing would be easier than to arrest a commanding general at the head of his troops, although this might disconcert a battle.[1] It is true that judicial supremacy will scarcely be able to find means to coerce the Legislature into the passing of this or that law. But what of that? As long as the judges can legislate, and as long as they can find, in the principles of the common law and of equity, remedies for every wrong and inconvenience, what do we really want of legislative acts? Are there not too many of them already? Is it not an universal complaint that we have too much legislation? Is not the diathesis of statutes an intolerable nuisance? How easily can we dispense with that incongruous, contradictory and ill-made mass of stuff which passes under the name of law. But it will be objected that the Legislature must meet at least to make appropriations of money for the purpose of carrying on the government, and that unless this is done, the judges, although "supreme," can not even draw their salaries. Why so? What are members of the Legislature but trustees of a public trust? And is it not a settled principle that equity will never suffer a trust to fail for want of a trustee? Can not a Federal court, through its own appointed trustees, lay the necessary tax, and levy, collect and disburse it?

[1] That this is no fancy picture, see Matter of Stacy, 10 Johns. (N. Y.) to which I have already alluded, where no less a jurist than James Kent, then Chief Justice of the Supreme Court of the State of New York, issued an attachment for contempt, without any preliminary order to show cause, against General Lewis, commanding the armies of the United States at a military post in the time of actual war. The collision between General Jackson and U. S. District Judge Hall after the battle of New Orleans, which resulted in Jackson sending Hall outside his lines and afterwards being fined $1,000 for contempt, which fine he paid, will be recalled in this connection.

Federal judges in times past have appointed their marshals trustees to collect taxes and discharge judgments against counties and towns;[1] and although this power was denied by the Supreme Court, its decision was not without dissent.[2] Whenever a sufficient occasion arises the court can recall that doctrine, as it recalled its previous doctrine in the cases cited as "State Tax on Railway Gross Receipts,"[3] in the Original Package Case,[4] in the Legal Tender Case,[5] and in the Income Tax Case.[6] Whenever a court, not elected by the people, and not responsible to them, assumes "supremacy" over all other departments of the government,— that is to say, assumes regal powers,— it will easily find means, albeit in the form of lawsuits, to execute those powers. Human nature being what it is, a body which, with the acquiescence of the people, has seized to itself the power to be the final and conclusive judge, not only of its own powers, but of the powers of all other departments of the government, will naturally go on expanding its own powers at the expense of the powers of the other departments, until it meets with serious resistance; and such has been the history of the judicial departments of our governments, Federal and State. It will work like that contrivance in mechanics known as a ratchet, forever moving the weight upward or forward, but never allowing it to recede. I do not for one moment impute to the judges of our day a purpose to carry their "supremacy" to any of the lengths here indicated. They are wise, unselfish and patriotic. But there is no telling how far the judges of the future, encouraged by the enthusiasm of courtier-like doctrinaires and by the lethargy of the people, may go. The bishops of Rome were allowed, by the careless indulgence of the

[1] Welch *v.* St. Genevieve, 1 Dill. (U. S.) 522; Supervisors *v.* Rogers, 7 Wall. (U. S.) 175.

[2] Rees *v.* Watertown, 19 Wall. (U. S.) 107.

[3] 15 Wall. (U. S.) 284; overruled in Philadelphia &c. R. Co. *v.* Pennsylvania, 122 U. S. 326, 344.

[4] Leisy *v.* Hardin, 135 U. S. 100; overruling Pierce *v.* New Hampshire, 5 How. (U. S.) 504.

[5] Hepburn *v.* Griswold, 8 Wall. (U. S.) 603; overruled by the Legal Tender Cases, 12 Wall. (U. S.) 457.

[6] Pollock *v.* Farmers' Loan &c. Co., 157 U. S. 429, and 158 U. S. 601; overruling Hylton *v.* United States, 3 Dall. (U. S.) 171, and Springer *v.* United States, 102 U. S. 586.

Roman Emperors, to assume the jurisdiction of punishing certain petty offenses. Their civil jurisdiction grew until, to their previous title of Pontifex, they added a title which, from the fall of the Tarquins, had been for ages odious to the Romans,— the title of Rex. And Rome herself,—

> "She who was named Eternal, and arrayed
> "Her warriors but to conquer; she who veiled
> "Earth with her haughty shadow, and displayed,
> "Until the o'ercanopied horizon failed,
> "Her rushing wings! O, she who was almighty hailed!

Became the capital of a petty ecclesiastical kingdom. And her monuments were torn down to build convents. And the urn of Trajan, the last Emperor who extended the boundaries of Rome, was taken down from where it stood among the clouds, at the summit of the column wound with the history of his victories, and in its place was put the statue of — of — Peter!

X. Inconvenience of Judicial Supremacy.

"Judicial Supremacy," then, when in full blossom, will not be merely "government by lawsuits;" it will be government by means of every legal writ or process that can be laid hold of for that purpose. It will be government by an extravagant expansion of every legal principle of which the books furnish any account. It will have this serious inconvenience — but this cannot be surmounted — that, in a given exigency, nobody may see fit to bring the necessary lawsuit. But are the wheels of government to stop because Smith does not see fit to sue Jones? Convenient suits can be concocted for the purpose of enabling the court to decide some great question for the people and to put the wheels of its coercive process in motion.

XI. Lack of Moral Responsibility on the Part of Counsel.

But, outside of these considerations, there are others which detract from the feasibility of "government by lawsuits." Under that form of government the courts will possess regal powers, and, under well-known rules of law, the judges will be immune: they will not be responsible for their conduct even when they act outside of their jurisdiction; and if they were answerable for overstepping their jurisdiction, the result

would be the same, since they are the conclusive judges of what that jurisdiction is. The judge in this respect is like the king; he can do no wrong. Moreover, unlike the constitutional monarchs of modern times, the judges have no responsible ministers. The members of the bar, who are, in a sense, their ministers, do not act under any proper sense of responsibility to the public. They do not hold, in a strict sense, any public office; they are not, in a proper sense, the trustees of any public trust. They are paid to represent particular clients, and they are expected, within certain ethical limits, to do and say for their clients what those clients could do and say for themselves if they had the necessary learning and skill. Their position, as the paid agents of particular clients, gives them a license to do and say, within the ethical limits indicated, all that can be done or said in behalf of those clients, without regard to the effect which may be produced by their eloquence or their sophistries upon the public rights. Half of the time on the wrong side in their professional work, they fall into the habit of dismissing moral considerations from their breasts when engaged in that work; and the public excuses them because of their supposed duty to their clients.

Lord Brougham voiced the lack of responsibility of an advocate to his country in the following celebrated passage in his speech on the trial of Queen Caroline: —

"An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among others, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion."

Accordingly, lawyers advance in courts of justice with the greatest earnestness, with the most seeming conscientiousness, and without a thought of their responsibility to the public, propositions which they would not dare to formulate in legislative bills if they were members of the Legislature; and they not

infrequently succeed in inducing the courts to enact those propositions into what is called "judge-made law."

Let me give you a case in point. I know a member of the Missouri bar of the highest standing. In every relation of public or private life no man is more sensitively honorable. But yet, this man succeeded in persuading the Supreme Court of Missouri that three rich men may procure themselves to be incorporated under the general law of that State, for the purpose of engaging in business exclusively for their pecuniary profit; may, in their character as individuals, get in debt to themselves in their character as a corporation; may, in their character as a corporation, get in debt to outsiders; may, finding themselves insolvent in their character as a corporation, transfer to themselves as individuals all the property owned by them as a corporation, for the purpose of preferring themselves as individuals, as creditors of themselves as a corporation, leaving their outside creditors in the lurch.[1] If you have been able to follow me through this thimble-rigging, you will see that the proposition is nothing more nor less than that a man may, by clothing himself with the artificial character of a corporation, become indebted to himself, and then prefer himself over his other creditors. This same lawyer was once an honored member of the Legislature of Missouri. I will ask you — I will ask him — whether, when he held that office, he could have been induced to introduce and promote a bill to enact as a law the proposition which he thus induced the Supreme Court of Missouri to declare. And yet, because he was working for some rich clients who desired to have such a law enacted by the Supreme Court of Missouri for their benefit, albeit a retrospective law,— for no court on earth had ever declared it to be the law before,— because, in imposing this sort of "judge-made law" upon the people of his State, he was working for a client and for a fee, he has escaped the public animadversion. His work is thought to be an able and commendable piece of professional work.

[1] Butler v. Harrison &c. Co., 41 S. W. Rep. 234. At the time of this arrangement, the three rich men held substantially, though not quite all, the stock in the corporation.

This lack of moral responsibility on the part of counsel communicates itself to the court. The judges proceed under the convenient fiction that they are declaring what has always been the law; they come to reason on technical lines and to dismiss moral considerations from their breasts in doing their judicial work, just as they did in their professional work when at the bar; and the "judge-made law" grows crooked and gnarled with technicality, until there is little actual correspondence between law and justice; and until a school of legal philosophers arises to tell us that there ought not to be any such correspondence. On the other hand, the people call a legal rule which is plainly opposed to natural justice a "technicality," and this word has come to be the most odious word in our language.

XII. Want of Intelligent Criticism of the Bench.

Not only, then, does the new doctrine of "Judicial Supremacy" invest the courts with regal attributes, the judges being, like the king, immune, while at the same time the public are deprived of the safeguard of a responsible ministry, — but there is the further want of the correcting influence of intelligent public and professional criticism. Every other department of the government — every other governmental officer, from the highest to the lowest,— comes in for his share of criticism, and for more than his share of ridicule and abuse. I have already alluded to the fact that, generally speaking, the judges escape all criticism; because the public and the lay press can not, and the lawyers dare not, criticise them. It is scarcely too much to say that the judges are like the Emperors of Rome, who, surrounded by courtiers and flatterers, supposed that all was going well throughout their empire until armies began to march against their capital in insurrection.

XIII. "Judge-Made Law" is Retroactive and Ex Post Facto Law.

Another inconvenience of judge-made law, which detracts considerably from the doctrine of "Judicial Supremacy" is that, although the courts are constantly and necessarily legislating, they nevertheless profess to be simply declaring the existing law. It results that, whenever a court of last resort lays down a new rule or abrogates an old one, it makes a *retro-*

active or *ex post facto* law, not only with reference to the particular case in which its judgment is rendered, but, under the operation of the rule of *stare decisis*, with reference to every other similar case, transaction or right existing at the time. All our constitutions prohibit the Legislatures from passing retrospective and *ex post facto* laws: the privilege of passing such laws is reserved alone to the judiciary. Doubtless this is one of the considerations which has made the judiciary so loth to make innovations upon existing rules of law.

XIV. Sovereign Legislation set Aside when Deemed Unreasonable.

The branch of our law which we call constitutional law has run mad. The judges are bound by their official oaths to refuse to enforce statutes which are plainly opposed to the constitution, because they are sworn to support the constitution, and are not sworn to support the acts of the Legislature. But it is a maxim, once acted upon and still mouthed by the judges, that a statute will not be held to be unconstitutional unless its conflict with the constitution plainly appears; and that, when it is susceptible of two meanings, one which brings it into conflict with the constitution and one which does not, the latter will be taken to have been intended by the Legislature, and in that sense the law will stand. This maxim, though still professed, is almost totally neglected by the judges. Statutes devised to prevent oppression of the poor and helpless by the rich and powerful, are set aside by the judges on casuistic and theoretical grounds, without pointing out any provision of the constitution which has been violated. Sometimes no stronger reason is given than the judicial fulmination that this is "an attempt to do what, in this country, cannot be done." [1] Wholesome statutes, such as those designed to prevent coal miners from being defrauded of their wages by means of the "truck store" system — statutes which have many counterparts in England,— are in America annulled by a single stroke of the judicial pen.[2]

[1] Godcharles *v.* Wigeman, 113 Pa. St. 431.

[2] Godcharles *v.* Wigeman, *supra*; State *v.* Goodwill, 33 W. Va. 179; State *v.* Fire Creek Co., 33 W. Va. 188. See also State *v.* Loomis, 115 Mo. 307, 319; Com. *v.* Perry, 155 Mass. 117; *s. c.* 28 N. E. Rep. 1126; Millett *v.* People, 117 Ill. 294; Frorer *v.* People, 141 Ill. 171; *s. c.* 31 N. E.

But the State courts find no difficulty in upholding, on grounds of public policy, statutes providing that the amount written in a policy of insurance shall be the amount recovered in case of loss, and prohibiting the parties from agreeing that the damages recoverable shall be the actual value of the property at the time of the loss.[1] The court which overthrew, in the flippant language already quoted, a "truck store act," designed to protect a humble and useful class of laborers from imposition at the hands of their employers, had no difficulty in upholding a statute making it unlawful for *unincorporated* persons to write policies of fire insurance.[2] And the same court found no difficulty in upholding a statute prescribing the form of a fire insurance policy, provided the Legislature, and not the insurance commissioner, did it.[3] Nay, it is no longer necessary, as was once thought,[4] to enable a judge to annul a statute, for him to find that it conflicts with some express provision of the constitution: he may annul it if he finds that it conflicts with those implied reservations upon the power of the Legislature which exist in all free governments,[5] and those implied reservations are whatever the judge chooses to imply. The police regulations of the States thus lie at the feet of the judges. Any attempt to extract from the judicial decisions any consistent statement of where the police power ends would result in piling up a mountain of incoherent dicta. Nay, more; the Federal judiciary have begun to deal with the statutes of the States exactly as the common law

Rep. 395; Ritchie *v.* People, 155 Ill. 98; Low *v.* Rees Printing Co., 41 Neb. 98; *s. c.* 59 N. W. Rep. 362; Coal Co. *v.* People, 147 Ill. 66; Ramsey *v.* People, 142 Ill. 380; Leep *v.* Railway Co., 58 Ark. 407, 416. Leading papers on this subject are: Mr. Judson, 23 Am. Law Rev. 871; Mr. Labatt, 27 Am. Law Rev. 857; Mr. Woodward, 29 Am. Law Rev. 236; Mr. Bayard, 30 Am. Law Rev. 1.

[1] Riley *v.* Franklin Ins. Co., 43 Wis. 449; Queen Ins. Co. *v.* Leslie, 47 Pa. St. 409; *s. c.* 24 N. E. Rep. 1072.

[2] Com. *v.* Vrooman, 164 Pa. St. 306; *s. c.* 30 Atl. Rep. 217.

[3] "We do not now deny the power of the legislature to direct the form of a policy of insurance against fire." O'Neil *v.* American Fire Ins. Co., 166 Pa. St. 72; *s. c.* 26 L. R. A. 715.

