DISPUTED QUESTIONS OF EVIDENCE Relevancy: Presumptions of Law and Presumptions of Fact.
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Reprinted from the Southern Law Review.
G. I. Jones and Company. St. Louis 1877.

Some Disputed Questions of Evidence.

I. Relevancy.

Sir J. F. Stephen, in his Indian Evidence Act of 1872, proposes the following rules as to relevancy:

"Evidence may be given in any suit or proceeding of the existence or non-existence of every fact in issue, and of such other facts as are hereinafter declared to be relevant, and of no others.

"Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place, or at different times and places.

"Facts which are the occasion, cause, or effect, immediate or otherwise, of relevant facts, or facts in issue, or which afforded an opportunity for their occurrence or transaction, are relevant.

"Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

"Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of any thing or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.

"Where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong, anything said, done, or written, by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them, is a relevant fact as against each of the persons believed to be so conspiring, as well for the purpose of proving the existence of the conspiracy, as for the purpose of showing that any such person was a party to it.

"Facts not otherwise relevant are relevant: (1) if they are inconsistent with any fact in issue or relevant fact; (2) if by themselves, or in connection with other facts, they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

"In suits in which damages are claimed, any fact which will enable the court to determine the amount of damages which ought to be awarded is relevant.

"Where the question is as to the existence of any right or custom, the following facts are relevant:

- Any transaction by which the right or custom in question was created, claimed, modified, recognized, asserted, or denied, or which was inconsistent with its existence;
- Particular instances in which the right or custom was claimed, recognized, or exercised, or in which its existence was disputed, asserted; or departed from.

"Facts showing the existence of any state of mind—such as intention, knowledge, good-faith, negligence, rashness, ill-will, or good-will towards any particular person, or showing the existence of any state of body or bodily feeling—are relevant when the existence of any such state of mind or body or bodily feeling is in issue or relevant.

"Where there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant."

To Mr. Whitworth, an English barrister, we are indebted for the following modification of Sir J. F. Stephen's scheme:

"*Rule I*—No fact is relevant which does not make the existence of a fact in issue more likely or unlikely, and that to such a degree as the judge considers will aid him in deciding the issue.

"*Rule II*.—Subject to Rule I, the following facts are relevant:

- Facts which are part of, or which are implied by, a fact in issue; or which show the absence of what might be expected as a part of, or would seem to be implied by, a fact in issue.
- Facts which are a cause, or which show the absence of what might be expected as a cause, of a fact in issue.

- Facts which are an effect, or which show the absence of what might be expected as an effect, of a fact in issue.
- Facts which are an effect of a cause, or which show the absence of what might be expected as an effect of a cause, of a fact in issue.

"*Rule III*.—Facts which affirm or deny the relevancy of facts alleged to be relevant under Rule II are relevant.

"*Rule IV*.—Facts relevant to relevant facts are relevant."

Sir J. F. Stephen, in his "Digest of the Law of Evidence," now gives the following as exhibiting his final views, adopting, in part, Mr. Whitworth's phraseology:

"Evidence may be given in any action of the existence or non-existence of any fact in issue, and of any fact relevant to any fact in issue, and of no others. * * * Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction or subject-matter, are relevant to the fact with which they are so connected.* * * Facts, whether in issue or not, are relevant to each other when one is, or probably may be, or probably may have been,

"The cause of the other;

"The effect of the other;

"An effect of the same cause:

"A cause of the same effect;

or when the one shows that the other must or cannot have occurred, or probably does or did exist, or not; or that any fact does or did exist or not, which in the common course of events would either have caused, or have been caused, by the other; provided that such facts do not fall within the exclusive rules," before stated, "or the exceptions," afterwards stated.

These exclusions and exceptions are afterwards thus specified: "*Similar but unconnected facts*. The occurrence of a fact similar to, but not specifically connected in, any of the ways hereinbefore mentioned with the facts in issue, is not to be regarded as relevant to the existence of such facts except in the cases specially excepted in this chapter." The exceptions are:

"Acts showing intention, good faith, etc.;

"Facts showing system;

"Existence of a particular course of business;

"Acts showing that a particular person assumed to be a public officer."

To the analysis just given, however, there are objections which I state in outline in my forthcoming work on Evidence (§ 26), and which I now expand. What is a "cause?" Is not the term open to at least two divergent meanings; and does not the value of the analysis before us depend upon our assuming one of these definitions to be true, where there are many reasons to regard it as untrue? The "cause" of a phenomenon, according to Mr. Mill, is the sum of all its antecedents. The objection to this, however, as is shown by Trendelenberg, in his acute essay on this topic, is, that as all nature is interdependent, everything thus becomes the cause of everything else; and, hence, as all things unite in this lateral causation, all evidence is relevant to every issue, and no issue can be narrowed to any particular line of evidence. On the other hand, if we mean by "cause," as I have heretofore argued in this REVIEW, such an interposition, by a responsible moral agent, as produces specifically the particular phenomenon in litigation, then to say that a particular fact is relevant to prove causation is assuming the very point in issue, which is whether the causation flowed from the particular fact.

Another criticism I would venture on Sir J. F. Stephen's analysis is, that the distinction made by him between "facts in issue" and "facts relevant to facts in issue" cannot be sustained. An issue is never raised as to an evidential fact; the only issues the law knows are those which affirm or deny conclusions from one or more evidential facts. This is shown by Sir J. F. Stephen's own illustration: "A," he says, when explaining the supposed distinction, "is indicted for the murder of B, and pleads not guilty. The following facts may be issued: the fact that A killed B; the fact that at a time when A killed B he was prevented by disease from knowing right from wrong; the fact that A had received from B such provocation as would reduce his offence to manslaughter. The following facts would be relevant to the issue: the fact that A had a motive for murdering B; the fact that A admitted that he had murdered B; the fact that A was, after B's death, in possession of property taken from B's person." If we scrutinize the group of facts classified in the last quotation as "facts in issue," we will find that, as they are facts which could not be put in evidence, they are not relevant facts, though they might be relevant hypotheses to be sustained by relevant facts. If counsel should ask a witness whether "A killed B," the question would, if excepted to, be ruled out, on the ground that it called, not for "facts," but for a conclusion from facts, and to such conclusions witnesses are not permitted to testify. Equally summarily would be dismissed the questions whether "A knew right from wrong," and whether "A had received from B such provocation as would reduce his offence to manslaughter." The only way of proving either of these "fact in issue," as they are called by Sir J. F. Stephen, is by means of what he calls "facts relevant to the issue." Did A kill B? We cannot say hat

it would be relevant to the issue for a witness to say, "A killed B," for a witness would not be permitted so to testify. No facts are relevant which are inadmissible; and the fact that A killed B, being in this shape inadmissible, is irrelevant. It is, however, admissible—to take up Sir J. F. Stephen's illustration of facts relevant to the issue—to prove that A had a motive for murdering B; the fact that A admitted that he had murdered B; the fact that A was, after B's death, in possession of property taken from B's person. From such facts, taken in connection with facts which lead to the conclusion that A struck the blow from which B died, the hypothesis that A murdered B is to be verified or discarded. The same line of observations is applicable to the second and third of the "facts in issue" mentioned by Sir J. F. Stephen. The proof of A's inability to distinguish right from wrong, and of the extenuation of his offence through hot blood, can only be made by proving "facts relevant to the issue" from which irresponsibility or hot blood can be inferred. We must, therefore, strike out from the category of relevant facts what Sir J. F. Stephen calls "facts in issue," or what may be more properly called pertinent hypotheses, and limit ourselves to the position that all facts relevant to "facts in issue" (or to pertinent hypotheses) are, as a rule, admissible. If we discard, as ambiguous, the word "fact," and substitute for it the word "condition" (corresponding to the logical *"differentia"* or incident), then the position we may accept is that *all conditions of a pertinent hypothesis are relevant to the issue, and that such conditions may be cither proved or disproved.*

NOTE.—The above paragraph (as well as several others in the course of this article) is taken from the work on Evidence to which I have referred.

It may, however, be objected that the definition I now propose is ambiguous in the use of the word "pertinent;" and that, by the introduction of this term, I beg the question at issue. I do not think so. By pertinent hypothesis I mean an hypothesis which, if proved, would logically influence the issue. Suppose, for instance, the question should arise before a duly constituted court, whether Mr. Wells, of the Louisiana Returning Board, was guilty of fraud in the alteration of returns. Relevancy in such an issue would be determinable, according to the definition I here propose, by free logic, and not by technical jurisprudence. The hypothesis set up by the prosecution in such a case would be that Mr. Wells, either for money or to gratify party zeal, tampered with the returns. If this hypothesis be sustained, the defendant, if the prosecution be properly conducted, would be deservedly convicted, and to sustain the hypothesis it would be admissible to prove any of its logical conditions. It would be relevant, for instance, to prove, as a condition of the hypothesis of corruption, that Mr. Wells took money, or offered to take money, for his action as a return judge; or that he made, personally or through deputy, falsifications in the records; or that by his subsequent conduct he tacitly admitted such falsifications.

It will be seen, therefore, from the illustration just given that the conditions of a pertinent hypothesis, which are as such relevant to an issue, are either prior, contemporaneous, or subsequent. A debt, for instance, for goods sold, as is contended, is sued for. Among the prior conditions of the hypothesis (or contention) of indebtedness may be mentioned the possession by the plaintiff of the goods. As contemporaneous conditions are to be classed what we call the *res gestæ*, or circumstances of the sale. Among the subsequent conditions is the conduct of the debtor, more or less effectively admitting the debt. Or damages are claimed in a suit for injuring cattle by running them down on a railroad. Among the prior conditions of the liability are the unfenced condition of the road, and the running of the locomotive at full speed over the unfenced sections. Among the contemporaneous conditions are the *res gesta*. Among the subsequent conditions is an admission of parties entitled to speak for the railroad company. In other cases we may regard as relevant conditions a party's subsequent conduct showing good or bad faith;

Gerish v. Chartier, 1 C. B. 13.

the subornation of witnesses to give a false account of a past transaction;

Melhuish v. Collier, 15 Q. B. 878.

subsequent acts of adultery to prove a prior act of adultery;

Boddy v. Boddy, 30 L. J. Pr. & Mat. 23.

subsequent defamatory words to prove the *animus* of prior defamation.

Pearson v. Le Maitre, 6 Scott N. R. 607; 5 M. & Gr. 700; Warwick v. Foulkes, 12 M. & W. 507; Simpson v. Robinson, 12 Q: B. 511.

Of course, when the conditions of a pertinent hypothesis are relevant, it is relevant to prove conditions fatal to such an hypothesis. If Mr. Wells were on trial, for instance, it would be relevant to prove that he was absent from Louisiana at the time of the commission of the frauds on the fran- chise of that state; or that he was himself the ignorant and unsuspecting dupe of others. Or, to turn to adjudicated cases, in a suit against a railroad corporation for negligently firing the plaintiff's farm, it is relevant for the defendant to prove the absence of conditions which would be the probable, if not necessary, conditions of such hypothesis. So, the defendant may show that his engines were so constructed as to make the profuse emission of fire highly improbable; that the coals that escaped fell on the bed of the road, on which there was no accumulation of

combustible material; and that the fire by which the plaintiff was injured was traceable to the negligence of other parties. Or, when the hypothesis of the plaintiff is that, when A and B perished in the same ship at sea, A survived B, it is admissible for the defendant to show that before the shipwreck A was stronger than B; that at the time of the shipwreck A was in a better place for the prolongation of life than B; and that after the ship-wreck there were traces of A having escaped the common and immediate death of those remaining in the ship. Or, *alibi* being the hypothesis set up by the defence, it is admissible to prove even independent crimes committed by the defendant, if such proof refutes the hypothesis of *alibi*

R. v. Briggs, 2 M. & Rob. 199; R. v. Rooney, 7 C. & P. 517; and see Whart. on Ev. § 28.

One of the most interesting illustrations of the doctrine here laid down arises in cases in which accident or casus is set up as a defence. A forged note is passed, and the defence is: "I passed it ignorantly; the whole thing was accident." Or a man is knocked down in the street, and his assailant, when put on trial, says: "This was all accident; I was jostled against him in the crowd." Or a carrier fails to comply with a contract made by him to transport goods from point to point, and sets up *casus* or *vis major* as his excuse. In each of these cases it is admissible to meet the hypothesis of *vis major*, *casus*, or accident, set up by the defence, by showing in rebuttal a series of other cases forming part of a system with that in litigation, and to which, as a body, the defence in question would be absurd. The rule in such case is that, when a system is established, the conditions of other members of the system may be proved to affect the case in court, has been further illustrated in cases in which the customs of one manor are put in evidence to affect other manors of the same system. No rule is better established, or more frequently acted upon, than that which precludes the customs of one manor from being given in evidence to prove the customs of another; because, as each manor may have customs peculiar to itself, to admit the peculiar customs of another manor in order to show the customs of the manor in question would be inadmissible as a disconnected fact by the rule above stated, and would put an end to all question as to the peculiar customs in particular manors by throwing them open to the customs of all surrounding manors.

Anglesey v. Hatherton, 10 M. & W. 235.

But whenever a connection between the manors is proved, such customs become admissible. It is not enough, it is true, to show merely that the two lie within the same parish and leet; nor even that the one was a subinfeudation of the other; at least, unless it be clearly shown that they were separated after the time of legal memory, since otherwise they may have had different immemorial customs. On the other hand, the customs of manors become reciprocally admissible if it can be proved that the one was derived from the other after the time of Richard the First; and it has been also held, that if the customs in question be a particular incident of the general tenure which is proved to be common to the two manors, evidence may be given of what the custom of the one is as to that tenure for the purpose of showing what is the custom of the other as to the same.

Ibid.; Stanley v. White, 14 East, 338.

On the same principle, when value is in question, and when certain things are proved to belong to a system, then the market value of such other things is relevant for the purpose of determining the market value of whatever is part of the system.

Campbell v. U. S., 8 Ct. of Cl. 240; Kansas Stockyard Co. v. Couch, 12. Kans, 612; Waterson v. Seat, 10 Fla. 326.

We must at the same time remember that a remote period, under different conditions, cannot in any view be taken as a standard,

The Pennsylvania, 5 Ben. 253; White v. R. R. 30 N. H. 188; French v. Piper, 43 N. H. 439; Paine V. Boston, 4 Allen, 168; Benham v. Dunbar, 103 Mass. 365; Dixon v. Buck, 42 Barb. 70; Columbia Bridge v. Geisse, 38 N. J. L. 39. See Potteiger v. Huyett, 2 Notes of Cas. 690; Abbey v. Dewey, 25 Penn. St. 413; East Brandywine R. R. v. Ranck, 78 Penn. St. 454.

nor can peculiar associations, likely to give a factitious value, be taken into account.

Palmer v. Ferrill, 17 Pick. 58; McCracken v. West, 17 Ohio, 16.

Distant markets cannot be consulted in proof of value;

Davis v. Sherman, 7 Gray, 291; Fowler v. Middlesex, 6 Allen, 92. See, generally, Kent v. Whitney, 9 Allen, 62; Boston R. R. v. Montgomery, 119 Mass. 114; Freyman v. Knecbt, 78 Penn. St. 141; Shenango v. Braliam, 79 Penn. St. 447; Baber v. Rickart, 52 Ind. 594; McLaren v. Birdsong, 24 Ga. 265.

though it is otherwise if the markets be in any way interdependent,

Harrington v. Baker, 15 Gray, 538; Greeley v. Stilson, 27 Mich. 153.

or sympathetic.

Siegbert v. Stiles, 39 Wis. 533.

Nor is it admissible for things of a different species to be taken into consideration in determining value;

Cliquot's Champagne, 3 Wall. 114; Kermott v. Ayer, 11 Mich. 181;:Sisson v. R. R., 14 Mich. 489; Comstock v. Smith, 20 Mich. 338.

nor should much weight be attached to proof that prices had been offered in private negotiations by third

parties; such evidence being open to fraud, and, at the best, indicating only private opinion, not the opinion of a market.

Gouge v. Roberts, 53 N. Y. 619.

And while hearsay is admissible to prove the state of a market,

Perkins v. People, 27 Mich. 386.

the value of an article, or the extent of a party's income, cannot ordinarily be inferred from the record of a tax assessment. This is the act of a third party, who must be called if obtainable.

A still more striking illustration of relevancy based upon system is to be found in the admissibility of collateral facts when such facts go to indicate constant natural laws. The seasons, for instance, pursue, in the long run, a regular course; and we may, therefore, presume that winter is cold and summer is warm; though this is open to proof that in an exceptional season the winter is comparatively mild, and the summer is comparatively cool. It may be that in a particular winter, even in a northern climate, we may have no snow-storms; yet we infer that what is usual is continuous, and not only do we take each fall the steps that will enable us to shelter ourselves against snow, but we assume as to any given past winter that there fell in it the usual quantity of snow. So with regard to ice. In New England, for instance, ice crops are usually formed each winter, and these may be stored if due diligence be shown; and on a suit based on lack of diligence in this respect it would be inferred, until the contrary was shown, that the winter was cold enough to produce the usual quantity of ice. Hence it is that *casus*, or the extraordinary interruption of apparent physical laws, must be affirmatively shown by the party alleging such interruption; and, until such proof, that which is usual is deemed to be constant. In order, however, that evidence based on the constancy of nature should be received, similarity of conditions should be first established. Thus in an action to recover damages for injury caused by removing stones from a river, resulting in the washing away the plaintiff's land, it has been held not error to exclude evidence of the effects of the action of the water at another place and time, the forces and surroundings not being first shown to be alike.

See Hawks v. Inhabitants, 110 Mass. 110 On the general topic, see Mill's Logic, ch. xiv.

One of the most difficult questions that arises in this connection is that which is presented when, to prove that the negligent dropping of fire by a locomotive was the cause of a particular conflagration by which adjacent property was consumed, the effort is made to put in evidence prior fires caused unquestionably by sparks proceeding from engines traveling the same road. Evidence of this class may be offered so as to meet two distinct phases of fact. The first is when a plaintiff, after proving that his house was fired by sparks emitted by engine No. I on the defendant's road, offers to show that on several former occasions sparks were emitted by the same engine in such profusion as to lead to the inference that the engine was either defectively con- structed or carelessly driven. In such case we must hold the evidence to be admissible. The fact that the engine has frequently caused damage of this kind indicates defects in its construction which impose upon its owner, if not its condemnation, at least the exercise of peculiar care both in its repair and its management; and that such care was applied, the burden, after proof of frequent fires caused by the same engine, is on him to show. On the other hand, suppose that, after the plaintiff proves a firing from engine No. 1, he offers to show a series of prior firings from engines Nos. 2, 3, 4, 5, and 6, without offering to show that there was such identity of construction of the engines, as a mass, as to make it probbable that the defects in engines Nos. 2, 3, 4, 5, and 6 existed in engine No. I. In such case the proof of firing from any other engine than No. 1 would be as irrelevant as, in an action by A for hurt from a kick of a horse belonging to B, it would be irrelevant to show that on other distinct occasions other horses of B had kicked C, D, and E.

Erie R. R. v. Decker, 78 Penn. St. 293. See Waugh v. Shunk, 20 Penn. St. 130; Carson v. Godley, 26 Penn. St. III.

There is, however, another contingency in which the argument from system does not apply. Suppose, for instance, that when evidence of prior firings by certain specified engines is offered, there is no identification, on the part of the plaintiff, of the engine by which the fire was emitted; or suppose that, though that particular engine is identified, there is no identification of the engines causing the prior fires, is the evidence relevant? We have now to touch a question of probabilities which has already been noticed, and we may adduce, in explanation, the same illustration. Although there were one hundred thousand people of a particular class at a particular place at a particular time, yet it is relevant to prove that A was at that place at that time when the question is whether A did something that could only have been done at that place and time. So, when an offer is made of a series of firings from a series of unidentified locomotives on the same road, such offer is relevant as one of the conditions of an hypothesis which charges a particular locomotive with the firing. Of weight, if disconnected with other evidence, it cannot be; relevant, for the reasons just stated, it certainly is. "The third assignment of error," so speaks *Mr. justice* Strong, in giving an opinion to this effect in the Supreme Court of the United States in 1876,

Grand Trunk R. R. v. Richardson, 91 U. S. (I Otto) 454.

is "that the plaintiffs were allowed to prove, notwithstanding objection by the defendants, that at various times during the same summer, before the fire occurred, some of the defendants' locomotives scattered fire when going past the mill and bridge, without showing that either of those which the plaintiffs claimed communicated the fire were among the number, and without showing that the locomotives were similar in their make, their state of repair, or management, to those claimed to have caused the fire complained of. The evidence was admitted after the defendants' case had closed. But, whether it was strictly rebutting or not, if it tended to prove the plaintiffs' case, its admission as rebutting was within the discretion of the court below and not reviewable here. The question, therefore, is whether it tended in any degree to show that the burning of the bridge and the consequent destruction of the plaintiffs' property was caused by any of the defendants' locomotives. The question has often been considered by the courts in this country and in England, and such evidence has, we think, been generally held admissible as tending to prove the possibility, and a consequent probability, that some locomotive caused the fire, and as tending to show a negligent habit of the officers and agents of the railroad company."

As concurring in this conclusion may be cited: Aldridge v. R. R., 3 Man. & G. 515; pigott v. R. R., 3 M. & W. 229; Boyce v. R. R., 42 N. H. 97, 43 N. H. 627; Cleaveland v. R. R., 42 Vt. 449; Sheldon v. R. R., 14 N. Y. 218; Field v. R. R., 32 N. Y. 339; Westfall v. R. R., 5 Hun (N. Y.), 75; Hayatt v. R. R., 23 Penn. St. 373; R. R. v. Williams, 42 Ill-358; St. Jos. R. R. v. Chase, 11 Kans. 47; Longabaugh v. R. R., 9 Nev. 271; Penn. R. R. v. Stranahan, 32 Leg. Int. 449; 2 Weekly Notes, 215.

Or, again, if the defendants should set up the hypothesis of *casus*, or of one of those occasional mechanical aberrations which due diligence cannot exclude, then it is relevant to show, as militating against this hypothesis, that other engines, constructed on the same general system as that by which the engine occasioning the fire was constructed, had emitted sparks to an extent from which negligence in the construction of the engines, if not in the care of them, may be inferred.

Ross v. R. R., 6 Allen, 87; Sheldon v. R. R., 14 N. Y. 218; Burke v. R. R., 7 Heisk. 451. See Piggott v. R. R., 10 Jurist, 571; 3 Man. Gr. & S. 229; Aldredge v. R. R., 3 M. & G. 515.

To meet another probable hypothesis such evidence may be relevant. It may be maintained by the defendants that the object fired was beyond the reach of sparks from their engine. In answer to this it has been held relevant for the plaintiff to prove that, a short time before, the defendants' engines, when passing the same point, emitted sparks which fell further than the building for whose firing the plaintiff sues.

II. Presumptions of Fact and Presumptions of Law.

The fallacy which logicians call "confusion of terms" has had a peculiarly mischievous influence in dealing with the doctrine of Presumptions. I have taken occasion, in my discussion of this topic in my work on Evidence, to show that the term *præsumtio*, in its classical sense, means exclusively a rule of law adopted for the purpose of determining the burden of proof. In the course of time, however, it has received meanings so various that it would be well if the term could be dropped. The ambiguity in the term "presumption," already discussed by me, is thus noticed by Mr. Mill:

Mill's Logic, II, 442.

"To be acquainted with the guilty is a *presumption* of guilt; this man is so acquainted, therefore we may *presume* that he is guilty; this argument proceeds on the supposition of an exact correspondence between *presume* and *presumption*, which does not really exist; for 'presumption' is commonly used to express a kind of *slight suspicion*, whereas 'to presume' amounts to absolute belief." Whether Mr. Mill is right in his definition of "presume" and "presumption" need not now be considered. It is enough for the present purpose to say that the words, even if not dis- tinguishable in the way *Mr. Mill* states, go to a jury, if left without explanation, open to meanings from which conclusions diametrically opposite can be drawn. The term "law" may be used, in connection with presumptions, in three senses: (1) A presumption of law, in its technical sense, is, as we have seen, a presumption which jurisprudence itself applies, irrespective of the concrete case, to certain general conditions whenever they arise. (2) But a presumption of law may be also a presumption of fact which jurisprudence permits; and it is the practice of judges to say that a presumption of fact is "legal"—*i. e.*, that it is one the law will sustain. (3) "Law," as we have already seen, may be used as including the laws of nature and of philosophy, as well as those of formal jurisprudence. Juries are constantly told, for instance, that certain conclusions of mental or physical science are presumptions of law; and in this way they are led to suppose that such conclusions bind, as absolute rules of jurisprudence, the particular case, no matter what may be the phases the evidence may assume.

That the difference between presumptions in law and presumptions in fact is not formal, but real, will be seen by the following analysis:

1. A presumption of law derives its force from *jurisprudence* as distinguished from *logic*. A statute, for

instance, may say that a person not heard of for ten years is to be counted as dead. This is a presumption of law, and is arbitrarily to be applied to all cases where parties have been absent for such period without being heard from. If there be no such statute, then logic, acting inductively, will have to establish a rule to be drawn from all the circumstances of a particular case. Or a statute may prescribe that all persons wearing concealed weapons are to be presumed to wear them with an evil intent. This would be a presumption of law, with which logic would have nothing to do. On the other hand, whether a particular person, who carries a concealed weapon, there being no statute, does so with an evil intent, is a question of logic—*i. e.*, probable reasoning, acting on all the circumstances of the case)—with which technical jurisprudence has no concern. It is not necessary, however, to a presumption of law that it should be established by statute, in our popular sense of that term. Statute, in its broad sense, includes juridical maxims established by the courts as much as juridical maxims established by the legislature. To make, however, a maxim established by the courts in this sense a statute, it must be not only definitely promulgated by judicial authority, but finally accepted; such maxims being, to adopt Blackstone's metaphor, statutes worn out by time, the maxim remaining, though the formal part of the statute has disappeared. The prominent maxims of this kind are the presumption of innocence and the presumption of sanity. Presumptions of law, therefore, are uniform and constant rules, binding only generically. Presumptions of fact, on the other hand, are the conclusions drawn by free logic, binding only specifically.

2. To a presumption of law probability is not necessary, but probability is necessary to a presumption of fact. *Pater est quem nuptiae demonstrant.* This is a presumption of law; and this presumption holds good even in cases where such paternity is highly improbable, if it should be possible. So we can conceive of cases in which it is highly improbable that an accused person should be innocent of the crime with which he is charged; yet probable or improbable as guilt may antecedently appear, he is presumed to be innocent until he is proved to be guilty. On the other hand, without probability there can be no presumption of fact. A man is not presumed to have intended an act, for instance, unless it is probable he intended it.

3. Presumptions of law relieve either provisionally or absolutely the party invoking them from producing evidence; presumptions of fact require the production of evidence as a preliminary. The presumption of innocence, for instance, makes it provisionally unnecessary for me to adduce evidence of my innocence. On the other hand, until I am proved to have done a thing there can be no presumption against me of intent. Evidence, therefore, which is the necessary antecedent to presumptions of fact, is attached to presumptions of law only as a consequent. Until the evidence is adduced there can be no presumption of fact; there is no presumption of law that is not applicable before the evidence is adduced.

4. The conditions to which are attached presumptions of law are fixed and uniform; those which give rise to presumptions of fact are inconstant and fluctuating. For instance, all persons charged with crime are presumed to be innocent. Here the condition is fixed and uniform; it involves but a single, incomplex, unvarying feature, *charged with crime*; it is true as to all persons embraced in the category. On the other hand, the presumption of fact, that *doing* presumes *intending*, varies with each particular case, and there are no two cases which present the same features. Persons charged with crime may be sane or insane, may be adults or infants, may be at liberty or under coercion; in each case, so far as concerns the presumption of law, they are persons charged with crime, and the presumption applies equally to each. But whether a person doing an act is sane or insane, is an adult or an infant, is at liberty or under coercion, is essential in determining intent. Presumptions of fact, in other words, relate to unique conditions, peculiar to each case, incapable of exact reproduction in other cases; and a presumption of fact applicable to one case, therefore, is inapplicable, in the same force and intensity, to any other case. But a presumption of law relates to whole categories of cases, to each one of which it is uniformly applicable, in anticipation of the facts developed on trial. Thus, for instance, all children born in wedlock are presumed by law to be legitimate until the contrary be proved; and this presumption applies to all children so born, no matter who they may be. On the other hand, whether a bastard is born of a particular father is determinable usually by presumptions of fact attachable to conditions as to which not two cases present precisely the same type.

Both the fallacy and the mischief of the doctrine I am contesting are signally illustrated by the way in which, by force of this doctrine, intention, which is eminently a matter of fact, has been turned into a matter of law. We are told that it is a presumption of law that intentional hurt done to another is malicious. Now, this is either a *petitio principii*, in telling us that something is malicious because it is malicious, or the argument rests on the major premise, that all hurts are malicious, which is untrue in fact. The only legitimate presumption we can draw in such cases is a presumption of fact, viz., that it is probable, from the circumstances of the case, that malice existed. The fallacy of turning an inference of fact, in respect to intent, into a presumption of law, may be thus illustrated: "All men who kill do so maliciously. A has killed B; therefore he has done so maliciously." This is the argument as to intent put syllogistically. But this may be indefinitely varied; and of these variations we may take the following, some of which have been sanctioned by the courts: "Men who fly when accused are guilty. A flies when accused; therefore," etc. Or, "Accused parties who fabricate evidence are guilty of the

offence they thus attempt to cover. A has done this; therefore," etc. Or, "He who has a motive to commit a crime commits it. A had a motive to commit a particular crime; therefore A," etc. Or, "He who was in the neighborhood at the time of the crime committed it. A was in such neighborhood; therefore A," etc. Now, no one doubts that it is admissible, as a series of facts from which guilt may be logically inferred, to prove that the defendant had a motive to commit the crime, and that he was in the neighborhood at the time the crime was committed; nor can it be disputed that the inference of guilt in the latter case is the same in kind, the inference of guilty intent from the mere fact of firing a shot. We must, therefore, either treat all presumptions of fact as presumptions of law, or we must remand the presumptions of malice and of intent to their proper place among presumptions of fact. Our office, in other words, in all questions of motive and purpose, is, as has been said, not deduction, but induction. It is not, "All acts of class A have a specific intent, and this act being of class A, consequently has such intent; "but it is," The circum- stances of the case before us make it probable that the act was done intentionally." The process is one of inference from fact, not one of predetermination by law.

The fallacy which has just been noticed pervades the civil as well as the criminal side of our law. Thus we are told by an authoritative writer that "the *deliberate* publication of a calumny, *which the publisher knows to be false*, raises, under the plea of 'Not guilty' to an action for libel;a conclusive presumption of malice."

Taylor's Evidence, & 71, citing Haire v. Wilson, 9 B. & C. 643; R. v. Shipley, 4 Doug. 73, 177; Fisher v. Clement, 10 B. & C. 475; Baylis v. Lawrence, 10 A. & E. 925.

Now, here again is either a mere *petitioprincipii*, being equivalent to saying, "A falsehood uttered deliberately and knowingly is a falsehood uttered deliberately and knowingly," or we have exhibited to us, not a "conclusive," but a rebuttable, presumption of malice. Undoubtedly the fact that a document, attacking the character of another, is published by a mere volunteer, is ground from which malice may be inferred. But this fact is not always enough to make out malice, for, when the publication is privileged, then, in order to show malice, facts inconsistent with *bona fides* must be proved.

Bromage v. Prosser, 4 B. & C. 247; Spill v. Maule, L. R. 4 Ex. 232; Whitefieltl v. R. R., 1 E., B. & E. 115.

Whether there is malice, therefore, even by force of the very line of cases before us, is a question of fact, determined by the evidence in the particular case. Another illustration of the same error may be noticed in an English ruling, that fraud is to be inferred wherever one man tells an untruth to another for the purpose of obtaining the latter 's goods.

Tapp v. Lee, 3 Bos. & Pul. 371. See Pontifex v. Bignold, 3 M. & Gr. 63.

Here, again, we have the same dilemma. Either the ruling, if it means that he who intends to cheat has the intention of cheating, is a bare *petitio principii*, or it rests on a false premise, namely, that a man, who by means of an untruth obtains another's goods, intends to cheat, in the teeth of the fact that there are innumerable cases in which untruths are uttered unconsciously, or as mere brag, or as matters of opinion, in which cases it is held that the intention to cheat is not proved.

See those cases enumerated in detail in Whart. Cr. Law (7th ed.)' §§ 2118, 2133.

In this case, also, we have the process of deduction erroneously substituted for induction, by which alone, as we have seen, conclusions as to intent can be reached.