[4] Sharpless *v.* Mayor, 21 Pa. St. 147, 161.

[5] Loan Association *v.* Topeka, 20 Wall. (U. S.) 655. Oddly enough, this case was the shibboleth of the Democratic party, in its presidential campaign of 1892, when assailing the power of Congress to pass a protective tariff law.

judges dealt with the by-laws of corporations, and to set them aside when deemed improper or unreasonable.[1] Indeed, constitutional law has so far run mad, that it has come to be the popular understanding that a statute, at all novel in its provisions, is to be regarded as "no good" until "tested" in the courts by some case gotten up for that purpose. This knowledge that their work is to undergo a subsequent scrutiny by another branch of the government, and is to go for naught if frowned upon by the judges, creates a corresponding sense of want of responsibility on the part of the members of the Legislature. If a suggestion is made to them that a bill proposes an unconstitutional law, the answer is, "What of that? our work is experimental merely; the judges will determine whether it is valid or not." The members of the Legislature regard their work as little more than proposals to the judges for laws, which the judges are to accept or reject according to their interpretation of constitutional provisions, according to their theories of implied reservations upon legislative power, and according to their casuistic views upon economical or social questions. The result is that they pass, with a deplorable levity, statutes of doubtful validity, and even of no validity.

XV. Signs of Revolt against Judicial Supremacy.

There are some signs of revolt against the new doctrine of Judicial Supremacy. While the masses of the people repose a just confidence in the integrity, sense of justice and patriotism of the judges, the disposition to criticise their work increases as the intelligence of the people rises. Great opposition has recently appeared to the extension of the use of the injunction into matters of crime in connection with labor insurrections; and while such use can generally be vindicated upon settled legal principles, yet the people see in it a curtailment of the right of trial by jury in criminal cases. Notwithstanding the decline of confidence in the jury system in civil cases which I have already pointed out, the right of trial by jury in criminal cases and in contests with corporations, remains dear

[1] See Allgeyer v. Louisiana, 165 U. S. 578, 589, 591, where a statute of Louisiana was held unconstitutional because it abridged the liberty to enter into "proper" contracts.

to the people. If the grounds of their affection could be analyzed, they would be found to be threefold: 1. The dread of submitting the determination of questions involving their lives and liberties to a professional class of men. 2. An unwillingness to trust that class with the decision of all questions of law and of fact in contests between themselves and wealthy persons and corporations. 3. A desire to preserve a popular negative upon the enforcement of the laws in hard cases. Outside of this, the average citizen understands that, as an historical fact, the right of trial by jury has generally been, in all countries, coincident with freedom. This opposition to the extension of the injunction, followed by process of contempt, with a trial before a judge, by the inquisitorial methods of the civil law, has recently gone so far that one of the greatest political parties assembled in national convention, last year denounced, in its political platform, what is called "government by injunction." So great was the political feeling on this question that if that party had left out seven words from its platform, the words "at the ratio of sixteen to one," it would in all probability have elected its candidate. Nor is this feeling confined to the Western, or so-called anarchistic portions of our country. It exists in the East as well, and both of the divisions of one of the great political parties lately struggling for the possession of the government of the American metropolis embodied it in their declarations of principles.

XVI. Rise of Lynch Law.

Another revolt against the new doctrine of Judicial Supremacy is found in the rise of what is called Lynch Law. It is now known that, throughout our country, more than twice as many criminals suffer death at the hands of mobs as at the hands of the courts. This revolt is a revolt against the delays and failures of criminal justice which have been produced by the ingenuity of lawyers and the casuistry of judges. At its foundation lies a feeling of profound disapproval of the existing administration of criminal justice; a feeling which, as I have said, has made the word "technicality" the most odious word in our language; a feeling that there is altogether too much constitutional law for the benefit of thieves, ravishers and

murderers; a feeling that if the lawyers and judges do not give safety to our homes, to our wives and our daughters, we will take the matter into our own hands and achieve such safety by swift and summary methods. I do not approve of lynch law; I deplore it. I also deplore the manifest causes that have produced it. The blame for the existence of those causes lies at the door of our profession. In the neighboring country of Canada, where they are not cursed with as much constitutional law as we are, but where they have the same freedom as we have, and more security,— murderers are hanged within three or four months after the commission of the crime; and I have never heard of but one case of lynch law in that country, and that was in the Northwest Territory.

XVII. Turn now to the Legislature.

If we turn from this picture to the Legislature, what relief is afforded to our eyes? The work of the courts is so much superior to that of the legislatures that the people, who are correct in their conclusions in the long run, have entirely lost confidence in their legislatures, while they retain a measure of confidence in their courts. The reasons are not far to find. They were stated with great clearness by Governor Griggs, of New Jersey, in his address before the American Bar Association at its last meeting. While nearly every other work in our complicated civilization is committed to trained experts, it is supposed that anybody can make laws. An ignorant political heeler or ward bummer is good enough to go to the capitol for that purpose. The legislatures have so declined, through their work being discredited by the courts, but chiefly through the fault of the people themselves in electing incompetent men to make their laws, that it is no longer an honor to be a member of a State Legislature. The office is sought chiefly by young lawyers, by men who are ambitious to make a start in political life, or by men who have private ends to subserve, either for themselves or others. The intertangled mass of ill-advised, ignorant, contradictory and badly worded legislation which is turned out at each session of any State Legislature, — together it must be confessed with some good and wholesome laws, — is appalling. In the last Legislature of Massachusetts thirteen hundred bills were intro-

duced; in that of New York four thousand five hundred and thirty-three; in that of New Jersey six hundred and fifty-seven; in that of Pennsylvania one thousand five hundred and sixty-six; in that of Illinois one thousand one hundred and seventy-four. While the other State legislatures no doubt exhibit the same industry in what Governor Griggs aptly called the work of turning conceptions into laws.

The following collection of crank legislative bills, which were introduced in the legislatures of last winter, was made by the industrious editor of the Chicago *Legal Adviser*:—

After a brief discussion the Kansas Legislature has decided to permit women to wear bloomers and corsets.

A bill has been introduced in the lower House of the Missouri Legislature, making it a penalty, punishable by a penitentiary sentence of five years, for a married man to be found guilty of matrimonial infidelity, under any circumstances whatever.

A bill has been introduced by a populist member of the Kansas senate, which provides for letting out all county offices to the lowest bidder. This ought to be entitled a bill to foster bribery.

A bill prohibiting the wearing of high hats by ladies in public gatherings, where an admission is charged, is likely to pass both houses of the Indiana Legislature.

Representative Hood, of the Missouri Legislature, has introduced a bill forbidding railway conductors and brakemen from flirting with female passengers. Violations of this law will be punishable by a fine of $25, payable by the corporation owning the railroad, they being held responsible for its enforcement.

A bill before the Legislature of California provides that two photographs shall be taken, at public expense, of every voter registered; one set to be placed in a book in alphabetical order of names, and the other in another book arranged by streets and numbers of rooms in houses.

A bill has been introduced in the Minnesota Legislature which provides that any person who shall give, or offer to give, or send flowers or any other token of sympathy or admiration to a person under arrest, charged with a crime amounting to a felony, or is under or awaiting sentence for a crime amounting to a felony, shall, unless such person stands in the relation of husband, wife, child, parent, brother or sister of such criminal accused, or is an ordained minister of the gospel, be guilty of a misdemeanor, and on conviction thereof, be punished by

imprisonment in the county jail for a term of not less then fifteen nor more than ninety days.

Among the bills recommended for passage in the Indiana House has been one making it unlawful to play football in that State.

A member of the Pennsylvania Legislature has proposed a bill by which the custom of "treating" is to be declared illegal, and a penalty put upon the offender.

The lower house of the Tennessee Legislature has passed a bill providing that all contracts hereafter made in that State, which stipulate for payment in gold, shall be void to the extent that they stipulate for such payment, and that all such contracts may be lawfully discharged in any kind of legal tender.

The Legislature of Indiana has before it a bill which provides a tax of $10 per year on every man wearing chin whiskers or "burnsides," and a lighter tax on goatees. Mustaches are exempt.

In the Legislature of Kansas, a bill has been introduced and solemnly referred to the Committee on Judiciary, to enact the Ten Commandments as part of the statutory law of that singular Commonwealth.

It is some relief to know that, of the enormous number of bills introduced into every Legislature, only a small proportion, not more than one-fifth, never more than one-half, succeed in passing; and that many of them receive their quietus through the Governor's veto. But notwithstanding this, the numbers that crowd themselves between the lids of the books of session laws is a subject of alarm. It is not the numbers merely that furnish just ground for concern, for the work of the Legislature never equals that of the courts. While the Legislature turns out one volume in two years, the appellate courts of the same State may turn out ten or even twenty volumes of reports in the same time. It is the mass of ignorance, incongruity, contradiction, inaptness and unsuitableness,— the result of new laws made by men who have no idea what the old laws are, or what new laws are needed, that appals. It is true that there is much confusion and contradiction in the opinions of the highest appellate courts — judges forgetting their previous decisions and overruling them without noticing the fact; rendering heated opinions which overturn all sound principles and merely illustrate the supreme thought or passion of the hour. But yet the contrast is so wide between the legislative rabble and the weak twaddle

of which the speeches made in legislative bodies so often consist, and the judicial courts, sitting with dignity, listening to solemn argument, examining every question presented to them with some degree of learning, care and deliberation, with the view of ascertaining what, in every case, law and right are, — that even the most unenlightened appreciate the difference. Another principal reason for the disparity in power and influence between the legislatures and the courts is that the legislatures meet infrequently and are limited to short sessions; while, with the exceptions of brief vacations, the courts are always at work, "sapping and mining," as Mr. Jefferson would say; but, as we see, know, and feel, forever moving forward like a glacier, overcoming all resistance, crowding all obstacles from their path, and thus establishing "Judicial Supremacy." It is simply an illustration of the natural law by which steady and persistent force overcomes irregular and spasmodic force.

XVIII. Clipping the Wings of the Legislatures.

Most of the constitutional changes of recent years have taken the direction of curtailing, in some way, the power of the legislatures. To prevent frauds upon legislation, it has been ordained that no bill shall contain more than one subject, which subject shall be plainly expressed in its title. To secure uniformity of laws and rights, and to prevent as far as possible the evil of "log-rolling," it has been provided that no local or special law shall be passed relating to an enumerated class of subjects. To secure the necessary attention to each bill, every bill is to be read three times and generally on three different days, in each House, and when it is passed and signed by the speaker, he must announce that fact aloud to the House. In many States, while the Legislature is in session, the business community is in a modified state of terror. Measures are introduced and their passage pressed, for the mere purpose of having them bought off by the interests to which they are inimical; and the feeling is strong that an extension of the time of legislative sessions is an extension of the opportunities for legislative wickedness. Accordingly, the duration of the legislative sessions has been limited to short periods,— in my State, the ordinary sessions to seventy days; in this State, I believe, to sixty days.

After the expiration of that period the members get small pay, or no pay at all. The public thus treat their legislatures very much as they treat houses of prostitution and dram shops in large cities,— as necessary evils which cannot be entirely eradicated, but which ought to be curtailed as far as possible. I doubt the expediency of too much curtailing the duration of the legislative session. In sixty or seventy days there is not time enough for the members to get acquainted with each other, and to do any considerable amount of sedate and deliberate work.

XIX. A Limited Initiative and Referendum.

It seems to me that what is really wanted as far as constitutional changes can effect a reform, is not, to limit the duration of the sessions, as much as to check the indiscriminite right of every member to introduce bills. There ought to be some sort of *initiative*,— either the recommendation of the Governor, or the concurrence of the heads of the principal departments of the State government, or a petition by a stated number of citizens, or, in the case of bills creating changes in remedial justice or legal procedure, the recommendation of a certain proportion of the judges or of the bar. Then I differ from Governor Griggs about the feasibility of the new idea of a *referendum* to the people before a given measure shall become a law. As a check upon legislative corruption, especially in the matter of bartering away valuable franchises, I would give that system a limited trial. Laws granting or renewing special franchises to corporations ought, it seems to me, to be submitted to the inhabitants of the municipalities affected by them; and if they are general in their nature, to the inhabitants of the whole State. The bill known as the Adams' Bill, which passed the last Legislature of Illinois, would never have been ratified by the voters of Chicago, much less by those of the whole State. In these two principles, the initiative and referendum, experimentally introduced at first, and carefully hedged and guarded, will be found the germs of a large and substantial reform. We have in some States the referendum already with reference to some local matters, such as the licensing of the sale of intoxicating liquors, whether agricultural lands shall be fenced or cattle restrained, etc.

XX. Destruction of our Free Legislatures.

But, after all, at the root of the evil of bad and excessive legislation lies a lethargic public opinion. The people ought to be aroused to the necessity of sending better men to their legislatures; and in this matter the legal profession, charged in a peculiar sense with the execution of the laws, and hence the leaders of public opinion, have a grave duty to perform. We should labor without ceasing to reform and strengthen the weakest, but the most important branch of our free governments. No nobler task can command the exertions of the great and powerful profession to which we belong. Let us remember that in our past history the halls of legislation have been the rallying-places of liberty. It was in the House of Commons that Hampden denounced the collection of the Ship Money, while seven of the twelve judges opposed him. It was in the House of Burgesses, of Virginia, that Patrick Henry electrified the colonies by the immortal declaration, "Give me liberty or give me death." Our first charter of liberty — our Declaration of Independence — was promulgated by a free legislative assembly; the Dred-Scott Decision, by a judicial court. As a member of the legal profession, as a well-wisher of his country, I solemnly protest against the destruction of our free legislatures, whether by unwise constitutional curtailments, or by the new doctrine of "Judicial Supremacy."

XXI. The Supreme Court of the United States.

In his letter to his brethren on the occasion of his retiring from the office of Justice of the Supreme Court of the United States, an office which he had held more than thirty-four years, a period exceeding that of Marshall or any other member of the court,— the venerable Justice Stephen J. Field used this language: —

"If it may be said that all of our decisions have not met with the universal approval of the American people, yet it is to the glory of that people that always and everywhere has been yielded a willing obedience to them. That fact is eloquent of the stability of popular institutions, and demonstrates that the people of these United States are capable of self-government. As I look over the more than a third of a century

that I have sat on this bench, I am more and more impressed with the immeasurable importance of this court. Now and then we hear it spoken of as an aristocratic feature of a Republican government. But it is the most democratic of all. Senators represent their States and Representatives their constituents, but this court stands for the whole country, and as such it is truly 'of the people, by the people, and for the people.' It has, indeed, no power to legislate. It can not appropriate a dollar of money. It carries neither the purse nor the sword. But it possesses the power of declaring the law, and in that is found the safeguard which keeps the whole mighty fabric of government from rushing to destruction. This negative power, the power of resistance, is the only safeguard of a popular government, and it is an additional assurance when the power is in such hands as yours."

It may seem ungenerous to offer even a word of dissent from language used on so solemn and pathetic an occasion, by a judge so eminent, by one who is held by the bench, the bar, and the people of our country in such an affectionate veneration. But a possible doubt may come into the popular mind as to whether the Supreme Court of the United States is the most democratic feature of all our institutions. It is in fact the least democratic of all. It is removed three degrees from the people. Its judges are appointed by a President who is not directly elected by the people; they are confirmed by a Senate whose members are not so elected. The President who appoints the judges is elected by a body of electors elected from the different States, and they are confirmed by a Senate elected by the legislatures of the different States. We have had Presidents who did not represent the majority of the popular vote, notably, John Quincy Adams and Rutherford B. Hayes. In the Senate the least populous of the States have a representation equal to the most populous. The forty thousand people of Nevada count as much in that body as the six or seven millions of New York. The Senate is in no just sense a representative body. Not only are the judges of the Supreme Court not appointed or elected by the people, or by officers directly elected by the people, but in case of an impeachment of any of them, the impeachment would be tried by the Senate, which, as I have shown, is a non-representative body. Nor do the judges of the Supreme Court

surrender to the people their official trusts at stated periods, as most other officers of our general and State governments do. I am therefore at a total loss to understand in what sense it can justly be said that the Supreme Court is "of the people, by the people, and for the people." Its strength and steadiness consist in the fact that it is not a democratic institution. Out of touch with the people, it is not swayed by the thought or clamor of the hour. It is well for the people that it is not so swayed. It is for the people in much the same sense that the King, the Emperor, the Pope is for the people. It is not for them in the sense that it is a part of them, or that it depends upon them. It indeed possesses the power of declaring the law; but I am not prepared to assent to the conclusion that "this power keeps the whole mighty fabric of government from rushing to destruction." The power to declare the law resided in the judges of England, but it did not prevent the Revolution of Cromwell, which "hewed the throne down to a block;" nor did the power of the Cromwellian judges prevent the restoration of Charles II.; nor did the judges prevent the revolution which placed the scepter in the hands of William and Mary. Our Supreme Court possessed the power to declare the law at the time when it rendered the Dred Scott decision, but that did not prevent the Civil War. Its judges, for the most part, had the good sense not to attempt to interfere with the operations of that war. They sat in their judicial robes and administered justice with courage, dignity, and decorum while the thunder of hostile cannon could be heard across the Potomac.

XXII. Its Power to Amend the Constitution.

It is not merely the power to declare the law which makes the workings of that great tribunal so beneficent. It is the power to expound, and incidentally to amend, the constitution, that gives the court its transcendent importance. The constitution is the briefest political code. Its framers could not think of everything, foresee everything, provide for everything. Nevertheless, as it cannot be amended except with the consent of three-fourths of the States, formal amendments cannot be made except to meet the greatest exigencies. What a blessing

it is, then, for the people to have a wise, learned and patriotic bench of lawyers who can amend it by a progressive interpretation. For example, our fathers, who framed the constitution, some of them great lawyers, in drafting the judiciary article, forgot to say anything about corporations. How convenient, then, to have the word "citizen," as used in that article, interpreted so as to mean "corporation,"— a body which might be composed of non-residents, or aliens, or even of free negroes, who, under the Dred Scott decision, could not be citizens of the United States so as to sue in its courts as individuals. Without this useful amendment, the cherished corporations, which have done so much in promoting our industrial development, would have been remitted for their justice to the beggarly elements of the State judicatories. Moreover, this convenient power of amendment may be exercised back and forth according to changing times and exigencies. It may make the venerable instrument read so as to allow Congress to levy an income tax without an apportionment in time of war,[1] and to prohibit it from doing so in time of peace.[2] The exercise of this convenient power of amendment may be necessary, under imaginable circumstances, to prevent a revolution.

XXIII. The Keystone of the Arch.

Nor do I assent in its full meaning to the statement that "it is to the glory of the people, that always and everywhere has been yielded a willing obedience" to the decisions of that court. The statement is not true. A willing obedience was never rendered to the Dartmouth College decision, and it has been so far curtailed by a rising and expanding police power that it has nearly passed out of our constitutional law. A willing obedience was not rendered to the Dred Scott decision, and it was reversed, as I have said, upon the field of battle. A willing obedience has not been rendered to the Income Tax decision, and it will be reversed by the popular action whenever it becomes really necessary to raise revenue in that way. Nor do I assent to the conclusion that it is, under all circumstances, to the "glory" of

[1] Springer v. United States, 102 N. Y. 586.

[2] Pollock v. Farmers' Loan &c. Co., 157 U. S. 429, and 158 U. S. 601.

a free people that they yield obedience to the decrees of a non-elective body of lawyers. Those decrees may be right, and they may be wrong. In times past they have often been wrong; though in the case of the Supreme Court of the United States they have generally commanded the assent of the people. That statement is as much to the glory of the court as it is to the glory of the people. It is safe to say that, in future, the work of that court will command the approbation of the people as long as it deserves it. I do not seek to minimize its importance in the general workings of the government. I yield to none in the high esteem in which I hold it. It has been justly called the balance-wheel of our complicated Federal system. It is indeed the Keystone of the Arch. I should be ashamed to stand before an audience of my professional brethren and to say that the fabric of constitutional law which it has slowly and laboriously built up, does not, on the whole, command my reverence and admiration. What sort of a government would we have without that body of constitutional law? What a chaos it would be but for the 25th section of the Judiciary Act. But I deny that we are to extend to that, or to any other court, a fetish worship. I deny that it is so exalted that its proceedings do not deserve the same watchful vigilance on the part of the people which they bestow upon the other departments of their government. There can be no such thing as judicial infallibility. I have pointed out some of its manifest tendencies — tendencies towards the aggrandizement of its own jurisdiction, at the expense of the powers of all other departments of government, Federal and State. I have pointed out some of the possibilities of a further aggrandizement of those powers. I have shown that, in the nature of things, that process of aggrandizement must go on so long as it is unchecked; since the body that is the conclusive judge not only of its own powers, but of the powers of all other departments of government, will aggrandize its own powers at the expense of the others. At the same time, I trust I am not an alarmist. I do not see in the court, as now constituted, any disposition to undermine and subvert the fabric of our government. Those judges, although non-elective, have no more motive for destroying the splendid fabric which they

and their predecessors have assisted in building up, than the King has to destroy his kingdom, the Emperor his empire, or the Pope and Cardinals their Church. While they have no motive for oppressing the people, their unquestioned tendency, in the great struggle which is coming between aggregated wealth and power on the one side, and the segregated masses on the other, is to side with wealth and power, and with the cultivation and intellect which go along with wealth and power. If that court is a conservator of the rights of property, it may be said that those rights need conservation against the modern spirit, rising and hourly increasing in strength, which is distinctly antagonistic to those rights. The right to hold and enjoy property, rightfully acquired, is of the very essence of liberty. Nor can we forget that the court has been equally zealous in upholding personal liberty, even as against military oppression. When the Civil War ended, and it was thereafter sought to try citizens by military commissions for crimes committed in connection with that war, the Supreme Court laid its heavy hand upon those who were making the attempt and said, "This shall not be done."[1] When at the close of the Civil War, the Congress and some of the States sought to impose a test oath as a condition precedent to the right to practice law, the court said "No."[2] When the United States sought to hold, without rendering compensation, the estates of General Lee, which it had seized for military uses during the Civil War, the court again said, "This shall not be done."[3] When the Congress, stimulated by the motives and feelings of the Civil War, undertook, through the so-called Civil Rights Law, to impose police regulations upon the States, the court again said, "This shall not be done."[4] In the celebrated Slaughter-House cases, the court upheld the rights of the States to control their domestic concerns.[5] The court, as was well said by one of its most distinguished members,[6] is for the supremacy of the government, and also for

[1] Ex parte Milligan, 4 Wall. (U. S.) 2.

[2] Ex parte Garland, 4 Wall. (U. S.) 333; Cummings v. Missouri, 4 Wall. (U. S.) 277.

[3] United States v. Lee, 106 U. S. 196

[4] Civil Rights Cases, 109 U. S. 3.

[5] Slaughter-House Cases, 16 Wall. (U. S.) 36.

[6] Mr. Justice Harlan.

State's rights. The people owe it a debt of gratitude which they will never cease to render. It will never be unseated in their affections until it deserves to be.

It is true — and there is great potency in the expression — that it possesses the power "to declare the law." It does not legislate directly; but when it lays down a rule of law in a contest between two suitors, it in effect publishes to the rest of us that when we bring a similar case before it for decision, it will decide it in the same manner. In that way it spreads among the people a silent but all-pervading law. It is true that you and I are not in strictness bound by a decision which any court may render in a lawsuit between Smith and Jones; as to us it is *res inter alios acta*, except in so far as we are admonished that the court will render a similar decision on the same state of facts in any suit to which we may be a party. The law that touches the defeated party in a civil action — that touches the convicted prisoner when called up for sentence — that touches you and me — is nothing more than *what the judge is going to say*. It may not be "glorious," but it is a part of good citizenship, to yield obedience to that kind of law, although our elected representatives did not make it. Surrounded as we are by that law, it may be truthfully said that we are "lapped in universal law." The Great Tribunal has, indeed,

> "———————— moving everywhere,
> "Cleared the dark places and let in the law,
> "And broke the bandit holds, and cleansed the land."

But, with all this, we cannot have Judicial Supremacy. We are still a self-governing people, and we will not have it. In the language of Mr. Hamilton, it is "the very definition of tyranny."

SOME SUGGESTIONS TOUCHING STATE AND LOCAL TAXATION.

BY D. C. WESTENHAVER, ESQ.

Very little attention on the part of the people in general has been given to the question of State and local taxation, and the sum total of knowledge on their part, respecting the nature and effect of such taxation, is exceedingly small. During the past fifteen years the battle of national politics has been waged in the main around the Federal taxing system. Into these battles have been thrown a tremendous expenditure of energy, time and money, with the result that everybody feels that he knows all that there is to know on the subject, even though the system itself may fall far short of what expert opinion pronounces to be the best. On the other hand no public discussion of any importance has been had of State and local taxation; and as the latter touches the business and enterprise, the comfort and well-being of the people in all their industrial relations, no question calls for more immediate and thorough study, or will repay more liberally for the time thus spent.

The most noteworthy phase of all modern governments is the increasing call for more revenues. E. L. Godkin, the acute and discriminating author of the Problems of Modern Democracy, observes with much force, that this increasing expenditure threatens to land, at no distant day, many of them in bankruptcy. This tendency is noticeable in the United States at the two extremes of our political systems, in the budgets of the Federal government at the one end, and in the budgets of the counties and municipalities at the other, while for reasons peculiar to themselves, and much regretted by many sound political thinkers, the States of the Union have not participated, except in a lesser degree, either in the increase of expenditure, or in the increase of debts. The anger of the people at the

failure of the internal improvement policy undertaken by the States between 1830 and 1845, led to the general adoption of a constitutional provision, forbidding the contracting of State debts, except in small sums, or in certain emergencies. These constitutional limits, coupled with the immunity from suit and compulsory process, enjoyed by a sovereign State, have effectually destroyed the credit of the States, crippled their usefulness, and prevented the growth of the governing functions; and, in consequence, the States have sunk into comparative insignificance, while the Federal nation and the municipalities have grown steadily in importance, extended the sphere of their activity, and increased their expenditures and rate of taxation.

That my remarks with respect to the increasing burden of debt and taxes may not seem the language of exaggeration, I shall descend briefly into details. The increase of local debts is the most significant fact, for it shows the extent to which the public is spending in excess of its income from all sources. The indebtedness of cities, that is of towns having a population in excess of 7,500, in 1870, was $352,800,000, in 1880 it was $698,270,000, and in 1890, as shown by the census of that year, it was $724,463,060 divided among 7,719 cities. The debts of the counties in the decade from 1880 to 1890 had grown $20,943,018, and aggregated at the end of the period $145,048,045.

The one bright side to this record may be found in the fact that during the last two decades the States reduced their debts more than $100,000,000, but this was done, as already explained, as the result of conditions that leave little cause for congratulation — results that endanger the just balance of powers, between State and nation, which our constitution implies as necessary to our dual system of government.

Accompanying this increase of local indebtedness is an increase in the local tax rate equally marked. The city of Baltimore has just levied a tax of $3.00 to each $100 of the valuation. The census of 1890 shows the rate in Chicago to have been $6.42 on the $100.00 and the average in the

cities of the State, with a population above 4,000, to have been over $5.00 on the hundred. The States of Iowa, Kansas and Nebraska are quite as bad. The State of Colorado averaged nearly as high as $4.00. The general average of municipal taxation in the East and South in cities with a population over 4,000 is much more conservative, but as shown by the census of 1890, the average would appear to reach nearly if not $2.00 on the hundred, and in large cities a rate of $2.50 and $3.00 is not unusual. The returns of the rate of taxation for the year 1880 are too meager to make any general comparison as to the increase during the period, but wherever figures are given, they almost uniformly show an increase in the local tax rate as well as in the extent, of the indebtedness. The Pennsylvania Tax Commission, however, made a report in 1878, in which it gives the relative increase of population, wealth debt and tax rate in fifteen of the principal cities of the country between 1860 and 1875; thus population increased during that period 70.5 per cent, taxable value, 156.9, debt, 270.9, and the rate of taxation 363.2.

So far as we can tell from the census reports the foregoing rates include the State, county and other local tax rates. In West Virginia, notwithstanding the constant complaint one hears, the rates are, by comparison, low. In the city of Martinsburg, the burden on all accounts including State and county, is $1.95 on the $100; in the city of Wheeling, $1.42; in the city of Parkersburg, $2.45, of which $1.10 is wholly for municipal purposes; in the city of Charleston, the rate is $3.45, of which $1.25 is wholly for municipal purposes. We have no rate from Huntington for the current year, but that given in the census report of 1890 places the rate at $2.93 which it is not likely has since grown less.

In view of these facts we may take it as true that these mortgages of the future in the shape of bonded indebtedness have been assumed at a time when the revenues from taxation have been enlarged by a greatly increased tax-rate

The superficial observer, who glances over these figures,

is quite apt to say that the money has been squandered by the cities; that the remedy lies in a suffrage restricted to property holders, or at least to such as have a personal stake in the welfare of the municipality; that cities should be prohibited from contracting debts, and restricted in the rate of taxes they may impose. As an understanding of the cause of this increased debt and tax-rate is essential to a clear comprehension of the problem to be dealt with, let us examine hastily these views.