It will be seen, therefore, that a presumption of law is a judicial postulate that a certain predicate is universally assignable to a certain subject. A presumption of fact is argument from a fact to a fact. That the scholastic jurists should have overlooked this important distinction is natural. They were mostly casuists, proficients in realistic philosophy, framed to construct endless groups of hypothetical cases, and to conceive of each group as having a real existence. Such groups it was their office to classify, and to each group to attach certain judicial *differentia*. In addition to this, at a time when judges were comparatively untutored, and when they had control over facts as well as law, it seemed desirable to limit as far as possible their discretion by attaching to specific combinations of facts certain fixed legal attributes. To understand how completely the prevalent classification of presumptions has been borrowed from scholastic, as distinguished from classical, authorities, it is proper to examine specifically the authors on whom our most authoritative text writers, when treating of presumptions, rely.

Of the scholastic jurists, the earliest to whom our text writers appeal is Accursius (1180-1260). Most of the probable reasons which come in the way of this learned glossarist are treated by him as presumptions of law. Among these we may notice the following:

Intent to be presumed on proof of killing, but it may be rebutted by presumptions, probanda amicitiam et affinitatem et qualitatem occidentis.

Constancy of disposition is a presumption of law because praesumitur quis remanere in eadem voluntate.

Due execution of an instrument is presumed as matter of law because praesumitur solemnitas.

Praesumitur ex eoquod plurimum accidit, ex eo quod fieri solet.

Quis semper ignorare praesumitur, nisi scire probetur.

Praesumitur ex eo quod plurimum accidit, ex eo quod fieri solet.

NOTE.—See these and others quoted in Burckhardt, Presumtionen, 14-15.

Tancred, a Bolognese jurist and ecclesiastic, whose work on the *ordo judiciaris* was written in 1324, though not published until 1515, is also frequently cited by our text writers to sustain their acceptance of the dominant view. Tancred rests his numerous conclusions on the following axioms: Omne bonum factum recte praesumitur actum; omne malum factum prave praesumitur actum. It is astonishing that English judges and jurists should quote such maxims without noticing how preposterous is the fallacy they contain. Putting them into plain English, Tancred 's maxims are a vicious circle of the coarsest texture. They are simply this: "All good acts are good; all bad acts are bad." Yet, as we have seen, this is no worse than saying, "All intentional acts are intentional; all malicious acts are malicious."

Alciat, or Alciatus, who is prominently cited by Mr. Best, in his treatises on Presumptions and on Evidence, was an Italian jurist (1492-1550), renowned as the founder of a school of jurisprudence which united literary elegance with judicial research. In his treatise *de præsumtionibus* he discusses at large *præsumtiones juris et de jure* and *præsumtiones juris*, recognizing at the same time as authoritative the Aristotelian distinction between *probatio inartijicialis* and *probatio artificialis*. A presumption *juris et de jure*, he tells us, is one established by law, and is called *de jure* because "super tali præsumtione lex inducit firmum ius et habet eam pro veritate." This kind of presumption is the "dispositio legis aliquid prsesumentis et super pœsumto tanquam sibi comperto statuentis," and is irrebuttable. A *præsumtio juris*, however (rebuttable presumption of law), is a "probabilis conjectura ex certo signo proveniens, quae alio non adducto pro veritate habetur." It must be *probable*, and with its probability increases its force; it must be a *conjectura*, and not absolute proof; it must be *ex certo signo proveniens;* Alciatus properly holding that, to enable a presumption of law to operate, it must rest upon a stable base of fact. But at this point Alciat opens the way to subsequent errors by holding (naturally enough to him, at an era when the provinces of law as the philosophy of social experience, and of law as jurisprudence, were not clearly distinguished) that every *probabilis conjecture* is a *præsumtio juris*. As to the *præsumtio hominis* he does not discourse; but among *præsumtiones juris* he enumerates certain *probabiles conjectures* which are based, not upon jurisprudence, but upon social science. These he seeks to subordinate to three rules: "*prima regula*, quod qualitas, quae naturaliter inest homini, semper adesse præsumitur; *secunda*, quod mutatio non præsumitur; *tertia*, quod semper fit prsesumtio in meliorem partem." Among the illustrations of the first rule he mentions parental love, as a result of which it is to be presumed that the disinheritance of a child is intended *bona mente*, and that the education given by a parent to a child is gratuitous. As an illustration of the second rule he announces it to be a presumption that every man cares more for his own business than that of another entrusted to him, and that when two persons perished together the strongest will be presumed to have survived. In applying the rule *mutatio non prasumitur* he specifies as presumptions of law "semel malus, semper malus," "olim obligatus, hodie obligatus," "olim dominus, hodie dominus." Undoubtedly these are presumptions of fact, to be drawn more or less convincingly from the circumstances of each particular case. They are, therefore, presumptions we are led to make from our observation of society, and, in practical life, business would be at a standstill unless they were employed. *Mutatio non præsumitur*, so Alciat correctly tells us; but the base from which this presumption starts has none of the fixedness and constancy necessary to the support of a presumption of law, defining law as jurisprudence. On the contrary, *mutatio non præsumitur* varies with each case, because susceptibility to change is a quality which is possessed to the same degree by scarcely any two objects we can enumerate. *Mutatio non præsumitur* we may say as to the procession of the seasons In order, but not as to any particular kind of weather in a particular season.

Menoch (Menochius), born in Paris in 1532, afterwards senator and counsellor in Milan, dying in 1607, is the author of a copious treatise, in six books, "de prœsumptionibus, conjecturis, signis, et indiciis." From Menoch has been drawn no small part of the English law on this branch of evidence. His first book treats of the general principles of presumption, filling with these a folio of large size. The remaining four books classify presumptions as follows; quae versantur (1) circa judicia; (2) circa contractus; (3) circa ultima disposition's et volitates morientium; (4) circa delicta et maleficia. The last book is devoted to miscellaneous presumptions which cannot de included within this classification. He adopts the Aristotelian divisions, as applied by Quintilian, between artificial and inartificial proof; and he holds that this division is substantially recognized in the classification, which he adopts, of prœsumptions as *juris et de jure, juris, and hominis*. The *præsumtio juris et de jure* he defines as a necessary conclusion from a fixed state of facts; the *præsumtio juris*, and the *præsumtio hominis*, as each a probable conclusion from a fixed state of facts. The *prcesumtio juris* is distinguished from the *præsumtio hominis* in this, that the first is, and the second is not, expressly established by statute. As, however, the statutes cannot embrace all possible cases, then, when a presumption is not included in the letter of the statute, but is analogous to one so included, it is to be treated as within the statute; a concession which, as Burckhardt remarks,

NOTE—Civilistisclie presumption, 33, to which work I am indebted for part of the above analysis.

obliterates the distinction between the *præsumtio juris* and the *præsumtio hominis*. As to the interesting

question as to the seats or bases from which presumptions may be drawn, he enumerates the following six as exhaustive: (l) persona; (2) causa; (3) factum; (4) dictum; (5) non-factum; (6) non-dictum. That this division embraces social and physical science under the term "law" is plain from the illustrations which are appended.

It is presumed, we are told, a *persona qualitate*, that an old' person dies before a youth; that a woman is less resolute than a man; that the weaker of two combatants did not begin the fight, that *semel malus, semper malus* (a maxim that, is reproduced by Rochefoucault). Under the head of causa are enumerated a series of conclusions based on the science of psychology; and the probable results of *amor, spes*, and *metus* are detailed. As to *metus*, we have announced the presumption that a young woman loses her chastity only by force. *Ex facto* come the following: *factum sequens declaret voluntatem pracedentem; a prasenti ad prceteritum et futurum prcesumitur;* and even a *futuro ad prcesens el prceteritum præsumitur.*

NOTE.—Menoch, qu. 19.

The following psychological inference is introduced by Menoch as a presumption of law: *non præsumendus est quis quam dicere quod non prius mente agitaverit;* a proposition which has been the cause of much confusion in our later Anglo-American jurisprudence. It is sufficient here to say that the term "law" is so defined by Menoch as to include sociology, psychology, and physical science, and that, as presumptions of law, he treats psychological, social, and physical inductions. No doubt a statute may take an induction so borrowed, and, in order to relieve the parties from proving that which is reasonably settled, make it a presumption of law. When two persons are exposed on one plank to the dangers of the sea, and both die, the probability is, so we infer, that the stronger survives the weaker. We may base this probability on the instinctive love of life, which leads the stronger to use his superior strength to secure his-survivorship; or on the physical laws of the human frame, which generally give longer endurance to the strongest. These, however, are presumptions of fact, which vary with each particular case. The legislature, however, in order to simplify litigation, and to give an arbitrary test by which something like uniformity of result may be reached, may enact by statute that in such cases the survivorship is to be determined by certain fixed rules. The presumption in such case is one, not of fact, but of law. The law may be very absurd, and may conflict with the conclusions of those sciences which are most capable of judging such issues; but, whether absurd or not, it is binding. Here, then, is the distinction which escaped Menoch, from the fact that he embraced all science and experience under the term "law." A presumption of law, in its true sense, is a presumption which, whether probable or improbable, is applied by statute, or by that which is equivalent to statute, to a fixed and constant condition of facts. A presumption of fact is a presumption applied by logic, aided either by common experience or by scientific research, to the exceptional and unique facts of each particular case.

If it be objected that I have exhibited in too great detail the views of the scholastic jurists from whom our prevalent classification of presumptions is taken, the answer is that it is only by such an exposition that the true character of the scholastic system can in this relation be known. Eminent English text writers, for instance, cite Menoch and Alciat as authority for the proposition that intent is a presumption of law; and, in fact, when we go back to the earlier English cases announcing this maxim, we find that its sole authorities are the scholastic commentators to whom I have just referred. We are led, therefore, to suppose (i) that maxims such as these have the authority of the Roman law, and (2) that they are part of a symmetrical system of jurisprudence based, as all practical jurisprudence must be, on the recognition of the coordinate power of the factors of law and of fact. But (1) the maxims in question, and the classification of presumptions to which they relate, are unknown to the Roman law, and are the creatures of the speculative scholasticism of the middle ages; and (2), what is more important, they are part of a false system which ignored reason as a coordinate factor in concrete adjudication, and which undertook to decide by a pre-announced rule of law every possible contingent question of fact. To these errors are attributable the multitudinous "presumptions of law" of the scholastic jurists; to this we owe those immense volumes of judicial casuistry which have done so much to mislead English writers on evidence.

The restoration of the classical and philosophical doctrine in this respect is by a process not unlike the restoration, under Niebuhr's auspices, of the treatise of Gaius, of which so much was used in the Justinian compilation. The parchment on which the full text of Gaius was written had been covered by monkish legends, while the original writing had been apparently obliterated. By diligent and skilful labor, however, the monkish legends have been removed and the text of Gaius restored. If we are bound by authority, then our duty is to perform the same office with the mediaeval text books by which, in this branch of law, our conclusions have been so long perverted. We must get rid of the crust of false scholasticism by which the true authorities have been hidden, and restore those authorities in the purity of their text. If we are not bound by authority, then let us toss away the mediaeval as well as the classical jurists; but let us, at least, regain our logic. If there is no technical jurisprudence fettering us to a particular theory of presumptions, then we must fall back on reason, and hold that only is a thing presumed to be true when its truth can be proved.

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Tweed's Case. Cumulative Sentences.
By Joel Prentiss Bishop.
Reprinted from the Southern Law Review.
G. I. Jones and Company. St. Louis 1877.

A Brace of Noted Cases; Namely, Stokes's Case and Tweed's Case.

I. Introduction. II. Stokes's Case. III. Tweed's Case.

I. Introduction.—Among cases which have agitated both the professional and general public during recent years, there are few more prominent than the two named at the head of this article, both decided by the New York Court of Appeals. I do not propose to enter into any popular views of either,—the history of each, I presume, is familiar to every reader,—consequently I shall limit myself to some consideration of the more prominent questions of law involved in each.

II Stokes's Case.—This case was decided in 1873.

Stokes v. People, 53 N. Y. 164.

There were several questions in it, but the prominent one, of which alone I am to speak, is the following:

The indictment against Stokes was for murder. A statute divided murder into degrees, and the jury found him guilty of murder in the first degree; "perpetrated," as the statute expresses it, "from a premeditated design to effect the death of the person killed, or of any human being." Some confusion of ideas seems to have prevailed at the trial; but the judge gave an instruction to the jury which was interpreted as equivalent to telling them, that, from the mere fact of killing, which was substantially admitted, the jury should infer the "premeditated design to effect the death," and return a verdict of guilty in the first degree; unless the defendant, by his proofs, satisfied them to the contrary. The Court of Appeals held that this instruction was wrong.

Plainly the instruction was a mere blunder, such as will sometimes occur on a trial presided over by the most careful of judges. It arose from an accidental failure to distin- guish the question before the jury, under the statute, from the familiar one at common law, where, by perhaps the majority of judges, it is held that, from a mere killing, or a mere intentional killing, the malice which constitutes murder is, *prima facie*, to be inferred. But where a statute, as in New York and some other of our states, goes further, and divides murder into two degrees, no court ever held that murder in the first degree is to be inferred from the killing alone; the utmost stretch of the presumption having been that it is murder in the second degree. This question could never arise in England, because murder in the first degree is there unknown; but in several of our states it has been agitated, the decisions are all one way, and there is no doubt upon it.

2 Bishop Crim. Proced. 2d ed. § 618; Witt v. The State, 6 Coldw. 5; The State v. Holme, 54 Misso. 153, 161.

The notable thing about this case, as a mere legal one, is, that many people, even among lawyers, thought, at the time, that the court had in some way been induced to bend the law in the interest of the crime of murder.

III. Tweed's Case.—As many hard things, now happily passed away, were at first said about the decision in Tweed's case, it would be gratifying could we find that it also accords with the general law, as administered in England and our other states. But it does not. Unquestionably it is law in New York, for it is the decision of the court of last resort. Nor do I even suggest that the tribunal erred therein. In other localities, where the common law prevails, to accept it would be to overturn what is fundamental and established in authority, and in principle is essential to the just administration of the criminal law.

This case is entitled People *ex rel.* William M. Tweed v. Liscomb; the latter being the warden of the prison in which Tweed was confined, and the proceeding being *habeas corpus*. It was decided in 1875.

People v. Liscomb, 60 N. Y. 559.

The facts were as follows:

A statute provided, that, "when any duty is or shall be enjoined by law upon any public officer, or upon any person holding any public trust or employment, every wilful neglect to perform such duty "should be a misdemeanor, punishable by imprisonment not more than a year, and a fine not exceeding two hundred and fifty dollars. Tweed had been indicted for two hundred and twenty distinct and several neglects under this statute, in one indictment, in as many separate counts, and had been found guilty on two hundred and four of the counts. Upon twelve of the counts the court had sentenced him to twelve successive terms of imprisonment of one year each, together with fines of two hundred and fifty dollars on each, and, on other counts, to additional fines, amounting in all to twelve thousand five hundred dollars. After the expiration of one year's imprisonment, and the payment of one fine of two hundred and fifty dollars, this writ of *habeas corpus* was brought, on the idea that the sentence upon one count exhausted the jurisdiction of the court, and the sentences on the other counts were void. It was denied, on the part of the People, that *habeas corpus* was the proper remedy, which, it was said, should have been a writ of error. That question I do not propose to discuss, but the other. The court held that the entire judgment subsequent to that on the first count was void, and the prisoner was entitled to his discharge.

The ground of the decision on this main issue was, that neither in felony nor in misdemeanor is it competent for a court to try a man for two or more separate offences, charged in one indictment, though in separate counts, and inflict on him a punishment greater than the law would permit on one of the counts. The only course to this end, even in the minor misdemeanors, is, it was held, for a separate indictment to be found for each offence, to be followed by a separate trial thereon.

And this course, it was deemed, is invariably essential for the protection of defendants. "The practice," said the learned judge, "of putting a man on trial for distinct offences at the same time is fraught with danger to the accused, and can never be done except at great risk of doing injustice. The law is tender of the rights of those accused of crime, to the extent of securing to them, by every means, a fair and impartial trial by a jury of the country, and protecting them against a conviction under the forms of law, but without an observance of, and adherence to, all the forms and rules of law calculated to protect the innocent.

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Now, in this case, Tweed was, in law, innocent, and should be deemed so also in morals, until proved guilty. The humane course, therefore, was to find against him two hundred and twenty separate indictments, and permit him to fee counsel, and pay witnesses, and overcome the People's evidence against him two hundred and twenty times. How long a period must be occupied in doing this it is impossible to calculate with certainty, but a very low estimate would be ten years of continuous defence. Meanwhile an extra court-house must be built, and an extra judge commissioned. But this burden would be for the People; Tweed would have burden enough to bear of his own.

Contrary to this view, the general doctrine prevailing elsewhere is, that the justice of the law forbids the harassing of defendants with multitudes of suits, whether criminal or civil, where the matter can be properly condensed into one. Such a course, even as to civil claims justly due, will in some circumstances subject him who pursues it to indictment at the common law.

Commonwealth v. McCulloch, 15 Mass. 227.

There are limits within which causes of action may be divided and prosecuted in different suits, and limits beyond which the party will not be permitted to go in that direction. Some civil claims are so diverse in their nature that they can be enforced only in separate suits.

The forms of the criminal law differ from those of the civil department; yet, in the criminal, the general truth just stated prevails the same as in the civil, though with perhaps less protection against multitudes of prosecutions. If a grand jury should find many indictments for petty offences growing out of one series of facts, where the whole could be more conveniently embraced in separate counts of one indictment, doubtless it would be competent for the court to order the whole to be tried together. And it may be that the court might even be justified in refusing to try one of the indictments, or in quashing all, should the prosecuting power decline condensing the whole into one. This would furnish to the defendant a sort of protection against an interminable harassment. Or, on the other hand, should the prosecuting power in the first instance manifest its wish to try two distinct offences together by charging both in one indictment, in separate counts, then, should the defendant object to this, and the court be satisfied that it would work injustice to him, it could order separate trials on the separate counts;

Commonwealth v. Hills, 10 Cush. 530, 534.

or it could quash a part of the counts

Bishop Crim. Proced. 2d ed. §§447, 455.

or, after the case was opened to the jury, it could require the prosecuting officer to elect on what count, or for what criminal transaction, he would proceed.

People v. Baker, 3 Hill (N. Y.), 159; Reg. v. Fussell, 3 Cox C. C. 291; 1 Bishop Crim. Proced. 2d ed. § 454,

et seq.
. In cases of felony the practice prevailing in most localities is, as a matter of course, to confine the prosecutor to evidence of a single criminal transaction, if the prisoner so requests; but in misdemeanors the court will exercise this power or not, according to the circumstances and demands of justice in the particular instance;

Bishop Crim. Proced. 2d ed. §§457, 458.

yet neither in felony nor in misdemeanor is there any inexorable rule of law forbidding the joining of counts for separate felonies, or for separate misdemeanors, or for misdemeanor and felony, in one indictment. Each count is, in effect and in form, a distinct indictment; and an indictment in a half-dozen counts, and a half-dozen indictments in one count each, differ in little, if anything, except in this, that to the former there is only one caption, with one endorsement by the foreman of the grand jury, while to the latter there are six captions (if the indictments are certified to a higher court), with six endorsements. In neither case is the existence of one count or indictment pleadable in bar or in abatement of another.

Bishop Crim. Law, 6th ed. § 1014.

The consequence of which is, that, alike in felony and misdemeanor, in cases in which an election would be enforced if asked, and those in which it would not, if the jury convicts the prisoner for more offences than one, charged in separate counts, the finding and the record are nevertheless good on a motion in arrest of judgment or on a writ of error;

Stark. Crim. Pl. 39; Rex v. Kingston, 8 East, 41; United States v. Stetson, 3 Woodb. & M. 164; The State v. Nelson, 14 Rich. 169; The State v. Brown, Winston, No. 2, 54; Henwood v. Commonwealth, 2 Smith (Pa,), 424; Ketchingman v. The State, 6 Wis. 426; The State v. Kibby, 7 Misso. 317; People v. Shotwell, 27 Cal. 394; together with many other authorities.

a fortiori, therefore, good on a proceeding by *habeas corpus*.

Whatever may be said of felony, there is no proposition better established as general doctrine, or less embarrassed by dissenting views, than that, under proper circumstances, separate and disconnected misdemeanors may be charged in distinct counts in one indictment, and the defendant be convicted for the whole. The authorities to this proposition could be multiplied almost without end, and nothing could be found against it.

For example, 1 Bishop Crim. Proced. 2d ed. 448, 452, and the cases there cited; The State v. Gummer, 22 Wis. 441; The State v. Tuller, 34 Conn. 280.

And this doctrine appears to prevail as well in New York

People v. Costello, I Denio, 83, 90; Kane v. People, 8 Wend. 203; People v. Rynders, 12 Wend. 425; People v. Gates, 13 Wend. 311; People v. Baker, 3 Hill (N. Y.), 159; Hodgman v. People, 4 Denio, 235.

as elsewhere. I do not understand the court, in Tweed's case, distinctly to deny this proposition, which they say is sustained by "a show of authority."

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But what they maintain, and what this case establishes as the law of New York, is, that, though there be such a conviction, no heavier judgment can be passed on the whole indictment than the law permits on one of the counts; and, if the court imposes the full legal penalty on one of the counts, any judgment it pronounces on the rest is void. This, I admit, is New York law; but it was never law anywhere else, and let us hope that it may not be hereafter. How could it be law elsewhere? Why, in any civilized community, should a court spend its time, merely to spread scandal, in convicting a man of an offence, if it had no power to punish him therefor? The end of the proof of crime, and the verdict of guilty, in a court, is, in other localities, punishment; and the proposition that the tribunal will proceed to the verdict involves, in other localities, the further proposition that it will take the final step to the sentence.

The court, in this case of Tweed, seems, by implication, to admit that, if there is a discretion as to the punishment, and it is divided among the different counts which charge distinct offences, the judgment is good, provided the sum of all does not exceed what would be permissible on one.

It is difficult to find a reason for this distinction. A man, having been convicted for three disconnected misdemeanors, stands before the tribunal to receive sentence. The judge pronounces what he deems just for misdemeanor number one. But he had the power, by violating the rules of judicial discretion, to make the punishment heavier. Coming next to misdemeanor number two, he addresses the prisoner thus: "Had I, when sentencing you for misdemeanor number one, shown myself unworthy to sit on this bench by improperly inflicting on you the highest penalty which the law allowed for what is charged against you, I should have no jurisdiction to punish you for this separate offence of yours. But as I inflicted only half the punishment which you incurred when committing misdemeanor number one, I now impose on you the other half for misdemeanor number two. As to misdemeanor number three, you cannot be punished for it, because you have been punished for numbers one and two. It is the rule, in circumstances such as attend this case, that a prisoner is to escape punishment for a third offence if he has already had imposed on him half the measure of the law for each of two

preceding offences." Now, it is believed that, since the plea of *autrefois attaint* ceased to be known in the law, no case other than this of Tweed's has appeared in our books wherein there is even an intimation that, in any circumstances, the right of a court to punish a convicted person for an offence depends upon whether or not a sentence, and what sentence, has been pronounced against him for another and independent offence. In Wilkes's case, the judges, in advising the House of Lords, said: "The balance is to be held with a steady, even hand; and the crime and the punishment are to counterpoise each other; and a judgment given, or to be given, against the same person, for a distinct offence, is not to be thrown into either scale, to add an atom to either

Wilkes's Case, 19 Howell St. Tr. 1075, 1134.

Speaking of the English law, the court observed: "It is quite evident that there would probably be no precedents of cumulative punishments, each to the full measure allowed by law, as they were imposed in the case before us. The reason is obvious. In England the punishment for misdemeanors is, as a general rule, discretionary with the court. As the court could, in all cases, upon a conviction of one or more misdemeanors, pass such judgment, and impose such punishment, as it should deem proper and apportioned to the crime or crimes charged, cumulative sentences, each fully exhausting the statutory power of the court in respect to a single offence, could not be imposed, as there is no such limit, and cases in England within this rule and form of punishment would give no color or support to the present judgment."

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In fact, however, there are reported English cases exactly within Tweed's case, as explained by this distinction; and the English judges took of them directly the opposite view to that taken of Tweed's case by the New York court. Thus it was provided by the statute of 2 Will. 4, c. 34, § 7, that, "if any person shall tender, utter, or put off any false or counterfeit coin, resembling," etc., "every such offender shall," etc., "be guilty of a misdemeanor," etc., "and, being convicted thereof, shall be *imprisoned for any term not exceeding one year*." Thereupon a man was indicted, in two separate counts of one indictment, for two several utterings, to different persons, on one day. Being convicted, the judge sentenced him, not as Tweed was sentenced, on each count, but to one consolidated imprisonment for two years. Was this right? "This case,'" says the report, "was considered in Easter term, 1834, by all the judges (except Park, J., and Patteson, J.), and they were unanimously of opinion that the sentence was incorrect, and that there *should have been consecutive judgments of one year's imprisonment each*

Rex v. Robinson, 1 Moody, 413.

—a direction which, it is perceived, the trial judge precisely followed in sentencing Tweed.

This case appears not to have been before the Court of' Appeals. Neither was the following: A statute provided, for a misdemeanor in office, the forfeiture of an exact sum of money in part punishment. An information charged several offences, in separate counts, exactly as in Tweed's case; and, upon conviction, the judge sentenced the prisoner, as Tweed was sentenced, to pay the whole forfeiture on each count. And the Court of Queen's Bench *in banc* and the Court of Exchequer Chamber both held this to be right.

Douglas v. Reg., 13 Q. B. 74. See, as to these two cases, 1 Russ. Crimes, 5th Eng. ed. by Prentice, 233, 305, and note; 1 Bishop Crim. Proced. 2d ed. & 1129.

But there was before the Court of Appeals an English case, stated by the learned judge who delivered the principal opinion, and reasoned upon, as follows: "What is popularly known as the Tichborne case is claimed to be a direct authority for the conviction and sentences in the case at bar. The prisoner was convicted, upon a trial before Lord Chief' Justice Cockburn and his associates, of two distinct acts of periury, upon separate counts in an indictment, and sentenced upon each to transportation for the term of seven years, as for disconnected offences, and it is said that the time named is the extreme limit of punishment upon a single conviction for the crime charged. But, if it be so, then there was a conviction for two offences, which in this state would be felonies, on the same trial, which is not permissible with us. The decision cannot be regarded as authoritative evidence of the law with us. It is enough to say that no question appears to have been made to the judgment; and whether it is as authorized by some statute, we do not know. Be that as it may, the judgment has not received the deliberate sanction of any court *in banc*, and has not ripened into a precedent, even in England. It is, at most, but evidence of what the common law is, as now administered in that country, but no evidence as to what it was on the 19th of April, 1775."

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As to any English statute regulating this question, plainly, if there were one, it would have been discovered by the diligent-counsel for Tweed. And, in this English case, every imaginable objection was taken by the defendant; and, if this one was not taken, the reason must have been that the question was too well settled to admit of argument. I cannot imagine how any legal person can so read the English cases as to doubt that the law was thus, and thus settled, in England, and that it has never there been otherwise.

See, in addition to cases already cited, Rex v. Jones, 2 Camp. 131; Campbell v. Reg., 1 Cox C. C. 269, 2 *ib*. 463, 11 Q. B. 799; Gregory v. Reg., 15 Q. B. 974.

In our own states—not speaking now of New York—the decisions are uniform, and in harmony with the English doctrine. For example, two or more offences of unauthorized liquor-selling, where each is punishable by a specific fine, may be joined in distinct counts in one indictment, and, on conviction, the full fine for every count may be imposed.

Barnes v. The State, 19 Conn. 398.

So it has been held, under a statute, that the keeping open of an ale-house and the selling of ale on a Sunday are two distinct offences; and, on an indictment in two counts, one for each, the fine for both may be imposed.

The State v. Ambs, 20 Misso. 214.

But not further to particularize, and observing that our courts hold the doctrine to be applicable equally where the punishment is imprisonment as where it is a fine, the English view of the question, directly contrary to what is adjudged in Tweed's-case, is maintained in Massachusetts,

Carlton v. Commonwealth, 5 Met. 532; Booth v. Commonwealth, 5 Met. 535 Josslyn v. Commonwealth, 6 Met. 236, 240; Crowley v. Commonwealth, 11 Met. 575; Kite v. Commonwealth, 11 Met. 581; Commonwealth v. Tuttle,. 12 Cush. 505.

in Connecticut,

The State v. Tuller, 34 Conn. 280; Barnes v. The State, 19 Conn. 398.

in Pennsylvania

Commonwealth v. Birdsall, 19 Smith (Pa.), 482.

in Missouri,

The State v. Ambs, 20 Misso. 214; The State v. Peck, 51 Misso. III

in Illinois;

Mullinix v. People, 76 111. 211, 215; Martin v. People, 76 111. 499.

and it would seem to be also in Maine

The State v. Hood, 51 Maine, 363.

Ohio,

Buck v. The State, 1 Ohio State, 61; Woodford v. The State, 1 Ohio State, 427.

Arkansas,

Baker v. The State, 4 Pike, 56.

Wisconsin,

The State v. Gummer, 22 Wis. 441.

California,

People v. Forbes, 22 Cal. 135; People v. Shotwell, 27 Cal. 394; *Ex parte* Dalton, 49 Cal. 463.

and probably some of the other states. On the other hand, I have looked into all the cases cited from the books of reports in Tweed's case, and into such others as seemed to afford any promise of instruction, and I find no one, English or American, ancient or modern, which furnishes a precedent, or an authority, or even a *dictum*, for the conclusion arrived at by the court. Still, as I have said, I do not question the correctness of this decision as an exposition of New York law. That enquiry does not lie within my path. But if the law out of New York is not settled, as I have thus explained it, contrary to this New York view, then neither adjudication nor legal argumentation can establish anything; our professional books are useless; jurisprudence is a myth.

I should here close; but a single explanation will prevent confusion in the minds of those who look further into this case. It was the English doctrine, established in early times, certainly as early as 1716, and confirmed by the House of Lords, "that," in the language of the judges, "a judgment of' imprisonment against a defendant, to commence from and after the determination of an imprisonment to which he was before sentenced for another offence, is good in law."

Wilkes's Case, 19 Howell St. Tr. 1075, 1136.

This, is still the doctrine of the common law of England, and, as to felonies, it was confirmed by Stat. 7 & 8 Geo. 4, c. 28, § 10.

I Russ. Crimes, 5th Eng. ed. by Prentice, 81, 82; Rex v. Williams, I Leach, 529; Reg. v. Cutbush, Law Rep., 2 Q. B. 379.

This doctrine has been generally followed in our states;

Bishop Crim. Law, 6th ed. & 953, and the cases there cited.

but, in a few of them,

Prince v. The State, 44 Texas, 480; *Ex parte* Meyers, 44 Misso. 279; Miller v. Allen, 11 Ind. 389; James v. Ward, 2 Met. (Ky.) 271.

some oversight, or a construction which a statute has been deemed to require, has led to a holding the other way. Still, there could be no question on this subject in Tweed's case; for the Revised Statutes had provided that, "when any person shall be convicted of two or more offences, before sentence shall have been pronounced upon him for either offence, the imprisonment to which he shall be sentenced, upon the second or other

subsequent conviction, shall commence at the termination of the first term of imprisonment to which he shall be adjudged, or at the termination of the second term of imprisonment, as the case may be."

2 R. S. of N. Y. p. 700, § 11.

This statute, it appears, would have rendered a consolidated judgment equally good with one in the form adopted by the court below.

5 R. S. by Edm. 560; People v. Forbes, 22 Cal. 135, 138.

JOEL P. BISHOP.

CAMBRIDGE, MASS.

The Civil Remedy—for—Injuries Arising from the Sale or Gift—of—Intoxicating Liquors.

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The Central Law Journal. St. Louis 1877.

Maynard & Thompson, Law Printers. St. Louis

The Civil Remedy For Injuries

Arising from the

Sale or Gift of Intoxicating Liquors.

- Introduction—The Statutory Remedy.
- The Laws of Maine, Connecticut, Indiana and New Hampshire.
- The Laws of Illinois, Iowa, Kansas, Michigan, New York, Ohio and Wisconsin.
- Who Liable—Master and Servant—Principal and Agent.
- The Joint Liability of Several Sellers.
- The Liability of Owners or Lessors of Premises.
- Injuries to the Person.
- Injuries to Property.
- Injuries to Means of Support—Rights of Wife.
- Actual and Exemplary Damages.
- Pleading—Limitation.
- Evidence.—What Acts will Bar a Recovery.