To restrict the suffrage is an impossibility, for no people can be found willing to surrender by their voluntary action the privilege of participating in all the functions of government — a privilege gained by long years of struggle. Nor, indeed were such restriction possible, do we regard it as wise or expedient; manhood suffrage, with all its blunders, is so valuable as a safety valve for discontent, that there is no alternative between it and government by the repressive force of absolutism. One may accordingly dismiss from consideration any idea of narrowing the base of popular institutions, as being both unwise and impracticable. I desire, however, to record my dissent from the time honored notion that the ignorance of the mass, or the willingness of the poor and thriftless voters to spend the money of the rich, or to tax them, has in any appreciable way contributed to the increase of the tax rate and local indebtedness. In making this statement, I merely give expression to what I believe is the general conclusion of modern investigation. The Pennsylvania Tax Commission of 1878 says: "The undue accumulation of debt in most of the cities of Pennsylvania has been the result of a desire for speculation on the part of the owners of the property themselves." In explanation of this statement, the Commission adds: "Large tracts of land outside the built-up portions of cities have been purchased, combinations made by men of wealth, and councils besieged, until they have been driven into making appropriation to open and improve streets and avenues in advance of the real necessities of the city. In many of these cases, owners of property need

more protection against themselves, than against the non-property holding class." H. C. Adams of the University of Michigan, in his "Public Debts," said by competent authorities to be the ablest book on Finance written in English, expresses the same opinion. Prof. Richard T. Ely, who is too well known to need an introduction to any circle of educated readers in the United States, in speaking to the same point, said: "Universal Suffrage is alleged to be the cause, and it is said the poor vote away the property of the rich. The facts do not tally with the theory. I have looked into the matter with care and I think I have had some facilities for so doing. I know of no American city, which is not controlled by wealth. The truth is this: *Unscrupulous wealth uses vicious poverty as a tool;* not that all wealth is unscrupulous, nor all poverty vicious." And in many places in his published works, he expresses the view that the wasteful expenditures in city governments and the debts of cities so far as they are not honest, may be traced to the influence of speculative schemes of property holders.

The simple truth is — and herein lies the chief fact of the whole subject — that this increase of indebtedness and in the rate of taxation is not due in the main, or even in the large part to jobbery or corruption, or wasteful extravagance, but is due to an extension of the sphere of governmental activity, calling for larger revenues, which our antiquated systems of State and local taxation are inadequate to produce. I repeat, governments as now organized are expected, nay, compelled by the wishes of the people, to assume new functions and undertake new duties. The industrial development, or the genius of the age, or what is the same thing, the prevailing belief of thinking people, has set new tasks for governments, which they must assume and perform, and which, in this era of Democratic self-government, cannot be shirked. Our property tax — for such in the main, is our system of State and local taxation — was built up under a condition of things, when society and industry and government were not complex; and while it was sufficient as a producer of revenue, for a

simpler age, it is now on the point of a complete collapse. Either government must be contracted into narrower fields, or new sources of income must be found by the States and municipalities.

These are but generalities. Let me descend to particulars. Local political units, as we have seen, show the chief increase in debts and tax-rates; hence for the cause of the increase, we should look to the expenditure of the municipalities, where fortunately the literature and statistics of taxation are abundant and easily accessible.

The humanization of society during the past century lies at the bottom of the situation. Our criminal laws have become ameliorated until the preservation of society would seem to demand greater severity in dealing with criminals. The conscience of mankind has quickened, till slavery once universal was regarded as a curse and swept from the face of the earth. Such tender pity was felt for the poor, struggling debtor, that imprisonment for debt was abolished and he may nowadays do business as an agent and board in a palace with his wife, while the creditor is driven to the wall through inability to collect his debts. An age, the conscience of which can in so short a period produce such a revolution in social standards, may, of course, be expected to look out liberally for the afflicted. Consequently, care for the insane, the deaf mute and the blind have called for larger expenditures year with year on the part of our government. Criminals instead of being hanged, or transported as punishment, are now to be reformed, and reform schools for male, and reform schools for female offenders, occupy a place in the tax budgets of civilized States. Even the incurables no longer tax the energies of their friends, or the patience of their neighbors, but are made a charge upon the State.

These are a few of the new duties, which fall to the States. When we come to the local political units the increased burdens are much greater. A century ago, citizens of a municipality hung lighted lanterns on the corners of their houses in the place of street lights, and diners-out

had to travel homeward in parties to protect themselves from footpads. Thorough, complete lighting as an aid to the safety and policing of a city, is a growing necessity, and has been an increasing burden on the city; but scarcely a city in the civilized world can be named where foot passengers are not now wholly safe at all hours of the night. In the same connection may be mentioned the fact that the police department of a large city, or one even of ordinary size, is a constantly growing charge; but as a reward, a George Gordon riot could not arise to-day and run its course in London or any known city.

The same is true of the Health Department. "Disease springs from filth, and filth is the natural consequence of crowded quarters. Cleanliness cannot be expected where many people are packed together, unless made the care of government." Accordingly, a large part of the debts as well as of the local taxes of large cities are for sewerage, the cleaning of the streets, the removing of snow and other regulations necessary to provide complete sanitation and comfortable habitations. The reward, however, is found in the fact that epidemics of cholera, plague and other diseases, which depopulated countries a few centuries ago, and ravaged a great number of American cities not many decades ago, have been avoided and the safety of mankind assured.

Schools and libraries, manual training, the making and paving of streets, the supply of water, all tell the same story in the tabulation of the indebtedness of city, and in the increase of its tax-rate. No one will gainsay the necessity for the rapidly increasing outlay for education, and the break-down of the apprentice system requires also the substitution of the manual training schools. Public parks, recreation grounds, even public baths may be regarded as necessary in the government of a crowded city; and are being furnished by them at an increasing cost. Provision for the housing of the poor has likewise become, in many parts of the world, a duty in part of the city. Yet, I again pause to say the reward is found in a higher stand-

ard of physical development, and an increasing length of life; a result which, in view of the fact that the population of the world is rapidly changing to a city one, justifies fully all that has been done and is doing, regardless of cost, to make a city as good a place to grow men and women as the country has been.

By these means the world has been made a much better place to live in. Man has increased in mental, moral, and physical stature, despite what agitators may say to the contrary. The sum total as well as the average distribution of those things which go to make life comfortable, have increased, even if a corresponding increase of intelligence and breadth of view has made restless discontent increase at a corresponding ratio. The point, however, which I desire in this indirect way, to press home, is, that there is a sound reason why debts and tax rates have increased, independent of all the blunders and all the corruptions which may have wasted a part of the income of States and cities; and that the increase of expenditure is not only unavoidable, even if undesirable, but that it is going to continue. And if space permitted, I could, I believe, prove what I must content myself with merely asserting, that the tendencies which I have been discussing are worldwide and by no means confined to American States and cities; indeed that government and civilization are on the whole progressing along the same lines in both hemispheres, calling for the same assumption of governmental duties, and the same increase of income to enable the government to discharge properly those duties.

The conclusion which the investigator arrives at, as to whether this "Gospel of Social Endeavor," as Godkin calls it, is wise or foolish, will fix in his mind the wisdom or propriety of prohibiting the incurring of debts by local political units. Unless this worldwide policy is to stop, debts must be increased, or taxes raised, or some source of revenue made available, which the American people, especially its municipalities, have permitted to be diverted to private uses. The most, therefore, one can safely

advise in this respect, would be a restriction of the rate that may be levied, or the extent to which debts may be incurred, somewhat similar to that which prevails in West Virginia; that is to say that the indebtedness shall not exceed a certain per centum of the total assessable basis, and that the levy shall not exceed a certain per centum on the hundred dollars. This may prove wise or unwise. If, however, such limitations would, as I believe likely, and indeed as I shall try herein to show is absolutely essential, set a limit to all further effort to work the property tax beyond its full capacity, and make governments resort to other sources of revenue, then the result would prove the wisdom of the effort; but if it would break down or severely cripple the development of which I have spoken, the restriction would be unwise.

This alternative brings me to one of the chief points I had in view, when I selected the topic assigned me on the programme. The system of property taxation as worked in most of the States and cities of this country is on the point of breaking down; if indeed it has not been already broken down. It cannot bear the burden placed upon it. Most assuredly, as the figures already cited as to the rates prevailing in many States and most municipalities, it has not produced enough revenue to keep governments out of debt, and it cannot be screwed to a higher pitch.

According to the views which prevailed among the economists of the days of Adam Smith, taxes are or should be paid out of interest or profits. Capital is now abundant; and the prevailing rate of interest is less than 6 per cent. The investment of it in active business so as to yield a greater profit than 6 per cent is a matter of no small difficulty. A tax rate, therefore, of five dollars on the hundred, the average rate prevailing in 1890, in the cities of Illinois, is, on this basis of interest or profit, an income tax of 80 per cent, while a tax rate of two dollars on the hundred, the average prevailing in 1890 in all municipalities of the United States, with a population of 4,000 or more, is an income tax of 33⅓ per cent. That

such a rate is honestly levied and collected, as the basic theory of our property tax system implies, cannot be possible. The result must be, and it really is, that people escape it as to visible property by undervaluation, and as to invisible by fraudulent concealments.

What, then, in the system of State and local taxation? The central, indeed in many States almost the entire part of it, is what is known as property tax. And what is the property tax?

The democratic principle of taxation is, that every man shall contribute to the support of the several governments under which he lives, in proportion to his ability. It has been assumed without proof, and I believe most falsely, that the amount of property of all kinds owned by the citizen is the true and best test of his ability to contribute to the support of these governments. Acting upon this assumption, democracy in the United States has labored to get on the tax books all the property, both real and personal, visible and invisible, corporeal and incorporeal, at a uniform valuation, and to levy a uniform rate of taxation upon it. And this is the property tax. This is the system of State and local taxation.

Notwithstanding, people in general regard this theory of taxation as a part of the existing order of the universe, and as immovable as the West Virginia hills, its establishment in Virginia was not achieved until about 1852, and it did not reach its full growth throughout the country in general, till about the same time. The growth of the system was a haphazard one. Before it was fully tested anywhere, the Civil War and the larger questions growing out of it, separated people's minds from the past, and only recently has the principle of the system been brought to the bar of public opinion for examination, by the increasing need for money. That principle, however, remains the same as it was fifty years ago. It has not been changed or adapted to changed conditions.

But two facts have become fixed. The first is that the property tax cannot be made to produce any more money;

indeed that it is already vastly overworked. The second is, that more money is needed by all the governments, and the question arises, how is it to be gotten? Experience has also, I believe, I may say shown that the assumption on which the property tax is based, namely that all invisible property can be gotten on the tax books, and that real estate can be valued with fair uniformity throughout an entire State, is not possible with any administrative machinery yet discovered; and to that extent the principle of the tax itself, waiving the efficiency of it as a producer of revenue, is at fault.

As this is a question of detail, and our purpose is to make suggestions, not to set down fixed conclusions, I shall only briefly refer to questions, which concern the administration of the tax. Briefly then; no State has yet secured a uniform valuation of real estate, nor one sufficiently fair to satisfy fair-minded people of the respective subdivisions of the State. The valuation of real estate must, from the necessity of the situation, be made by persons having a knowledge of its local value; consequently, counties and towns are made the bases of such appraisements of value, and their officers or citizens serve as the appraisers. In effect, therefore, each county or city is asked or permitted, in a great part at least, to fix the amount of its contribution to the public treasury. It is no reflection upon human nature to say that under this condition of things, the citizens or officers of each county yield to the natural temptation to make the valuation abnormally low; while the same influences operating with greater or less force in all the local subdivisions, produce a valuation of real estate, which has no uniformity throughout the State. Then, also, whatever returns are thus made must be accepted, since no central authority can have special knowledge sufficient to revise the valuations; or else some clumsy or arbitrary arrangement is created like that existing in West Virginia, whereby a horizontal increase is authorized, in case the values returned should be too low. Like the rains from heaven, this falls upon the just and unjust alike. These and other difficulties

of applying the real estate property tax over so large an area as a State, have caused many economists to conclude and to advise, that the State should, if possible, raise its revenue from other sources than the property tax, and leave it to the local taxing powers, where there is little temptation to value unfairly, and these inequalities of valuation can be reduced to something like a fair uniform basis, as between different citizens.

With respect to the personal property tax, the battle of conflicting opinion has waged around the assessment of that which is called invisible or intangible. Indeed we may broaden its meaning, and include that which may easily leave a place where it is taxed, as well as that which can go into hiding. The American system or principle again, has been that "all the world shall be taxed." No exemptions of any consequence shall for any cause be permitted, even though the list of taxable articles shall mount into the thousands.

As already stated, this view with respect to personal property reached its full development in Virginia about 1852; for previous to that year a small tax on dividends and interest was the only effort to tax this species of wealth. In other States the same principle has met with a cordial approval from lawmakers, and determined efforts made to enforce it. In West Virginia hostilities have not been so active. The majority reports, it is true, of the West Virginia Tax Commission, in so far as they related to taxation, were devoted almost exclusively to the advocacy of this view, and of the means whereby it could be enforced in practice; yet while spasmodic efforts have been made from time to time to pass more rigid laws to catch invisible property in the taxing net, nothing practical has followed from the reports. Furthermore, so far as I can see, the drift of opinion in West Virginia is now away from the views of the Tax Commission. But the history of the taxation of invisible personal property in other States, furnish sufficient light on the subject. Every conceivable device — oaths, forfeitures, penalties, criminal punish-

ment — have been tried with the view of placing on the assessors' books, with something like fairness, all forms of invisible and intangible personal property. If drastic laws can accomplish the undertaking, those of Ohio ought to work to perfection. Other States have tried equally severe measures.

And what has been the result! The result in Ohio, if we are to believe the testimony of the State officials and others who have examined the working of her law, is a complete and conclusive failure; that each individual in effect fixes the amount of personal property on which he will pay taxes, and that the law is effective only as to a few conspicuously conscientious persons, and orphans, lunatics and deceased persons' estates, as to whose holdings the public records furnish full information. The witnesses from other States enforce the same conclusions. Without going into further particulars, I may say the weight of opinion is decidedly against the view of the West Virginia Tax Commission, and in accord with the view of David A. Wells in his report as a member of the New York Tax Commission. He says: "Now how is property of such a character (i. e., invisible and incorporeal), to be reached, valued and assessed for taxation? Every effort heretofore made in every country to tax it has proved wonderfully uncertain and unequal, and therefore every country that has ever attempted it, with the exception of Holland and the States of the Federal Union, have abandoned the project as something wholly impractical." And he adds, with a strong citation of authority to support him, that the decadence of Holland dates from the time when she began the taxation of property that could readily leave the country. It is evidently a waste of time to pursue this line of campaign further. The process cheapens the moral obligation of an oath, stifles respect for law, and may hasten a decadence of American manhood. The sooner the success of such a policy is given over as impracticable the sooner will thought and energy turn itself in a wiser direction.

These two facts with respect to the property tax, the impossibility of fairly valuing real estate over an area as large as a State, and of reaching and valuing invisible and incorporeal personal property, are of capital importance. In readjusting or revising our tax law, they should be kept constantly before us. But it may properly be asked: if you give up real estate as a part of the State system, what will you substitute in its place? If you give up invisible and incorporeal property how are you to secure the larger revenues needed on all hands to discharge their growing public duties? The answer is not easy. My purpose is not to formulate policies, but to make suggestions. E. L. Godkin in an article entitled "Who will pay the Bills of Socialism" says, that modern governments in planning to double their expenses, doing work worthy and necessary in itself, without any visible additions to their incomes, are acting the part of improvident spendthrifts. And there is some truth in his observation, but it is not the whole truth. The visible wealth of the world has, it is believed, kept pace with the increase of public duties on the part of the governments, but the most productive part of it serves private masters alone, while the public in most American States and cities have hobbled along with tax systems fifty years behind the age.

The exemption of real estate from State taxation is not as impossible as it may seem to West Virginians, who see it year after year yield about two-thirds of the State revenue. Several of the United States succeed in getting along without any real estate tax, notably Pennsylvania, Delaware and one or two others. Of course something else must take its place, but experience here as well as in other matters, furnishes valuable suggestions.

The following figures are taken from Richard T. Ely's Taxation in American States and Cities, as I did not have any way of securing those for the current year.

Pennsylvania, for the year 1887, received from its tax on corporation stock $1,702,000; on the gross receipts of

corporations, $776,388; on the stock of banks, safe deposits and trust companies, $431,628; on collateral inheritances, $763,871; from a commutation tonnage tax, $460,000.

Massachusetts for the year 1886, derived the main items of its State revenue as follows: Corporation tax $2,227,579; bank tax (State and national), $2,398,267, while its State property tax, real and personal, yielded only $1,499,805.

New York for the year 1887, received one and a half millions from its tax on corporations; and from its collateral inheritance tax two-thirds of a million. Had Gov. Black not unwisely vetoed recently the new collateral inheritance tax New York might have received revenue enough from it enough to make practicable at no distant day the exemption of real estate from a State tax.

Wisconsin for the year 1886 received nearly one-half its general revenue from a license tax on railroads, while for the same year Georgia received $300,000, or one-fifth of its general revenue from the rent of the West Point and Atlanta Railroad, which the State owns.

In view of this fact, what may be said of the action of the Federal government, which practically built the three Pacific Railroads, and handed them over free of rent to private corporations!

In abandoning the policy of trying to tax invisible property and of listing every item of visible personal property, let it be borne in mind that when the existing tax systems were devised, the corporate form of wealth, which affords so large a part of the invisible property, had not been developed to any great extent. This wealth should be reached as it embraces a large part of the total; but it cannot be done by the impossible method of trying to tax the invisible, or by the almost equally impossible method of listing and valuing with reasonable fairness innumerable items of visible personalty. The foregoing items from the tax budgets of other States are selected as showing the extent to which indirect taxation on corporate and invisible wealth may be made more productive, than the old-fashioned property tax; and the law of taxation, known as the

law of diffusion, may be safely trusted to spread the burden throughout the whole population more fairly than the property tax. In addition to distributing the burden more fairly the ease of assessment and collection are greatly enhanced and the evil effect on the nation at large by cheapening honesty and creating a nation of law-breakers is immeasurably diminished.

As already hinted at, the sources of State and local taxation should be separated; and in apportioning between the State on the one hand, and the counties and cities on the other, the various sources of public revenue, it is well to reserve to the former, all kinds of railroad and corporation taxes, taxes on insurance companies, and licenses regulating the liquor traffic. The reason of this is that the influences represented by these forms of wealth are too strong to be handled by any government weaker than a State, and even then the success achieved has not been anything to boast of.

An admirable substitute for the property tax as the central figure of a State system, would in the opinion of many be the income tax. So long as it was regarded as a part of the Federal tax system, economists were loth to advise its use by the States. They felt that an element of direct taxation upon the wealth of the country was a much needed part of a congressional budget; for in no way can a healthy pervading public supervision of congressional expenditures be created except by making the wealthy of the country feel that what Congress spends comes from their pockets. The income tax would have answered this purpose admirably, but as a constitutional amendment would now be needed to make this available, and as amendments to the Federal constitution are an impossibility, there is no longer any reason why the States should not at once avail themselves of this tax. I shall not pause to answer the objections that I know will be made to the adoption of such a policy: that it is impossible of enforcement, that it is class legislation, that it is an effort on the part of the poor, led on by demagogues, to confiscate the property of the rich,

are a few of the epithets that may be expected. Adam Smith remarks that before his day none were taxed except those that were too weak to resist. Richard T. Ely says he knows of no American State or city that is not ruled by wealth. E. L. Godkin says that one of the most difficult of the problems of democracy is to keep wealth in subjection to the law on the one hand, and to protect it from the attacks of demagogues on the other. My hearers may each add his personal observations to the conclusions of these wise men, and I think he will agree that under an income tax, even were it nominally progressive, the superior resisting powers of the wealthier classes are such, that relatively, their contribution would be no larger than of those in the poorer. And with respect to the enforcement of such a tax, any one who investigates the subject will, I believe, conclude that one-tenth part of the time and energy expended in trying to make the valuation of real estate uniform, throughout a State, or to catch invisible or incorporeal personalty, would suffice to bring an income tax to the perfection it has attained in even Switzerland, and other small States of Europe.

A State policy of the kind I have outlined will leave a larger margin of the property tax to the counties and cities, with which to meet their increasing burdens and to discharge their growing duties. The experience of other cities, if one will take the time to acquaint oneself thoroughly with it, furnishes suggestions as to how revenues may be gotten; *or in other words, how the municipal corporation as a business institution may be made self-sustaining.* The tax burdened property owners of Charleston and Huntington, I have not the least doubt, read with a thrill of envy the report published not long ago, that in the city of Glasgow no property tax was assessed. This result was made possible, or, in other words, the corporation made self-sustaining, by a wise use of the franchises of street railways, gas and electric lighting plants, water works and other forms of public service. The experience of Glasgow is typical. Thus Berlin, said to be the best governed city

in the world, derived in 1885, 73 per cent, and Paris in 1887 over 20 per cent of the revenue, not from taxation, but from the profits of productive property owned and operated by them. Other cities may be named with the same showing; and, in consequence, the despondency created by the increase of local debt in the European cities is now giving way to cheerfulness. The appropriation to the public use of the revenues arising from these franchises, which are purely public property, has and can be made to do more in the way of supplying revenues for municipalities than anything that can be devised. I shall not follow this in detail, but will merely state the principle, with a few illustrations.

Taxation, as we now understand it, first became an item in the revenues of the English Crown, about the time of Charles I. Previously, the monarch had conducted the business of the State and paid his own expenses from voluntary gifts and the profits of property owned by him. In the progress of popular control of governments, all ownership of any productive asset has from time to time been discarded, and resort had exclusively to taxes, designed of course to be an exaction from each in proportion to his means. This has proved inadequate. Modern democracies are, therefore, now reverting in a measure to the older forms and seizing for the public some of the agencies of public service, called franchises, and are appropriating their revenues.

The ownership by States and cities of valuable franchises and pieces of productive property are not so unusual in America as may be supposed. The rent derived from a railroad by the State of Georgia already mentioned, may be cited as an example. Massachusetts in 1887 derived from the ownership of the Hoosac Tunnel, $383,765, and Pennsylvania received from its interest in the Allegheny Railroad, $212,500. The city of Wheeling, although selling gas at 90 cents a thousand, received, so I was informed not many years ago, a net profit of not less than $10,000 a year from its ownership of its gas works, or about fourteen

per cent of its total revenue. The same is true of Richmond and many others. The city of Boston has an enormously profitable piece of property in some river front lands reclaimed by the city. Some one of authority, whose name I do not recall, has said that with the ownership of the docks in New York City he could derive a revenue large enough to relieve all other property from taxation; but whether right or wrong in the opinion, he would unquestionably do so, if he had control of the street railway franchises. These instances will suffice, although they might be multiplied indefinitely.

With a few general observations, I shall conclude this paper. Good people, without investigation, may cry out, that this is centralization and socialism. I am not called upon to reply to the charge; I am merely making suggestions and stating facts, but I may say that to this extent at least the spirit of the age, which is increasingly democratic, has gone and is going. The movement will not be checked by calling it names. Wealth and intelligence should join in it, lead it and direct its progress along proper lines of justice and fairness. And advocates of this policy reply with some reason, that it is not a question of centralization, or decentralization. The former exists already with respect to the interests concerned. The question is as to whether they shall be centralized in public and responsible, or in private and irresponsible hands. But in sober truth it is the local units of government that are gaining in power most rapidly the world over, including the United States. Hence it is a movement the opposite of centralization; and being in its nature a sort of co-operative plan of self-help on the part of the inhabitants of a city, instead of the acceptance by them of aid from an external and superior power, it is individualistic, rather than paternalistic, in its character.

A more serious matter is the capacity of the people of American cities to manage public property of the kind described. Notwithstanding our pride of country, we cannot truthfully deny that the government of American

towns and cities, is the weakest spot of our political institutions, indeed, as Prof. Bryce tells us, our conspicuous failure, and in marked contrast to German and English cities. And as the coming, if not the present civilization of the world, is to be an urban one, a failure in the government of the cities is truly a most grievous failure.

While not denying that municipal government by political party machinery is bad, the evils are not organic, from which there is no escape. Our people are as honest and as moral as any that can be found, perhaps as any that ever existed; they are made of serious, sober material; they have what Matthew Arnold calls "the instinct for conduct." Let them become convinced that things are wrong, and it is not likely that they will, as did the people of the ancient world, fall listlessly into decay, without a sturdy, vigorous effort at regeneration. Accordingly, as I have already drawn out this paper to an unreasonable length, I shall finish with the expression of a confident hope and a firm belief that the American people will be found not wanting in the great task of sustaining the burdens and performing the duties imposed upon cities by the changing civilization of the world, and that they may be safely intrusted with the ownership and management of these new forms of public property.

RENT REMEDY — A RELIC.

BY HON. B. L. BUTCHER.

The alliteration in the title of this paper is not intended to mock at age and hoary hairs, but rather to bring sharply to your attention that governmental function of ancient times, which has with unusual vitality, persisted to the present times, in the hands of one class of creditors, exclusively. I refer to the power to distrain for arrears of rent, commonly known as the remedy for rent by distress.

The definition of rent proper is, "a right to a certain profit issuing periodically out of lands and tenements corporeal, in retribution for the land that passes."

At the Common Law, only rents coming within this definition, or "rents proper," were recoverable by distress; and, this harsh remedy found place in that most wonderful unwritten code of the most wonderful people that have come upon the world's stage of action, in all history, commonly named Anglo-Saxon, but from a legal stand more properly Norman-Saxon because of the necessity under the feudal system of tenures, for prompt obedience and response, in time of danger, to the tenant to take up arms in defense of the king or lord, against their enemies. The penalty for default was, that the personal property on the land in the possession of the tenant was liable to seizure, by the lord, to enforce performance by the tenant either of military or civil service.

At first this seizure, or remedy by distress, was only the taking and holding of the property of the tenant in pledge, by the lord, until redeemed by the tenant, by the performance of the duty required of him; and, which he had pledged himself to perform, when he became invested and seized of the tenement, and acknowledged fealty to the lord.

The prompt performance of rent service was necessary for the preservation and continuance of the government itself, and the power of distress was the resort, to insure the rendition of the service, which was the symbol of the political system of feudal tenure.

The remedy by distress for the collection of taxes in this day, is upheld by exactly the same reason; and it is the only legitimate descendant of the distress remedy. All others are bastards — lacking as they do identity with governmental necessity.

The feudal system was introduced into England by William the Conqueror from Normandy, after the battle of Hastings, through confiscation of vast numbers of estates of the dead and defeated Saxon thanes; and the grant and

distribution of these great landed estates to the victorious Norman lords, soldiers and followers, under the feudal laws of Normandy. The system was extended and adopted by the Saxon thanes who were permitted to retain their lands, in order to secure recognition and protection from the new government and be upon an equality with their Norman neighbors. They, therefore, attorned to the Black Prince, and received again by grant their lands in feudal tenure from the king; and by this act swore allegiance and did homage to the Norman conqueror; and each "Became his man from that day forth, of life and limb and earthly honor."

The Norman lords and Saxon thanes in turn granted the lands to their tenants by the same formalities, and in consideration of the same promise of service; and the tenants pledged themselves in the same solemn manner to their respective lords.

At first these tenures from the lord were held at his will, afterward for a definite term; still later, for life; and finally many were enlarged, so as to become inheritable; and so the feudal system became a great pyramid of power, its foundations co-extensive with the landed estates of the kingdom, reaching upward through all the stratifications of society to the king himself, from whom the titles all emanated by the fiction of fealty.

These feudal holdings were inalienable by the tenants without the consent of the lord; and his seigniory was subject to the same limitation without the consent of the tenant, so their mutual relations, entered into for mutual defense, could not be dissolved except by mutual consent. It was a government compact — not a private contract.

As the progress of civilization made wars less frequent, and the necessity of military service less important, the lord found it convenient, as well as necessary, to meet the demands of the king, to require of the tenant a stipulated sum of money in lieu of military or other service; and it followed necessarily that arrears of this money substitute might by the same token be exacted by distress.

I need not follow the many incidents that gathered about the various tenures in England, and in Virginia, nor the legislative effort to reform abuses, and make tolerable the laws and their execution, both in England and in the Colonies, down to the time of the abolition in Virginia of the substance of the system, that was by its nature not adopted to the new conditions.

In its conception the remedy by distress, of course, was justifiable for rent, as we now justify the same remedy for taxes, against the defaulting tax-payer; and insist that no other remedy comports with the State's majesty, to enforce payment; *when we bear in mind*, that rents were taxes, under the feudal idea. It may be also admitted that after the abolition of the feudal tenures, under the royal grants, by "free and common socage" in Virginia, the remedy may still have been justified, as it seemed to favor the very poor tenant, who could pledge his goods, and in the case of farm tenants, his crop as well, as security for the rent, and be enabled thereby to make better terms, and secure better quarters for himself and family.