SECTION 1. *Introduction—The Statutory Remedy*. The following discussion, relative to the traffic in intoxicating liquors, will be restricted to a consideration of the civil remedy given in many of the states for injuries resulting from the sale or gift of such commodities. It is not proposed that this shall be an argument, either in favor of or against the liquor trade. The sale of intoxicating liquors is, at common law, as lawful and as unrestricted as the sale of dangerous weapons or of poisonous drugs. But in this country, there has, within recent years, grown up a deep-seated prejudice, or perhaps to speak more correctly, an honest and sincere sentiment against this particular kind of commerce, which can hardly be said to be the outgrowth of any party or of any sect. The advocates of this idea, having in some states become powerful enough to obtain temporary possession of the legislatures, have proceeded to prohibit its sale, either entirely or under extraordinary restraints; to treat the trade in spirits as an outlaw, and as an enemy to society and good government. In other states, and still more recently, its supporters have become sufficiently imprudent and ill-advised, to set the law at defiance, under the form of a modern crusade, thus retarding the advancement of their own opinions, by making those whom they regard as the enemies of sobriety and good morals the victims of injustice, and themselves the disturbers of the peace and of law and order. The difference between the rum seller who vends his wares inviolation of law, and the prohibitionist who seeks to prevent him by conspiracy and riot, is certainly

very slight; and it would seem that the latter has come to recognize the fact, that public opinion will not sustain even a meritorious object if sought to be attained by illegal means. It is more than probable that the advocates of prohibitory laws may never be successful. There are two considerations against which they are waging an almost hopeless war, the one without which a government can hardly endure, the other with which we do not desire to part even in the least—revenue and liberty.

The laws, which are the subject of this review, are open to no such objections; and that they have been adopted in but eleven states, is at least singular. In the enactment of the statutes giving a right of action for damages caused by the sale of intoxicating liquors, the legislatures have not sought to interfere with their sale, but have endeavored to give redress and compensation for damages actually inflicted by one person and suffered by another, in cases where no remedy was to be had under the law as understood and administered in the courts.

Bedore v. Newton, 34 N. H. 117; s. c., 2 Cent. L. J. 363.

The seller of intoxicating liquors is made responsible for the injurious results of his sales on the same principle as common carriers, bailees and agents are liable for the negligent conduct of their affairs. The statutes but extend a well-known principle of the common law, that one shall be held to strict account for the consequences of his acts, and the application of an ancient maxim that there is no wrong without its appropriate remedy. The traffic itself is not restricted. The dealer may sell, if he so desires; but he is required to be careful to whom he sells, not to sell enough to cause intoxication, nor to a person whom he knows to be in the habit of becoming intoxicated and wasting his own and his family's property, nor to add to an intoxication already commenced, and the consequences of which he may reasonably foresee.

Bertholf v. O'Reilly. 8 Hun, 18.

The law does not say you must not deal in such wares. It says: "You may legally sell, but if what you sell produces intoxication and consequent damages, you must pay; if you sell to any one who is intoxicated, or who will use it to become so, you must take the risk of damages; you may do the legal act, but you must do it in a proper manner."

Jackson v. Brookins, 5 Hun, 535.

An owner is not prevented from renting his premises for the purpose of liquor selling; but he is required to see that he rents them to persons who will so carry on their business, that no one shall be injured in person, property or means of support, by reason of such sales. It is required of the owner, who alone has the power to select his tenant, that he shall assume the risk of his tenant's acts in the business of selling intoxicating liquors.

Bertholf v. O'Keilly, *supra*.

It is hardly necessary to say that such an action is purely the creature of the statutes. The familiar doctrines of the common law allowed of no such remedy, on account of the remoteness of the injury.

Dillon v. Linder, 36 Wis. 344; Struble v. Nodwift, 11 Ind. 64

The constitutionality of these acts has been more than once raised, but without exception they have been sus- tained.

Bedore v. Newton, 54 N. H. 117; S. C., 2 Cent. L. J. 363; Mulford v. Clewell, 21 Ohio St. 191; Duroy v. Lechter, 10 *Ib*. 483; Schafer v. Smith, 4 Cent. L. J. 271; State v. Johnson (111.), 3 Month. West. Jur. 72.

It has been settled that the right to sell intoxicating liquors is not one of the privileges and immunities of citizens of the United States, which, by the fourteenth amendment to the Constitution, the states are forbidden to abridge. The legislature has a right to prohibit the selling of articles which are considered injurious to society.

Bartmeyer v. Iowa, 18 Wall. 129.

The question is doubtful only, when such prohibitions interfere with the vested rights of property. This question was raised in the Supreme Court of the United States in the case last cited, but not decided, on the ground that it was not properly presented in the record. But from the expressions of the judges who delivered opinions then, it would seem that such rights in property, even when standing in the way of the public good, can be divested only by awarding proper compensation to the owner. But the question, as it arises under the damage acts, presents wholly different features. Under these acts, no property is taken away; only the use of a license is interfered with, and such a regulation can not be said to differ essentially from the provisions of the excise laws forbidding sales to minors or on Sunday. As the right of the legislature to restrain the sale of liquors is unquestionable, the person taking a license is subject to all existing laws, and to such as may thereafter be passed. The right given is personal, and may be wholly taken away, or it may be restricted or burdened with conditions or penalties to any extent the law-making power may deem proper. It is not a contract depriving the legislature of the right to act.

Baker v. Pope, 2 Hun, 557.

The Supreme Court of the United States has very recently reiterated these views,

Munn *et al*. v. People, 4 Cent. L. J. 250.

as to the regulation of private property, wherever necessary for the public good.

SEC. 2. *The Laws of Maine, Connecticut, Indiana and New Hampshire*.—The Maine law of 1858 contained a general provision that any person, not authorized under the act, selling intoxicating liquors, should be liable for all injuries committed by the person to whom the liquor was sold, while intoxicated, to be recovered in an action on the case;

"If any person, not authorized as aforesaid, shall sell any intoxicating liquors to any person, he shall be liable for all the injuries which such person may commit while in a state of intoxication arising therefrom, in an action on the case, in favor of such person." Maine, Rev. Stats, of 1871 p. 304, sec. 32.

and a statute of Connecticut contains a somewhat similar provision

"Whoever shall sell intoxicating liquor to any person who thereby becomes intoxicated, and while so intoxicated shall, in consequence thereof, injure the person or property of another, shall pay just damages to the person injured in an action on this statute; and if the person selling such intoxicating liquor is licensed, the recovery of a judgment for such damages shall be conclusive evidence of a breach of the bond." Revision of 1875, p. 269, sec. 9.

A statute of Indiana, passed in 1853, but repealed two years later, gave a like remedy

"Any wife, child, parent, guardian, employer, or other person, who shall be injured in person, or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name against any person, and his sureties, on the bond aforesaid, who shall, by retailing spirituous liquors, have caused the intoxication of such person, for all damages sustained, and for exemplary damages." Act of March 4. 1853, sec. 10.

limited, however, to a suit on the bond of the vendor,

Martin v. West, 7 Ind. 657.

and to the case of a licensed retailer.

Struble v. Nodwift, 11 Ind. 65.

In 1873, an act, commonly known as the Baxter Law, was passed, giving to the wife, child, parent, husband, guardian, employer, or other person, a right of action for injuries caused to them by the sale of intoxicating liquors, against the seller, and the landlord of the premises where the sale took place. This was, however, repealed in 1875 by an act which restricts the right of action to damages caused by sales in violation of law.

The Indiana Act of March 17, 1875 (Acts Special Session, 1875, p. 55), requires a person to whom a license to sell spirituous liquors is granted to give a bond, with good sureties, in the sum of 82,000, conditioned that he will keep an orderly house, and pay all fines, costs, and judgments that may be rendered against him. Sec. 20 of this Act is as follows: "Every person who shall sell, barter, or give away any intox-icating liquors, in violation of any of the provisions of this act, shall be personally liable, and also liable on his bond, to any person who shall sustain any injury, or damage, to their person, or property, or means of support, on account of the use of such intoxicating liquors, so sold as aforesaid, to be enforced by appropriate action in any court of competent jurisdiction."

Under the former law it was decided by the Supreme Court, in construing the provisions of the act, that in an action by a wife, under the statute, it was necessary for her to establish: 1. The intoxication of her husband, habitual or otherwise. 2. That she had been injured in person, or property, or means of support, in consequence of such intoxication. 3. That the intoxication from which the injury resulted was caused in whole, or in part, by the selling, bartering, or giving intoxicating liquors to the husband by the defendant

Fountain v. Draper, 49 Ind. 441.

In New Hampshire, in case of the death or disability of any person in consequence of intoxication from the use of liquor unlawfully furnished, damages may be recovered by any one dependent upon the injured person, or upon whom the injured person is dependent for means of support, from the person unlawfully selling or furnishing the liquor.

"Whenever any person in a state of intoxication, shall commit any injury upon the person or property of any other individual, any person, who by himself, his clerk or servant, shall have unlawfully sold or furnished any part of the liquor causing such intoxication, shall be liable to the party injured for all damage occasioned by the injury so done, to be recovered in the same form of action, as such intoxicated person would be liable to, and both such parties may be fined in the same action; and in case of the death or disability of any person, either from the injury received as herein specified, or in consequence of intoxication from the use of liquor unlawfully furnished as aforesaid, any person who shall be in any manner dependent on such injured person for means of support, or any party on whom such injured person may be dependent, may recover from the person unlawfully selling or furnishing any such liquor as aforesaid, all damage or loss sustained in consequence of such injury, to be recovered in an action on the case; and any married woman may bring such action in her own name, and recover such damages to her own use." Laws of 1870, ch. 3, sec. 3.

Under this act there are five different-cases in which a remedy by action is given. All of them involve such private and personal relations as that of parent and child, husband and wife, and an injury to either, with a remedy to the other; or, without such relations, a remedy, founded on an injury to person or property, by an action by the party injured. These cases are: The case of injury by one intoxicated to the person or property of another, with a remedy to such other; the case of the death or disability of the person injured, from such injury, with a remedy to any person dependent on him for means of support; the case of death or disability, in consequence of intoxication, with a remedy to such persons as are dependent on him for means of support; the case of death or disability from the injury received, with a remedy to any person on whom the injured party may be dependent; and the case of death or disability, in consequence of intoxication, with a remedy to any party on whom the injured person may be dependent.

Hollis v. Davis, 56 N. H. 74.

SEC. 3. *The Laws of Illinois, Iowa, Kansas, Michigan, New York, Ohio and Wisconsin*. In addition to the laws on this subject just cited, in seven other States, Illinois, Iowa, Kansas, Michigan, New York, Ohio and Wisconsin,

Illinois—Rev. Stats. Ill. Ch. 43, p. 439, approved March 30, 1874.—SECTION 8. "Every person who shall, by the sale of intoxicating liquors, with or without a license, cause the intoxication of any other person, shall be liable for, and compelled to pay, a reasonable compensation to any person who may take charge of, and provide for, such intoxicated person, and $2 per day in addition thereto for every day such intoxicated person shall be kept in consequence of such intoxication, which sums may be recovered in an action of debt before any court having competent jurisdiction."

SEC. 9. "Every husband, wife, child, parent, guardian, employer, or other person, who shall be injured in person, or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name, severally or jointly, against any person, or persons, who shall, by selling, or giving, intoxicating liquors, have caused the intoxication, in whole, or in part, of such person, or persons; and any person owning, renting, leasing, or permitting, the occupation of any building, or premises, and having knowledge that intoxicating liquors are to be sold therein, or who, having leased the same for other purposes, shall knowingly permit therein the sale of any intoxicating liquors that have caused, in whole or in part, the intoxication of any person, shall be liable, severally or jointly, with the person, or persons, selling or giving intoxicating liquors aforesaid, for all damages sustained, and for exemplary damages; and a married woman shall have the same right to bring suits, and to control the same and the amount recovered, as a *feme sole;* and all damages recovered by a minor, under this act, shall be paid either to such minor, or to his or her parent, guardian, or next friend, as the court shall direct; and the unlawful sale, or giving away, of intoxicating liquors shall work a forfeiture of all rights of the lessee or tenant, under any lease or contract, of rent upon the premises where such unlawful sale, or giving away, shall take place; and all suits for damages under this act may be by any appropriate action, in any of the courts of this State having competent jurisdiction."

SEC. 10. "For the payment of any judgment for damages, and costs, that may be recovered against any person, in consequence of the sale of intoxicating liquors, under the preceding section, the real estate and personal property of such person, of every kind, except such as may be exempt from levy and sale upon judgment and execution, shall be liable; and such judgment shall be a lien upon such real estate until paid; and in case any person shall rent, or lease, to another any building or premises to be used or occupied, in whole or in part, for the sale of intoxicating liquors, or shall knowingly permit the same to be so used or occupied, such building *or premises so used or occupied shall be held* liable for and may be sold to pay any such judgment against any person occupying such building or premises. Proceedings may be had to subject the same to the payment of any such judgment recovered, which remains unpaid, or any part thereof, either before or after execution shall issue against the property of the person against whom such judgment shall have been recovered; and when execution shall issue against the property so leased or rented, the officer shall proceed to satisfy said execution out of the building or premises so leased or occupied as aforesaid. Provided, that if such building or premises belong to a minor, or other person under guardianship, the guardian or conservator of such person, and his real and personal property, shall be held liable instead of such ward, and his property shall be subject to all the provisions of this section relating to the collection of said judgment."

SEC. 5. "No person shall be licensed to keep a dramshop, or to sell intoxicating liquors, by any county board, or the authorities of any city, town, or village, unless he shall first give bond in the penal sum of $3,000, payable to the People of the State of Illinois, with at least two good and sufficient sureties, freeholders of the county in which the license is to be granted, to be approved by the officer who may be authorized to issue the license, conditioned that he will pay to all persons all damages that they may sustain, either in person, or property, or means of support, by reason of the person so obtaining a license, selling or giving away intoxicating liquors. * * * * Any bond taken pursuant to this section may be sued upon for the use of any person

or his legal representatives, who may be injured by reason of the selling or giving away any intoxicating liquor by the person so licensed, or by his agent or servant."

Iowa—Code of 1873, Sec. 1556; see Sec. 8 of Illinois Act.

Sec. 1557; see Sec. 9 of Illinois Act.

SEC. 1558. "For all fines and costs assessed, or judgments rendered, of any kind against any person for any violation of the provisions of this chapter, the personal and real property, except the homestead as now provided by law, of such person as well as the premises and property, personal or real, occupied and used for that purpose, with the consent or knowledge of the owner thereof or his agent, by the person manufacturing or selling intoxicating liquors contrary to the provisions of this chapter shall be liable, and all such lines, costs, or judgments, shall be a lien on such real estate until paid; and when any person is required by Secs. 1528 and 1529 of this chapter to give a bond with sureties, the principal and sureties in the bond mentioned shall be jointly and sever-ally liable for all civil damages, costs, and judgments that may be adjudged against the principal in any civil action authorized to be brought against him for any violation of the provisions of this chapter,"

Kansas—I Dassler's Stats., Ch. 35, p. 354.

Sec. 9; see See. 8 of Illinois Act.

Sec. 10; see Sec. 9 of Illinois Act.

Michigan—Laws of 1871, p. 363. This act was approved and took effect April 20, 1871. Sec. 2 is as follows: "That every wife, child, parent, guardian, husband, or other person, who shall be injured in person, property, means of support, or otherwise, by any intoxicated person, or by reason of the intoxication of any person, shall have a right of action in his or her own name against any person or persons who shall, by selling or giving any intoxicating liquor or otherwise, have caused or contributed to the intoxication of such person or persons; and in any such action the plaintiff shall have the right to recover actual and exemplary damages. And the owner or lessee, or person or persons renting or leasing any building or premises, having knowledge that intoxicating liquors are to be sold therein at retail as a beverage, shall be liable severally or jointly with the person so selling or giving intoxicating liquors as aforesaid. And in every action by any wife, husband, parent, or child, general reputation of the relation of husband and wife, parent and child, shall be *prima facie* evidence of such relation, and the amount recovered by every wife or child shall be his or her sole and separate property. Any sale or gift of intoxicating liquors by the lessee of any premises resulting in damage shall, at the option of the lessor, work a forfeiture of his lease; and the circuit court in chancery may enjoin the sale or giving away of intoxicating liquors by any lessee of premises, which may result in loss, damage, or liability to the lessor or any *person* claiming under such lessor." Comp. Laws, 1871, Vol. 1, Ch. 69, p. 690.

New York—Laws of 1873, Ch. 646, *See.* 1.—" Every husband, wife, child, parent, guardian, employer, or other person who shall be injured in person or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her name against any person or persons who shall, by selling or giving away intoxicating liquors, [have] caused the intoxication in whole or in part of such person or persons; and any person or persons owning or renting or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, shall be liable severally or jointly with the person or persons selling or giving intoxicating liquors aforesaid, for all damages sustained and for exemplary damages; and all damages recovered by a minor under this act shall be paid either to such minor, or to his or her parent, guardian, or next friend as the court shall direct; and the unlawful sale or giving away of intoxicating liquors shall work a forfeiture of all rights of the lessee or tenant under any lease or contract of rent upon the premises." (Rev. Stats., 1875, Vol. 2. p. 946.)

Ohio.—Act of May 1, 1854, 2 S and C. 1431. Section 6 of this act is substantially the same as section 1556, and section 7 as section 1557 of the Iowa code. By the Act of April 18, 1870 (Saylor 2360), section 7 of the Act of May 1, 1854, was amended so as to read like section 9 of the Illinois act. (3 Saylor's Stats. 2360, ch. 1871.)

Section 10 of the Act of May 1, 1854, is amended by Act of April 18, 1870, so as to read as follows: "For all fines, costs and damages assessed against any person or persons in consequence of the sale of intoxicating liquors, as provided in section 7 of this act, and the act to which this is amendatory, the real estate and personal property of such person or persons of every kind, without exception or exemption, except under the act to amend an act entitled an act to regulate judgments and executions at law, passed March 1, 1831 (Chase 826), passed March 9, 1840, took effect March 15, 1840 (Curwen, eh. 306), shall be liable for the payment thereof; and such fines, costs and damages shall be a lien upon such real estate until paid; and in case any person or persons shall rent or lease to another or others any building or premises to be used or occupied in whole or in part for the sale of intoxicating liquors, or shall permit the same to be used or occupied, in whole or in part, such building or premises so leased, used or occupied, shall be held liable for and may be sold to pay all fines, costs and damages assessed against any person or persons occupying such building or premises; and proceedings may be had to subject the same to the payment of any such fine and costs assessed or judgment

recovered which remain unpaid, or any part thereof, either before or after execution shall issue against the property of the person or persons against whom such fine and costs or judgment shall have been adjudged or assessed; and when execution shall issue against the property so leased or rented, the officer shall proceed to satisfy said execution out of the building or premises so leased or occupied as aforesaid; and in ease such building or premises belong to a minor, insane person, or idiot, the guardian of such minor, insane person or idiot who has control of such building or premises, shall be liable and account to his or her ward for all damages on account of such use and occupation of such building or premises, and the liabilities for the fines, costs and damages aforesaid; and all contracts whereby any building or premises shall be rented or leased, and the same shall be used or occupied in whole or in part for the sale of intoxicating liquors, shall be void; and the (lessee) person or persons renting or leasing said building or premises, shall, on and after the selling or giving intoxicating liquors, as aforesaid, be considered and held to be in possession of said building or premises." (3 Saylor's Stats., 2364, ch. 1871.)

Section 7 of the Act of 1870, is again amended by an Act of February 18, 1875 (4 Saylor's Stats., p. 3394), as follows; "Provided, that such husband, wife, child, parent, guardian, or other interested person liable to be so injured by any sale of intoxicating liquors to any person or persons aforesaid, who shall desire to prevent the sale of intoxicating liquors to the same, shall give notice either in writing or verbally before a witness or witnesses to the person or persons so selling or giving the intoxicating liquors, or to the owner or lessor of the premises wherein such intoxicating liquors are given or sold, or shall file with the township or corporation clerk in the township, village or city wherein such intoxicating liquor may be sold, notice to all liquor dealers not to sell to such person or persons any intoxicating liquors from and after ten days from the date of so filing said notice; and such notice or notices filed with such clerk shall be entered by the clerk of such township, city or village in a book to be kept for such purpose, which said book shall be open for the inspection of all, etc.; otherwise, the aforesaid injured person or persons shall not be entitled to real or exemplary damages for the alleged injuries which they may have sustained by the intoxication of any of the aforesaid persons, viz,: husband, wife, child, parent, guardian, employee or any other person or persons whomsoever; provided, that such notice, whether served personally or filed with the clerk as aforesaid, shall, during its existence, enure to the benefit of all persons interested.'

SECTION 2 makes it unlawful for any saloon keeper or other person to publish the fact of such notice having been given, by posting or printing in any paper or circular.

Wisconsin.—By section 1, ch. 127, of the Laws of 1872, it is declared to be unlawful for any person to sell intoxicating liquors without having first obtained a license therefor; and that no person shall be granted such a license without giving a bond "conditioned for the payment of all damages to any person, which may be inflicted upon or suffered by them, either in person or property, or means of support, by reason of obtaining a license, selling or giving away intoxicating drinks, or dealing therein;" that such bond may be sued or recovered upon for the use of any person, or his legal representatives, who may be injured by reason of the selling or giving away of intoxicating liquors by the persons so obtaining the license. Section 6 of the same act is, in its provisions, like section 1 of the New York Statute. This section was repealed by ch. 179, Laws of 1874. Section 16 of the latter act reads as follows: "Any person or persons who shall be injured in person, property or means of support, by or in consequence of the intoxication of any minor, or habitual drunkard, shall have a right of action severally or jointly in bis, her or their name against any person or persons who haye been notified or requested in writing by * * * the husband, wife, parent, relatives, guardians or persons having the care or custody of such minor or habitual drunkard, not to part with liquor or other intoxicating drinks to them, and who, notwithstanding such notice and request, shall knowingly sell or give away intoxicating liquors, thereby causing the in-toxication of such minor or habitual drunkard, and shall be liable for all damages resulting therefrom. A married woman shall have the same right to bring suit and to control the same as a *feme sole."* As to the effect of the amendment on causes then pending, see Dillon v. Linder, 36 Wis. 344; Farrell v. Drees, Supreme Court of Wis., Feb. Term, 1877.

statutes have been passed, and are now, and for some years have been, in force, providing a more complete remedy for damages resulting from the sale of intoxicating liquors. These statutes are substantially the same in their provisions and effect, and, for the purposes of this review, may be grouped together. In the first place, they differ from the laws of Connecticut, Indiana, Maine and New Hampshire, in giving a right of action for the consequences of the in- toxication of a person, without regard to the unlawfulness of the sale. They even go further than this, in making no distinction between a sale and a gift. They provide that every husband, wife, child, parent, guardian, employer, or other person, who shall be injured in person, or property, or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise, of any person, shall have a right of action in his or her own name severally or jointly against any person who shall, by selling or giving away intoxicating liquors, have caused the intoxication in whole or in part of such persons, for all damages sustained from the effect of such intoxication, and for exemplary damages.

Rev. Stats. 111., ch. 43, sec. 9: Iowa Code of 1873 sec. 1557; Kas. 1

Dassler' Stats ch. 35, sec. 10; N. Y. Laws of 1873, ch. 646, sec. 1; Ohio, Saylor, 2360, sec. 7; Mich. Laws of 1871, Vol. 1, ch. 69, sec. 2; Wis. Laws of 1872, ch. 127, sec. 1.

Under the Illinois and Kansas Statutes, it is declared that any person who shall, in Illinois, by the "sale,"—in Kansas, by the "sale, barter or gift," of intoxicating liquor, cause the intoxication of another, shall be liable and compelled to pay a reasonable compensation to any person who may take charge of, and provide for such intoxicated person; and in Illinois "two dollars," in Kansas "five dollars "per day in addition thereto for every day such intoxicated person shall be kept in consequence of his intoxication, which sum may be recovered in an action of debt before any court having jurisdiction.

1 Dassler's Stats., ch. 35, sec. 9; Rev. Stats. Ill., ch. 43, see. 8.

In Iowa and Ohio, the right to recover such compensation is restricted to cases of unlawful sales of liquor, or sales made without the proper license, and to the sum of "one dollar" for each day.

Iowa Code of 1873, sec. 1556; Ohio, 2 S. and C. 1431, sec. 6.

These sections, it may be observed, contemplate two conditions, in which the person cared for may be placed. For simply taking charge of and providing for him while drunk, a reasonable compensation is allowed; while for keeping him in consequence of his intoxication—as when sickness ensues, or if while drunk he injures himself, or becomes disabled, and it thereby becomes necessary that care should be bestowed upon him—a sum certain is allowed to be recovered from the seller. And as no more than the penalty can be recovered under the latter part of the section, evidence of what it was worth to care for the person injured is inadmissible.

Brannan v. Adams, 76 111. 335.

A wife may recover under this section the stated compensation for taking care of her husband while intoxicated, in addition to any injuries to person or property, or means of support, for which she may claim damages under the other sections.

Wightman v. Devere, 33 Wis. 370.

Besides the personal liability of the vendor or donor of intoxicating liquors for all damages arising therefrom, under the statutes of Illinois, Michigan, New York and Ohio, any person owning, renting, leasing or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, or who having leased a building for other purposes, shall permit the sale of intoxicating liquors therein, which may have caused, in whole or in part, the intoxication of any person, is made Kable, severally or jointly, with the person or persons selling or giving the intoxicating liquors, for all damages that may be sustained from such sale or gift, and likewise for exemplary damages.

Rev. Stats. 111, eh. 43, see. 9; Mich. Laws of 1871, Vol. 2, oh. 69, sec. 2; N. Y. Laws of 1873, ch. 646, sec. 1; Ohio (Saylor) 2360, sec. 7.

By the Illinois, Iowa and Ohio statutes, the premises in which the sale is made are liable, and a judgment obtained under the acts becomes a lien upon the property, whether owned by the person who sold or gave away the liquor, or by one who has rented it to be used for the sale of intoxicating liquors, or though leased or rented for another purpose, permits it to be used in such manner;

Rev. Stats. 111., ch. 43, sec. 10; Code of Ia. sec. 1558; Ohio (Saylor) Stats., 2364, ch. 1871.

and proceedings may be had to subject the premises to the payment of a judgment, either before or after execution is against the property of the person against whom the judgment may have been recovered. And if the building or premises belong to a minor, or other person under disability, the guardian or conservator of such person, and his real and personal property, are liable in the place and stead of the property of his ward. In Illinois, Ohio, New York and Michigan, the sale or gift of intoxicating liquors, contrary to the provisions of the act, works a forfeiture of all rights of the lessee or tenant under any lease or contract of rent upon the premises, where such unlawful sale or gift takes place.

Rev. Stats. Ill. ch. 43, sec. 10; N. Y. Laws of 1873, ch. 646, sec. 1; Ohio (Saylor) 2360, see. 7; Mich. Laws, 1871, ch. 69, sec. 2.

The court of chancery, under the last statute, is authorized to enjoin the sale or gift of intoxicating liquors, by any lessee of premises, which may result in liability on the part of the lessor. Under all the statutes, a married woman is given the right to bring suits, and to control them and the amount recovered, as a *feme sole*, and all damages recovered by a minor are directed to be paid either to him or her, or to his or her parent, guardian, or next friend, as the court may order.

In Illinois, Iowa, and Wisconsin, a party applying for leave to sell intoxicating liquors is required to give a bond, with sureties, conditioned to pay all damages that may be sustained by any one from the sale, either in person, property, or means of support. A bond, given in pursuance of this provision, may be sued upon for the use of any person, or his legal representatives, who may be injured by reason of the selling or giving away of intoxicating liquor by the person licensed, or his servant or agent

Rev. Stats. 111. ch. 43, sec. 5; Code of Ia. sec. 1558; Wis. Laws of 1872 ch. 127, sec. 1.

This section of the act, and the section giving a general cause of action by the parties therein named, are to be construed together; the latter defining more specifically and limiting the obligation of the bond required by the former.

State v. Ludington, 33 Wis. 107.

By recent amendments to the statutes of Ohio

Act of 1875 (4 Saylor, p. 3394).

and Wisconsin,

Laws of 1874, ch. 179, sec. 16.

the liability of the seller is restricted to the consequences of sales made after notice to him not to sell to the person intoxicated, given by any of the parties mentioned in the acts as having the right of action.

Under the statutes of the seven states which we have classed together, it has been remarked that the liability for the sale or gift does not, in case of damage resulting, depend upon its unlawfulness

Hayes v. Phelan, 4 Hun, 732.

Herein the liability differs from that created under the laws of Connecticut, Maine, Indiana and New Hampshire, where the remedy is given only when the transaction has been in violation of law,—such as a sale by an unlicensed person, or to a minor or habitual drunkard, or to one after notice from his wife or family of his dissolute habits. It may be here remarked, however, that the Ohio statute, although wanting the proviso, "contrary to the provisions of this act," has been construed to authorize actions of this kind in cases only where the sale has been unlawful. But this construction was arrived at upon a consideration of several acts passed at different times, and amended at different periods, and is neither in accordance with the Wording of the laws, nor the decision of a court of final resort.

Granger v. Knipper, 2 Cin. 480; Mason v. Shay, 7 C. L. N. 152.

And except in this instance, it has not been attempted to evade the law and the intention of its framers by such an interpretation. A defendant may, it seems, nevertheless show that he had been licensed to sell spirituous liquors, and was legally selling them under that authority on the occasion complained of, not as a defense, but in mitigation of damages.

8 Alb. L. J. 135.

SEC. 4. *Who Liable—Master and Servant—Principal and Agent.*—The words "any person," as used in the statutes, are very broad, and embrace all persons making the sale, without regard to their capacity—whether owner, son, clerk, or servant.

Worley v. Spurgeon, 38 la. 465.

The servants, as well as the principals, are liable in criminal prosecutions under the liquor laws. State v. Schicker, 33 la. 195. And assuming to act as agent for the owner without authority will not exonerate one from the responsibility.; though merely acting as messenger, as in transmitting the liquor from the seller to the buyer, and the money from the buyer to the seller, would hardly bring him within the statute. Com. v. Williams, 4 Allen, 587. But see, Johnson v. People, 3 West. M. Jur. 723. Evidence that his employer had prohibited him from selling in his shop would be inadmissible in his behalf. Com. v. Tinkham, 14 Gray, 12. So in suits to recover penalties under the acts. Roberts v. O'Connor, 33 Me. 496. As to the liability of a servant in a social club, who deals out liquors to its members, see State v. Mercer, 32 la. 405, and of the members themselves, Marmont v. State, 48 Ind. 21: Com. v. Smith, 102 Mass. 144.

With regard to the proprietor, in the construction of these statutes, the doctrine of agency, the liability of the master for the acts of his servant in the course of his employment, has been strictly applied. One engaged in the sale of intoxicating liquors is held responsible for the acts of his servants in that business, even though in the particular transaction they disobeyed his instructions

Peterson'v. Knoble, 35 Wis. 80; Smith v. Reynolds, 8 Hun, 128; Keedy v. Howe, 79 111. 133.

"No man," says Cooley, C. J., in a leading case under these statutes,

Kreiter v. Nichols, 28 Mich. 496. But see Oviatt v. Pond, 29 Conn. 479.

"can be excused from responding for the negligent conduct of his servant because of having instructed him to be careful, or for his frauds because of having told him to be honest." He is not liable for wrongs done by the servant outside of his employment but he is responsible for everything arising in the course of his business, and the fact that he gave orders to the contrary does not relieve him from liability if they be disobeyed

But in criminal prosecutions the rule is different; and if a servant sell, in violation of law, without the knowledge and against the instructions of his employer, the latter is not responsible. Lathrope v. State. 51 Ind. 192; O'Leary v. State, 44 Ind. 91; Wreidt v. State, 48 Ind. 579.

It is essential, however, that the sale should have been with the consent of the owner or servant, and a subsequent ratification will not render him liable. The case of Kreiter v. Nichols

28 Mich. 496.

is in point here. In this case the evidence showed that the intoxicating liquors were not furnished to the

husband of the plaintiff by the defendant himself, but that he refused to let him have the liquor, and instructed his servants to do the same, which they did. It appeared, however, that the defendant kept a grocery store, at which liquors were sold, and he was also a brewer of lager beer, and it was not disputed that the husband, who had been an employee of defendant, had procured liquor at the store, and had drunk beer at the brewery on several occasions. The trial judge charged the jury that the defendant would be liable for the sales in violation of his orders, if, when he found it out, he charged the liquors to him and deducted the amount from his wages. On appeal, the judgment was reversed for error in this instruct- tion. The court held that no such principle, as above stated, could be applied to the case of a person who, without the permission of the owner, obtains his liquor, and that the fact of the owner demanding and receiving pay for it could not make him a wrong-doer in the original trespass on his rights. "By the statute law of this state," say the court, "as well as by the common law, beer is recognized as property, and the brewing of beer is a lawful business. The law protects this property precisely as it protects any other lawful product. If one steals it from the owner, he is punished for it; if he converts it to his own use in any form, a civil action will lie to recover from him the value. And this civil action would not depend in any degree upon the method or purpose of the conversion. Whether destroyed from a belief in its deleterious effects, or made way with in carousals or private drinking, the legal responsibility to pay for its value would be the same. And it will scarcely be disputed that, in this case, if defendant's statement is truthful, he might have recovered from the husband the value of the beer, on the same grounds precisely as he might have recovered for any unlawful conversion of other property. But if defendant might lawfully recover for the conversion, he might, also, lawfully settle for it. He does not thereby sanction what was originally done; but he makes one who has done him a wrong compensate him for the wrong."

It is not necessary that the party selling should compel the purchaser to drink, or use any art, device or trick, to cause him to become intoxicated, or know that he would become so.

Burnaby v. Wood, 50 Ind. 405.

SEC. 5. *The Joint Liability of Several Sellers*,—A seller of intoxicating liquors by which another is injured in person, property or means of support, is not released from liability, if a part of the liquors causing the intoxication was sold by others. He is liable if he contributed to the result.

Woolheather v. Kisley, 38 Iowa, 486fountain v. Draper, 49 Ind. 441.

This proceeds upon the well-settled principle, that where a person undertakes to do an unlawful act, which will result in injury to another, and uses the means calculated to produce such a result, the fact that other persons may have been engaged in producing the same result will not exonerate him from the consequences of his act. From his using the means, the law presumes not only that he intended to produce the result, but that the common intent which will create mutual liability exists without proof of a previous agreement, or a common understanding, when the means employed lead to that inference. Therefore, it will not avail the defendant to show that others sold the party liquor which may have contributed to his intoxication.

Hackett v. Smelsey, 77 Ill. 109; Emory v. Addis, 6 Ch. L. N. 336.

The rule in criminal law is, that if persons, combining in intent, perform a criminal act jointly, the guilt of each is the same as if he had done it alone, and it is the same if, the act being divided into parts, each proceeds with his several part unaided. And if, while persons are doing what is criminal, another joins them before the crime is completed, he becomes guilty of the whole; because he contributed to the result. But if, in these cases, there is no mutual understanding of each other's purpose, each who contributed to the result will be responsible simply for what he personally meant. 1 Bishop on Crim. Law, 630, 642. So all joint tort-feasors are jointly liable where, in legal consideration, the act complained of might have been committed by more than one, and a joint action may be brought against several for an assault and battery, or a malicious prosecution. The question of the joint liability of several sellers of liquors, under the statutes, has generally been decided, when not specially enacted, upon the common-law principle governing the liability of joint tort-feasors. But it is submitted that the rule, as stated in the text, having regard to the result and the separation of the damages, is the correct one. The case of Stone v. Dickenson, 5 Allen, 29, has been looked upon settling the question. Nine different creditors wrongfully sued out writs against then debtor: placed them in the hands of the same officer, who arrested the debtor on all the writs at the same time; each creditor being ignorant of what the other was doing; it was held that they were jointly or severally liable, though there was no pre-concerted action. Bigelow, C. J., said: "As a matter of first impression, it would seem * * * they could not be regarded as co-trespassers in the absence of proof of an intention to act together, or of knowledge that they were engaged in a common enterprise. But a careful consideration of the nature of the action and of the wrong done * * * will disclose the fallacy of this view of the case. The wrong which constitutes the gist of the action is, that he has been unlawfully arrested. * * * It is only one wrong. The error consists in supposing that the several parties * * * can not be regarded as co-trespassers, because it does not appear that they acted in concert, or knowingly employed a common agent. Such preconcert or knowledge is not essential to the commission of a joint trespass. It is the fact that they are all united in the wrongful act, or set on foot, or put in motion the agency by which it was

committed, that renders them jointly liable to the person injured." On the other hand, several cases have been cited as establishing a contrary doctrine. In Auehmuty v. Ham, 1 Denio, 493, it was held, that where dogs belonging to several owners are found in company engaged in killing sheep, each owner is responsible for the injury done by his own dog, and for no more. In this case, the trial court instructed the jury "that the defendant was liable to pay for all the sheep of the plaintiff which had been killed or bitten by dogs between the first of July and the first of October, 1843," against a contrary instruction asked by defendant—"that he was only chargeable for the injury done by his own dog," etc. Jewett, J., said: "The court should have charged that the plaintiff was entitled to recover of the defendant the value of all the sheep of the plaintiff which, from the evidence in the case, they were satisfied the defendant's dog had killed or wounded; and that he was not accountable for such as Minkler's dog had killed, nor for any damage done the plaintiff's flock of sheep by otiier dogs than his own." To this and other cases of like character it is answered, that separate owners are not at common law jointly liable for injuries jointly committed by their respective animals, though all happens as part of a single transaction. In such cases each owner is liable only for the injuries committed by his own animal, because of his negligence in permitting it to run at large. This *neglect* is the ground of the owner's liability. As the animals are supposed to be under the separate control of each owner, and his negligence is distinct from that of the other, and not in furtherance of a common object, they can not be jointly liable, because the wrongful neglect of each is wholly independent, and the damages are not the direct result of the act. There is no concurring agency of the owners in the trespass. If, however, the separate owners of such animals keep them in common, and suffer them to run at large as one herd or body, then they are jointly liable for all damages by the united trespasses of all, or any, of the animals. Jack v. Hudnall, 25 Ohio St. 255; Boyd v. Watt, 27 Ohio St. 25.9.

"If two persons willfully administer distinct portions to another, which together produce death, will it be claimed that neither of the parties can be punished, because the death was not solely caused by the poison administered by either one of them? If plaintiff's husband had taken one or more glasses of liquor at some place other than at defendant's saloon, which did not intoxicate him, and before its effect had passed off, he obtained several glasses of liquor from defendant which, together with that previously drunk, did cause intoxication, are both of the defendants to be deemed innocent, or are they both guilty? "

Woolheather v. Kisley, 39 la. 486.

Clearly the latter rule must be adopted in such cases.

But a different rule must be adopted where the wrongs are successive and independent, though committed against the same person. There must be concurrent action, a cooperation, or a consent, or approval, in the accomplishment by the wrong-doers of the particular wrong, in order to make them jointly liable. For it has been held, that a joint action may not be brought against a physician who prescribed, and an apothecary who put up noxious medicines. In an Iowa case

La France v. Krayer, 421a. 143.

it was held that the sale, by one defendant, of liquors to the husband of the plaintiff became an independent and complete cause of action, and a sale to him of intoxicating liquors by another person on the next day, the next week, or the next month, would not give a joint right of action for either the first or last sale. Each was complete in itself. This is true where the drunkenness complained of was not a single fit of intoxication.

Jewett v. Wanshura, 8 Ch. L. N. 324.

The rule of joint liability would seem to apply specially to a case where several persons supply liquor to one who commits a trespass while in a state of intoxication, produced by the liquor so furnished.

Bodge v. Hughes, 53 N. H. 616.

And so it does, except under the New York statute, where it is held, that a joint action will not lie against two or more persons who separately, and at different times, and at different places, have sold liquor to the same person, each quantity of liquor haring contributed to produce the intoxication that caused the injury.

Jackson v. Brookins, 5 Hun, 530.

But when any other rule than that before stated is adopted, the difficulty arises in this, that there can seldom be any mode of separating the liability of the different parties. If a dozen sales are made by a dozen dealers, no inquiry is possible as to the particular glass of liquor which caused the intoxication, or as to the particular drink from the effect of which the damage arose.

Kearney v. Fitzgerald (la.), June Term, 1876.

But there may undoubtedly be cases where such a separation might be made. To take an illustration.

Boyd v. Watt. 27 Ohio St. 259; S. c., 3 Cent. 1. J. 756.

A, on the first day of January, sold a pint of whiskey to D, who paid for it; D's wife needed the money so expended, to buy bread. On the tenth of January B sold brandy to D, for which he paid the money; D's wife required the money at the time to pay for meat to eat. On the twentieth of January C sold a quart of whiskey to D and received payment, and D's wife needed the money to purchase raiment. On each occasion D became

intoxicated, and wasted so much of the plaintiff's means of support, as he expended money in the purchase of the liquor, and time while so intoxicated. In such a case it might not be impossible to separate the damage resulting to the plaintiff from the acts of each. But the case is very different where successive sales by several have produced a particular intoxication from which the injury sued for has resulted; or where the damages result from the state or condition of one, caused by repeated sales for a series of years. To state the rule of joint liability which should govern in this class of cases briefly: 1. If the defendant is the sole cause of the intoxication, he is liable for all the damages resulting. 2. If some of the injury is caused by others, he is not liable for damages resulting from their sales. 3. But if the damages can not be separated, then he will be liable for all injuries to which he has contributed.

Where all are considered as joint wrong-doers, and each is liable for the injury done by all, all may be sued together, or one or any number of them separately; but there can be but one satisfaction for the injury.

Kearney v. Fitzgerald, Supreme Court of Iowa, not yet reported; Emory v. Addis, 3 Ch. L. N, 336.

A plaintiff can collect but one sum, though several amounts may be awarded him in different actions. He is, however, entitled to the costs in each suit.

Pomeroy on Remedies, 314.

But if he has prosecuted several jointly, and the jury has assessed a different sum as damages against each defendant, the plaintiff may enter judgment against all for any of the amounts as he elects.

First Nat. Bank v. Indianapolis, 45 Ind. 5.

On the other hand, where each seller is liable for the injuries produced by himself only, settling with, or suing one, will not release the others.

Jewett v. Wanshura, 8 Ch. L. N. 324.

The common-law doctrines, concerning the liability of tort-feasors, and as to the joinder or separation of them in actions brought to recover damages for the wrong, are not affected by the new system of procedure introduced by the codes.

Pomeroy on Remedies, 307.

The question of misjoinder may be raised by demurrer, or the parties may apply for a severance. A neglect to demur does not waive this objection; as, under the codes,—and in nearly all of the states where this action is allowed, codes of procedure are in force,—the defendant may, at the trial, interpose the same objection to the plaintiff's recovery, though he has omitted to allege it on the record,

Ib. 291; Jackson v. Brookins, 5 Hun, 533, and cases cited.

Whether it will be for the interest of a defendant, where several are joined, to obtain a severance, will depend upon the particular case. Though, as there can be but one satisfaction, it would seem to be to his interest to remain where he will have to assume but a share of the damages and costs. But it may happen that his connection with the injury to the plaintiff has been only slight, while that of his co-defendants may have been of such a nature' as to sustain a claim for punitive or vindictive damages;—a claim which, under some circumstances, as will be seen m a subsequent section, where the question of damages is more fully considered, may be allowed.

SEC. 6.—*The Liability of Owners or Lessors of Premises*. These statutes also, as has been seen, give a right of action against the owner or lessor of the premises, where the sale is made, severally or jointly with the person making the sale, where the owner has leased or rented the property for such a purpose, or has knowledge that intoxicating liquors are being sold therein.

Bertholf v. O'Reilly, 8 Hun, 15.

While the plaintiff may bring an action against the seller of liquors causing intoxication and damage alone, and having recovered judgment, by another action against the owner, enforce it, yet he has the right to join them in one action, and therein obtain complete relief.

La France v. Krayer, 42 la. 143.

And the judgment so recovered may be reversed as to one and affirmed as to the other.

Rengler v. Lilly, 26 Ohio St. 48.

This part of the law, however, does not apply to the owner of premises, who himself sells liquor therein. Therefore, where the owner sells in violation of the act, he is liable because of his sales, and not on account of his ownership of the premises in which the sales are made; and to proceed against him, under this section, in such a case, would be improper.

Barnaby v. Wood, 50 Ind. 405.

What will amount to "knowingly permitting" or "suffering" intoxicating liquors to be sold in violation of the statutes, on the part of a Lessor of premises, who may have rented them for legal purposes, the lessee subsequently engaging in illegal sales, has been the subject of considerable discussion. Must he not, it has been suggested, have a present absolute right to control the use, before he can be said to permit? Can permission exist without active participation in the control of the property? Can the law be construed as laying hold of the

lessor as a hostage for the lawful behavior of his tenant, and hold him to knowingly permit, where he merely knowingly suffers the unlawful act to be done by one who has exclusive control as against him and all the world? If obliged to resort to law for an injunction to restrain or to compel a forfeiture, the breach of duty being of conditions subsequent, will not the very law which exacts a resort to it, apply the strictest rules to the lessor's case, and estop him from a remedy upon the slightest grounds of acquiescence, such as once accepting rent after having reasonable grounds to believe in the existence of the unlawful user, or deny him relief, except upon proof beyond a reasonable doubt?

Granger v. Knipper, 1 Cin. (S. C.) 480.

It is, we apprehend, a sufficient answer to this objection to say that the owner is entirely protected, under the very sections of the statutes creating his liability, by the forfeiture which ensues upon the sales being made by the tenant. He is not required to move until the forfeiture is complete, and he will not be held liable unless he does some affirmative act signifying his assent to the use of his property for such purposes, or his permission for its continuance.

state v. Ballingall, 42 la. 87.

Mere inactivity on his part to find out the fact, or a failure to take steps to prevent such a use of the premises, will not render him liable.

State v. Abraham. 6 la. 117.

The permission to occupy the premises, with knowledge that intoxicating liquors are to be sold therein, constitutes the basis of the liability imposed by the act. Neither the permission nor the knowledge is to be presumed or inferred, but should be established by clear and satisfactory proof. It is doubted whether, considering the relations of the parties, the occupation, by the husband, of premises belonging to his wife, where he and she reside, is such a permission to occupy as would make her liable under the statute. And it has been held that from the mere fact that the wife, the owner of the premises, lived with her husband in a hotel, it could not be inferred that she had knowledge that intoxicating liquors were sold therein, it not being proved that she ever witnessed a sale, or had ever been present in the bar-room where the sales were made, or had ever given her consent that such sale should be made, or that she was informed that they were in fact made, or of any circumstances tending to induce such an inference.

Mead v. Stratton, 8 Hun, 151.

But general reputation of the place being used for the purpose of selling spirituous liquors is admissible on the question of the defendant's knowledge.

State v. Shanahan, 54 N. H. 437.

Where it was proved that the defendant by a written lease let a building to one F for the sale of liquor, on an understanding that F was to occupy it for that purpose, and F did occupy it for that purpose, it was held that such facts would sustain an allegation of "suffering" the premises to be occupied for the purposes named, as well as an allegation of "letting" for a like purpose.

Ibid.

Again, a landlord certainly has power to prevent the use, by his lessee, of his property for illegal purposes, as he has power to restrain the use of his property for a purpose different from that for which it was leased, or for a purpose which may render it dangerous,

Bennet v. Sadler, 14 Yes. 526; Mayor v. Bolt, 5 Ves. 129.

and this on general principles, without regard to the statutory provisions which declare a forfeiture, and, in one case, expressly empower the court to enjoin this particular use of property.

Mich. Stats., *supra.*

And where a landlord seeks to avoid a lease for a violation of the act on these grounds, the defendant can not prevent such avoidance by showing a payment of rent for the entire term

McGarvey v. Puckett, 27 Ohio St. 669.

The Ohio law provides that all contracts, whereby any building or premises shall be rented and leased, and used or occupied in whole or in part for the sale of intoxicating liquors, shall be void, and the person renting or leasing the premises shall, upon such a sale taking place, be considered and held to be in possession of the premises.

Ohio Law, *supra*.

The existence of two conditions is necessary to render a contract void under this statute. 1. The building or premises must have been rented or leased for the sale of intoxicating liquors. 2. The leased property must be used or occupied for that purpose. The mere use or occupation of the property by the tenant for the purpose indicated is not enough; it must have been contemplated at the time of the making of the lease. Neither is it sufficient, that such a use of the lease was contemplated at the making of the contract by the tenant; it must have been known to the lessor. From its wording, the meaning of the statute is very ambiguous; but, as used in this section, the lessor is the actor, and it is the lessor, and not the lessee, who is "to be considered and held to

be in possession," on and after the sale.

Zink v. Grant, 25 Ohio St. 353.

The difference between this section and the sections contained in the several acts, in relation to forfeitures is, that in the other cases the use of the premises by the tenant for the sale of intoxicating liquors renders the lease void at the election of the lessor, while in this the lease becomes void as to both parties.

Justice v. Lowe, 26 Ohio St. 373.

The word "premises," as used in the statutes, includes lands and tenements. Therefore, a justice of the peace in most of the states would not have jurisdiction in an action against the owner or lessee of premises, who knowingly permits liquor to be sold therein, whereby injury is sustained, such an action being one in which the title to real estate is drawn in question.,

Bowers v. Pomeroy, 21 Ohio St. 184.

If the sale be made upon any portion of the property leased, it works a forfeiture of the whole. Therefore where the act which it was claimed forfeited the lease was committed in a grocery store upon the property leased, judgment was held to be properly rendered by the restitution of the whole premises of 350 acres.

McGarvey v. Puckett, 27 Ohio St. 672.

The provisions of the statutes declaring that real estate not owned by the seller, but wherein the sale is made, shall be held liable for the payment of a judgment against him, do not create a lien upon the property, but simply authorize it to be subjected to the payment of the judgment in a suit against the owner, instituted for that purpose. Until the commencement of a suit against him, the judgment creditor acquires no interest in the property; and if before the suit is brought it has been sold and conveyed, it can not be subjected to the payment of such a judgment. To construe the statutes, so as to make a judgment against the seller a lien on the property, either from the rendition of the judgment against the seller of the liquor, or from the time the action accrued, would render titles to land very insecure. No one could safely purchase real estate on the faith of the records showing that it was free from incumbrances. He would be obliged to search for the previous occupiers of the property, and to ascertain whether any judgments or causes of action existed against them while in possession.

Bellinger v. Griffith, 23 Ohio St. 619.

The statutes of Illinois, Iowa, Kansas, Michigan, New York, Ohio and Wisconsin, give a right of action for three separate descriptions of injury caused by the sale of intoxicating liquors, viz.: Injury to the person, to property, and to means of support.

SEC. 7. *Injuries to the Person.*—To sustain the action for injuries to the person, an assault, or some actual violence, or physical injury to the person, or health, must be shown.

Mulf ord v. Clewell, 21 Ohio St. 193.

Under a statute of Missouri, making it a ground for divorce at the suit of a wife, if the husband shall "offer such indignities to her person as to render her life and condition intolerable and burdensome," it was held, in Cheatham v, Cheatham, 10 Mo. 296, overruling Lewis y. Lewis, 5 Mo. 278, that unfounded charges made and repeated against a wife by her husband, calculated to render her life intolerable, were not a sufficient ground for the granting of a decree. "If mere words," say the court, "will constitute the indignities to the person mentioned by the statute, by what standard of refinement shall the offended sensibilities of the female be estimated? Natural temperament, education and the associations of life will very much vary the degree of unhappiness and discomfort, which reproaches of this character would be likely to produce. If words, unaccompanied with actual violence, constituted the charge, they must have been such as to inflict indignity and threaten pain, and produce a reasonable apprehension of injury to the person or health of the party complaining." Hooper v. Hooper, 19 Mo. 355.

So, where the plaintiff charged that in conse- quence of his intoxication her husband at times became-delirious, wild and dangerous, compelling her to nurse and attend him, and that she had been put to much fear, and had been forced to abandon his house on account of his bad conduct and disagreeable society, but complained of no actual violence, it was held that the action could not be sustained for injury to her person. "Mortification and sorrow and loss of her husband's society is not enough. This is her misfortune, for which she has no remedy under the law. If she had been attacked by her drunken husband and injured by his violence, she could recover."

Mulford v. Clewell, 21 Ohio St. 193; Albrecht v. Walker, Supreme Court of Illinois, not yet reported.

But under the Wisconsin statute, where the husband, while intoxicated, without actual violence, but by threats and abusive language and intimidation, drove his wife out of his house, and kept her out for several hours, it was held that this constituted a physical injury and suffering sufficient to sustain an action.

Peterson v. Knoble, 35 Wis. 80; Wightman v. Devere, 33 Wis. 570.

SEC. 8. *Injuries to Property.*—The term "property," as used in these statutes, requires no special construction. Damages caused through the squandering of the money or chattels of a wife, or other person,

Mulford v. Clewell, 21 Ohio St. 197; Hemmes v. Bentley, 32 Mich. 89.

or the value of the property destroyed by a person while intoxicated, may recovered under this section from the seller of the liquor causing the intoxication.

Woolheather v. Risley, 38 la. 187.

Unlawfully depriving a person of his money or other property, upon general principles, creates a right of action in favor of the party injured, and these principles apply equally to the case of one obtaining the money of another by the unlawful sale of intoxicating liquors. Therefore a party may sue for money paid during a period of time for liquor sold to him in violation of these statutes. And the same right exists in favor of his personal representatives, it being an injury to the estate of the intestate of a proprietary character, as distinguished from a mere personal injury.

Kilborn v. Coe, 48 How. (N. Y.) 141.

No demand of the chattels, or notice of claim, is necessary before the suit can be brought. An action of this kind differs from an ordinary action for conversion of property; for it is not brought for the vendee's conversion, but for the act of the party making away with the property while under intoxication effected by the defendant. The wrongful act for which suit is brought is not the conversion of the property, but the sale of the liquor.

Mulford v. Clewell, *supra.*

And where a wife sues the vendor of liquors for the value of property belonging to her, which has been made away with by her husband, while under the influence of liquor supplied by the defendant; if, as between the plaintiff and the husband, the property was hers, whether it would have been hers as to creditors or a purchaser from her husband in possession, is not material; for the defendant in such a proceeding does not occupy either of these relations.

Woolheather v. Risley, *supra.*

Where the plaintiff's son took his horse, saying that he was going to visit a friend some miles distant, but instead of this went directly to the saloon of one of the defendants, where he became intoxicated, and while in such condition afterwards drove the horse so violently that it died; it was held, under the New York statute, that an action could be maintained against the saloon-keeper and the landlord of the premises jointly for the value of the horse.

Bertholf v. O'Reilly, 8 Hun, 16.

And an action may be maintained by a person prevented from following his usual occupation by being struck, beaten or wounded by an intoxicated person, against the seller of the liquor by which the intoxication was produced, and the owner of the building in which it was sold.

English v. Beard, 51 Ind. 4S9.

SEC. 9. *Injuries to Means of Support—Rights of Wife*.—The term "means of support," as used in the statutes under consideration, has received a different interpretation by different courts. The wife is the person whose damage in most cases is laid under these words, and a statement of the application and extent of the term requires an examination of the rights of a wife, under the law, to the support of her husband. Broadly, the phrase as used in the statutes relates to whatever a husband might have earned or made by his labor and attention to business, and contributed to the maintenance of his family.

Wightman v. Devere, 33 Wis. 570.

A husband is morally and legally bound to supply his family with the necessaries and comforts of life. If he have no other resources, it is his duty to contribute his labor and its proceeds to their support. A wife has thus an interest in his capacity to labor, and this especially, if she be wholly dependent. Therefore, his intoxication of itself, as affecting his capacity to labor, gives her a cause of action.

Schneider v. Hosier, 21 Ohio St. 99.

Nor is the liability of the defendant confined to cases of injury resulting immediately from drunkenness, or arising during its continuance; it extends as well where the injury results from insanity or sickness produced by intoxication.

Mulford v. Clewell, 21 Ohio St. 191.

Health is as indispensable to the ability to labor, as is the ability to labor to means of support. To sustain the action by the wife, it is not necessary that she has actually been without support, or at any time in whole or in part deprived of support. Means of support relate to the future as well as to the present. It is sufficient if the sources of her future maintenance have been stopped or diminished below what is reasonable for one in her station of life.

Mulford v. Clewell, *supra.*

In Iowa, the refusal of the court below to charge the jury that, "if the plaintiff was in no worse condition after, or by reason of the sale of liquors to her husband, than she was before, she has not suffered in her means of support, and cannot recover therefore," was held correct.

Woolheather v. Risley, 38 1a. 189.

So, in Illinois, the ruling of the trial judge, in rejecting an instruction submitted by the defendant, that if the

wife had sufficient means in her own right to maintain herself as comfortably as she was supported by her husband before the date of the charges, or was able and competent to earn her own livelihood, she could not maintain the action, was assigned for error but overruled. The Supreme Court said: "Prom the earliest period of the law, there has been a legal obligation on the husband to support his wife. No act of the legislature of this state, when this cause of action accrued, had ever abrogated such law. It has never been annulled by judicial construction, nor do we recognize in courts the right to annul it. The right of support is not limited to the supplying of the bare necessaries of life, but embraces comforts that are suitable to the wife's situation and the husband's condition in life. Because the wife may be able-bodied and can earn a livelihood, it does not follow that she does not suffer injury in means of support by loss of her legal supporter. Nor does it so follow where she may have independent means of her own. There are always independent means of support. No one is absolutely dependent on another for means of support; for, where there is the absence of other means, it is provided by public authority."

Hackett v. Smelsley, 77 Ill. 109.

But in a Wisconsin case it is intimated that, if the husband when sober was physically incapable of performing any work or labor, or attending to any business, or was of such indolent or shiftless habits that he in fact made his wife support him, his intoxication would not injure her means of support, as used in the statute.

Wightman v. Devere, *supra*.

And in New York, the exposition of this phrase in all the other states has been entirely dissented from. The Supreme Court of that state, in one case, say, that the reasoning adopted in the other states, "if carried out consistently, would result in the doctrine that the wife has an interest in the property of her husband, so that she could maintain an action for its injury, as he is as much bound to support her out of his property as out of his wages; and that a creditor would be injured in his means of support by the intoxication of his debtor, for the debtor is as much legally and morally bound to pay his creditors as to support his wife."

Hayes v. Phelan, 4 Hun, 738.

This extraordinary ruling stands alone, and seems to have been made without any regard to the obvious intent of the framers of these laws. But leaving this out of the question, it would certainly seem a sufficient answer to it, that in the same section the wife is authorized to bring an action for injury to her property, and that even at common law she may maintain a suit for an injury to her contingent interest in her husband's estate, though an interest which is not an actual one, but which the law considers as more than a possibility.

Bullard v. Briggs, 7 Pick. 533; Buzick v. Buzick, 3 Cent. D. J. 786.

The fact that the wife is specifically mentioned in the statute, and the creditor is not, makes it unnecessary to consider whether legally their rights are precisely the same. An examination of this case shows, however, that the expression just quoted is more in the nature of a *dictum* than a judicial decision; and it may be considered as settled under this section, wherever it is found in the statutes of the states which have adopted the civil damage law, that the wages of the husband are part of the wife's means of support, in that they belong to her for that object; that a diminution of them from the causes stated will give her a right of action, and that having the right to rely upon the support of her husband, his previous conduct, except under extraordinary circumstances, or the possession by her of independent means, will not alter the case. It has been held, however, under the New Hampshire statute, which makes a person unlawfully furnishing spirituous liquors responsible for injuries resulting therefrom, and gives a remedy to any person on whom such injured person may be dependent for means of support, that this does not give one upon whom a person becomes dependent in consequence of intoxication produced by liquor so furnished, and who was not previously dependent upon him, any right of action.

Hollis v. Davis, 56 N. H. 74.

An action will lie, at the suit of a wife or child, against the seller of liquors to one who, while so intoxicated, and in consequence of such intoxication, receives injuries resulting in death.

Emory v. Addis, 6 Ch. L. N. 335; Jackson v. Brookins, 5 Hun, 533; Krach v. Heilman, 4 Cent. L. J. 233; Schmidt v. Mitchell (Sup. Court Ill.), not yet reported; Mason v. Shay, 7 Ch. L. N. 152.

In one of the earliest cases decided under the New York statute, a contrary conclusion was reached. There the complaint alleged that plaintiff's husband died early on the morning of the 5th of July; that he was intoxicated on the evening previous: that his death was caused by such intoxication, produced by the sale to him and others of intoxicating liquor, whereby an affray took place in which he was killed by one of his drunken companions, and that the plaintiff by reason thereof had sustained damages in being deprived of the companionship of her husband, and of the customary support and maintenance of herself and her children. The court held that this did not show any cause of action; that the intent of the statute was to throw the responsibility for the injurious lots of an intoxicated person on the vendor or giver of the intoxicating liquor, but not to make him liable for all results arising therefrom, and that under the statute a right of action existed against the donor or seller in cases alone where it would lie against the intoxicated person.

Hayes v. Phelan, 4 Hun. 743.

But this opinion may be said to be over- ruled by a later case in the same court, where several persons became intoxicated and engaged in a drunken affray, in which one of their number was killed, and an action was brought against the sellers of the liquors which caused their intoxication. The opinion of the court in this case is an excellent exposition of the meaning and purposes of these statutes. "It is true," says the court, "the statute does not in express terms give the right of action upon the cause of death. It does not define the injuries meant to be covered, or enumerate them. It says, generally, 'injuries to person, property or means of support, in consequence of the intoxication of any person.' If death ensues, as the natural and legitimate result of the intoxication, it is covered by the language of the statute. All injuries are covered that are consequent upon the intoxication. If death were excluded, then the minor and temporary injuries would be provided for, while the greatest and most permanent of all would be excluded. The statute should not be so construed. It admits of the other construction, and that is more consonant with its benign purposes. Its main object was to provide a remedy for cases before remediless. Had it been confined to injuries to person and property, it might have been said, that only those injuries were meant to be covered, for which there was before then a remedy against the intoxicated person. But when it provided for injuries to means of support, it made actionable a new class of injuries without remedy at common law, and unprovided for by any previous statute. The wrong consisted in the fact that the sellers of liquors shut their eyes to the condition, in person or family, of those to whom they sold. They dealt out an article which, under certain circumstances often liable to exist and to be known to the seller, would, without fail, produce injury, and perhaps death. Carelessness and neglect, morally criminal, were shielded under the license law. For this wrong, the statute under consideration provided a remedy. Notice the class of persons especially endowed with a right of action; —husband, wife, child, parent, guardian. When the statute provided that any of them might have a right of action for any injury to his or her means of support, in consequence of the intoxication of any one, is it reasonable that the legislature only meant to provide for such causes of action, as before then already existed against the intoxicated person? It seems not; but that the main object was to provide a remedy for an evil entirely without remedy before. The law does not provide how the injury to the means of support must be produced in order to be actionable, when it is in consequence of intoxication. It is therefore without limit in that respect."

Jackson v. Brookins, 5 Hun, 533.

The fact of the marriage being illegal and void, if proved, will prevent the plaintiff from recovering for injury to means of support, but will not deprive her of the right to maintain an action against the seller of intoxicating liquors to her alleged husband, if she shall have sustained injuries to her person or property by reason thereof;

Kearney v. Fitzgerald, Supreme Court of Iowa, not yet reported.

SEC. 10. *Actual and Exemplary Damages*.—The statutes authorize the recovery of damages co-extensive with the injury, and likewise exemplary damages. But it is well settled that exemplary damages can not be awarded without proof of actual injury; the seller can not be punished, even if he has sold in violation of the wishes of the friends and family of the drunkard, unless the party bringing suit has sustained an actual and substantial loss.

Ganssly v. Perkins, 30 Mich. 495; Wightman v. Devere, 33 Wis. 570; Keedy v. Howe. 79 111. 133; Roth v. Eppy, 16 Am. L. R. Ill; Freese v. Tripp, 6 Ch. L. N. 330; Boyd v. Watt, 3 Cent, L. J. 756; Kellerman v. Arnold, 71 Ill. 632; Brantigan v. Waite, Blanke *et al.* v. Fulford, and Albrecht v. Walker, decided in the Supreme Court of Illinois, and not yet reported.

But if it appear that a wife has sustained actual damages to her means of support, exemplary damages may be awarded even without proof of aggravating circumstances, such as the defendants furnishing the husband with liquor after notice from her not to do so, or endeavoring to prevent him from reforming by tempting or inducing him to drink intoxicating liquors.

Hackett v. Smelsley, 77 111. 109.

But the fact of the wife having notified the seller not to sell to her husband should always enhance the damages;

McEvoy v. Humphrey, 77 111. 388.

for he can in such a case have no excuse for his conduct, and his disregard of the law and of the rights of others may well merit the award of punitive damages. In a recent case,

Kellerman v. Arnold, 74 111. 632.

in speaking of exemplary damages, it was said, where a seller of intoxicating drinks had been notified not to sell in a particular case, or where he placed temptations in the way of one to seduce him from the paths of sobriety, or where one, who had been an habitual drunkard, was endeavoring to reform and free himself from the toils in which he had been bound, if he should be interfered with by the dram seller, to conquer his resolution, such a person would be a fit subject for exemplary damages, and such damages, so awarded, would

be in the nature of compensation to the injured party. And though, as has been seen,

Ante, Injuries to the Person, Sec. 7.

anguish of mind and mental suffering do not constitute such an injury as to be the ground for an action under these statutes, yet actual damages being proved, they may be taken into consideration upon the question of exemplary damages.