But when the legislature in pursuance of the constitution of the State provided exemption laws in favor of the "husband or parent and the infant children of deceased parents," to the amount of two hundred dollars that might be held, free from forced sale, except for taxes and purchase money, this last argument for the retention of this relic of feudal times was answered, and the distress remedy reached the limit of its usefulness, besides being out of tune with the more advanced commercial legislation providing for *pro rata* distribution of assets among creditors.

It seems, as the necessity for the remedy disappeared, however, its field was unwisely extended, both in England and in the Virginias, by legislation, under the idea of making the collection of all rents uniform. Our statute — Sec. 7 of Chap. 93 of the Code, declared that: "Rent of every kind may be recovered by distress or action."

But what parity of reasoning will lead us, in this day, to place in the hands of every person to whom a rent

of any character may be due, the power of the tax-collector?— *the extreme limit* of the exercise of government over the property of the citizen. The reason of the law in the case of the tenant, for rent proper, passed away a long time ago, even in England, and there never was any reasoning for the remedy for other, or improper rents, either in England or in the Virginias; and if the reason for the law has passed away, the law itself should follow, for the reason of the law is the law; and, if it have no reason, then it is unreasonable to enforce it, and enforcement is a species of petty tyranny.

It is not hard to trace the thin edge of the wedge, which has forced its way into the most commonplace affairs of private business, from its lofty origin, asthe *sine qua non* of government under the feudal regime. As long as the king looked to the lords to furnish him men and money for the maintenance and protection of the State in peace and in war, the right of the lords to distress the tenantry, whether to secure men or money, was justified; but, when the separation and transition came, and the State came to ignore titles, and distinctions, and lords, and sought the taxes for its support, and the men for its protection, directly from the body of the people, there was such a revolution in governmental affairs, that it swept away all the ancient feudal props to the throne, and the very bed-rock foundation of feudal tenure crumbled out, and all the intermediary scaffolding came down, and left an impersonal State, instead of the king and paternal over-lords. The help of the lords was long a necessity to the king, and the tenants were compelled, under pain of distress, to rally to the help of the lords, but the king and the tenant changed places; and, there was no longer need for the help of the lords; but this, it seems, has not prevented the landlords from helping themselves ever since!

The argument that the relation of the landlord and tenant being of a personal character, the landlord through sympathy for the tenant, in his misfortunes either of sickness or lack of work, became a creditor often by the exercise of

humane instincts, and incurred the risks of furnishing shelter to his poor tenant. So that it was only fair, that he should know in *advance*, of the *exercise* of this virtue, that bread and meat and clothing and doctor bills and funeral expenses could not prevail against him! But this argument is disposed of by the exemption statute of $200.00 of personal property to the unfortunate tenant, if he be "a husband or parent or the infant children of deceased parents,"—and he generally is.

The present law of West Virginia gives the lessor or his agent the right, for any class of rent not more than a year old, to go before a justice of the county in which the leased premises are situated, and make affidavit that the tenant owes rent now due, amounting to a given sum; thereupon, it is the duty of the justice, to issue a warrant of distress, directed to the sheriff or other officer of the county, commanding him in the name of the State, to seize the goods and chattels of the tenant, found on the leased premises or removed therefrom not more than thirty days, sufficient to pay the amount of the rent claimed in the affidavit to be due, and the costs of the proceedings. The officer armed with this process proceeds to enter the leased premises where the tenant, his assignee or under tenant, may have personal property, to seize and take into his possession sufficient of it to pay the rent claimed, and the costs, and carts it off to his private pound! There has been no notice to the tenant, who is the party of the second part, to the lease contract. He has no opportunity to be heard. Execution has been issued and his goods seized and carried off, and may be advertised and sold in ten days! It may be said that the tenant by this process is only called upon to pay his debt and has no room for complaint. The fact that he is required to do so quickly is not a great hardship. Yet, it is much quicker than is required by law of any other debtor, to pay any other account after it is due.

It is *not that* feature of the process of which complaint is now made, or against which this paper is directed, so much as the fact that all this may be done without notice to the

debtor, or leave to contest the validity and the correctness of the demand in any court; and because it requires this debt to be paid before all other debts, giving a legal prefference to one creditor over all others; not for diligence or business tact of the creditor, but by the favor of the law.

But our statute has provided a method to prevent the *sale* of the tenant's goods, if he desire to contest or delay the collection of the account of the landlord, if he come forward and give a forthcoming bond, payable to the creditor, with good personal security, for the delivery of the goods on a day named by the officer, in a penalty of double the value of the goods taken; it being the duty of the officer to restore the goods to the owner when the *bond* is given! In case the bond is forfeited it is the officer's duty, also, to forthwith return it to the clerk's office of the Circuit Court of the county in which the premises are situated. Why shall he give bond before he is permitted to defend against the account? Nobody else is required to do so, not even a non-resident — security for costs is all he gives! It is required in no other controversy. What fault has he committed? He owes a man for shelter that he is unable at present to pay. But does he not owe another man for meat, another for bread, another for milk, another for clothing, another for groceries, another for medicine, that he cannot pay for the same reason? Why do not these several creditors swear out their distress warrants?

It is explained, that by a certain ancient law, written in the Doom Book, many centuries ago it was ordained that when the relation of landlord and tenant existed, the landlord should have the first lien on all the tenant's goods brought upon the leased premises, and they were not to be removed therefrom until all rents had been paid; and that law with its additions and modifications has continued to the present day.

And now all manner of rents, whether proper or improper, reserved or granted, with or without clauses of dis-

tress, assigned or descended, common or joint, apportioned or gross, are collectible by distress. And this, it is said, for the good of the poor! Why has not this remedy, if it is good for the poor, spread to other than rent creditors? The reason is easily suggested — the butcher, the baker, and the candlestick maker, were all tenants themselves; and none but the king and lords had need of this extraordinary privilege: only those who represented the State or king and lords could exercise it.

But after the tenant has induced some friend of more kindness that caution to sign his bond and obtained again his property, he finds that to defend the wrong and defeat the unjust claim against him he must appear in the circuit court upon notice or suit on the bond and there make his defense, — thus forcing him to litigate a rent account, usually of small amount, in an expensive court, where he must appear by attorney; so that it were better for that man that he had never been born.

The remedy by distress is like the horns of domestic cattle, useful when, as their ancestors were, engaged daily in fierce conflict with wolves and bears and savage men, but now a source of danger to each other and those having needful relations with them, as well as a constant menace to all hornless domestic animals. It has become the fashion to dehorn; and, in a few generations, the horned steer will be as rare as the hornless one a few years ago. So should this harsh horn of the rent remedy be cut off and rent accounts let rest upon their merits, as other rights and credits; and, when in dispute, be enforced by action as other accounts.

While I dream of altruistic ideals, I do not hope to realize; but, there is a vast difference between dreams of Utopia and a plain condition which confronts a man who uses another's fields, or houses, or other real estate, or engages to pay a stipulated rent for their use, or grants a rent out of property to another, in case he have a controversy over the account; for, before he can be heard, his property is distrained and taken from him for the arrears

claimed by his adversary; and he is compelled to give bond with good security in double the value of the property taken, to pay the account and the costs, before he can defend against the demand at all and in the court farthest removed from him, and at greatest cost, no matter how small the amount in controversy.

But if this tenant should undertake to collect from this same claimant of rent, an account for work and labor performed, with brain or with brawn, the defendant must be plainly notified in writing, at least five days before the day set for the hearing, and if he have defense, he has seven days continuance, as a matter of right, in the cheap justices' court; or his two rule days in any court of record. Then he may require a bill of particulars in either court; and make up his defense at his leisure, and, after he is ready, try the case. If judgment is entered against him and execution issued, it usually runs for a period of sixty days, in which time if he desire additional delay, he may give a forthcoming bond or bond to stay execution, as the case may be. Look upon this and then upon that! Yet this last is the law for all classes of accounts and demands except rent. No bond is required until *after* trial, and then only to obtain delay. Time and opportunity are given in the *first instance*, to make full defense. It has been said that the law's delays are as much a man's legal rights, as the remedy itself.

But why should one creditor have *priority* over another, by law?

There is no argument in law or in ethics that gives one creditor of equal honesty and diligence, rights that another may not acquire, except in the exceptional case of purchase money, and then only when of record.

Our complacency under this anomaly may be, perhaps, explained much as a man with a wen or a wart on his person! He has been with it so long in all his "goings in and comings out" and has become so accustomed to the huge excrescence and its distorting effects, that he does not ordinarily feel it an incumbrance; and he goes through life with

a great wart on his head, hand or face, rendering him unsightly, and often seriously hindering his usefulness, without knowing that it could be removed by one act of the surgeon's knife without danger or pain.

It is time the legislative knife were applied to this ancient, gnarled branch of the law, which so distorts the symmetry of the otherwise fairly homogeneous character of the remedies for the enforcement and defense of property rights.

MEMORIALS

OF

DECEASED MEMBERS.

JUDGE SAMUEL WOODS.

BY HIS ASSOCIATE AND FRIEND, HON. OKEY JOHNSON.

The true object of any one who attempts to write a sketch of the life of another should be to put on record the prominent traits of character of the subject of the sketch so all may know what manner of man he was, and gather from his life something which may inspire others in the journey.

Our greatest poet has said,

"Lives of great men all remind us
We can make our lives sublime,
And, departing, leave behind us
Footprints on the sands of time."

"Footprints that perhaps another,
Sailing o'er life's solemn main,
A forlorn and shipwrecked brother,
Seeing, may take heart again."

The life of Judge Woods was well-balanced and well-rounded, and from it may be gathered much by our young men to inspire them to greater effort and better living. Samuel Woods was born in Beauce County, Canada, East, on the 19th day or September, 1822. His birthplace, I have heard him say, was in the territory in dispute between England and the United States, and when the Maine boundary question was settled, his birthplace became a part of the territory of the United States, and so he became a citizen of this country.

His parents were Irish. He was not born with a "silver spoon in his mouth," but was born poor, and by experience knew what poverty meant. He knew, when a boy, if he were ever educated, he must do the greater part in furnishing his own opportunities. When a boy his father

moved to Meadville, Pennsylvania, the seat of Allegheny College, where the boy with his father worked at the plasterer's trade. Fortunately for the boy the father took him to a college town. Seeing the college and the students did, no doubt, much to fire his young heart with the greatest desire for a college education. He did not give up this great desire of his heart, but toiled and studied, and entered the college, and graduated in the classical course in 1842, when he was twenty years old. He studied law with Fox Alden, a noted lawyer in Pittsburg. He also taught school. He was one of the teachers in the famous old Academy at Morgantown where so many men who afterwards gained distinction commenced their education. In 1844 he married, at Meadville, Miss Isabella Neeson, sister of James Neeson, a prominent lawyer afterwards at Fairmont in this State, and afterwards in Richmond, Virginia. In 1849 young Woods moved to and located for the practice of the law at Philippi, Barbour County, Virginia. To this place the year after he brought his bride, and they then founded a home, which has as many pleasant memories surrounding it as any home in West Virginia; a home, the sweet influence of which has blessed the children reared therein, and from which benedictions have gone to bless the country all around it. Here in this town and at this home Mr. Woods commenced his professional career. Of splendid physique, of fine address, of great natural endowments, a classical education, a fine legal education, under one of the leading lawyers in Pittsburg, in a comparatively new country, he commenced his career as a lawyer under most favorable circumstances. A man who despised falsehood, with no bad habits, strictly abstaining from all intoxicating liquor, and not even using tobacco, and being an enthusiast in religion, his fidelity to every trust reposed in him, his indomitable perseverance and great industry, his ability to take care of his client's interests in court, soon gave him a standing in the counties in which he practiced, that no other lawyer possessed. His zeal, honesty and ability gave him a clientage that placed him in the very front

ranks of his profession, and until he retired from the practice in 1883, he was deservedly regarded as the Nestor of the bar in the counties of Barbour, Randolph, Taylor and Webster, where he practiced. He had so won the confidence of the people, that with his learning and great legal ability, fine address, and persuasive eloquence, he was well-nigh irresistible before a jury. In more than one instance he successfully defended clients on indictment for murder on the ground of self-defense, when most people outside of the jury thought his client was the aggressor.

By his earnestness and tenacity to the interests of his clients, his influence was great, not only with juries but with the courts also. His great success in his profession did not come to him by extemporaneous efforts, but by a life of integrity, by his general education, by his legal learning, and by that without which his splendid talents would not have availed him,— his mastery of the facts and laws of his cases, and never going into an important case without thorough preparation, unless forced in by the other side, then frequently the other side was sorry it brought on the battle, for few men were more ready for a sudden legal contest than he. He was a man of splendid physique, about six feet tall, with broad shoulders, with a grand personal presence; from his boyhood to old age he was what the world calls a handsome man. He was abstemious, using neither spirituous liquors nor tobacco, and in consequence through his long life enjoyed perfect health. He was erect, he was agile as a boy, and was fond of boyish sports; he fenced and boxed, and like a boy even in his manhood rollicked with the children. He was pure and earnest in speech and never used slang, was self-reliant and with men bore himself with great dignity. Was skillful with mechanical tools, and understood surveying and could practice it. He was a man of great industry and indomitable will. He never worked without a purpose; and having formed the purpose he pursued it without change or flagging to its consummation. He did not wait for

opportunities, but, by his great will power, made the opportunity.

He was blessed with an interesting family, three sons and three daughters. He educated his three sons at the University,— nice young men, moral, Christian and upright like himself; endowed with bright minds, and all chose their father's profession. The eldest, Frank, has a good law practice in Baltimore. J. Hop. and Samuel V. are lawyers in good practice in Philippi, their native place. I had the privilege of examining all of them for admission to the bar, and the license of each bears my signature.

The three daughters were all sent to good female seminaries and all were finely educated. It was indeed a happy home, just such as might be expected with such a father and mother.

The judge had a fine law office in Philippi in which was a good law library. On the wall of that office was placed the mortar-board and trowel, the tools with which he worked at the trade that enabled him to educate himself. He was not ashamed of them, but to his friends who called on him he exhibited them with pardonable pride.

He also had in his pleasant home a fine private library, in which could be found many valuable books, classical, scientific, philosophical, theological, poetical and many others. His books were not in his library for show, but for use, and no one used them so much as he. He found much of his recreation in reading and in solving difficult mathematical problems. He was a great mathematician. He was passionately fond of poetry. He could read poetry without his book for hours at a time. I have heard him repeat nearly all of Tam O'Shanter. He also kept up his French so that he could read it with facility.