Freese v. Tripp, *supra;* Both v. Eppy, *supra.*

"Whatever may be the rules of the common law," it is said in an Ohio case, "as to the state of facts necessary to justify the assessment of exemplary damages, it is clear that exemplary damages may be recovered in any action brought under this section, in which the evidence shows a right to recover actual damages."

Schneider v. Hosier, 21 Ohio St. 98.

And in the same state an action was brought under the act of 1854 by several railroad contractors who had in their employ a number of hired hands, for the sale to them by the defendants of intoxicating liquors, "whereby they became drunk, unable themselves to work, prevented the other hands and teams from working to advantage, and the progress of the job was hindered and delayed, and the contractors were thus injured in their property and means of support." The Supreme Court sustained a verdict awarding actual and exemplary damages against the defendants.

Duroy v. Biiria, 11 Ohio St. 332.

In Wisconsin, in a case where a husband, in consequence of becoming intoxicated by liquor sold to him by the defendant, received certain injuries, it was held that the wife was entitled to recover: 1. Compensation for watching, nursing and taking care of him during his sickness; 2. Damages for injury to her own health in consequence; 3. The expenses of employing medical attendance and assistance; 4. The cost of hiring labor to attend to his business.

Wightman v. Devere, 33 Wis. 570.

And in Illinois, where the husband of the plaintiff had become a confirmed drunkard, abandoning an occupation in which he was earning five dollars a day, and had squandered a valuable property, a verdict of $10,000 actual, and $2,000 exemplary damages was considered not excessive.

Jewett v. 'Wanshura, 8 Ch. L. If. 324.

In Michigan, the statute has received a somewhat stricter construction. In a recent case in that state,

Ganssly v. Perkins, 30 Mich. 492.

the court say: "There can be no exemplary dam-ages without actual injury. It is to be observed that injuries received from the intoxication of strangers are embraced in the same clause with those suffered from the intoxication of wards, relatives or husbands and wives, and that persons who have no blood or marital connection with the intoxicated person are also grouped together. It is plain, therefore, that the measure of damages can not be the same in all cases, and that there must be some of them where exemplary damages would be absurd. There is nothing in these cases to exempt them from the rules applied to any other cases of actionable wrongs. The actual damages should be as nearly commensurate with the actual injury as the nature of the case will permit; and exemplary damages should be given in those cases alone where the plaintiff has some personal right to complain of a wanton and willful wrong which the wrongdoer, when he committed it, must be regarded as having committed against the plaintiff himself, in spite of the injury he must have known she was likely to suffer by it. The foundation of exemplary damages rests on the wrong done willfully to the complaining party, and not on wrong done without reference to the party." And, in another place, they say: "The plaintiff's testimony indicated that she had *not* been deprived of the sober society of her husband; defendants were liable for the mischief which they may have produced, by preventing his improvement or making him worse; but they are not responsible for damages as they would have been, if they had reduced him from sobriety to sottishness. The moral quality of contributing to the degradation of one already debased is no better than if he were sober. But the remedy is given for the injury suffered by the wife; and she loses much less in property and comfort when her condition is not seriously changed, than when there is considerable change." And, in New York, it is held that exemplary damages should be given only where there are circumstances of abuse or aggravation proved in the case on the part of the vendor of liquor.

Franklin v. Schermerhorn, 8 Hun, 112.

The defendant may prove that he had forbidden his servants to supply the intoxicated person with liquor, and that they willfully disobeyed him without his connivance,

Freese v. Tripp, *supra*; Kreiter v. Nichols, 28 Mich. 499.

or that he endeavored to prevent his obtaining the liquor, and had frequently refused him, or that he had procured it by artifices,

Bates v. Davis, 76 Ill. 223.

not in bar of the action, but in mitigation of exemplary damages. For a like purpose it has been held in New York, that he may prove that he was, on the occasion complained of, lawfully selling under the author- ity of a

license granted by the state or town.

8 Alb. L. J. 337.

But such evidence is not admissible in Illinois.

Both v. Eppy, *supra.*

In Indiana, in an early case, it was held that where the sale was illegal, thus rendering the seller liable to a criminal prosecution, he could not be punished with vindictive damages in a civil action.

Struble v. Nodwift, 11 Ind. 65.

But it has been since held that the act of 1873 has expressly abrogated this rule.

Schafer v. Smith, 4 Cent. L. J. 271.

in Illinois, on proof of illegal sales, exemplary damages may be recovered.

Mason v. Shay, 7 Ch. L. N. 152.

The statutes providing that any person who shall be injured in person, property or means of support, *in consequence* of the intoxication, habitual or otherwise, of any person, shall have a right of action, it would seem to require an extraordinary interpretation to hold that the defendant is not responsible for all consequences arising from the sale of intoxicating liquors, but only for consequences which he may be presumed to have foreseen as likely to be the result of his sales. Yet, in a recent Indiana case,

Krach v. Heilman, 4 Cent. L. J. 233, citing Marble v. Worcester, 4 Gray, 395; Crain v. Petrie, 6 Hill, 522; Ryan v. N. T. C. R. R., 35 N. Y. 210; Fairbanks v. Kerr, 70 Penn. 86.

where a husband became grossly intoxicated from liquor sold to him by defendant, and while being hauled home in his wagon in this state, received injuries from a barrel of salt falling upon him, from, which injuries he died, it was held that his widow had no right of action under the statute, the death of the husband being the immediate, and the intoxication of the husband only the remote cause of the injury to her. In support of this view the court say: "The defendants, in causing the intoxication of the deceased, could not have anticipated that, on his way home, he would be fatally injured by the salt barrel. This was an extraordinary and fortuitous event, not naturally resulting from the intoxication. Suppose, by way of illustration, that a person, by reason of intoxication, lies down under a tree, and a storm blows a limb down upon him and kills him, or that lightning strikes the tree and kills him; could it be said, in a legal sense, that his death was caused by intoxication? In the chain of causation, the intoxication may have been the remote cause of his death, because, if he had not been intoxicated, he would not have placed himself in that position, and therefore would not have been struck by the limb or lightning. In the case supposed it may be assumed as clear, that the parties causing the intoxication would not be liable under the statute to the widow, as for an injury to her caused by the intoxication of the deceased. Yet there is no substantial difference between the case supposed and the real case here." It is likely that, on the general principles applicable to such a case, the conclusion reached by this court is correct; for, to make the defendant liable, it is not enough to say, that as the injury would not have occurred but for his act in selling the liquor, and thereby intoxicating the person who was killed, therefore the defendant is responsible; for he can only be held liable where his act, in the absence of any independent intervening agency, would be likely to be followed by an injury to another. But a fair construction of the statute, and the intent of its framers, would seem to justify the adoption of a different rule in this peculiar class of cases. Such has been the tendency of the courts generally.

See Both v. Eppy, 16 Am. L. R. Ill; Schmidt v. Mitchell, Supreme Court of Illinois, not yet reported; Emory v. Addis, 6 Ch. L. N. 336.

The Supreme Court of Indiana, in a still more recent case,

Callier v. Early, 4 Cent, L. J. 406; Monthly Jurist, May, 1877.

has applied the same rule to the case of one who, while intoxicated, was run over and killed by a train of cars. The death of the person (the husband of the plaintiff in the case referred to), caused by the train of cars, the court say, "is an effect which is not naturally, necessarily, or even probably connected with the fact of unlawfully selling intoxicating liquors to him by the defendant, whereby he became drunk; and when the death could take place only upon the coincidence of his stepping on the track and the train passing at the same time, the consequence becomes more remote and more disconnected with the cause alleged. The death need not take place immediately and directly upon the cause, but it must be effected by a chain of natural effects and causes, unchanged by human action; or the party who committed the first act will not be responsible. In this case, the running of the train of ears was the human action, which changed the course of natural effects and causes connected with the act alleged against the defendant. * * * The plaintiff's husband was killed by the train of cars, and not by the act of the defendant in unlawfully selling him intoxicating liquor." In an article upon the Ohio liquor law, published in the Monthly Jurist for May, 1877, and which has come under our notice since this review went to press, the decision of the Indiana court in these two cases is very ably criticised. "It seems apparent," says the writer, "that a saloon keeper, in selling intoxicating liquor, must contemplate that the person buying the same may, and even probably will, if he becomes intoxicated, be hurt by some one of the many

instruments of danger found in cities and towns where liquors are sold. Stripped of his reason and the use of his limbs, what is more natural or probable than that the purchaser will meet injury or death? Just how he may be injured,—by what train, or in what place—the saloon keeper probably can not tell; but that injury will probably befall him, the seller must contemplate. So if one sells liquor to another by which he becomes intoxicated, and the seller then places him in a wagon, with another drunken man for a driver, is it not probable that an accident will happen to them? A wrongdoer is liable for the natural, necessary and even probable consequences of his acts. The intention of the legislature in passing this law seems to have been to provide for cases like these, and give a remedy where none existed. Prior to the adoption of this law, a wife was without a remedy, if her husband became intoxicated and was killed by the cars. On account of the deceased being drunk, she could not recover in an action against the railroad company. It was clearly the intention, of the legislature to apply the law to cases like these; and to do so, requires no extension of the act by judicial construction." In dismissing this phase of the subject, it may be sufficient to say, that in no other state where these statutes exist has such a narrow construction been placed upon their provisions, or such an apparent attempt been made to defeat the wholesome remedy which their framers have endeavored to give.

SEC. 11. *Pleading—Limitation*.—The action under these statutes is confined to persons who are injured in person, property or means of support; no right of action is given on the mere ground of relationship.

Ganssly v. Perkins, 30 Mich. 495.

Though it was probably the intention of the legislature to give a single right of action and single damages to but one person for a single injury, it would seem that such right may arise under these statutes to a husband or wife and each of their children, be they ever so many, as well as to all other persons mentioned in the section.

Franklin v. Schermerhorn, 8 Hun, 112.

In a very recent Illinois case the declaration averred that the defendant sold and gave to one E intoxicating liquors, "and thereby caused him to become, and he was during that time before named, habitually intoxicated." It was contended that this was an averment that the intoxication was caused in whole by the defendant; that such must be the proof; and that it was not sufficient, to sustain the count, to show that the intoxication was caused in part by the defend-ant. But the court overruled the objection. "The statute," they say, "gives the right of action where the defendant shall have caused the intoxication in whole or in part. Contracts are entire, and must be proved substantially as alleged; but torts are divisible, and in them the plaintiff may prove a part of his charge and recover, if there be enough proved to support the tort.

Roth v. Eppy, 16 Am. L. Reg. Ill; Hill v. Blanford, 45 111. 8.

But a complaint on the bond under the Indiana statute, which averred that the intoxication was caused in part by liquors sold by the defendant's principal, and that while so intoxicated, and by reason of such intoxication, the purchaser caused damage, has been held bad.

Schafer v. Cox, 49 Ind. 460.

Under the New Hampshire statute, a declaration in trespass alleging an assault and battery as having been committed directly by the defendant, is sufficient where the plaintiff seeks to recover damages for an assault upon him committed by a person while in a state of intoxication caused by liquors unlawfully furnished him by defendant.

Bodge v. Hughes, 53 N. H. 615.

In Indiana, it is held that the complaint must distinctly aver that the injury complained of, and the damages sought to be recovered, resulted in consequence of a sale of intoxicating liquors; and therefore an averment that, whilst A was intoxicated by reason of liquor sold him by C, he inflicted a mortal wound on the husband of the plaintiff, causing his death, does not sufficiently show that the wound was inflicted by reason of the intoxication of A.

Schafer v. Cox, 49 Ind. 460.

But a complaint by a wife, alleging that her husband became intoxicated by liquor purchased from the defendant, and thereby neglected his work, squandered his money, and damaged the plaintiff in her means of support, is good.

Barnaby v, Wood, 50 Ind. 405.

In actions under these statutes, the intoxicated person is not a necessary party defendant.

English v. Beard, 51 Ind. 489.

The *ground* of action for personal injuries is the tortious act against the person injured, although the *right of action* therefor is conferred by the statutes upon the wife or personal representatives, and the statute of limitations runs from the time of the selling of the liquor which caused the intoxication, and not from the date of the injury.

Eminett v. Grill, 39 Iowa, 690.

But the right of action so far vests at the time of the injury, that the statute does not divest it upon the death of the husband, nor does it abate upon common law principles. The party doing the injury has no interest in it

and no control over it. The right of action vests in the injured person to be prosecuted in his or her own name, and for his or her own use. The wife does not lose her identity by the death of her husband. The relation of wife, though essential by the terms of the statute to the inception of the right of action, is not necessary in the prosecution of the remedy, and after the death of the husband she may bring her action for the cause of his death under the statute, though "widow" be not expressly named in it.

Hackett v. Smelsley, 77 Ill. 109.

The statute does not require that she be a wife at the time of bringing her action, but only at the date of the wrongful act.

Schneider v. Hosier, 21 Ohio St. 116; Jackson v. Brookins, 5 Hun, 530.

So an employer may sue for injuries done to him by the intoxication of his servant, after the relation of master and servant has terminated.

SEC. 12. *Evidence—What Acts will bar a Recovery*.—The injuries sought to be established in these cases not being recognized or redressed under the rules of the common law, the evidence necessary or competent to prove them and their extent is not confined within the bounds of that admissible to establish a common-law tort.

Dunlavey v. Watson, *supra*; Guenerech v. Smith, 34 la. 348; Kniffen v. McConnell, 30 N. Y. 285.

Under the rule, however, adopted by the Ohio courts in this class of cases, the plaintiff is required to prove his case beyond a reasonable doubt.

Mason v. Shay, 7 Ch. L. N. 152.

What constitutes intoxication is a question of fact to be determined by the jury upon the whole evidence in the light of their own observation.

Roth v. Eppy, 16 Am. Law Reg. 111.

As to the meaning of the term intoxicating liquors, as used in these statutes, see Worley v. Spurgeon, 38 Iowa, 465; Jewett v. Wanshura, Ch. L. N. 324; and in criminal prosecutions, State v. Stapp, 29 Iowa, 551. The court will take judicial notice of the fact that spirituous liquors are intoxicating. Carmon v, State, 18 Ind. 450; Com. v. Peckham, 2 Gray, 514. But not that common brewers' beer is intoxicating. Klare v. State, 43 Ind. 483. In Jackson v. State, 19 Ind. 312, it was held that, where an indictment charged the sale of wine, the court did not judicially know that it was not intoxicating-. It was argued by the defendant that wine was not intoxicating, and that it was not in the power of the legislature to declare it so. In State v. Moore, 5 Blackf. 118, it was held, that "fermented" was not "spirituous" liquor. Evidence that lager beer is not intoxicating is inadmissible in a complaint for selling l in toxicating liquors." Com. v. Bnbser, 14 Gray, 83. It has been held that ale, being produced by fermentation and not by distillation, is not "spirituous liquor." People v. Crilley, 20 Barb. 248; State v. Moore, 5 Blackf. 418; Kevin y. Ladue, 3 Denio, 437; Com. v. Markoe, 17 Pick. 465; Com. v. Jordan, 18 Pick. 228. But in State v. Wittmar, 12 Mo. 407, ale, beer, porter, rum, gin, brandy, whiskey and wine, are held to be within the term "intoxicating liquors." See also Houser v. State, 18 Ind. 106.

The injury to the means of support of a married woman, caused by the sale of intoxicating liquors to her husband, by which he acquires habits of intemperance and idleness, may vary greatly, according to the age, condition and cir-constancies of herself and husband. Evidence therefore in such cases that the husband was a sober, industrious man, providing for and supporting his family prior to the time when the defendant caused his intoxication by selling to him intoxicating liquors, and after such sales and in consequence thereof he became less industrious than he had been before; that such sales caused him to neglect his business or work, or squander his means to any extent so as to decrease the means of support of his wife, is admissible; and the jury may be instructed to take these circumstances into consideration on the question of damages.

Dunlavey v. Watson, 38 la. 400.

But it is improper for the court to charge as a matter of law that the selling of intoxicating liquors to a person far gone in habits of intoxication, and who had become diseased bodily and mentally, would be more aggravating than selling to one not so badly addicted to intemperance, or who had more vigor of body or mind. All such questions are for the jury.

Ludwig v. Sager, Supreme Court of Illinois, January Term, 1877.

Evidence is admissible to prove the fact of the intoxication of the party who caused the injury during a certain period, before it has been shown that such intoxication was caused by the defendant.

Woollheather v. Risley, 38 la. 486.

So it is proper to prove the practice of the drunkard in visiting other saloons, in order to show what proportion of the money he had spent for liquors had been paid to defendant.

Hemmens v. Bentley, 32 Mich. 89.

The inability of the husband to obtain employment on account of his habits of intoxication may be shown, but not his desire for intoxicating liquors.

Roth v. Eppy, *supra*.

Evidence is inadmissible to prove sales of liquor made prior to the passage of the acts giving the remedy,

Dubois v. Miller, 5 Hun, 332.

or subsequent to the commencement of the action;

141 Woollheather v. Risley, *supra*.

and evidence that the wife, since the suit was brought, had purchased liquors and drunk them with her husband, is admissible only where damages are sought by her for injury to her feelings and disgrace caused by her husband's intoxication.

Kearney v. Fitzgerald, *supra.*

Under that section of the statutes, allowing the recovery of compensation for taking care of a person while intoxicated, it is held that, if the person so intoxicated had recovered from the effeet of the liquor sold him by the defendant, and was sober at the time of receiving the injury, or if he had become sober and afterwards got intoxicated upon liquors sold by others, the first seller would not be held liable. Therefore, in such a case, any evidence is admissible which may tend to show that the iujured party had become sober before the accident, or had injured himself while under the effects of an intoxication subsequent to that caused by the defendant. So, also, evidence is proper which may show the length of time required to recover from an intoxica- tion,

Brannon v. Adams, *supra*.

and the delivery of the liquor to the person is sufficient evidence of a sale.

State v. Fairfield, 37 Me. 517.

The evidence must be confined to the cause stated in the declaration or petition; and where the injury alleged is to means of support, it is error to admit proof of injury to property.

Hackett v. Smelsley. 77 111. 109.

Under those acts which give a remedy in case only of sales or gifts made in violation of their provisions, the proof is required to be more direct, such an action being in its nature *quasi* criminal. Where the action is brought for damages caused by the sale of liquors to an habitual drunkard, it must be shown that the defendant knew him to be such,

Markert v. Hoffner, 4 Am. L. Rec. 111.

although it need not be proved that he was intoxicated at the time the liquor was furnished.

Fountain v. Draper, 49 Ind. 441.

But knowledge of the intemperate habits of the person may be proved by reputation.

Elam v. State, 24 Ala. 77; Wickwire v. State, 19 Conn. 477; State v. Kalb, 14 Ind. 404.

And in the case of a sale to a minor, the burden of proof is upon the defendant to show that he believed him to be of full age.

Farback v. State, 24 Ind. 77; Rineman v. State, *Ib*. 80; Seltz v. State, 41 Ind. 162.

And it has been held that a sale to a minor, who asks for the liquor in behalf of one to whom it might lawfully be sold, is in contravention of the statute.

v. Fairfield, 37 Me. 517.

The furnishing of liquors to a minor, as prohibited in the statute, is complete, although the liquor may have been purchased by another, and supplied by the seller in pursuance of such purchase.

State v. Munson, 25 Ohio St. 381.

And the statement of a physician who was in the habit of getting intoxicated, made at the time of his purchases of liquor, that he wanted it for a patient, and for medical purposes, did not, it has been held, in the absence of proof to the contrary, raise the presumption that the sales were made to the patient.

Boyd v. Watt, *supra*.

The intent of these statutes is to furnish redress and compensation to innocent sufferers from the consequences of the sale of intoxicating liquors; and, therefore, if a person has by his acts and conduct voluntarily and knowingly encouraged and contributed to bring about such a condition in another, he can not be permitted to complain of any wrongs which he may suffer at the hands of one while in a state which he has assisted to produce. Therefore the seller would not be protected from the consequences of his own actions, if he should receive injury at the hands of one of his intoxicated customers. On the same principle, a wife suing for injury to her means of support, may be estopped by her acts from recovering any damages for an injury to which she may have contributed.

Kearney v. Fitzgerald, Supreme Court of Iowa, not yet reported; Engleken v. Hilger, *Ib.*

Therefore, in an action by the wife, if it be proved that she voluntarily bought liquors of the defendant to be drunk as a beverage by herself and her husband, she can not be considered as an innocent sufferer from the effects of intoxicating liquors, if injured by him while intoxicated, and will not be entitled to the protection of the statute. But the purchase by her of liquor for the use of her husband at home, in order to prevent him from squandering time and money at saloons, is not such a complicity on her part as to bar her recovery for such injuries.

Kearney v. Fitzgerald, *supra.*

The fact that the wife accompanied her husband to various places and gatherings, and drank liquors with him, and that the husband kept liquors in his home and drank the same at home with the wife's knowledge and approval, and that all of such drinking on the part of her husband was with her knowledge and consent, is proper to be considered by the jury on the question of damages, especially as the statute allows exemplary damages. But such facts do not constitute a bar to the action.

Hackett v. Smelsley, 77 111. 109.

and the wife may prove that her husband compelled her to attend such places, and may be permitted to show the whole circumstances of the case as explanatory of her conduct. And where the plaintiff's husband was an habitual drunkard, and she had forbidden the sale of liquors to him by the defendant, but a day or two after such notice she went to the defendant's saloon in company with her husband, and in his presence directed the defendant to sell him all the liquor he asked for, it was held, in an Iowa case, that the only reasonable inference from such conduct was that the plaintiff acted under the coercion of her husband, and that the jury had a right to find that the defendant drew this inference, and therefore knew that she was not acting voluntarily.

Jewett v. Wanshura, *supra.*

In a New York case, it was held that the plaintiff's allowing his son to take his horse to drive to a neighbor's, though knowing the son to be of intemperate habits, was not such contributory negligence as to defeat his right of action for the value of his horse, where the son had gone to a saloon and procured liquor, and, while under its influence, driven the horse so violently that it died.

Bertholf v. O'Reilly, *supra.*

Liability of Public Officers to Private Actions for Neglect of Official Duty.
BY Thomas M. Cooley..
Reprinted from the "Southern Law Review."
G. I. Jones and Company. St. Louis 1877. *Press of G.I. Jones and Company*. St. Louis

Liability of Public Officers to Private Actions for Neglect of Official Duty.

A public office is a public trust. The incumbent has a property right in it, but the office is conferred, not for his benefit, but for the benefit of the political society. The duties imposed upon the officer are supposed to be capable of classification under one of three heads: the, legislative, executive, or judicial; and to pertain, accordingly, to one of the three departments of the government designated by these names. But the classification cannot be very exact, and there are numerous officers who cannot be classified at all under these heads. The reason will be apparent if we name one class as an illustration. Taxing officers perform duties which in strictness are neither executive nor judicial, though in some particulars they merely execute the orders of superiors, and in others they judge for themselves what is to be done. But sometimes, also, their duties partake of the legislative. All such officers are usually called administrative, while inferior executive officers are designated ministerial.

All offices are established and filled on public considerations, but some of the officers are expected to perform duties which specially concern individuals, and only indirectly concern the public. We may illustrate here by the case of sheriff. This officer serves criminal process, arrests and confines persons accused of crime, etc., but he serves civil process also. The nature of the duty suggests the remedy in case of neglect. If the duty neglected is a duty to the state, he is amenable to the state for his fault; while for the neglect of private duties, only the person who is injured may maintain suit. But, as a general thing, it is only against ministerial officers that an action will lie for breach of duty. The reason generally assigned is that, in the case of other officers, it is inconsistent with the nature of their functions that they should respond in damages for failure in satisfactory performance. In many cases this is a sufficient reason, but in others it is inadequate.

If we take the case of legislative officers, their rightful exemption from liability is very plain. Let it be supposed that an individual has a just claim against the state which the legislature ought to allow, but neglects or refuses to allow. Here may be a moral, but can be no legal, wrong. The legislature has full discretionary power in all matters of legislation, and it is not consistent with this that the members should be called to account in the courts for their acts and neglects. Discretionary power is, in its nature, independent; to make those who wield it liable to be called to account by some other authority is to take away discretion and destroy independence. This is as true of inferior legislative bodies—such as boards of supervisors, city councils, and the like—as of state legislatures. The courts may put them in motion sometimes, when they neglect or refuse to act, but cannot require them to reach particular conclusions, nor visit them with damages because they do not. It is only when some particular duty of a ministerial character is imposed upon a legislative body, which its

members are required to perform, and in regard to which no discretion is allowed them, that there can be a private action for neglect. Such duties are sometimes imposed upon subordinate boards, like supervisors or county commissioners, and their members made personally responsible for performance.

Passing to the class of executive officers, the rule is still the same. The governor of the state is vested with a power to grant pardons and reprieves, to command the militia, to refuse his assent to laws, and to take the steps necessary for the proper enforcement of the laws. But neglect of none of these can make him responsible in damages to the party suffering therefrom. No one has any legal right to be pardoned, or to have any particular law signed by the governor, or to have any definite step taken by the governor in the enforce- ment of the laws. The executive, in these particulars, exercises his discretion, and he is not responsible to the courts for the manner in which his duties are performed. Moreover, he could not be made responsible to private parties without subordinating the executive department to the judicial department; and this would be inconsistent with the theory of our institutions. Each department, within its province, is independent.

Taking next the case of the judicial department, and still the same rule applies. For mere neglect in strictly judicial duties no action can lie. A judge cannot be sued because of delaying his judgments, or because he fails to bring to his duties all the care, prudence, and diligence that he ought to bring, or because he decides on partial views and without sufficient information. His selection for his office implies that he is to be governed in it by his own judgment; and it is always to be assumed that that judgment has been honestly exercised and applied. But, nevertheless, all judges may have duties imposed upon them which are purely ministerial, and where any discretionary action is not permitted. An illustration is to be found in our *habeas corpus* acts. These, generally, make it imperative that 'a judge, when an application for the writ is presented which makes out a *prima facie* case of illegal confinement, shall issue the writ forthwith; and the judge is expressly made responsible in damages if he fails to obey the law. A similar liability would arise if a justice of the peace were to refuse to issue a summons when it was lawfully demanded, or an execution on a judgment, and the like, because here the duty is merely ministerial.

But, although it is plain enough, in these cases of discretionary powers, that there should be no individual liability, there are many cases, in which the powers are not discretionary, where the exemption is equally clear. The reason based on the nature of the powers is, therefore, found to fail in these cases, and we must look for something further. And, looking further, we shall probably be able to find a general rule by which all cases may be determined. That rule seems to be this: that, if the duty which the official authority imposes upon an officer is a duty to the public, a failure to perform it, or a wrongful performance, must be a public, not an individual, wrong; while if the duty is a duty to the individual, then a failure to properly perform it may give rise to an individual action.

Now, discretionary powers almost always impose only public duties. How plain this is in the case of the legislature. Members of any legislative body are not chosen to perform duties for individuals, but to perform duties to the state. The performance of these may benefit individuals, and the failure to perform them may prejudice individuals; but this is only incidental. Congress imposes taxes on some article of domestic and foreign manufacture; this benefits the home manufacturer, but the act is not supposed to be passed for his benefit, but for the benefit of the country. Congress passes an act removing taxes from another class of manufactures; this injures some one, but it violates no duty owing to any individual. The individual has no personal rights in the law whatever, and it is made or repealed without the necessity of considering his private interest in any manner. Congress passes a law allowing a private claim and ordering its payment; this benefits the claimant, but it is supposed to be passed in the interest of the whole country, and because it is for the public good that all just claims upon the nation should be recognized and provided for. If Congress should reject the claim, there is still the same presumption that the public interest has been consulted, and that the claim is rejected because it ought to be. In either case the duty imposed on the members of Congress—which was a duty to the public only—is supposed to have been performed.

So in the case of the judge. His doing justice as between two particular individuals, when they have a controversy before him, is not the end and object which were in view when his court was created and he appointed to a seat in it. Courts are created on public grounds; they are to do justice as between suitors, to the end that peace and order may prevail in the political society, and that rights may be preserved and protected. The duty is public, and the end to be accomplished is public; the individual benefit or loss results from the proper and thorough, or improper and imperfect, performance of a duty for which his controversy is only the occasion. The judge performs his duty to the public by doing justice between individuals, or, if he fails to do justice between individuals, he may be called to account by the public, in such form and before such tribunal as the law may have provided. But the individual suffers no legal wrong from his neglect.

This principle does not apply exclusively to officers of high grade; it does not depend on the grade at all, but on the nature of the duty. This will appear if we take, as an illustration, the case of the policeman. His duty is to serve criminal warrants, to arrest persons who commit offences in his view, to bring night-walkers to

account, and to perform various duties of a like nature. Within his beat he should watch the premises of individuals, and protect them against burglaries and arsons. But suppose he goes to sleep upon his beat, and, while thus off duty, a robbery is committed or a house burned down, neither of which could have happened had he been vigilant; who can bring him to account for this neglect of duty? Not the individual injured, certainly. He is not the policeman of the individual; he is not hired by him, paid by him, or controlled by him, and he owes no duty to him. The duty he owes is to the public—to the state, of which the individual member is only a fractional part, and incapable, as such, of enforcing rights which are not individual, but general. If a policeman fails to guard the premises of John Smith, the neglect is a breach of duty of exactly the same sort as when he fails to take John Smith to the lock-up for being drunk and disorderly; and if John Smith could sue him for the one neglect, so he could for the other. And it is proper to note here that in this instance the officer has not discretionary duties to perform, but those which are purely ministerial.

The same is true of officers having charge of the highways, and empowered to lay out, manage, and discontinue them. They may decline to lay out a road which an individual desires, or they may conclude to discontinue one which it is for his interest should be retained. There is a damage to him, but no wrong to him. In performing, or failing to perform, a public duty, an officer has touched his interest to his prejudice. But the officer owed no duty to him as an individual; the duty performed or neglected was a public duty. An individual can never be suffered to sue for an injury which, technically, is one to the public only; he must show some special wrong to himself, and damage alone does not constitute a wrong.

Waterer v. Freeman, Hob. 266.

It may be said that the case of a highway commissioner who improperly opens or discontinues a road, to the prejudice of an individual, is like that of one who commits a public nuisance to the prejudice of an individual. In each case there is a public wrong and also a private damage. But the two cases differ in this: the common law imposes upon every one a duty to his neighbor, as well as to the public, not to make his premises a nuisance; but the duties imposed upon the road officer, in laying out and discontinuing roads, are to the public alone. Conceding that his action has failed to regard sufficiently the interests of individuals, still no private right of action is made out, because, there being no private duty, there is nothing for the individual to complain of except the breach of the public duty. But the state must complain of this, not individuals.

The classes of officers to whom the like principles apply are so numerous that we cannot pause to enumerate them all. One more may be mentioned. The quarantine officer is commanded to take certain steps to prevent the spread of contagion. He is culpable in a very high degree if he neglects so to do, because the duty is a public duty of the highest importance and value. He does neglect, and a thousand persons are infected in consequence. But not one of these persons can demand from the negligent officer a personal redress. The duty was laid on the officer as a public duty— a duty to protect the general public; but the office did not charge the incumbent with any individual duty to any particular person. If one rather than another was injured by the neglect, it was only that the consequences of the public wrong chanced to fall upon him rather than upon another; just as the ravages of war may chance to reach one and spare another, though the purpose of the government is to protect all equally.

This case may be usefully compared with that of the inspector of meats in the public markets. The duties are imposed upon that officer, not only for the protection of the public in general, but for the protection of each individual purchaser in the market; and, if one is injured by reliance upon the inspector, it may be admissible to hold the inspector liable to an individual suit. Hayes v. Porter, 22 Me. 37. See, also, Couch v. Steel, 3 El. & Bl. 402, in which an action against the master of a vessel for going to sea without medicines, contrary to law, was held sustainable by one injured by the want of them. See, also, Curdos v. Bozant, 1 La. An. 199.

But there are some offices which, though created for the public benefit, have duties devolved upon their incumbents which are duties to individuals exclusively. In other words, in these cases, instead of individuals being incidentally benefited by the performance of public duties, the public is to be incidentally benefited by the performance of duties to individuals. A case in point is that of the recorder of deeds. It is for the general public good that all titles should appear of record, and that all purchasers should have some record upon which they may rely for accurate information. But, although a public officer is chosen to keep such a record, the duties imposed upon him are usually duties only to the persons who have occasion for his official services. He is simply required to record, for those who apply to him, their individual conveyances, and to give to them abstracts or copies from the record if they ask for them and offer the legal fees. All these are duties to individuals, to be performed for a consideration; the public do not commonly enforce them, nor do they commonly punish the failure in performance as a public offence. But the right to a private action on breach of the duty follows of course. The breach is a wrong, and injury from it is presumed.