He was very successful in business, accumulated quite a fortune, between 1848, when he located in Philippi, and the breaking out of the Civil War in 1861, thirteen years. He sympathized with the South. He was a candidate for a seat in the convention of 1861. He was elected. He went

to the convention, and while the convention was in session the country was plunged into civil war. Sumter had been fired on, and the reverberation of the explosion was heard around the world. President Lincoln called for three hundred thousand troops for the purpose of suppressing the resistance to the government and apportioned Virginia's quota for her to raise. For what! as they viewed it, to fight against Virginia and Virginians. Brave old Jubal Early had stood up for the Union in that convention; even went so far as to indorse General Anderson returning the fire from Fort Sumter; said he had done nothing but his duty. But when Virginia was required to raise troops to fight against Virginia his love for the Union was destroyed. Mr. Woods, regarding the Civil War as actually begun and the dire alternative presented to fight for Virginia or the Union, he cast his fortune with Virginia, and a few days after Fort Sumter fell, and the call for the troops was made; the ordinance of secession was passed by a large majority, although up to that time a large majority of the convention was opposed to secession. But they regarded the die as cast, and they had no alternative but to stand by their State. How fixed were they in their opinions, and in their allegiance to Virginia, let the terrible struggle, the most gigantic in either modern or ancient history, attest. Poor Virginia bared her sacred bosom to the storm of war, and her soil drank up more fraternal blood in the valley, at First and Second Bull Run, the Seven Days battles near Richmond, at Fredericksburg, Chancellorsville, First and Second Cold Harbor, the Wilderness, Spottsylvania Courthouse, Petersburg, Appomatox, and other places from Washington to Richmond, than was spilled in all other places, in that terrible four years of war and carnage. Mr. Woods was now an exile from his Philippi home for four years. He was in the South fighting for what he believed to be right. He was attached to the celebrated "Stonewall Brigade."

When the war closed and the angel of peace spread his

white wings in benediction over this stricken land, and the South lay prostrate beneath a mighty load, singing the sad strain:—

"Around me blight, where all before was bloom,
And so much lost, alas, and nothing won
Save this, that I can lean on wreck or tomb,
And weep, and weeping pray, Thy will be done."

And oh! 'Tis hard to say, but said 'tis sweet;
The words are bitter, but they hold a balm,
A balm that heals the wounds of my defeat,
And lulls my sorrows into holy calm.

"It is the prayer of prayers, and how it brings,
When heard in heaven, peace and hope to me;
When Jesus prayed it, did not angels' wings,
Gleam 'mid the darkness of Gethsemane?"

Mr. Woods returned to his Philippi home. Not like a culprit, not like a traitor, but with head erect, realizing that God still reigned. "He was troubled on every side, yet not disturbed. He was perplexed, but not in despair; persecuted, but not forsaken; cast down, but not destroyed." Mr. Woods came home like a man and by his upright Christian conduct, won those who looked askance upon him when he returned. When he left he was the class leader in his little church in Philippi. He had not been long at home when he was invited by those who were "on the other side," to take his old place as class-leader. He took it, and at the altar of prayer he mingled his petitions with theirs, he visited their sick and dying, he spoke words of consolation to the bereaved ones, aye, he went with them to the holy communion and partook with them of the emblems of the broken body and shed blood of their common Savior. He was good enough to do all this, they had the greatest confidence in his Christian character, but they would not let him vote. He was not good enough for that. But he waited, and but a few years of political persecution could endure, and he saw his political shackles fall to the ground.

In 1871 he was a candidate in the Sixth Senatorial District for a seat in the constitutional convention which was

to meet in 1872. He was elected, and in that convention was Chairman of the Committee on Bill of Rights and Elections, and a member of the Revisory Committee, composed of the Chairmen of the several committees. He was a very able, influential member of that convention and had much to do in forming a constitution that not only made test oaths odious and impossible, but a constitution that has stood the test of over a quarter of a century without very material change. He did much on the stump in his district to have the constitution ratified by the people. He was a fluent speaker and a clear logical reasoner, and his power with the people was great. He could say with truth, what but few justices ever could say, that he never was defeated for a public office by the people.

At the election in August, 1872, under the new constitution, all the officers of the State were elected. The candidates for circuit judge in the Parkersburg Circuit, Geo. Loomis, the Republican candidate, and James M. Jackson, the Democratic, both claimed to be elected. Judge Jackson obtained the certificate, and Judge Loomis contested. In the special tribunal for the trial of the case, Mr. Woods was selected as one of the judges. He wrote the opinion in the case; a clear, concise and able opinion, deciding the contest in favor of Judge Jackson. For this opinion, see Loomis *v.* Jackson, 6 W. Va. Judge Haymond resigned his seat on the Supreme Bench of the State the last of December, 1882. Gov. J. B. Jackson, on the first of January, 1883, appointed Judge Woods to fill the vacancy until the next general election in November, 1884. He was a candidate for election to fill the unexpired term of Judge Haymond. He was elected by a good majority, after nearly a year's service on the bench. Of his qualifications for that high position, serving with him for the six years he was on the bench, I believe I am qualified to speak.

He brought with him to the bench fine native talents, his classical education, wide range of reading, his legal education, which was very much widened and deepened by his long and successful practice at the bar; these, with sound and

mature judgment, practical good sense, great industry, with a profound sense and love of justice, and the obligation on him to find the justice and right of the case, fitted him in a high degree to discharge the duties of that most responsible position. He was a cautious, conscientious judge. He also studied and worked to keep himself in the line of the decisions. He did not believe he had any right, and he did not dare, to depart from the rule of settled law. For the strongest proof of this let me refer to his very able and exhaustive opinion in the case of Wilson *v.* Perry, 30 W. Va., where he was compelled to decide that a testator's bequests, some of them were void because the settled law in this State and in Virginia said they were, because indefinite charities. A good and pious old man had left money in trust for churches and Sunday-schools, and Judge Woods would have been glad to have sustained the bequests if he could have done so. Authorities from many of the States would have upheld such bequests, but the decisions in Virginia and this State had pronounced such bequests void, and he did not dare to depart from those decisions. The Legislature had not overruled them, and he did not dare to usurp the law-making power. His duty was to decide what the law was, and not what he might think it ought to be. He and his associates would not, because they felt that they did not dare to do so, indulge at all in "judge-made law."

Another one of Judge Woods' decisions which I will cite dislayed great ability of analysis, and all the other qualities of an able jurist. That is Flanagan's case in 26 W. Va. Flanagan had been indicted for the murder of a woman, who, with her child, had been burned to death in a log cabin in Randolph County. Flanagan was tried, convicted of the murder and sentenced to die on the gallows. His counsel brought the case up on writ of error. In the opinion Judge Woods displayed great ability. He came to the conclusion, in which all the judges concurred, that there was absolutely no proof in the record, (and all the evidence was certified), that the house was

burned by an incendiary; that it did not take fire accidentally, that there was no proof of the *corpus delicti* and the court reversed the judgment, set aside the verdict, and remanded the case for a new trial. In that case the rules governing circumstantial evidence are well and forcibly laid down. Judge Woods wrote many strong opinions, covering a great number of subjects. His opinions will be found in eleven volumes of our Supreme Court reports from the twenty-first to the thirty-first, inclusive.

If our courts of last resort could have such judges as Samuel Woods there would be no room for complaint.

Judge Woods was a deeply religious man and for his religion he never apologized, and was careful not to put any stain upon it. He was ever ready to testify to the truth of religion. A scene occurred once at a skating rink in Wheeling that illustrates the faithfulness of Judge Woods to his religious principles. Miss Jennie Smith, the evangelist, was holding a series of meetings in the rink. One night a poor man in deep mental distress came to the anxious seat, to find comfort, that he sadly needed. Judge Woods and the president of the court were there, and Miss Smith called on both to pray for the poor penitent, which they did, and there on their knees wrestling with God for mercy for that poor distressed soul, was half the Supreme Court of Appeals of West Virginia. Did they lower their dignity? If there is anything in our holy religion, they did not. They were but doing their duty. Judge Woods was never ashamed of the profession he had made. For many long years he had been a consistent member of the Methodist Episcopal Church. That religion that he had experienced in his youth was his solace through life and in death. Judge of the Supreme Court of Appeals of the State as he was, he felt he was but a poor mortal, and in daily need of forgiveness. He believed in prayer, as

> "The simplest form of speech
> That infant lips can try;
> Prayer, the sublimest strains that reach
> The Majesty on high."

and that

"Prayer is the Christian's vital breath,
The Christian's native air,
His watchword at the gate of death,
He enters heaven with prayer."

Judge Woods on the expiration of his term of office on the 31st day of December, 1888, retired from the bench and returned to private life, full of honor, and with a consciousness of having faithfully discharged his most sacred trust. He did not again go into active practice of the law as he might have done, but spent his time in attending to his large private interests. In his retirement he enjoyed life; of his wife and family he was extremely fond, and his grandchildren were good company for him. A short time before his retirement from the bench in June, 1888, his *Alma Mater* conferred on him the degree of LL.D. He had a great sorrow in December, 1895, in the loss of his loving wife, with whom he had lived for forty-six years. It was a hard blow and he only survived it a year and a few months, for on the 17th day of February, 1897, he died very suddenly, after a few days illness, of heart disease; died so suddenly that he had no time to call his children about him and bid them good-bye. But what of that? Had he not talked to them many a time of the future? His whole life speaks to them now. He was trusted in the church, in the Masonic fraternity, of which he was a prominent member, in every station of life, in the home, at the bar, in the political service of the State, on the Supreme Bench. He was conscientious, able and upright, and left the world better for having lived in it.

JUDGE ADAM CAREY SNYDER.

BY HIS ASSOCIATE AND FRIEND, HON. OKEY JOHNSON.

The West Virginia Bar Association has lost one of its brightest ornaments, and although Judge Snyder's place in this association has been vacant for more than a year, yet the sense of our loss is as fresh in our minds and hearts as when the news flashed upon us that he was dead. The death of each successive dear friend leaves a heart-wound that time cannot heal. The woodsman's axe strikes the oak in the forest; the gash is made in the faultless trunk; the giant tree trembles at the shock, but the tree lives, the wound heals; you may not be able to see the scar left from the stroke, but cut into that oak and the wound is clearly visible. So the wounds made in our hearts by death's cruel strokes on our friends, are invisible to the eyes of others, but they are visible to the All-seeing Eye, and felt by us as long as life lasts. It is both a sad and pleasant duty for me, at the bidding of this association, to prepare for publication on our records the estimate we place on the life and character of our deceased brother. It is presumed I was selected for this task, because for seven and a half years I was intimately associated with him in our court of last resort. Judge Snyder came from Revolutionary ancestry. He was a son of the Revolution. For this reason perhaps he was intensely American. His grandfather, John Halderman, was a soldier in our war for independence. He was the son of John and Elizabeth (Halderman) Snyder. His grandfather, Jacob Snyder, removed from Pennsylvania to Pendleton County, Virginia, not long after the close of the Revolutionary war. The subject of this sketch, Adam Carey Snyder, was born in Highland County (then Pendleton), Virginia, on the 26th day of March, 1834. After receiving such education as the schools of his neighborhood afforded, he went to Mossy Creek Academy, in Augusta

County, Virginia, in 1852–3; Tuscarora Academy in Mofflin County, Pennsylvania, in 1854–5; Dickinson College, Pennsylvania, in 1856, and Washington College, now Washington-Lee University, at Lexington, Virginia, in 1857–8, where he completed his collegiate course. He then entered the law school at Lexington, Virginia, in charge of Hon. John W. Brockenbrough, then judge of the United States District Court for the Western District of Virginia. At that time the jurisdiction and business of the United States District Court was not what it is now, and Judge Brockenbrough had much more leisure than our Judge Jackson, who is, and for thirty-six years has been, one of the hardest worked judges in the whole county. Judge Brockenbrough was kind to his law students and gave them every advantage in his power. It was his custom to have a number of his law students summoned on the petit jury, and they would attend his court in its different sessions and serve as jurors. This was of great advantage to his students, and gave them a practical knowledge of the practice at the bar, that would have taken them in the usual way years to acquire. Besides, they learned much from hearing the rulings of the able judge on points of law as they would arise at the trial, and in his terse and explicit charges to the jury on the law of the case. Young Snyder profited as much as anyone could from this splendid training, which showed itself through his whole professional and judicial life. He was admitted to the bar at Lewisburg, Greenbrier County, then Virginia, in 1859, which place he made his home, and where he commenced his law practice, and where he had to wait for practice as most young lawyers do; but he was not idle. He pursued his legal studies and made his influence felt in various ways, among others, in writing editorials for his town paper. In 1861 the great civil war-cloud burst, and the whole country was drenched in fraternal blood. Young Snyder's surroundings were such that he could not hesitate long as to where his fortune in the strife would be cast. Unlike Maine's greatest orator, he did not first consult one

side and then the other to find out, if he could, which side would prevail in the fratricidal strife, with a view of placing himself on the side of the victors so that he might reap a personal advantage. Though he loved the Union yet he loved his State, and when his State went into the Confederacy, like the great Lee he could not fight against his State, so like all the other young men in his section of the State, heard the call of his mother Virginia for help, and rushed to rescue. Call him mistaken, if you will, but he followed the dictates of his training, and the impulse of his loyal heart to his State. He believed he was right, and to prove it see him in the strife, with his company, the Greenbrier Rifles, in the old Twenty-Seventh Virginia of which he was adjutant, the battle in the valley of Virginia, at first and second Bull Run, at Harristown, Winchester, Cross Keys, Port Republic; the seven days battles around Richmond, Fredericksburg, Chancellorsville and Gettysburg. If his gallantry in battle, and day and night exposure to death, did not attest his devotion to the cause he espoused, nothing would. In August, 1863, on furlough he visited friends in Monterey in Highland County, Virginia, and a detachment of Federal soldiers made him a prisoner of war, and he was taken to the Athaeneum, a military prison at Wheeling, West Virginia, and remained there in close confinement until March, 1864, when he was exchanged. He told me that when he was taken to Wheeling, and saw the multitudes of men in the streets, and the general business prosperity, and read the great Northern papers which told of the general prosperity and unlimited resources of the North, his faith of Confederate success failed him, and when he was exchanged and returned to the South, he told his friends they never could succeed, being convinced by what he had seen and heard,—that his friends were disposed to doubt his loyalty because he told them the truth. Broken down in health, and suffering from the wound he received at Bull Run on the 21st of July, 1861, and from scurvy contracted in prison, he went to his old home in Highland County and being incapacitated for further mili-

tary service, he did not again join the army. He resumed the practice of the law as soon as his health would permit, and in 1865 was elected prosecuting attorney of Highland County. After the test oath law that prevented him from practicing in West Virginia was repealed, he returned to Greenbrier County, now West Virginia, for the new State had been formed in 1863. He at once took high rank as a lawyer in both the State and Federal courts. He continued his practice in which he was very successful, until the first of June, 1882, when he was appointed by Governor J. B. Jackson a judge of the Supreme Court of Appeals of West Virginia, to fill the vacancy caused by the death of the lamented Judge Patton. He was appointed until the next general election, which occurred in November of that year. He was a candidate and was elected. When he had filled the unexpired term for which he was elected, he was, in November, 1884, elected for the full term of twelve years. He remained upon the bench until the 8th of November, 1890, when, tired of judicial life, and being pressed by business cares, he resigned his judgeship. Upon the retirement of Judge Johnson, on the 31st day of December, 1888, who was then the president of the court, Judge Snyder was elected to the position, and was president of the court when he resigned. His associates on the bench were, first, Judges Haymond, Green and Johnson, then for six years, Judges Green, Johnson and Woods; then for about one and a half years, Judges Green, Brannon and English, and for eleven months, Judges Brannon, English and Lucas.

His resignation on the 8th of November, 1890, after more than eight years on the Supreme Bench, where he had distinguished himself, and while in the zenith of his usefulness as a judicial officer, caused serious regret in the bar, and in the people generally, whom he had so unostentatiously and faithfully served.

He retired to his home in Lewisburg, to attend to his large private interests. He might have had a large law practice, but he declined almost all cases brought to him,

attending to but a few large cases in the higher courts, preferring to look after his large private business interests, consisting in coal mines, iron mines, etc. He came out of the Civil War with nothing but a good education, a large experience, great industry, a strong will, and indomitable pluck and energy. He had pluck, push and principle, and with a judicious use of these essential qualities, he accumulated a reputable fortune, and no one could truthfully say that he made any of it dishonestly. He was a domestic man, with strong attachments for his home.

In 1869 he married Miss Henrietta H. Cary, a daughter of William and Ophelia (Mathews) Cary. They had five children, four sons and one daughter. One son is a physician in Baltimore, one a civil engineer and the other two are now students in the West Virginia University. The youngest, a daughter, Julienne, is at the homestead in Greenbrier County with their widowed mother. After his retirement from the bench he spent all the time possible with his family not absolutely necessary to devote to his large private business. But the time came when his health, never robust, failed him. In July, 1896, he was suffering from stomach trouble and his friends had some apprehension, but thought he would rally. The family physician came one day, and felt it his duty to prepare him for the great event that he knew must soon take place. He told him he had but a short time to live, and if he had any business to attend to it ought to be attended to now. An awful announcement to make — tell a man that death was but a short time in the future; that he was about to leave his family and all he loved on earth; that he must take the journey to "that undiscovered country, from whose bourne no traveler ever returns;" that he must meet his God. To one who was unprepared for such a change, such an announcement would naturally cause great alarm. But did it prostrate him? No; calm as he ever was, he sent a messenger for his closest friend outside his own family, Major A. F. Mathews, who hastened to his bedside, and, as calm and undismayed as he had ever been in perfect

health, he talked to his friend about his business affairs, and instructed him what to do, and in less than forty-eight hours, at two o'clock p. m. on the 24th of July, 1896, he had "crossed the flood" and "this mortal had put on immortality." "The terror king had no terror for him," as I know he had reflected much on the future state and he did not dread it.

He went not

> "Like the quarry slave at night,
> Scourged to his dungeon, but sustained and soothed
> By an unfaltering trust; approched his grave,
> Like one who wraps the drapery of his cloak
> About him, and lies down to pleasant dreams."

Thus died Judge Snyder like the hero he was.

He is removed from us, and now let me, his friend and associate on the Supreme Bench of this State for seven and a half years, leave on record my estimate of his character, in which all who knew him must concur. He had a splendid intellect, trained by a liberal education, and a mind richly stored with knowledge, with a strong will, which gave him indomitable industry, energy and perseverance, and well fitted him to fill any station in life to which he might be called.

His great heart was filled with love to his fellow-man, that he despised oppression and injustice of every description, and was outspoken against it.

With the most tender affection for his wife and children, his efforts were exerted to the utmost to secure their happiness.

There was no duty as a citizen he owed to the State that he did not faithfully discharge.

In his chosen profession of the law he was not only able and brilliant, but he was also honest and honorable.

He would fight his clients' legal battles, with even more energy and courage than he would fight his own. His engagement with his brother lawyers he would always keep with scrupulous fidelity. He never mistreated an enemy, nor betrayed a friend. His social qualities endeared him

to his friends. He was kind and affable, fond of an anecdote, and quick at repartee. He was a sociable, lovable, congenial friend and companion.

But I particularly wish to speak of him as a judge. It requires a peculiar combination of high qualities to create the highest type of a judicial officer.

He must be a man of strong native intellect. He must have a fine education, one which will so discipline his mental powers that he will be capable of hard, long-continued mental labor, and never relax his mental hold until he has arrived at a proper and just conclusion; one that will stand the test of time; right, because to decide otherwise would do injustice in that particular case, and as a precedent to be followed would do injustice in many cases in the future.

He must have a strong innate sense of justice, so that when he is in possession of the facts, he intuitively knows on which side justice requires the decision to be. It is said of the great Chief Justice Marshall that he possessed such a judicial mind, that after examining a second, he would come to a conclusion, and would announce it to his brethren, and say: "this case must be decided so." "Story, find the authorities to sustain this decision." And Story would find them.

He must follow the precedents. The judge is far from the line of duty who will follow his own caprices, rather that the precedents.

The judge or court that will do this is doing that which will, as long as the book containing such opinions exist, stamp him as wanting in one of the most essential elements of a good and upright judge. To do so works rank injustice, because the court is in such case usurps the province of the legislature. Much worse than this, because the legislature would correct what it supposed had been an improper rule established by the court, which act would not act retrospectively, but perspectively, and, of course, would not affect prior cases that would come under the rule; but where a court undertakes to depart from the precedents, and decides contrary thereto, and changes a

rule of property, its decision acts retrospectively and robs a man of rights and property to which he was entitled under the established rule.

He must be incorruptible; all his conduct and decisions must be such, that no breath of suspicion should ever cause the blush of shame to color his judicial face, and no calumny could ever soil his judicial robes. His whole demeanor should be such, and his "life so gentle, and the elements so mixed in him, that nature might stand up and say to all the world, *this is a man*."

The standard of judicial qualification as given above is very high, and many judges fall far below it, but these qualifications are essential to the judicial office. Judge Snyder filled every one of these requirements. He possessed a fine discriminating, judicial mind. He possessed other qualifications that distinguish the higher type of a judicial officer. He was terse and concise in expression. This qualification was one of the many that gave him a great judicial reputation. He was clear; no one ever misunderstood one of his opinions.

His opinions are models. They come fully up to the proper standard of judicial opinions, nothing repeated, nothing omitted, long enough to make everything clear, not too short so there might be a feeling of disappointment that the reasoning was incomplete. They generally give but one reason for the point decided and that the best one, and each point sustained by only the most pertinent authority. He wrote many opinions which will be found in seventeen volumes of our Supreme Court reports, from the twentieth to the thirty-sixth inclusive. They are all there, clear and convincing. He was a most conscientious judge. His whole aim was to decide the case according to law without regard to consequences. Nothing but strong reason and authority, having the force of *stare decisis*, could drive him from a position taken after due consideration.

In the consultation room he was extremely tenacious of his opinions, and would only yield to reason, or binding

authority. I have seen him carry his points many times in consultation, by the force of his reasoning. But he would yield quickly and gracefully if convinced he was wrong.

As long as jurisprudence shall command the admiration of the lawyer, judge and statesman, and have the respect of the people, the value of Judge Snyder's strong and convincing opinions will increase, and their luster will never fade.

Being endowed with a splendid intellect, which was cultivated by a college training, and by his habits of great industry, and searching investigation, enriched by a profound knowledge of the law, he was well equipped to make the distinguished judge he was. He was a profound lawyer and an able and upright judge, and as such he is embalmed in the hearts of the bench and bar of West Virginia, and was respected, admired and loved by the people of his State. His opinions were numerous, and took a very wide range, and whether the case involved intricate constitutional questions, or questions arising from breach of contract, tort or in equity, he brought to their solution the same close and convincing reasoning. But two of his many opinions will be referred to, as showing the strength of his judicial mind, and his true and close reasoning, and which justify all that has been said as to his power in writing a model judicial opinion.

The first, *State* v. *Goodwill*, 33 W. Va. 179, involves an abstruse constitutional question. The miners at certain mines in the Kanawha Valley had agreed to take in payment for labor orders on the company's stores. The legislature passed an act making it a misdemeanor for coal companies to pay their miners in such orders, and affixed a penalty to the violation of the statute. Among others, Goodwill was indicted, demurrer to the indictment was overruled and he pleaded not guilty. The case was tried and he was found guilty and the fine imposed. To the judgment he obtained a writ of error. Judge Snyder prepared the opinion of the court, and in a most clear and concise opinion, came to the conclusion that the statute was

class legislation, and broke down the sacred right to make such contracts as people chose to make that were not against the constitution, and held "that it is not competent for the legislature under the constitution to single out owners and operators of mines and manufacturers of every kind, and provide that they shall bear burdens not imposed on other owners of property or employees of labor, and prohibit them from making contracts which it is competent for other owners of property or employees of labor to make. Such legislation cannot be sustained as an exercise of the police power. That the act of the legislature which prohibited persons engaged in mining and manufacturing from issuing for the payment for labor any order or paper except such as is specified in said act, is unconstitutional and void."

The other case, decided before that, *White* v. *Tenant*, 31 W. Va. 79, involves a nice question in private international law, or the conflict of law. The opinion is short, long enough, true, clear and convincing, and applies the law to the facts of that case in this language: "When a person entirely abandons his former residence in one State, with no intention of resuming it, and goes with his family to another residence which he has rented in another State, with the intention of making the latter his residence for an indefinite time, the latter residence is his domicile, notwithstanding the fact that after he and his family arrived at the new residence, which is only about a half mile from the State line, they go on the same day on a visit to spend the night with a neighbor in the former State, intending to return in the morning of the next day, but is detained there by sickness until he dies, and never does, in fact, return to his new home."

If all our courts of last resort could be composed of such judges as the subject of this sketch the country would be safe.

HON. BENJAMIN FRANKLIN MARTIN.

BY HON. JOHN W. MASON.

The story of a long and active life cannot be told in the brief paper which this association will expect from me. The many noble traits which marked the character of Benjamin Franklin Martin cannot be described in the time which I could reasonably ask you to allow me on this occasion. He lived through the most interesting and important period in the history of this country — from October 2d, 1828, to January 20th, 1895. In all the great events of his day he took an active part. He had positive and decided views on all subjects and never hesitated to express them. There was nothing negative about him. He was positive and aggressive, without the slightest degree of hypocrisy. To his friends he was confiding and loyal, to his enemies open and frank. One might not always agree with him but no man who knew him well, could avoid admiring him.

He was born on a farm near Farmington, in Marion County, West Virginia. After reaching the age of about twenty-one years he left the farm and entered Allegheny College at Meadville, Pa., graduating in June, 1854. Returning to his native county with his young bride, he taught school at Fairmont for about two years, studied law in the meantime and was admitted to the bar in the spring of 1856. In the autumn of 1856 he moved to Taylor County, where the remainder of his life was spent. He married Miss Nancy E. Carlan, of Meadville, Pa. This marriage was a most happy and fortunate one. They were congenial and devoted to each other. For more than forty years there was not a happier home in America than Mr. Martin's. Nothing in Mr. Martin's exalted character deserves a higher meed of praise, than does his exemplary and pure home life. None but those who were admitted

to his fireside and knew his inner and every-day life, understood how good and truly noble he was.

For many years he devoted his talents and energy to the practice of his profession, and was recognized by every one who knew him as a very superior lawyer. He was industrious, methodical and scrupulously honest. In the preparation of a case for trial he seemed to neglect nothing which human foresight could anticipate. Every possible phase of the case was considered and nothing left to chance. But it was in the midst of a jury trial that he displayed to best advantage his matchless skill and wonderful powers. As a trial lawyer he had no superior and few equals in the courts in which he practiced. The antagonist who exposed the weak points in his armor was sure to have it pierced by Mr. Martin's keen lance. In these battles he was as manly as he was brave and adroit. He met the issues fairly and without evasion. Be it said to his honor, he never intentionally misstated a fact or attempted to mislead the court or jury. A marvelous memory enabled him to quote accurately the evidence in the very language of the witness. He rarely took notes of the evidence, even in a very lengthy case, yet he would repeat with great accuracy every material fact proven. His addresses to the jury were models of logic, accuracy and simplicity of language. He always spoke to the jury and not to the audience; and sought a verdict for his client and not glory for himself. Earnestness, a plain and simple style, logical arrangement, with most delightful and pleasing manners, made him a popular speaker.

For many years he was the most successful practitioner in his county. This success was attained, not alone by the fact that he was a good lawyer, and an experienced and astute debater, but by reason of the further fact, that the people loved him and confided in him. He had the unquestioned confidence of the people from whom the juries were selected, and thus the unsullied reputation he had built among his neighbors aided him largely in his work. A bad man cannot be a successful practicing lawyer for any considerable length of time at the same place.

Mr. Martin gave some time to politics. As a politician he was zealous and hopeful and had the power of inspiring his associates with much of his zeal and earnestness. He was a member of the State convention of 1872 which framed our present constitution. Being a good lawyer and an able speaker he occupied a very high position in that convention of distinguished men. Twice his party elected him a member of the House of Representatives of the United States — in 1876 and again in 1878. His majority in 1878 was the largest ever given to any man in the district. From early manhood he was a member of the Methodist Episcopal Church. He was a lay delegate to the General Conference of 1876; president of the Lay-Electoral Conference at Parkersburg in 1887; one of the trustees and treasurer of the Conference Seminary at Buckhannon, and superintendent of his Sabbath School for many years. He was one of the most active men in the State in all good and charitable work. He was generous and liberal to a fault. Contributions were made by him to every good work within his reach. Not a church was built in Taylor County for forty years to which he did not give substantial aid. He was never too deeply engrossed in business or politics to decline to do a favor for a deserving neighbor.

Standing beside the beautiful stone, which a loving wife has had erected to mark his resting-place in the cemetery at Fairmont, one can say as Burns said of a friend:—

"An honest man here lies at rest
As e'er God with his image blest;
The friend of man, the friend of truth;
The friend of age and guide of youth;
Few hearts like his with virtue warmed,
Few heads with knowledge so informed;
If there's another world he lives in bliss;
If there is none he made the best of this."

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