Suppose the recorder refuses to receive and record a conveyance when handed to him with the proper fees; this is a clear wrong, and, as such, is actionable. Suppose he under-takes to record it, and, in so doing, commits an error which, makes the conveyance appear of record to be something different from what it is; this, also, is a

wrong, for his duty is to record it accurately. In this last case the question of difficulty would be, who is entitled to maintain the suit; or, in other words, who is the party that is wronged by the recorder's mistake.

The cases are not agreed on the question who should sustain the loss when the grantee in a deed has duly left it for record, and the recorder has failed to record it correctly. The question in such a case would commonly arise between the grantee in such a deed and some person claiming under a subsequent conveyance by the same grantor, which was first correctly recorded. In some cases it is held that the grantee in the first deed is not to be prejudiced by the recorder's error. The reason is thus stated by Breese, J.: The person seeking to take advantage of the error "is, in effect, claiming to enforce a statute penalty, imposed upon the grantee in the deed, by reason of his having omitted to do something the law required him to do to protect himself and preserve his rights. The law never intended a grantee should suffer this forfeiture if he has conformed to its provisions. The plaintiff claiming the benefit of this statute being, as it is, in derogation of the common law, and conferring a right, before unknown, he must find in the provisions of the statute itself the letter which gives him that right. To the statute alone must we look for a purely statutory right. All that this law required of the grantee in the deed was that he should file his deed for record in the recorder's office, in order to secure his rights under the deed. When he does that, the requirements of the law are satisfied, and no right to claim this forfeiture can be set up by a subsequent purchaser. The statute does not give to the subsequent purchaser the right to have the first deed postponed to his if the deed is not actually recorded, but only if it is not filed for record."

Merrick v. Wallace, 19 111. 486, 497. Substantially the same doctrine-has been declared by Drummond, J., in Polk v. Cosgrove, 4 Biss. 437, and Riggs v. Boylan, *ib*. 445. See, also, Mim v, Mim, 35 Ala. 23; Garrard v. Davis, 53 Mo. 322.

Here it is seen that the grantee in the deed has brought himself strictly within the letter of the statuter and has performed all that the statute, in terms, makes requisite for his protection.

There are several cases in which it has been decided that the failure of the recorder to index a deed as required by the statute could not affect the title of the grantee. Curtis v. Lyman, 24 Vt. 338; Commissioners v. Babcock, 5 Oreg. 472; Bishop v. Schneider, 46 Mo. 472; *s. c.*, 2 Am. Rep. 533. But this, also, must depend upon the phraseology of statutes. See Gwynn v. Turner, 18 Iowa, 1. In general, the provisions on the subject of index are probably made for the convenience of examination of records, and not for the protection of those whose deeds are recorded. See Schell v. Stein, 76. Pa. St. 398.

Where this doctrine prevails it is difficult to understand how the recorder can be responsible in damages to the grantee for anything more than has been paid him for making the erroneous record, unless, in consequence of something which subsequently takes place, an actual damage is suffered which can be shown. Such damage might, undoubtedly, befall if afterward he should negotiate a sale and find the erroneous record to stand in the way of its completion; but as the deed, if in existence, could be recorded over again on payment of the statutory fees, this cost would seem to furnish the measure of recovery. If, however, the deed were lost or destroyed, a second recording would be impossible, and the question of remedy might then be more serious. As the injury in such a case would result from the conjunction of two circumstances—first, the error in the record, and, second, the loss of the deed—the question of remote cause and proximate cause would be involved, and the conclusion might, perhaps, be that the proximate cause of' damage was to be found in the subsequent facts, and not in the recorder's error.

On the other hand, there are many cases in which it has been decided that every one has a right to rely upon the record actually made as being correct, and that, if it is erro- neous, the peril is upon him whose deed has been incorrectly recorded. The leading decision to this effect was made under a statute which provided that "no mortgage should defeat or prejudice the title of any *bona fide* purchaser unless the same should have been duly registered"—a provision very different from that in the statute of Illinois already in substance given. A mortgage of $3,000 was recorded as one of $300; and Chancellor Kent said of the statute: "The true construction of the act appears to be that the registry is notice of the contents of it, and no more, and that the purchaser is not to be charged with notice of the contents of the mortgage any further than may be contained in the registry. The purchaser is not bound to attend to the correctness of the registry. It is the business of the mortgagee, and, if a mistake occurs to his prejudice, the consequences of it lie between him and the clerk, and not between him and the *bona fide* purchaser. The act, in providing that all persons might have recourse to the registry, intended *that* as the correct and sufficient source of information; and it would be a doctrine productive of immense mischief to oblige the purchaser to look, at his peril, to the contents of every mortgage, and to be bound by them when different from the contents as declared in the registry. The registry might prove only a snare to the purchaser, and no person could be safe in his purchase without hunting out and inspecting the original mortgage—a task of great toil and difficulty. I am satisfied that this was not the intention, as it certainly is not the sound policy, of the statute."

Frost v. Beekman, 1 Johns. Ch. 288, 298. And see Beekman v. Frost, 18 Johns. 544.

Other cases to like effect are referred to in the note.

Baldwin v. Marshall, 2 Humph. 116; Lally v. Holland, 1 Swan, 396; "Sanger v. Craigue, 10 Vt. 555; Shepherd v. Burkhalter, 13 Geo. 444; Chamber;ain v. Bell, 7 Cal. 291; Parrett v. Shaubhut, 5 Minn. 323; Scoles v. Wilsey, 11 Iowa, 261; Miller v. Bradford, 12 Iowa, 14; Breed v. Conley, 14 Iowa, 269; Terrell v. Andrew County, 44 Mo. 309; Brydon v. Campbell, 40 Md. 331. See Kerr v. Russell, 69 Ill. 666.

Let us suppose that where such is the rule of law, a deed is so recorded that the record fails to describe the land actually conveyed, and that the grantor sells the land a secand time to one having no knowledge of the prior conveyance, thereby cutting off the first conveyance. There would be, under such circumstances, a direct loss to the first grantee of the whole value of the land, and it would seem that he must be entitled to a remedy against some one for a remuneration. That he might treat the second conveyance by his grantor as one made in his interest, and sue and recover from him the amount received from the second grantee, we should say would be clear. This would be only the ordinary case of one affirming a sale, wrongfully made by another, of his property, and recovering the proceeds thereof—the familiar case of waiving a tort, and suing in *assumpsit* for the money received.

Lamine v. Dorrell, Ld. Raym. 1216; Bennett v. Francis, 2 B. & P. 554; Read v. Hutchinson, 3 Camp. 352; Mann v. Locke, 11 N. H. 248; Smith v;. Smith, 43 N. H. 536; Jones v. Hoar, 5 Pick. 285; Glass Co. v. Wolcott, 2 Allen, 227; Gilmore v. Wilbur, 12 Pick. 124; Webster v. Dr infer-water, 5 Me. 323; Foster v. Tucker, 3 Me. 458; Bank of North America v., McCall, 4 Binn. 374; Willett v. Willett, 3 Watts, 277; Pearsoll v. Chapin, 44 Pa. St. 9; orrison v. Rogers, 3 111. 317; O'Reer v. Strong, 13 111. 688; Guthrie v. Wickliffe, I A. K. Marsh. 83; Sanders v. Hamilton, 3 Dana', 550; Stearns v. Dillingham, 22 Vt 627; Elliott v. Jackson, 3 Wis. 649; Fuller v. Duren, 36 Ala. 73; Pike v. Bright, 29 Ala. 332; Barlow v. Stalworth, 27 Geo. 517; Budd v. Hiler, 27 N. J. 43; Welch v. Bagg, 12 Mich. 42; Johnson v. Reed, 3 Eng. 202; Foye v. Southard, 54 Me. 147; Tamm v. Kellogg, 49 Mo. 118.

But in many cases such redress might be inadequate, because less than the value of the land was received on the second sale, and no reason is perceived why he might not sue in tort for the value of that which he has lost, if that: promises more satisfactory redress. If one, knowing he has already conveyed away certain lands, gives a new deed which defeats the first, this is as gross and palpable a fraud as can well be conceived of; and, like the selling of property in market overt, though it may pass the title, it cannot protect the seller when called upon by the owner to account for the property the latter has been deprived of.

See Andrews v. Blakeslee, 12 Iowa, 577; Holmes v. Stout, 10 N. J. 409.

But the question of a remedy against the recorder would, in this case, as well as that before suggested, be complicated as a question of proximate and remote cause, and would require a consideration which, up to this time, it has never, so far as we are aware, received. Does the loss of the estate result from the error of the recorder? or does that merely furnish the occasion for another event, to which the loss is in fact attributable as the proximate cause? The question would be still further complicated if, before the second conveyance by the original grantor, the first grantee had himself disposed of the land, so that the loss would fall, not upon the party whose deed was defectively recorded, but upon one claiming under him.

See Ware v. Brown, 2 Bond, 267.

Here the damage, instead of following directly the recorder's misfeasance, follows it only after two intermediate steps a conveyance by the first grantee, and another by the first grantor, which has the effect to defeat it.

The recorder of deeds may also injure some person by giving him an erroneous certificate. The liability for this is clear if the giving of the certificate was an official act; otherwise not. It was an official act if it was something the person obtaining it had a right to call for, and which it was his duty to give. Thus, one has a right to call for copies to be made from the records, and for official statements of what appears thereon; and he is entitled to have these certified to him correctly. But he is not entitled to call upon the recorder for a certificate that a particular title is good or bad; and such a certificate, if given, would not be official. The reason for this is that a certificate to that effect must necessarily cover facts which the records cannot show; and a title may be good or be defective for reasons which cannot, under any recording laws, appear of record. Therefore, if the register certifies that a title is good, he only expresses an opinion on facts, some of which he may officially know, but others of which he cannot know as recorder, and, therefore, cannot officially certify to.

Introduction to Cooley's Blackstone, p. xvii.

But suppose the register's certificate to cover nothing he might not be required to certify officially, and, therefore, to be properly and strictly an official act, but incorrect, and suppose the person who applies for and receives it is not injured by it, but a subsequent purchaser, to whom he has delivered it with his title deeds, is injured-has such subsequent purchaser a right of action against the recorder? In other words, as it is a duty the recorder owes to every one who may have occasion to rely upon his records, to see that they are correctly made, is it also his duty to every who may have occasion to rely upon his certificates, to see that they are correct also?

The difference between the two cases may be said to be this: that the records are for public and general

inspection, and are required to be kept that all persons may have, by means of them, accurate information concerning titles, while the giving of a certificate concerning something recorded is a matter between the recorder and the person calling for it, and legally concerns no one else. The recorder knows that his records are to be seen, and titles to be made in reliance upon them; he is not bound to know that his certificate is for the use or reliance of any but the person who receives it, nor can he be supposed to give it for any other use. But, on the other hand, it may be replied that such certificates are usually obtained as satisfactory evidence of title in making sales, and they are expected to have their effect, not upon the person who receives them, but upon some one to whom, by means thereof, he may be enabled to effect a sale, or from whom he may obtain a loan. It is such a person, therefore, that may be supposed to be in view when the certificate is obtained, and an injury, if any occurs, would be likely to fall upon him, rather than upon his grantor or mortgagor. If, therefore, the erroneous certificate of the register would, as has been said, "make him liable to the party who has been injured by it,"

Agnew, J., in Schell v. Stein, 76 Pa. St. 398, 401.

must it not make him liable to the party who, in reliance upon it, has been induced to deal with the title, rather than to one who, by means of it, has been enabled to realize or accomplish more than his real title would justify.

In Housman v. Girard Building, etc., Association, to appear in 81 Pa. St., the supreme court of Pennsylvania has recently decided that, for a false certificate of searches, the recorder of deeds is liable only to the party who employs him to make it. In that case the certificate was obtained by a party contemplating a loan on the property, and who actually made a loan, relying on the certificate, and was injured thereby.

The case of a postmaster may be instanced as that of an officer who owes duties both to the public and to individuals. In the main, his duties are to the public: he is to receive and forward mail to other offices; to keep correct accounts with the department, and, perhaps, with contractors; to draw money orders, etc. But, in respect to mail matter received at his office, at a certain stage a duty is fixed upon him in behalf of individuals. When the proper person calls for anything which is there for delivery, he must deliver it, and he is guilty of an actionable wrong if he refuses.

Lane v. Cotton, Salk. 17; Smith v. Powdich, Cowp. 182; Rowning v. Goodchild, 2 W. Bl. 908; Teale v. Felton, 1 N. Y. 537; *s. c.*, in error, 12 How. 284.

He would be liable also if, through his carelessness, the letter of an individual should be lost or destroyed while in his-charge; nor is any reason perceived why the carrier would not be equally liable if, through his fault, a mail should be lost.

Ford v. Parker, 4 Ohio (N. S.), 576; Maxwell v. McIlvoy, 2 Bibb, 211; Sawyer v. Corse, 17 Gratt 230.

There is a separate and distinct duty as to each paper, letter, or package carried, and a breach occurs if, through negligence, any one fails to be safely carried and safely delivered.

Whitfield v. Le Despencer, Cowp. 754, 765.

So the collector of customs owes to the merchant, whose goods pass through his hands, the obligation to appraise or inspect them with reasonable promptness, and deliver them on the duties being paid. A merchant might be ruined by needless delays in the performance of this duty, and the responsibility should be unquestionable.

See Barry v. Arnaud, 10 Ad. & El. 646, 670. A supervisor, required by law to report a claim to the county board for allowance, is liable for neglect to do so, though in good faith he may believe the law invalid, and refuse on that ground. Clark v. Miller, 54 N. Y. 528.

The case of judges of election is one in which duties to the public and to individuals are so united and combined that the question of remedy is often one of no little difficulty. The duty to hold the election, to manage it fairly, and to receive the votes of all qualified electors, is one imposed for the general interest of the state, and concerns its highest welfare. But its performance also concerns the individual; for the privilege of taking part in the electoral machinery of the state is supposed to be of great value to every elector, and, from the time of Ashby v. White,

2 Ld. Raym. 938; *s. c.*, 1 Smith's Ld. Cas. 246.

it has been regarded as settled law that an action for damages might be maintained for a wrongful refusal by the officers to receive the elector's vote. The differences in the decisions have related to the circumstances under which the suit might be brought. If, as is the case in some states, the oath of the elector is made the test of his right to vote, it is con-ceded that an action will lie if the oath is taken and the vote refused;

Spraggins v. Houghton, 3 111. 377; State v. Robb, 17 Ind. 536; Gillespie. v. Palmer, 20 Wis. 544; People v. Pease, 30 Barb. 588; Goetchins v. Mathewson, 61 N. Y. 420.

and in some states it is held that, if the right depends on qualifications of which the election officers must judge, they will, nevertheless, be liable for a refusal to receive the vote, though no corruption be charged against them.

Lincoln v. Hapgood, 11 Mass. 355; Henshaw v. Foster, 9 Pick. 312; Capen v. Foster, 12 Pick. 485;

Blanchard v. Stearns, 5 Mete. 298; Harris v. Whitcomb, 4 Gray, 433; Jeffries v. Ankeny, 11 Ohio, 372; Monroe v. Collins, 17 Ohio (N. s.), 665; Anderson v. Milliken, 9 Ohio (N. S.), 568.

But in other states the usual protection which is given to judicial officers is extended to these, and they are held liable for depriving the elector of his privilege only where malice or corruption is charged and established against them.

Jenkins v. Waldron, 11 Johns. 114; Wecherley v. Guyer, 11 S. & R. 35; Gordon v. Farrar, 2 Dougl. (Mich.) 411; Peavey v. Robbins, 3 L. Jones, 339; Caulfield v. Bulloch, 18 B. Mon. 494; Miller v. Rucker, 1 Bush, 135; Chrisman v. Bruce, I Duv. 63; Wheeler v. Patterson, I N. H. 88; Turnpike v. Champney, 2 N. H. 199; Rail v. Potts, 8 Humph. 225; Bevard v. Hoffman, 18 Md. 479; Elbin v. Wilson, 33 Md. 135; Friend v. Hamill, 34 Md. 298; Pike v. Megoun, 44 Mo. 492. See State v. Daniels, 44 N. H. 383, and Goetchins v. Mathewson, 61 N. Y. 420. In this last case the whole subjects fully and carefully examined, and the authorities analyzed.

But the mere failure or refusal to receive a vote when offered is only one of many ways in which an elector's right to have a voice in an election may be defeated. The following may be suggested:

The defeat of an election by the officer's failing to take some necessary preliminary action.

Permitting illegal votes to control the election.

Destruction of the ballots after they are received.

Falsely returning the result, whereby the majority are deprived of their rights.

In every one of these cases the legal voter who has sought to exercise his privilege and has failed, or who, after exercising it, has had his action nullified by the election officers, has suffered palpable wrong, the same in sort and degree as when his individual vote is wrongfully rejected. But there is no precedent of an action for an individual injury of this sort. The precedents go no further than this: to fix upon the election officers the duty, to the individual, to register his name—if registry is required—at the proper time and place if he presents himself, and to receive his vote if it is tendered when the polls are open for the purpose. Any further duty which these officers owe is a duty to the aggregate public, and the injury which one citizen suffers from failure to perform it is the same with that suffered by every other citizen similarly situated, and, therefore, as in the case of public offences which touch the general public alike, the neglect cannot support an individual action. If an election has actually taken place, and the officers attempt to deprive the person elected of his office, by false returns or otherwise, the law will afford him a remedy for the recovery of the office. But if an election has been prevented, it is not supposed possible to ascertain what the result would have been had it taken place, and, consequently, no individual redress is possible. The public is wronged, and, in a legal view, only the public.

There are many cases in which it has been decided that, in the case of specified public officers, the only duty they owed to individuals was to act with good motives and integ- rity but that an action would lie against them where malice and injury to an individual were the impelling motives of their conduct. Thus, members of a school board have been held liable for the malicious removal of a teacher.

Burton v. Fulton, 49 Penn. St. 157. See Hogga v. Bigley, 6 Humph. 236; Walker v. Hallock, 32 Ind. 239; Lilienthal v. Campbell, 22 La. An. 600; Harman v. Tappenden, 1 East, 555.

So, a county clerk, it is said, may be held liable, to the party injured, for wilfully and maliciously approving an insufficient appeal bond.

Billings v. Lafferty, 31 111, 318. See Chickerin g v. Robinson, 3 Cush. 543; Tompkins v. Sands, 8 Wend. 462.

In New Hampshire it is said that "surveyors of highways are liable in damages for any wanton, malicious, or improper acts in making and repairing highways;"

Rowe v. Addison, 34 N. H. 306, 313.

a very general statement, which we should suppose might require some qualification. Undoubtedly, if what the surveyors do amounts to a trespass, as where they throw surface waters upon adjoining lands, the party injured is entitled to his remedy, whether the motive to their action was good or bad; but it cannot always be true that a party dissatisfied with the repair of a highway which is entrusted to a board of public officers can charge malice as a ground for a private action. He should be able to show how his own estate as unnecessarily interfered with, or that its enjoyment is purposely diminished in a manner that makes his case exceptional.

See Waldron v. Berry, 51 N. H. 136, where the New Hampshire and other cases are collected and analyzed.

In Connecticut it is held that a wharf master may be liable to a party injured by his order for the removal of a ship from a certain dock, if it could be shown that the order was given with a malicious purpose to cause injury.

Gregory v. Brooks, 37 Conn. 365. See Brown v. Lester, 21 Miss. 392.

But our own view is that the doctrine that a public officer, acting within the limits of his jurisdiction in the discharge of a discretionary duty, can be held liable upon an assumption that he has acted wilfully or maliciously, is an exceedingly unsatisfactory and dangerous one; and that those decisions are safest, and most consonant to public policy, which deny it altogether. Motives are not always readily justified to the public, even

in the cases where they have been purest; and the safe rule for the public is that which protects its officers in acting fearlessly, so long as they keep within the limits of their legal discretion.

See Sage v. Laurain, 19 Mich. 137. The case of assessors charged with malicious over-valuation is in point here, and the decisions which hold that they cannot be held liable seem to us right beyond question. Weaver v Devendorf, 3 Denio, 117; Cooley on Tax. 552.

It has been decided in New York that a superintendent of canal repairs, who, having the means to make repairs, and being charged with the duty to do so, neglected to perform the duty, was liable for the damages of a party whose use of the canal was prevented or impeded in consequence.

Adsit v. Brady, 4 Hill, 630; Robinson v. Chamberlain, 34 N. Y. 389 f Insurance Co. v. Baldwin, 37 N. Y. 648.

But here the duty was imperative, and was not left to the officer's discretion. In the same state commissioners of highways who have funds for the repair of the public ways, but neglect to use them for the purpose, are, on like grounds, responsible to parties injured by the want of repair.

Hover v. Barkhoof, 44 N. Y. 113. Compare Garlinghouse v. Jacobs, 29. N. Y. 297; Lynn v. Adams, 2 Ind. 143; Dunlap v. Knapp, 14 Ohio. (N. S.), 64.

The duty in such cases is not discretionary, but imperative. It is also distributive—imposed for the benefit of the public, and also of each individual of the public who may have occasion to make use of the public ways; in that particular corresponding to the duty imposed upon railway companies to sound signals at street-crossings, as a warning to each individual who may have occasion to be passing that way.

The case of a sheriff is that of an officer upon whom the law imposes duties to individuals as well as to the public. In so far as he acts as a peace officer, individuals are concerned only that he shall commit no trespass upon their rights; but in the service of civil process he is charged with duties only to the parties to the proceedings. These he must perform at his peril, and although in many cases the duties are of great nicety, and require an investigation into the facts, and the exercise of sound judgment and discretion, yet he is looked upon as a ministerial officer merely, and is supposed to be capable of ascertaining, beyond mistake, what his duty is, and of performing it correctly. The law, therefore, does not excuse his errors, though he may have been led into them honestly while endeavoring faithfully to perform his duty. A striking illustration of the severity of this rule may be found in the case where an identity of names leads him to serve his writ upon the wrong party;

Jarmain v. Hooper, 6 M. & G. 847.

or where he seizes the goods of the wrong party, but on such evidence as might have misled any one.

Davies v. Jenkins, 11 M. & W. 755; Dunston v. Patterson, 2 C. R. (N. s.) 495.

The same act or neglect of a sheriff may sometimes afford ground for an action on behalf of each party to the writ; as where, having levied upon property, he suffers it to be lost or destroyed through his negligence. In such a case the plaintiff may be wronged because his debt may be lost, and the defendant may be wronged because a surplus that would have remained after satisfying the debt is lost to him. The officer owed to each the duty to keep the property with reasonable care, and there is a breach of duty to each if he has failed to do so.

Jenner v. Joliffe, 9 Johns. 381, 385; Bank of Rome v. Mott, 17 Wend. 554; Bond v. Ward, 7 Mass. 123-129; Purrington v. Loring, 7 Mass. 388; Barrett v. White, 3 N. H. 210#224; Weld v. Green, 10 Me. 20; Franklin Bank v. Small, 24 Me. 52; Mitchell v. Commonwealth, 37 Pa. St. 187; Hartlieb v. McLane, 44 Pa. St. 510; Gilmore v. Moore, 30 Geo. 628; Banker v. Caldwell, 3 Minn. 94; Tudor v. Lewis, 3 Mete. (Ky.) 378; Abbot v. Kimball, 19 Vt. 551; Fay v. Munson, 40 Vt. 468.

The purpose of this paper being merely to indicate general rules, and not to go into particulars, the case of another class of officers may be referred to by way of illustration. We allude now to those whose duty is to cut drains for the draining of considerable tracts of land, and afterwards to keep them open for the public benefit. The position, duty, and responsibility of such officers, it may be well to say at the outset, are not always the same. Sometimes they constitute a corporate board, and then the act of one, if lawful, is the act of the corporation. Sometimes they are officers of cities or villages, and then their acts are the acts of the municipal corporation that elects or appoints them, and may render such corporation liable. But sometimes they act directly under an independent statutory authority, subordinate to no corporation, so that their neglects are chargeable to no one but themselves as individuals. This last is the position usually occupied by persons chosen as drain commissioners by towns, counties, or other districts of territory; they are chosen by the voters of the district, because the statute prescribes that mode of selection, but they act independently of the people of the district afterwards.

There are various ways in which the failure of such an officer to perform his duties faithfully and promptly might result in damage or loss to individuals. *First*, it might delay the completion of a work which had been ordered, and thereby land might be left overflowed and useless which should have been drained. But it is impossible to count upon this as an individual injury, since what is lost is only an advantage the party expected to reap from an exercise of public authority—not something which has actually become his. It is to be

compared to the loss, by a candidate, of an anticipated election, in consequence of a riot at the polls, or through fraudulent votes; it may be a hardship, but it can support no action, because it takes away only an uncertain expectancy, and not a vested right. It may also be compared to the case of one who is a deserving object of charity under the poor laws. Such a person, from his circumstances, may have a right to expect relief from the proper officer, and it will be the duty of the officer to give it if the case is deserving. But the officer's neglect cannot give a private right of action; for until something has, in some legal way, been specifically set apart for the pauper, so that in law it has become his property, he can have no legal right which the officer's neglect defeats. And so up to the time when, by the construction of a drain, individual rights have actually attached, the delay of the commissioner, in the view of the law, can be a matter only of public concern—not a private injury.

But when the drain is made, the benefits to private estates arise, or should arise, and then there may be complaint either, *first*, that the plan or execution of the work has not brought the benefit it should have brought; or, *second*, that by neglect of the officer the drain is impeded. In the first case there can be no right of action, because as yet everything is in expectancy. But if, when the drain is completed, it is suffered by negligence to be obstructed, and thereby private estates are injured, the right to redress by suit seems clear. There is a distinct duty incumbent upon the officer who is charged with keeping the drain open, which he owes to every person who would be injured by his neglect; and where damage concurs with a breach of this duty the right of action is complete. But this, of course, supposes the means in his hands for the purpose, as without this there can be no neglect.

This general principle is recognized by the following among many other cases: Parker v. Lowell, II Gray, 353; Childs v. Boston, 4 Allen, 4I;Barton v. Syracuse, 37 Barb. 292; Wallace v. Muscatine, 4 Greene (Iowa), 373; Phillips v. Commonwealth, 44 Pa. St. 197; Hover v. Barkhoof, 44 N.Y. 113.

It has been said in a recent treatise of accepted value that "the liability of a public officer to an individual for his negligent acts or omissions in the discharge of an official duty depends altogether upon the nature of the duty as to which the neglect is alleged. Where his duty is absolute, certain, and imperative, involving merely the execution of a set task—in other words, is simply *ministerial*—he is liable in damages to any one specially injured, either by his omitting to perform the task, or by performing it negligently or unskilfully. On the other hand, where his powers are discretionary, to be exerted or withheld according to his own judgment as to what is necessary and proper, he is not liable to any private person for a neglect to exercise those powers, nor for the consequences of a lawful exercise of them, where no corruption or malice can be imputed, and he keeps within the scope of his authority."

Shear. & Redf. on Neg. § 156.

But, if this is correct as a general rule, it is subject to a great many exceptions; for, as is above shown, there are many cases in which the duty is absolute, certain, and imperative, and is also ministerial, in which no action will lie, because the duty is exclusively public. The case of election officers defeating an election is a conspicuous instance; the voters who lose the opportunity to deposit their ballots are allowed no private right of action, though their damage is the same, in kind and degree, with that of voters whose ballots are wrongfully refused when the polls are open. The reason we have already stated to be this that the duty to prepare for and hold an election is a public duty exclusively, while the duty to receive ballots when the polls are open is one severally due to each individual elector. There are also numerous cases in which duties are entrusted to the judgment and discretion of officers, and where, nevertheless, actions are sustainable against them. We have referred to some of these. It is true, the decisions regarding them are not harmonious—some courts holding that the obligation the officer owes to the individual is only to discharge his duty with integrity and to his best judgment, and that he is liable to an action only when malice or corruption is established, while others admit some exceptions, and hold, especially in election cases, that the officer must, at his peril, concede to the individual his legal rights.

Lincoln v. Hapgood, 11 Mass. 350. Compare Tozer v. Child, 7 El. & Bl. 377.

The true general rule, we conceive, may be stated thus: whenever an individual can show that he suffers an injury through the neglect of a public officer to respect and recognize some right which the law assures to him, he is entitled to some appropriate redress there for; while for incidental loss which he may suffer in consequence of the neglect of purely public duties, he is entitled to no redress, because no right pertaining to him as an individual has been violated. And this is wholly independent of the circumstance that his loss or damage is or is not exceptional and special.

VIII. Liability of Railroad Companies for Remote Fires.

Whether a railroad company is to be liable for all fires of which its locomotives are the occasion, is a question so important to the industrial interests of the land, that I may be excused for giving to it in this place a more elaborate discussion than I was able to do in my treatise on Negligence. A squatter, for instance, builds, three hundred feet from a railroad, a shanty, and permits between the shanty and the railroad a mass of dry stubble to collect. This stubble is easily kindled by sparks from the locomotive, and the shanty is soon in a blaze. The same carelessness which left a lane of combustible materials from the railroad to the shanty, leaves a further lane of combustible materials to other buildings, constructed with equal recklessness, a little further on. Over this continuous line the fire races rapidly; and by this process the suburbs of a city, successive stages being in the same way accomplished, is set on fire, and finally the city itself is destroyed. The railroad company is sued for the damage, and it is held liable, and, of course, is swamped; its whole assets, when brought to the hammer, not being sufficient to satisfy the judgment. Or, to take a decided case, a manufacturing company builds a dam to supply its works with water. A heavy rain falls, and the dam is swept away. The water descends on another dam, carelessly built by other parties, and this dam also yields. Another dam, built with equal carelessness, is broken through by the tremendous accumulation of water bearing against it, and finally a valley is flooded and a group of villages submerged. The company owning the dam which first gives way is sued; and a judgment is entered against it for the whole of the final damages, although it proves that but for the carelessness with which dams number two and number three were constructed such damages would not have ensued. The company thus sued is ruined and its operations closed by the process, just in the same way as the railroad corporation, which was the occasion of the fire in the first illustration given by me, is destroyed. Now, in both these cases the injury to the community is not terminated by the annihilation of the two corporations sued. A subsidiary injury, of no mean dimensions, is to be found in the recklessness which such procedure imparts to non-capitalists dealing with dangerous instrumentalities. If I am held to be personally responsible for the consequence of placing combustible materials by the side of a railroad, or of building inadequate dams at the base of a great manufacturing reservoir, then I will be careful not to place such combustible materials under the eaves of a locomotive engine, or to dam up water, in the trough of a natural watershed, without taking the precautions which a good mechanic, an expert in such work, is accustomed to use. But if I am not so responsible, I will build recklessly, and to this recklessness will be traceable ruin which otherwise would have been averted. The very fact that when a suit for damages is brought, I am skipped over, and the rich corporation behind me attacked, while it assures me, if I am poor, a position of irresponsibility, increases the recklessness of myself and other non-capitalists, and thus increases the risks by which the capitalist, who is alone held liable, is beset.

Capital, by this process is either destroyed, or is compelled to shrink from entering into those large operations by which the trade of a nation is built up. We are accustomed to look with apathy at the ruin of great corporations, and to say, "well enough, they have no souls, they can bear it without pain, for they have nothing in them by which pain can be felt." But no corporation can be ruined without bringing ruin to some of the noblest and most meritorious classes of the land. Those who first give the start to such corporations are men of bold and enterprising qualities, kindled, no doubt, in part by self-interest, but in part also by the delight which men of such type feel in generous schemes for the development of public resources, and the extension to new fields of the wealth and industry of the community. Those who come in, in the second place, to lend their means to such enterprises after these enterprises appear to be reliable objects of investment, are the "bloated bond-holders," consisting of professional men of small incomes, and widows and orphans whose support is dependent on the income they draw from the modest means left to them by their friends. Nor is it these alone who are impoverished by the destruction of the corporations of which I here speak. The corporation may itself be soulless, and those investing in it may deserve little sympathy, but those whom it employs are the bone and sinew of the land. There is no railroad, no manufacturing company that does not spend three-fourths of its income in the employment of labor. When the corporation's income ceases, then the laborer is dismissed. We hear sometimes of the cruelty of the eviction of laborers from their cottages at a landlord's caprice. But there are no evictions which approach in vastness and bitterness to those which are caused by the stoppage of railway improvements or of manufacturing corporations; in few cases is there such misery to the laboring classes worked, as when one of these great institutions is closed. I think I may, therefore, safely say that the question before us relates eminently to the industrial interests. And in this sense it demands from us the most careful thought.

Stating the question before us in the concrete, it is this:

Is a railroad company liable for damages by fire, of which, through ignition from one of its locomotives, it is one of the occasions, when, between the starting of the fire by the locomotive and the damage, intervenes the negligence or malice of third parties, by which the damage is immediately caused?

Stating the question as an elementary proposition, it is this:

Is a person liable for damages of which, unintentionally, he is one of the occasions, when, between the

occurrence of the occasion and the damage, intervenes the negligence or malice of third parties, by which the damage is immediately caused?

This question, it will be at once seen, opens to us the whole doctrine of causation. What is a juridical cause? Is there a distinction between a "condition" and a "cause?" If so, and should it appear that this distinction is *juridical fundamental*, how does it bear on the issue before us? This question has been much agitated in other countries and in other generations than our own. Perhaps I may best illustrate it, at least in its historical relations, by adverting to a famous controversy now a century old.

On the 27th of September, 1774, died at the Vatican, Pope Clement XV., not many months after the issue of the bull *Dominus ac Redemptor noster*, suppressing the order of the Jesuits. The cause of his death has been the subject of a contention in which the doctrines we just noticed are incidentally discussed with singular acuteness and persistency. On the one side, we are pointed to the advanced age of Ganganelli, the secular name by which Clement XV. is best known; his habits of gastronomic indulgence; the similarity of his disease with those usually produced by over-eating; and in particular to a suspiciously excessive dinner he swallowed shortly before his final attack. On the other side, it is argued that while the dyspepsia which he suffered was the *occasion*, it was not the *cause* of his death; that his constitution was such that he could have withstood this particular disease for years without succumbing; that the disease was accelerated by a subtle poison administered to him, by which its symptoms were aggravated and made fatal, and that the traces of this poison were detected in his remains. But even supposing that the latter statements are correct, are we to speak of such poison, supposing it to have been negligently given, or supposing it to be part of remedies honestly prescribed by Ganganelli's physicians, as causing his death? Was not that death caused equally by other antecedents in his eventful life? As threads in this cord of causation, are we not to enumerate hereditary infirmities which we can well suppose him to have received from his parents, and the enervating influence of a secluded ecclesiasticism, and the anxieties of the papacy at an era so critical, and that innumerable series of agencies which had united, for several generations, in bringing Christendom face to face with the revolutions which were then about to convulse the world?

I have introduced this illustration because it gives, in a concrete shape, a case supposed by Mr. Mill,

I Mill's Logic, 2d Lond. Ed. 398.

when advancing the theory of causation which is the basis of the adjudications which I here contest. "For every event," so says Mr. Mill, "there exists some combination of objects or events, some given concurrence of circumstances, positive and negative, the occurrence of which will always be followed by that phenomenon. We may not have found out what this concurrence of circumstances may be; but we never doubt that there is such a one, and that it never occurs without having the phenomenon in question as its effect or consequence. * * It is seldom, if ever, between a consequent and one single antecedent that this invariable sequence subsists. It is usually between a consequent and the sum of several antecedents; the concurrence of all of them being requisite to produce, that is, to be certain of being followed by the consequent. In such cases it is very common to single out one only of the antecedents under the denomination of cause, calling the others merely conditions. Thus, if a man eats of a particular dish and dies in consequence, that is, would not have died if he had not eaten of it, people would be apt to say that eating of that dish was the cause of his death. There needs not, however, be any invariable connection between the eating of the dish and death; but there certainly is, among the circumstances which took place, *some combination or other upon which death is invariably consequent;* as, for instance, the act of eating of the dish, combined with a particular bodily constitution, a particular state of present health, and, perhaps, even a certain state of the atmosphere; the whole of which circumstances, perhaps, constituted in this particular case the conditions of the phenomenon, or, in other words, the set of antecedents which determined it, and but for which it would not have happened. The real cause is the whole of these antecedents; and we have, philosophically speaking, no right to give the name of cause to one of them, exclusively of the others."

The first and more technical objection to this theory is, that it is logically defective in making everything the cause of everything else. Thus, in the case of Ganganelli, there is not an event in prior or cotemporaneous history of which we can safely say that in no way it entered into the combination of occurrences on which his death was consequent. Thus, to begin with one of the most obvious, it is clear that if his father, an accomplished physician of Arcangelo, possessed of peculiar ecclesiastical influence, had not lived, or had not lived at Arcangelo, or had not possessed at Arcangelo the influence just noticed, his son either would not have lived at all, or would not have been educated at Arcangelo under circumstances so favorable to his subsequent success, or would not have obtained those early ecclesiastical appointments which were the stepping stones to the papacy. So we have to suppose a line of ancestors from his father back, a change as to the conditions of either of whom would have prevented, if not the existence, at least the ecclesiastical education and promotion of the pontiff. But this is not all. The bull *Dominus ac Redemptor noster*, to take up a single line of enquiry, was one of the antecedents of the death; but what were the antecedents of the bull *Dominus ac Redemptor noster?* When we look even at those antecedents alone by which that famous bull was qualified, our field of observation

expands until not only all the events of cotemporaneous Christendom are introduced, but all prior events by which Christianity was established or modified. What immediately produced the bull *Dominus ac Redemptor noster?* As we search for its immediate antecedents, we notice Joseph II. visiting Rome in person, in order, under motives of philosophical liberalism, to obtain the election of an anti-Jesuit pope, and then vehemently urging on Ganganelli, as the pope-elect, decisive anti-Jesuit action; and with Joseph II. we observe the Spanish and French Bourbons, under the influence of court intrigues, operating to promote the same object; and with them co-operates Gallicanism, jealous of whatever conflicts with the prerogatives of a national episcopate, and Jansenism not merely instinct with retributive vengeance on its old adversary, but implaca- bly hostile to whatever militated against the Augustinian doctrine of grace. But what were the antecedents of Joseph II., and of French and Spanish Bourbonism, then in their corrupt decline, and of Jansenism, and of Jesuitism itself? Must we not, on this view, declare of the death of Ganganelli, as was declared by Fichte of the grain of sand, that he noticed on a shell on the sea beach, that the laws of the whole universe must be reversed in order to place that grain of sand elsewhere?

Fichte, die Bestimmung des Menschen, Werke ii. 178; cited by Mansell, Aids to Faith, p. 26.

May we not even ask, with Fichte, whom Mill in this respect follows, whether, in order to carry this grain of sand a few yards further, some one particular yet necessary ancestor of ours may not have perished from hunger, or cold, or heat; and thus all that his descendants might do or hope to do, to have been hindered so that a grain of sand might lie in a different place? It is true that the reply at once arises that as a child's hand could have moved this grain of sand from the beach to the shell, so an assassin's stealthy purpose could have interrupted ordinary physical laws, and, in spite of all his antecedents, caused the pontiff's death. But this, according to the philosophy we here examine, would not change the fact that the assassin with his poison is only a co-ordinate figure in the interminable range of antecedents by which the death in question is equally caused. This death, in fact on this theory, forms part of a combination of events, each of which is dependent on the other, and neither of which can exist without the other. In this respect it is again, on this showing, like Fichte's grain of sand, which is put where it is by the equilibrium of the universe, and yet from which the equilibrium of the universe results. The localization of the ancestor, on Fichte's hypothesis, is as essential to the existence of the grain of sand, as the localization of the grain of sand to the existence of the ancestor. Hence, we have the grain of sand and the ancestor part causes of each other; and each, therefore, is part cause of itself. Each event, in other words, according to such a theory of causation, becomes part cause of its own causes, and contributes to create that by which it was created. We are baffled, therefore, when we seek for causation on this hypothesis, either by being turned back to antecedents which, as unconditioned by time or space, are beyond our cognition; or which are each other's causes, which is absurd.

I said there was a second reason for my taking Ganganelli's death to illustrate Mr. Mill's notions of causality. The first reason is, that Mr. Mill Suggests this death himself. The second is, that it enables me to bring to bear on this topic the Roman law, which was that, to pursue the analogy in the way a similar theme is treated by Robert Browning, by the forms of which the pontiff's death was actually investigated. But there are other grounds for appealing to the Roman law to aid in the present investigation. The Roman jurists were not only great lawyers, but they were familiar with the Epicurean scheme of causation which Mr. Mill has lately reproduced. Eloquently is this hypothesis discussed by Cicero; and two, at least, among the Justinian jurists, are referred to by Cicero as masters in the science of jurisprudence in its wide sense. But we have not to content ourselves with mere inferential proof such as this. Ulpian is the most copious writer cited in the digest; and at the very beginning Ulpian takes pains to show us that Greek philosophy has been cautiously weighed by him, in the reaching of judicial results. If, therefore, we are to look for an adequate tribunal to determine what is causality, as a practical question, and in the only shape in which the enquiry can become useful to us, we may well find this tribunal in a court governed by the principles of the Roman law.

"What killed Ganganelli?" We can conceive such an enquiry as this to be instituted before a Roman court of initiatory process, a court exercising functions similar to those of one of our own committing magistrates. "What killed Ganganelli? "In the days of Ganganelli, as well as in the days of Justinian, and in our own days, epicureanism and stoicism each had their votaries; and it is not difficult to imagine epicurean philosophers, who anticipated Mr. Mill in one part of his speculations, and stoical, philosophers, who anticipated him in another, as among the witnesses of the pontiff's death. An epicurean cook, or chief of the kitchen, would not have been an unnatural inmate ot the pontifical household; and stoical physicians were not likely, in those days, to have been unknown in such a court. We can, therefore, readily conceive of an examination such as the following:

Judge—What, to your knowledge, was the cause of the Pope's death?

Epicurean Cook—The "sum of all his antecedents;" this is the only kind of causation which philosophy can possibly know.

Judge—(Supposing him not to lose his temper at the answer.) But you presided over the Pope's kitchen the day of his death; was there anything that went to him different from his usual diet? Anything to cause

indigestion?

Witness—Everything caused everything. Indigestion, if it existed, can not be said to be caused by the Pope eating a particular dish. It was *caused*, as the philosophers tell us, by the dish, and the Pope's own constitution, and the constitutions of his ancestors, and the particular state of the atmosphere by which he was surrounded, and the particular states of prior atmospheres by which this particular subsequent atmosphere was produced, and—

Judge—But stop. You are here to answer a particular question, and that question you must answer now, or go to prison until you do. You and I have nothing to do with these events you call the "sum of all the antecedents." You saw the food sent to the Pope. Was there anything in it by which his death might have been caused?

Or suppose the question to be put to the surgeons who examined the Pope's remains, What caused his death? And suppose a similar answer to have been made. What other reply can we conceive of than this:

"You are bound to tell which of these innumerable antecedents, of which you speak, was *the* cause; the only cause which public justice can deal with, and which public safety demands."

Nor is the reasoning of our Anglo-American courts differ ent in result, though it is couched in less philosophical terms than those by which, as we will presently see, the conclusions of the Roman jurists are defended. Thus, in Stokes' case, a case where every possible defence that ingenuity could devise and audacity propose, was offered, judge after judge, herein following a uniform line of unassailable adjudications, scouted at the idea that Fisk's "constitution" or other "antecedents" had anything whatever to do with the case, except so far as those antecedents tended to show Stokes that he was about to be attacked by Fisk; and it was even ruled that so close and immediate an antecedent as the probing of the wound by the surgeons was irrelevant, unless it should be proved that the probing itself was such as to have produced, as a regular and ordinary inference, the death of Fisk. So in York's case, famous in the annals of Massachusetts jurisprudence, and in Flanagan's case,

Flanagan v. People, 52 N. Y. 699

reported in the fifty-second volume of the reports of the New York Court of Appeals, the highest courts in Massachusetts and New York, following herein the leadings of all other Anglo-American courts who have discussed the question, dismiss with summary curtness the suggestion that the defendant was in a condition of mind to be necessitated by circumstances to do a particular thing. Sane or insane, there is no one, it is held, who is necessitated to any act by "the sum of all his antecedents."

Is this barbarous? If it was the English common law alone which rules this,—a law so disdainful of metaphysics, and which metaphysics so much disdains,—the rebuke of barbarism might be treated as a natural retort. But not only the English, but the Roman law thus speaks; and the Roman law, in the person of some of its most eminent modern jurists, defends this position by reasoning which may be thus condensed:

Feuerbach, Peinliches Recht; II. Berner, Strafrecht, §§ 6–22.

An offence is committed, or an injury done; it is essential for us, when we come to punish the offence or redress the injury, to distinguish between those of its conditions which are mechanical and irresponsible, and those which are moral and responsible. The *cause* must be punished or restrained; it must be punished or restrained because it is the cause. Two reasons may be given for this. The first is *absolute; punitur quia peccatum est;* because it follows in response to a first principle of our nature, a principle, the disregard of which would inflict incalculable injury, that retribution should follow on wrong. The second reason is that the same experience which tells us that while the stone can not be made better or worse by moral training or by fear of punishment, a man may be prevented from casting that stone at another man's head, by moral training and by fear of punishment. Hence it becomes one of the chief offices of society to discriminate between the antecedents by which an event is conditioned; and, then, for juridical and moral purposes, to cast aside such as are mechanical and irresponsible, and to select such as are moral, responsible, and capable of being mounded by law. To the latter class of conditions a further analysis is to be applied. Not every moral agent, who is the condition of an event, is to be dealt with as its cause. To make him a juridical cause, he must either design the event, and it must have resulted from his design; or, if attributable to his negligence, it must result, by the force of ordinary natural laws, directly from that negligence.

This process of analysis is one which is necessary, before any moral or juridical judgment can be expressed on any topic requiring juridical action. Here, for instance, are certain revenue frauds alleged to have been perpetrated at St. Louis. Undoubtedly there are antecedents enough, without either of which such frauds could not have been consummated. Unless there had been whiskey, there would have been no tax on whiskey, and no opportunity of fraudulently evading such tax. Had it not been for the civil war we would not have found it necessary to levy an excise; and had there been no excise there would have been no excise laws to elude. Nor can it be said that the antecedents which thus pass before us are such that their agents are necessarily non-liable. If you adopt the doctrine of causation which I here contest, there is no person who contributed to either of these antecedents who is not a party to the St. Louis whiskey frauds. Mr. Jefferson Davis could be indicted as one of

the authors of the frauds; for Mr. Jefferson Davis was prominent in bringing about the war which led to the imposition of the whiskey tax. The few surviving advisers of Mr. Buchanan would come in as parties; for it was to their negligence that wo owe that want of preparation by which the war was made so protracted and expensive. Many a government war-contractor would have to tremble in his shoes; for every dollar that was unduly or recklessly added to the debt was one of the conditions by which the whiskey tax was made necessary. Nor would it be possible, when we read General Sherman's Memoirs, and Mr. Boynton's reply, not to see that there are few among our generals whose negligence may not have contributed very largely to the same result, and whose complicity, therefore, on the theory before us, it is the duty of a court of justice to try. Where, indeed, if the "cause" of whiskey frauds is the "sum of all their antecedents," would we stop? Could we refuse to acknowledge that the love of whiskey is sometimes so maniacal a passion that the desire for its gratification is irresistible? Has not dipsomania, by materialistic philosophers who follow in the wake of Mr. Mill, been regarded as a physical disease which confers irresponsibility? Are not those who urge the passage of laws thwarting such a propensity in some part chargeable with the violation of such laws? Can we exempt, therefore, temperance crusaders from complicity in the whiskey frauds? And who but the voluntary moderate drinkers was it that stimulated the temperance crusade, if they did not directly stimulate the production of whiskey? And could whiskey have been manufactured without grain; and without grain could there have been any whiskey frauds? Who, in fact, can be relieved from prosecution in such case, if all persons who are in any way concerned in producing the conditions of the whiskey frauds are to be viewed as causing such frauds? Yet the absurdity of such reasoning is demonstrated by a mere statement of its consequences. To juridical determine responsibility we must necessarily determine between the *cause* of an event and its *conditions*. There is no opinion that can be reached by us on any pending issue in which the discrimination which is here vindicated must not be employed. We can not act either rationally or justly without so discriminating.

But still a step further may we advance. *Ex post facto* moral judgment is as objectionable as *ex post facto* legislation. We have no right to institute a moral code for a new case, and condemn as immoral that which had not been declared immoral before. Nor can this prior announcement of immorality be made exclusively in the abstract, any more than the adjudications of our courts can be constructed simply in, the abstract, without reference to the facts of any particular case. As to constitute juridical precedent there must be decisions on facts litigated at the bar of the courts, so to constitute moral precedent there must be decisions on facts litigated before the bar of public opinion. Hence, in order to justly judge cases arising now, we must justly judge cases that arose in former days; and the conclusions reached as to the cases of earlier eras go to make up the common law of morals by which future cases are to be tried. Hence it is that there is not a single prominent event in history in which, in order to dispense moral justice faithfully in future, we are not compelled to institute this very analysis of causality which Mr. Mill declares to be beyond the philosophical range. The death of Ganganelli is but one among myriads of cases in which we summon philosophy in all its departments, not merely to acquiesce in such a discrimination, but to assist in making it. What caused the death of Napoleon's prisoners at Jaffa? Is Napoleon to be charged with the atrocity of poisoning them, simply that they might not encumber his retreat? Were there any circumstances that mitigate the act, supposing it to be proved? Now, undoubtedly, the men who thus died were sick; undoubtedly the climate was unhealthy; but the whole force of our moral judgment against Napoleon consists in the conclusion that neither sickness nor climate caused these deaths, but that they were caused by Ihe orders of Napoleon himself. What caused the lapse of Europe, after the high civilization of Rome, into the barbar— ism of the dark ages? Was this a consequence of Christianity, or was it in spite of Christianity? And was it not traceable partly to the enervations of imperialism, partly to the incursions of those Northern hordes whom Christianity ultimately civilized? Hence we have to dismiss, before we can answer this question, those antecedents which we may regard as extraneous to the issue, such as ignorance, barbarism produced by the old despotisms, nervous reaction from the torpor of those despotisms. Now, when we are engaged in-either of the three great duties which we have just successively sketched,—either in judicially determining a litigated issue, or in expressing a moral judgment on a pending measure, or in making up a common law of ethics by determining vexed-questions of the past, it is mocking us to tell us that the cause, the only cause about which we care to know, the cause which we can logically reach, is the sum of all the antecedents. We demand to know which of these antecedents-are mechanical and physical, not subject to moral or juridical law, and which are not mechanical and physical, and which hence are subject to moral and juridical law. We demand to know which antecedents are subjects of moral criticism and-adjudication, and which are not. And as logic is the science of the discovery of truth, logic must make this discrimination for us. Any theory of logic which fails to do this is false to its mission and must be cast aside.

How, then, is causation, in its moral and juridical relations, to be defined? I know no better way than by appealing to the distinction established by Aristotle, to which the Roman jurists constantly advert. Cause, in this view, may be conceived either as material, formal, efficient or final. The *material* cause is the matter from which a thing is constructed, including the forces used in its construction. The *formal* cause is the pattern or law

or archetype in accordance with which the thing in question takes shape. The *efficient* cause is the energy of change or motion by which a natural order of sequences is interrupted and a new order instituted. The *final* cause is that for the sake of which a thing is done; it is, in respect to creation, the final good designed by its author; *#o o# ###x# x## #o #y##o# causa finalis*. The two last were those with which the jurists solely concerned themselves. The last was used only for exegetical purposes. The discovery of the meaning of a statute might be helped by a consideration of the final cause the law-maker had in view. But cause, to the eye of the jurist as well as of the moralist, is mainly to be viewed in the sense given in the third of Aristotle's categories. The object of jurisprudence, as well as of ethics, is to determine what is the efficient cause of a phenemenon affecting society. Is that efficient cause a cause on which law, ethical or juridical, can properly act? If so, it must be singled out from all other conditions, so that it may be made the subject of moral and juridical action. Hence we find that *a cause*, in its juridical relations, *is such an interposition by a responsible human agent, as changes the ordinary sequence of physical laws, and produces, by its immediate and' regular efficiency, the result under investigation*

NOTE.—See, for an able vindication of this definition, Bar's Lehre vom Causalzusammenhange. To Professor v. Bar, one of the most eminent of living jurists, I take this additional opportunity of expressing my indebtedness for the powerful reasoning contained in the treatise to which I here refer.

It will not take us long to apply the argument just given to the question of the liability of railroad companies for injuries of which they are the *occasion*, but not, in the sense of' the definition just given, the *cause*. "The sum of all its antecedents, is the cause; "so says Mr. Mill; and this expression has been quoted more than once by judges who maintain that we are at liberty to single out any one antecedent that may have contributed to an injury, and then make that antecedent pay for the injury. A locomotive engine, to recur to the case with which we began, drops a spark on a mass of rubbish which the recklessness of a wood-cutter has left on a field over which the railroad company has no control. The fire thus kindled, under an unprecedently high wind, is whirled off some hundred feet, and a frame building, partially built, and surrounded by shavings, on the outskirts of a city, is consumed. From this building the fire readily passes to a block of houses whose owners ultimately sue the railroad for the damages. But, if there is only a limited range for the selection of antecedents, why not sue the owner of the frame 'building, who left it in such a state that it was well fitted to be a fire conductor; or why not sue the wood-cutter, who is as directly chargeable with the fire as if he had himself taken the coal from the spot on which it fell, and carried it to the shavings of the building which was first consumed? Practically, indeed, it would be answered that the wood-cutter is not to be sued because he has no money to pay the damages, and because, even if he had, not being a corporation, but being of that struggling class for which a jury's sympathies are so readily invoked, it is not sure that a verdict could be got against him at all. But theoretically, why he is not the person to be immediately called to account, it is difficult to see. He is the real incendiary. He is the one who carried, from the spot where it fell, the fire by which the block of houses was burned down. Supposing that we are to confine ourselves, in such cases, to anything like a limited liability, it is as absurd to relieve him from immediate responsibility, as it would be to pass over, in a prosecution for arson, the man who sets fire to a house with a bundle of matches which he finds in the street, in order to convict the person by whom these matches were carelessly dropped.

But, if our range of selection among antecedents is unlimited, why stop at the railroad company? The railroad company may be in fact poor. If put up for sale under a judgment, its value may be but a song; and besides this, it might be worth while to consider whether a jury might not, even for a railroad company, feel some sympathy. For, after all, it will not be merely the "bloated bondholder "who will suffer if the railroad is ruined. Thousands of operatives are mediately or immediately employed in running it, and in keeping it in repair. To its conveniences of transportation all the farmers bordering on it owe a market in which to buy and in which to sell. Even the wood-cutter who has virtually carried the coals dropped by its locomotives and by them set '.fire to the neighboring town,—even this laborer has an in interest in the prosperity of the road; for if the road is killed out, what becomes of the work by which his living has been made? Even the neighboring town, thus set fire to, is interested; for as the road made it, so with the road it may die. So a jury might argue; and if we are entitled to skip any antecedent we choose, why not skip the railroad company, and attack an antecedent still less likely to find friends,—the rich capitalist, for instance, who contributed to build the road, or the rich manufacturer by whom its locomotives were constructed? Ought not the capitalist, before he lent his money, to have seen to it that his money should be prudently employed, and ought he not to be treated as accessory to damages which would not have occurred but through him? And ought not the manufacturer to have refused to furnish locomotives without impervious spark fenders, and was not his negligence in this respect one of the most conspicuous conditions of the burning of the town? Why, then, not sue the rich man who lent the money, or the rich man who built the locomotives? Or, if not these, why not go back still further, until we light upon some other antecedent, still more wealthy and friendless, by whom the losses we have sustained may be made up?

This, then, leads us to the practical difficulty in the way of the theory of juridical causation which we here contest. Carry this theory logically out, and we lapse into a state of barbarism to which it is impossible to conceive of jurisprudence as giving the faintest toleration. Reckless impecuniosities is to be passed over when we are seeking for a responsible cause, and we are allowed to go back until we hit, in the line of antecedents, upon wealth that is without immediate friends. But what will be the consequences of this? Will the squatter become any more careful by discovering that, outrageous and destructive as is his carelessness, he is not to be brought for it to legal account? Are the dangerous classes to be made any the less dangerous by being thus treated as ciphers whose only value is to increase the verdict against others who, though merely remote conditions of the disaster, are selected for suit simply because they are rich? And will rich men contribute to any ventures which involve such terrible risks? Who will put money into a railroad, or into a manufacturing corporation, if the imperfections to which such institutions are necessarily subject, are made the basis of suits for damages immediately caused, not by such imperfections, but by the negligence of irresponsible men recklessly tampering with such imperfections? The first result would be the stagnation of business by the withdrawal of capital from organizations involving such risks. A second result would be the stoppage of the wages and the consequent impoverishment of myriads of operatives, who, by these organizations are employed. Another result would be the communism which would follow from a policy which makes wealth the basis of liability; which, as soon as prudence collects money, compels distribution for the benefit of indolence; and which makes the wealth of a man the distinguishing reason why he should be cast in an action for tort. No principle pregnant with such incidents as these can we conceive of the law as tolerating, yet pregnant with these incidents is the principle that all the antecedents of an event are to be viewed as juridical its cause, and that among these antecedents we may select any one we choose for a suit.

I fall back, therefore, as the only sound solution of this problem, to that which I have just proposed, that a person whose negligence may have been one of the antecedents or conditions of an event is relieved juridically from liability, if such negligence is applied to the particular event by the intervening negligence or malice of a third party. Of course from this rule we are to except those cases in which such intervening negligence is the natural consequence of the original negligence. I may leave, for instance, a horse and wagon on a highway by the door of a large public school; and as it is my business to know that such is the case, and that the children, in playing about the school-house, may unconsciously startle the horse, then I may be liable for the injury the horse may inflict by running away. But if I negligently leave my horse and wagon in a lane where no such disturbance is probable, and if through the wild driving and noise of a "rough" tearing down the street, my horse takes fright, then the "rough," not I, is liable for the harm. Or I may negligently permit the water in my reservoir to percolate into my neighbor's field, and for this I am liable to him; but I am not liable to a distant proprietor whom my neighbor thinks proper to inundate by digging a ditch which pours the accumulated flood down into the latter's cellar. Or, to apply this distinction to the question immediately before us, a railroad company is liable for all damage which, excluding those caused by the intervention of responsible third parties, is the the natural and immediate and regular result of fire negligently escaping from its locomotives. But it is not liable for damage which, had it not been for the negligence or malice of such intervening parties, would not have occurred.

That causal connection, to state the conclusion just given in the abstract, is broken by the intervention of an independent responsible agent, when, without which intervention, the damage would not have existed, is a maxim of the Roman law, which, in my work on Negligence, I have had occasion to state at large. As sustaining this maxim in our own law may be cited the following cases:

Hooley v. Felton, II C. B. N. S. 142; Mangan v. Atherton, L. R. I Exch. 239; R. v. Ledger, 2 F. & F. 857; Sharp v. Powell, L, R., 7 C,P. 253; Saxton v. Bacon, 31 Vt. 540; Stevens v, Hartwell, II Metc, 542; Shepherd v. Chelsea, 4 Allen, 113; Richards v. Enfield, 13 Gray, 344; Perley v, R, R., 98 Mass. 414; Crain v. Petrie, 6 Hill, N. Y. 522; Ryan v, R. R., 35 N. Y. 210; Webb v. R. R., 49 N. Y. 425; S. C., 3 Lans. 453; Hofnagle v. R. R. 55 N. Y. 608; Penna, R, R. v. Kerr, 62 Penn, St. 353; Cuff v. R, R., 35 N. J. 17; State v. Rankin, 3 So. Car. 438. As conflicting directly with the conclusion reached above are to be mentioned, Fent v. R. R., 59 111, 35I; Atchison R. R. v, Stanford, 12 Kans. 354, See Annapolis R. R. v. Gantt, 39 Md. 116; Balt & O.R. R. v. Shipley, 39 Md. 252; Pollett v. Long, 56 N. Y. 200.

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Effect of a Change in the Law Upon Rights of Action and Defences.

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Reprinted from the Southern Law Review.

G. I. Jones and Company. St. Louis 1877.

III. The Effect of a Change in the Law Upon Rights of Action and Defences.

A very interesting and important question frequently is, what effect has been produced upon a right of action, or upon a previously existing defenses to an action, by a change in the law effected by statute after the right has accrued, or the cause of action has arisen, to which the defense was applicable. The question is encountered in a great variety of cases, and is sufficiently important to be considered under the several heads where the cases seem to range themselves. This is done imperfectly below.

I. *Cases where Laws are Repealed which Imposed Penalties, or some Loss or Deprivation in the Nature of a penalty*.—In cases of this nature there seems to be little room for hesitation regarding the proper rule. Where the right to recover the penalty, or to insist on enforcing that which is to cause loss to another, comes wholly from the statute, it must necessarily cease to exist the moment the statute is repealed. The result is inevitable, since the repeal of the statute takes away the foundation of the right. As the penalty, before it is recovered, is not property, and the right to it is not in the nature of a contract, the power to take it away is not inhibited by any provision of the constitution, and the legislative power of repeal is unquestionable. Nor is it of any importance in this connection whether the right to take advantage of the statute was given to the public, or to a common informer, or to some individual specially concerned; it being a mere statutory right not yet enforced, it cannot have force or vitality beyond that of the statute itself. This is the rule where a criminal penalty is provided,

Miller's Case, 1 Bl. Rep. 451; Anonymous, 1 Wash. C. C. 84; The Irresistible, 7 Wheat. 551; United States v. Tynen, 11 Wall. 88; Commonwealth v. Duane, 1 Binn. 601.

but it applies to civil cases with equal force.

The point arose in a case-of no little interest and importance, which was brought under the statutes of the United States for the reclamation of fugitive slaves, and was passed upon by the federal Supreme Court. The statute of 1793, on that subject, imposed a penalty of five hundred dollars upon any person who should knowingly or willfully obstruct or hinder any owner, his agent or attorney, in arresting a fugitive from labor, or should rescue one after his arrest, or harbor or conceal one, knowing that he was a fugitive from labor. The penalty was recoverable by the claimant for his own use, and was doubtless intended to some extent as a compensation to him for losses and expenditures which he would be likely to suffer or incur. The statute of 1850 made new provisions, which, in the opinion of the court, repealed this. A penalty having accrued under the first statute before the second was passed, suit was brought for its recovery. Mr. Justice Catron, delivering the unanimous opinion of the court, declared that the repeal of the statute which gave the penalty took away all right of recovery. The penalty, being given by the legislature, might be remitted by the legislature. There was, and could be, no vested right in it.

Norris v. Crocker, 13 How. 429.

In rendering this conclusion the court only followed previous decisions in the same court, all to the same effect.

Yeaton v. United States, 5 Cranch, 281; Schooner Rachel v. United States, 6 Cranch, 329; State of Maryland v. Baltimore & Ohio R. R. Co., 3 How. 534. This last case was also one of considerable interest, the penalty, which was remitted, being one of $1,000,000, imposed for the benefit of one of the counties of Maryland, in order to compel the railroad company to locate its line so as to accommodate and benefit that county. See, also, Confiscation Cases, 7 Wall. 454. In those cases it was decided that the attorney-general might remit penalties under the revenue laws even after judgment, against the remonstrance of the informer, who would lose his interest thereby.

The decisions to the like effect in the state courts are very numerous, and it may almost be said that the doctrine has been held without dissent.

See Wilson v. Hardesty, 1 Md. Ch. Dec. 66; Potter v. Sturdevant, 4 Me. 154; Oriental Bank v. Freese, 18 Me. 107; Lewis v. Foster, Ill. H. 61; O'Kelly v. Athens Manuf. Co., 36 Geo. 51; Engle v. Shurtz, 1 Mich. 150; Cole v. Madison County, Breese, 115; Parmelee v. Lawrence, 48 Ill. 331;

Chicago etc. R. R. Co. v. Adler, 56 Ill. 345; People v. Livingston, 6 Wend. 526; Thompson v. Bassett, 5 Ind. 535.

there being scarcely an instance in which the doctrine has been denied, that no individual can have in a statutory penalty any vested right which the legislature would be precluded from taking away, or which would remain after the statute under which it was claimed had been repealed.

In some of the cases which have been referred to, that which the statute permitted to be recovered, or which was forfeited under it, was not designated a penalty, but, as in the fugitive slave case, assumed the form of, or was intended as, compensation to a party for a wrong done or injury suffered by him. One of the cases in Maine was of this description. The statute entitled the plaintiff, in case of the breach of a prison bond given by his debtor, to recover in a suit upon it the amount of his debt, costs, and expenses, with twenty-five per centum interest. Obviously this would exceed the damages suffered by him, and might be very greatly in excess. A later statute repealed this, and substituted a recovery of the actual damages the creditor had suffered, to be estimated by a jury. This recovery, it was held, was all that the creditor could demand, though the breach had occurred previously. All that the first statute gave in excess of the actual damages was in the nature of a penalty, whether so denominated or not, and the control over it did not depend on what it was called.

Oriental Bank v. Freeze, 18 Me. 107, citing Potter v. Sturdevant, 4 Me. 154.

Other cases involved the validity of statutes which mitigated the penalties against usury, and of these the same view was taken.

Wilson v. Hardesty, 1 Md. Ch. Dec. 66; Parmelee v. Lawrence, 48 Ill. 331; Engle v. Shurtz, 1 Mich. 10; Curtis v. Leavitt, 15 N. Y. 9; Welch v. Wadsworth, 30 Conn. 149; Wood v. Kennedy, 19 Ind. 68.

If a party promises to pay usury, it is only by the favor of the law that any special remedy or protection is given him, and he can have no special claim to—certainly no vested right in—a favor which, at the same time, is a punishment to his creditor.

Where the penalty is taken away by statute, it seems to be immaterial that a suit has been previously commenced for the recovery of the penalty. This is on the ground that the court, in rendering a decision, can only apply the law which is then in force.

Schooner Rachel v. United States, 6 Cranch, 329; Yeaton v. United States, 5 Cranch, 281; United States v. Passmore, 4 Dall. 372; Norris v. Crocker, 13 How. 429; Confiscation Cases, 7 Wall. 484; United States v. Tyner, II Wall. 88; Satterlee v. Mathewson, 16 S. & R. 169, and 2 Pet. 580; Maynes v. Moore, 16 Ind. 116; Bacon v. Callendar, 6 Mass. 303; Cowgill v. Long, 15 Ill. 203; Butler v. Palmer, I Hill, 324; Commonwealth v. Leftwich, 5 Rand. 657; Commonwealth v. Welch, 2 Dana, 330; State v. Squires, 26 Iowa, 340; Mather v. Chapman, 6 Conn. 54; Engle v. Shurtz, 1 Mich. 150; People v. Herkimer Com. Pl., 4 Wend. 206; McMinn v. Bliss, 31 Cal. 122.

And this rule applies even on appeal, though the judgment appealed from may have been rendered before the law was changed.

McCardle's Case, 7 Wall. 506; Bristol v. Supervisors, 20 Mich. 95; Ludlow v. Jackson, 3 Ohio, 553; State v. Norwood, la Md. 195.

There is, indeed, a case in New York which seems to be opposed to this view. In that case a tenant had incurred forfeiture by removing property from the demised premises to avoid a distress for rent, and a judgment was recovered against him for the statutory penalty. He appealed, and, pending the appeal, the legislature abolished the remedy by distress, but without in express terms abolishing the penalty. Jewett, J., in passing upon the case in the supreme court, says: "At the instant the thing was done for which the penalty was given, it became a debt or duty, vested in the plaintiff. It is in the nature of a satisfaction to him, as well as a punishment of the offender.

Citing Company of Cutlers in Yorkshire v. Ruslin, Skinner, 363; Grosset v. Ogilvie, 5 Brown P. C. 527; College of Physicians v. Harrison, 9 B. & C. 524.

The plaintiff having acquired a vested right to the penalty, the statute abolishing the right of distress, subsequently passed, which did not in terms repeal the section in question, in no way affects that right."

Palmer v. Conly, 4 Denio, 374.

With great respect, it seems to us that the learned judge begs the question when he assumes that a vested right was acquired in the penalty. Certainly there is a great weight of judicial authority against this view. But he may have been right in attaching importance to the fact that the provision which gave the penalty was not expressly repealed.

True, it would become inoperative as to future cases when the remedy by distress was taken away, but there was nothing inconsistent in taking away that remedy and still leaving the penal provision applicable to the cases that would come within it; that is to say, to the cases that previously had occurred. On this ground the case may, perhaps, be harmonized with those decided in other courts.

2. *Cases where Statutes are Repealed with Saving of Rights Accrued*.—But while it is entirely competent to take away statutory penalties after they have accrued, it is also competent, by the proper clause in the repealing statute, to save them. This is often done; the effect being to continue in force, for the purpose of recovering the penalty, the statute which gave it.

The Irresistible, 7 Wheat. 551; Broughton v. Branch Bank, 17 Ala. 828; People v. Gill, 7 Cal. 356; Cochran v. Taylor, 13 Ohio N. S. 382.

3. *Cases where Laws are Repealed which Forbade Particular Contracts*.—These cases present more difficulties than those already considered, and there has not often been occasion to pass directly upon the effect of a repeal where the repealing statute contained no express provision on the subject of the previous invalid contracts. It might be urged with some plausibility that if the contracts were such as the common law would have sanctioned, and which, therefore, would have been valid but for the statute, the repeal of the statute, thereby removing everything which constituted an impediment to their validity, must leave them subject to the rules of the common law, and, therefore, enforceable. An illustration may be taken from the prohibitory liquor laws, so called. These laws, in general, forbid the making of certain contracts which, at the common law, would have been perfectly legal and valid. Remove the statute, and what impediment remains to the enforcement of such a contract? All the elements of a recovery then exist—an agreement of minds and a consideration—and nothing is in the way, unless it be the statute which has now been repealed. Has the dead statute vitality for any such purpose? But, on the other hand, the condition of things at the time the statute was repealed cannot be ignored. If there was then no contract, how can the repeal of the statute bring a contract into existence? The general rule unquestionably is, that a negotiation between parties must depend for its validity and construction upon the law in force at the time when, and the place where, it was executed. This is so even where the remedy is pursued in another jurisdiction; the tribunal which is called upon to enforce rights under it ascertains what those rights are by enquiring what force and effect was given to the contract by the law of the place at the time of contracting. This is elementary. If, therefore, that law utterly forbade any contract of the nature of that which is relied upon, it is not perceived how any change in the law, which simply removes an impediment to enter into a contract, could impart vitality to a void negotiation, any more than it could import new terms into a valid agreement. If there was no contract while the law was in force, there remains none after it was repealed. This seems plain.

See Milne v. Huber, 3 McLean, 212.

It is possible, however, that the terms of the statute which preclude a recovery may have something to do with the effect of the repeal. If the statute forbade any contracts, its repeal, as already stated, can create none. But if, on the other hand, the statute only permitted a certain defiance to be made to a contract, there would at least be plausibility in an argument that, when the statute which gave the defense was taken away, the contract remained and would be enforceable. The distinction is a somewhat nice one, and it would not be safe to act upon it without satisfactory evidence in the statute itself that its purpose was not to make all contracts of the kind absolutely null and void, but rather to give a defence as a privilege. Such a privilege could only become available when suit was brought; and if before that time the law which gave it was taken away, the privilege would be gone. But a void contract must be treated as invalid whenever the facts which constitute its invalidity are brought to the attention of the court.

The question of the legislative right to make valid an agree- meant which, by the law under which it was made, was invalid, would seem to be now so conclusively determined as not any longer to be the subject of discussion. The right has been affirmed in a great variety of cases, and the argument that, in validating the invalid agreement, the legislature is in effect making for the parties a contract where no contract existed before, has almost invariably been put aside as unsound. The legislature, it is said, is only furthering the apparent design and purpose of the parties when it removes the statutory impediment to the validity of their arrangements, and gives them legal effect. It can wrong no one to remove a legal bar to the accomplishment of that which he has attempted.

A leading case on this point was that in which the Supreme Court of Pennsylvania affirmed the right of the legislature to validate one of the Connecticut leases of land in that Commonwealth, which the courts had previously declared, as a result of state legislation on the subject, were void, and could not create the relation of landlord and tenant. The legislature subsequently, by declaratory act, affirmed the validity of such leases, and of the relation of landlord and tenant under them. This presented very squarely the question of legislative power, which is above suggested, and it was squarely met by the court in an able opinion, often since that time followed in that and other states.

Satterlee v. Mathewson, 16 S. & R. 169. For other Pennsylvania cases affirming the same principle see Walton's Lessee v. Bailey, I Binn. 477; Haas v. Wentz, 4 S. & R. 361; Underwood v. Lilly, 10 S. & R. 101; Barnet v. Barnet, 15 S. & R. 72; Tate v. Stooltzfoos, 16 S. & R. 35; Bleakney v. Bank of Greencastle, 17 S. & R. 64; Menges v. Wertman, I Penn. St. 218; Journeay v. Gibson, 56 Penn. St. 57.

In this case the legislation was attacked as destructive of vested rights, and as violating the obligation of contracts. It certainly violated no vested rights, unless an inequitable defense could be held to be one, for a defense against a fair contract must always, so far as the party himself is concerned, be inequitable.

See Foster v, Essex Bank, 16 Mass. 245; Welch v. Wordsworth, 30 Conn. 149.

Neither did it violate the obligation of contracts.

Its purpose, on the other hand, was to perfect the contract and do away with the difficulty in its

enforcement.

Satterlee v. Matliewson, 2 Pet. 380. See Watson v. Mercer, 8 Pet. 88; Carpenter v. Pennsylvania, 17 How. 456.

We cannot give the facts of other cases, many of which are equally strong and pointed; nor is it at all necessary when the principle is so firmly settled. Some further cases affirming it are given in the note.

Lewis v. McElvain, 16 Ohio, 347; Johnson v. Bentley, *ibid*. 97; Chestnut v. Shane's Lessee, 16 Ohio, 599; Trustees v. McCaughy, 2 Ohio N. S. 152; Goshen v. Stonington, 4 Conn. 209; Beach v. Walker, 6 Conn. 190; Norton v. Pettibone, 7 Conn. 319; Savings Bank v. Allen, 28 Conn. 97; Bass v. Columbus, 30 Geo. 845; Winchester v. Corina, 55 Me. 9; Andrews v. Russell, 7 Blackf. 474; Grimes v. Doe, 8 Blackf. 371; Maxey v. Wise, 25 Ind. I; Boyce v. Sinclair, 3 Bush, 264; Payne v. Treadwell, 16 CaI. 220; Deutzel v. Waldie, 30 Cal. 138; Sticknoth's Estate, 7 Nev. 227; Harris v. Rutledge, 19 Iowa, 389; Gibson v. Hibbard, 13 Mich. 215; State v. Norwood, 12 Md. 195.

In all these cases it is to be understood that the statute not only removes the legal impediment which before existed to a lawful contract, but it expressly assumes to validate the contracts attempted before. The question, therefore, does not arise on a mere repealing statute, and, consequently, the cases do not conflict with what has above been said—that a repealing statute leaves previous invalid arrangements in the same state of invalidity in which it found them. But this is not a necessary result; the legislature may retrospectively affirm that which would have been valid but for the statute repealed, provided that, in express terms, they declare their purpose to that effect. There are, indeed, certain limitations upon their power; it is generally conceded that they cannot retrospectively, by their affirmance of a contract, divest rights which have been acquired in reliance upon its invalidity;

Greenough v. Greenough, II Penn. St. 489; Southard v. Railroad Co., Dutch. 22; Brinton v. Seevers, 12 Iowa, 389; Sherwood v. Fleming, 25 Texas, 408; State v. Warren, 28 Md. 338.

nor could they validate a contract obtained by fraud or duress, or from an insane person.

White Mountains R. R. Co. v. White Mountains R. R. Co. of N. H., 50 N. H. 50; Routsong v. Wolf, 35 Mo. 174.

These are very plain exceptions to the general power; they rest upon rules of right, the force of which is universally felt and conceded. The contract of a married woman, however, or of an infant, entered into after he had arrived at an age when only the statutory impediment could stand in the way of his acting independently, might, as we think, be validated.

See Chestnut v. Shane's Lessee, 16 Ohio, 599; Goshorn v. Purcell, II Ohio N. S. 641; Dulany's Lessee v. Tilghman, 6 G. & J. 461; Walton's Lessee v. Bailey, I Binn. 477; Journeay v. Gibson, 56 Penn. St. 57.

What has above been said is applicable not only to cases of contracts forbidden, and to those which have been executed by parties while laboring under legal disabilities, but also to contracts which are required to be made under particular formalities, and are invalid because the formalities are not complied with.

4. *Cases in which a Change in the Policy of the Law might Affect Contracts*.—The cases are numerous in which contracts are held to be invalid because they contravene some general policy of the state. This policy may be declared or established by statute, or it may result from the common law as it is accepted and enforced in the state. It is now a rule of general acceptance that, whenever a thing is forbidden by statute, it is illegal to do it, and any contract having in view to circumvent and defeat the purpose of the statute is also illegal, and, therefore, void.

Bartlett v. Vinor, Carth. 252; *s. c.*, Skinner, 322; Drury v. Defontaine, I Taunt. 136; Fowler v. Scully, 72 Penn. St. 456; I Pars, on Cont. 457–459.

Nor need the prohibition be direct; it is sufficient that the statute has in view a purpose which it undertakes to accomplish, and that the contract is either designed to defeat that purpose, or will tend naturally to do so.

O'Hara v. Carpenter, 23 Mich. 410.

Therefore a contract, the object of which is to evade the revenue laws of the country, or a contract originating in a business transaction on Sunday, when such transactions are forbidden, are as much void when not directly so declared as when they are.

2 Pars, on Cont. 753, 757, and cases cited. There are, of course, exceptions to this as to all other rules. If a statute imposes a penalty for the doing of a certain act, and it seems to be the intention, in passing it, that the payment of the penalty shall be the sole liability for the doing of such act, the act itself may be valid. Pangborn v. Westlake, 36 Iowa, 546.

And the rule is the same where the infirmity in the contract is because of its contravening some general principle of the common law. An immoral contract, a contract which tends to corrupt legislation, a contract in general restraint of marriage, a champertous contract—all these are incapable of enforcement for the reason above assigned.

Pothier on Obligations, 1–9; 2 Pars, on Cont. 747.

And as such contracts would be unlawful in their inception, it is not believed that a statutory change in the policy of the state, effected by legislation after such contracts had been entered into, would, render them susceptible of enforcement. If they were not contracts when the legislation was enacted, doing away with the cause of the invalidity would not impart life to them. The cause had accomplished the mischief before. The repeal of a statute of limitations does not revive a cause of action previously barred by it, and the principle would seem to apply in all cases where an agreement of parties is, for any reason, incapable of enforcement. If originally invalid, it is not called into existence as an effective engagement by removing, *ex post facto*, that which precluded its being formed if once valid, and afterwards put an end to, it cannot be revived by removing that which had destroyed it.

But the question might still remain, whether an express legislative recognition of contracts, originally invalid for repugnancy to some rule of public policy, might not give them legal force? Suppose, for example, a contract void because in restraint of trade; what principle should preclude its being retrospectively validated, that would not be equally applicable to a contract invalid because expressly prohibited by law? In either case the legislature would be giving effect, to the manifest purpose of the parties, in entering into the agreement, by removing the impediment which they had encountered. Indeed, the reasons for interference would commonly be stronger in those cases than in the case of contracts rendered invalid by statute; for public policy, in its application to contracts, is not always so clear and distinct as to apprise parties with reasonable certainty what compacts they may, and what they may not, make; and Those which are entered into in perfect good faith are sometimes held invalid because opposed to a public policy which the parties themselves failed to comprehend. The illustration of contracts in restraint of trade is very pertinent here. It is utterly impossible for any one to determine at this time, from the reported cases, how far the old common law on this subject is now in force. That it is greatly modified, in the changed circumstances of this country, may be safely affirmed in the light of the most recent decisions;

Oregon Steam Nav. Co. v. Winsor, 20 Wall. 64; Schwalm v. Holmes, 49 Cal. 665; Beal v. Chase, 31 Mich. 490.

and it would seem not only an act warranted by law, but by sound reason and good morals, to put at rest the questions relating to such contracts as far as possible—not only for the future, but for existing arrangements also. If it is allowable to validate a contract which the statute at the time would not sanction, still more certainly ought it to be to affirm one only forbidden by some vague and uncertain rule of public policy, respecting the existence of which even an expert might reasonably be in doubt. Indeed, where the policy itself had been growing fainter and more uncertain in the lapse of time, as it has in the case referred to, until even the courts are in doubt whether it should be recognized at all, a legislative declaration that it should no longer be recognized might possibly be held to be evidence that the policy itself had previously disappeared, so that courts might feel at liberty to enforce previous contracts entered into in good faith, and which, if made since the legislation, would be plainly and unmistakably legal.

The repeal of a law which forbade certain contracts might possibly raise questions of the right to recover back that which had been paid upon, or received in consideration, thereof. If a contract is illegal, and something has been given for or done under it, the general rule of law is that the courts will not interfere to aid either party. If they have engaged in an unlawful negotiation, and one has suffered in consequence, the law will not undertake to relieve. The law cannot concern itself with a settlement of equities growing out of a transaction in which, by reason of their disobedience of law, none of the parties have any claim to consideration. Possibly an exception might be made to this rule in cases where to interfere might be the most likely means of making the law respected in the future, and where not to interfere would only encourage future disobedience."

Compare Adams v. Gay, 19 Vt. 358; Smith v. Bean, 15 N. H. 577; Tucker v. Mowrey, 12 Mich. 378; Sumner v. Jones, 24 Vt. 317; Dodson v. Harris, 10 Ala. 566; Myers v. Meinrath, 101 Mass. 366; Holman v. Johnson, Cowp. 343; Waymell v. Reed, 5 T. R. 599.

And sometimes it is expressly provided by statute that whatever is received on a specified illegal transaction shall be deemed to be received without consideration, and may be recovered back. Of such a statute there might possibly be room for saying that it was penal in its nature, and its repeal took away the right of recovery it gave. But as it only provides that one shall have back what another has unlawfully obtained from him, there would be at least equal reason for saying that it could fairly be called a remedial statute. The right under it would be a right to recover money had and received by the defendant to the plaintiff's use—a right sounding in contract; and; in general, such rights, when they once accrue, are not to be affected by the mere repeal of the statute, or the change in the common law under which they arise.

5. *Cases where Statutes undertake to give a New Defence to Contracts*.—The general rule of law which requires statutes to be so construed as to apply prospectively only, unless "by their terms a retrospective effect is clearly intended, would prevent the statutes here referred to applying to-existing contracts where a purpose to that effect is not explicitly declared or plainly evidenced by the statute. Supposing such a purpose to be

apparent, the question will remain, how far it is competent to give it effect. In certain cases it is unquestionably admissible; in others it is not in the power of the legislature to authorize that to be accepted as a defence to a contract which was not such when the contract was entered into. The distinction between the two classes of cases would seem to be this: If the new defence would defeat a contract previously valid, or take away any right assured to the party by it, then the defense could not be allowed, for it would come within the prohibition of that clause of the constitution of the United States which forbids the states passing laws which impair the obligation of contracts. But if the new defense only presents legal objections in some new way, or is designed only to make available an existing equity, the provision for it should be regarded as affecting the remedy only, and for that reason competent and admissible. But it is admitted that this classification is not very exact; for a contract may possibly be legal, and yet opposed to some plain equity which the law ought to recognize, if it does not. Whether a defect in the law in this regard may not be remedied, and the amended law applied to existing arrangements, will be considered further on.

Of the cases in which new defenses have been held not admissible, we may refer to those relating to slave contracts, which were entered into while slavery was lawful and enforced afterwards, notwithstanding positive legislative or constitutional enactments declaring that it should be admissible to show in defense what was the consideration, and that it should constitute a complete defense. Remembering that the whole policy of the country had been changed by the constitutional declaration of the illegality of slavery, it would seem that if any class of contracts could be declared invalid in consequence of the subsequent legislation, then these must certainly be. If made now, they would not only be declared invalid on constitutional grounds, but also because, to sustain them at all, positive law would be required. Slavery rests upon positive law, and cannot exist independent of it. Nevertheless, such contracts entered into while such positive law existed must be enforced. We may think them unwise, impolitic, immoral if you please, but the law recognizes them now because it did so when they were made. The new defense, which would import into them an infirmity not then recognized, cannot be admitted.

White v. Hart, 13 Wall. 646; Osborn v. Nicholson, *ibid*. 654.

But it is familiar law that remedies are always under leg- islative control, and may be changed at will, provided the change does not go to the extent of depriving the one party of substantial redress, or of fastening upon the other some new obligation.

That a statute is void which takes away all remedy is a principle that would seem to require no support from authorities. A few are referred to. Call v. Hagger, 8 Mass. 423; Bruce v. Schuyler, 4 Gilm. 321; West v. Sansorn, 44 Geo. 295; Coffman v. Bank of Kentucky, 40 Miss. 29; Jacobs v. Smallwood, 63 N. C. 112; Hudspeth v. Davis, 41 Ala. 389; Griffin v. Wilcox, 21 Ind. 371; Rison v. Farr, 24 Ark. 461, McFarland v. Butler, 8 Minn. 116.

In the exercise of this legislative control it is often deemed just and proper that new defenses be given in order to work out more perfectly, by means of them, the real equities of the parties. If this is all that is sought, it cannot be inadmissible. A technical rule of law may be removed where only injustice would result from its enforcement. A legal defense may be allowed where only an equitable defense existed before. A set-off, or recoupment, may be substituted for a cross-suit, and so on. Nothing of this nature violates the obligation of contracts. It is only in the direction of giving a reasonable and just effect to contracts, and the policy of the law would favor rather than forbid it. To give more complete and effectual defenses, so long as they only bring out the just rights of the parties, is no more unjust, nor, as we believe, more unwarranted, than to take away merely technical or inequitable defenses. In either case, justice is promoted, and no rights entitled to protection are violated.

Hope v. Johnson, 2 Yerg. 123; Brandon v. Green, 7 Humph. 130; Lewis v. McElvain, 16 Ohio, 347; Bolton v. Johns, 5 Penn. St. 145; Sunderland v. De Leon, I Texas, 250; Steamboat Co. v. Barclay, 30 Ala. 120; Cutts v. Hardee, 38 Geo. 35a

On this branch of our subject, reference may be made to some early cases in Massachusetts. It was decided by the supreme court of that state that a prisoner within the jail limits was not at liberty to enter upon the premises of private individuals, though they were within the prison bounds, and that a breach of his bond for the jail limits was committed if he did so. Subsequently the legislature changed the law in this regard, and enacted that no person, having given bond for the liberty of the yard, should be considered as having committed an escape in consequence of having entered into or upon any private estate or property lying within the limits of such jail-yard. In suits subsequently brought, the court applied this statute to breaches which had previously occurred.

Walter v. Bacon, 8 Mass. 468; Patterson v. Philbrook, 9 Mass. 151; Locke v. Dane, *ibid*. 359. Compare with these Fisher v. Cockerill, 5 T. B. Monr. 122; Lewis v. Brackenridge, 1 Blackf. 220.

We should say of these cases that they go to the very extreme limit of what is admissible, for they *seem* to change the legal effect and obligation of the contract itself, and to render that not a breach which was a breach

when the contract was entered into. It is to be observed, however, on an examination of the cases, that the reasons for the passing of the act were the doubt which had existed on the subject before, and the fact that parties had passed the prison limits in the full belief that the law permitted what they were doing, and without any intention to violate their contract. There was, therefore, in their cases something in the nature of mistake; of law, it is true, rather than of fact; but a mistake of law always presents some claim to equitable consideration, and it may be deserving of serious reflection whether to permit relief in cases of such mistakes would not be fairly within the competency of the legislature under principles already recognized. The reasons for permitting equity to relieve against mistakes of fact, but not against mistakes of law, are not very plain to the common apprehension, and cases often occur which it would seem just to make exceptions.

That new defences may be made available in suits pending when they were provided for, see U. S. Bank v. Longworth, I McLean, 35.

We have referred to the statute of limitations as cutting off rights under contracts. It is a general and very just rule that new conditions cannot lawfully, by legislation, be imported into contracts;

Robinson v. Magee, 9 Cal. 81.

but reasonable regulations are always admissible, even though they might result in a loss of remedy when not complied with. A statute of limitations would come under this head; so would a provision for the compul sory registry of deeds and other like instruments. Possibly such provisions might be so unreasonable as to require the courts to declare that they took away rights under pretence of regulating them; but we speak of those cases where the regulations are such in fact, and not in pretence merely.

6. *Cases of New Recognition of Rights where there has been Wrongful Action.*—From time to time the law of torts is changed, and remedies given where none existed before. It is not customary to make legislation of this character retrospective, and the right to do so is sufficiently questionable to justify its not being attempted. But it would also be impolitic in a high degree. It might possibly not be held to come within the technical definition of *ex post facto* legislation, but, in substance and effect, it would differ from it so little that a court might well hesitate to enforce it. The question of the right to provide for and recognize new defenses in the case of wrongs previously committed would be different. It might not be admissible to make an act a tort which was not so when done, but it might be perfectly just to allow a tort previously committed to be mitigated by all those circumstances which would in any way tend to excuse it, or to relieve the responsible party from any of the consequences.

We have always believed that when the question of the power of the legislature to narrow, qualify, or take away, rights of action was in question, too much importance was attached to the circumstance that the right did or did not arise out of contract. True, the federal constitution, undertakes to defend contracts only; but did they really need this defence? Would they not, on general principles of constitutional law universally recognized in this country, be inviolable by legislative authority, whether expressly guarded as they now are or not? The question may not now be of practical importance, but it is not perceived how the legislature could be powerless to take away a man's horse, and yet competent to confiscate his commercial paper. The one is property as well as the other. And where a right of action results from the principles of the common law, and has once become fixed and vested, it would seem that this also should be considered inviolable on the same reasons.

See Griffin v. Wilcox, 21 Ind. 370; Hubbard v. Brainerd, 35 Conn. 563; Bryan v. Walker, 64 N. C. 146. Compare White v. Hart, 13 Wall. 646.

We use the word "contract" here in its ordinary sense, as the framers of the constitution doubtless did also. Of chartered rights we have no occasion now to speak.

But there are some defences in the case of torts that are not wholly reasonable, and that often operate unjustly. An instance may be taken of the rule that a party who has suffered by reason of the negligence of another shall not be allowed to recover if his own negligence directly contributed to the injury. On public grounds the rule may be wise, but it very often works gross injustice. If two parties are alike negligent, and the whole injury has changed to fall upon one, there is no just reason, when we consider the cases of the two parties, why the other should not be compelled to share the loss with him. The courts of admiralty require this, and the courts of some other countries apportion the loss as best they may be able under all the circumstances. Suppose the legislature to require our courts of common law to do so, and apply the new rule to previous transactions; what would be the ground of complaint? Only, as we should suppose, this: that taking away the defence was really creating a new right of action. It purports to affect the remedy, but it really gives a right; it is an indirect method of accomplishing an inadmissible result. Legislation may not create torts; but to limit by statute the recovery for torts to what is just and right, as between the parties, wrongs no one, even though the recovery be based upon transactions which took place before the statute was adopted.

T. M. Cooley.

The Law of Domicil, Considered with Special Reference to the Commercial Relations, Taxes, Succession to Estates.
BY Francis Wharton, LL.D.,
Author of Law Evidence, Law of Negligence, Etc.
G. L. Jones and Company, St. Louis 1877. *Press of G. I. Jones and Company*. St. Louis

The Law of Domicil.

Every person is subject to some particular system of law, by which he is more or less exclusively bound. The necessity of this will be more obvious when we view man, *first*, as to his commercial relations; *second*, as to his taxes; and, *third*, as to the succession to his estate on his death.

As to commercial relations, there are many cases, in this connection, in which it is important to determine the law with which an individual may be viewed as identified. A note is payable to me, for instance, but on its face no specific place of payment is designated. The presumption, in such case, is that the law by which the mode of payment is settled is the law in which I am myself enveloped. So, also, may it be inferred as to moratory interest flowing from me, when no other law is specified by which such interest may be governed. So, if I be an insurer, as to policies issued by me; or, if I be a banker, as to obligations issued by me. In default of other modes of discovering the law binding such cases, jurisprudence selects the law to which I am subjected myself.

So, in a still higher degree, is it with taxes. A man cannot, on any common principles of justice, be taxed for the same subject-matter by two independent sovereignties. He cannot, therefore, be taxed as to his income, or as to his person, or as to his estate, by more than one of the states of our American Union, although a contrary practice has, as to personal property, occasionally been resorted to. He cannot be taxed by *both* the United States and a foreign country; for, if he could, all the nations in the world, who could get hold either of him or of his property, could come down on him, and universal commercial ruin would ensue. In reference to taxes, therefore, even more fully than in reference to commercial obligation, each person must be viewed as subject to some one particular law, by which alone he is to be governed. This law, indeed, may involve a series of successively subordinate jurisdictions. Thus, subordinate to the federal government is the state, and subordinate to the state is the town; and these may, each in its sphere, tax the same person. But *two* governments of equal rank cannot *both* make the same person individually liable for personal taxes. Therefore, a man can be *personally* taxable only in *one* town in Massachusetts, or in *one* state in the American Union, or in *one* empire among the great powers of the world. And there must be some test, in cases of conflict, to determine to which claimant the taxes are to be paid. This test is supplied by domicil. Real estate and, according to the better opinion, personal assets are taxable by the law of the place where they are situated. But income taxes, poll taxes, and taxes on debts payable (without local security) to the creditor at his domicil, are settled by the *lex domicilii*.

So, still more strikingly, is it the case in the descent of estates. Few of us can be sure where we will die. Even those who have resisted, in youth, the dislodging power of enterprise, are apt, when their life is closing, to wander listlessly abroad in the restless languor of old age. New countries, in fact, are populated by emigration, and old countries renovated by emigration's reactions. Europe sends us its surplus populations to form our new families, whose object is to make money, and these new families, when they become old, go to Europe to spend the money so made. Domestic discomfort, also, has its share in producing these migratory propensities. Europe, it has been said, sends us our cooks, and our cooks send us to Europe. But, whatever may be the cause, the tendency to travel is almost universal; and those who do not travel to make money, travel to spend it. Hence it is that the place of a man's death is far from being universally the place of his home, or of his business. Such being the case, it is of much moment to us to determine whether the property we leave is to be sequestered by some foreign state—to pass through devious channels to objects which we did not intend, or whether it is to be placed in the custody of laws with which we are familiar, and of guardians whom we may elect. There is nothing, in the chances and changes of life, in which, as has been just seen, there is greater likelihood of a conflict of laws. And yet there is no subject as to which we must be more anxious to prevent, while as yet we can, the occurrence of such a conflict. This can be done only by agreeing, internationally, upon a common arbiter, by which a just, a universal, a peaceful, and a pre-ascertainable result can be reached. And this arbiter is the *lex domicile*.

We have thus noticed three personal relations as to which there is constant likelihood of conflict, and as to which, therefore, it is important to have some common test, internationally acknowledged, by which we can

determine the applicatory law. These relations, to recapitulate, are, *first*, business in general, so far as concerns contracts with others; *second*, taxation; *third*, succession after death. What test, therefore, is there, of international acceptance, which we can adopt to determine collision on these topics ? Let us glance, in turn, at the tests which have been at different times suggested, closing with that which alone has a philosophical basis, and which has secured international assent, showing, as we proceed, that domicile affords the only just arbiter.

First. Can Present Residence be such a Test?—If so, a man doing business temporarily in Boston, no matter how settled his permanent abode might be elsewhere, might be subject to Massachusetts law. Yet this would be only during his residence; and as soon as his residence shifts, the applicatory law shifts. Supposing, for instance, that he leaves Boston at noon, by the Shore Line, for New York. In this case, independently of the series of local municipalities through which he rushes, and which in rapid succession permeate him with their respective judicial atmospheres, he is, in turn, subjected to four sovereign jurisprudences: Massachusetts, Rhode Island, Connecticut, and New York. If he have a note payable, with no designation of the place of payment, then this note, as he moves—if mere residence be the test—changes its legal hue at each boundary, and becomes, as to some of its incidents, substantially a new paper three times in an afternoon. This, however, would be as destructive to business as it is absurd. Then, again, the place we may happen to be in, at any particular time, is the result often of accident, determined sometimes by negligence, sometimes by providential dispensations which we cannot control; and it would be as unphilosophical as pernicious to make our most solemn engagements and dispositions of property depend on contingencies so arbitrary. Hence it is that by no civilized nation is mere residence regarded as the test by which the law, in cases of conflict, can be determined.

If *residence* must be rejected, so must, *a fortiori*, nationality, Nationality cannot apply as between the sister states of the American Union, each of which has a separate jurisprudence, while the oath of allegiance is to the federal government alone. Again, the right of expatriation is now by treaty acknowledged by the great powers of Christendom; and expatriation implies a voluntary divesting of one nationality before the full obligations of a second have matured. Neither residence nor nationality, therefore, can be invoked to supply the missing test.

But the need has been met by the adoption, by the consent of jurists of all nations, of domicil, as supplying, so far as concerns personal *status*, the applicatory law. Domicil, in some cases, interprets a man's contracts; domicile always determines his personal taxes; domicil always directs his succession. What, then, is domicile ?

By the American courts it has been substantially defined as a *particular place adopted by a person as his permanent residence, to be retained by him, as such, for an indefinite period of time*. It is not necessary, as will hereafter be seen, that this domicile should be one in which he is invested with political rights; nor need it be his corporeal residence at a given period of time, for he may leave it for years, and yet retain it as domicile, if he have the intention of returning; nor need he be even a citizen of the country in which domicile is claimed, for he may have a domicil before he is naturalized. But it is essential that such domicil should be either impliedly or expressly adopted by him, and occupied as his permanent residence, to be indefinitely retained by him. And this definition has been accepted substantially by the whole civilized world.

Such being the definition of domicil, there are several questions connected with it which will now be examined, as follows:

First. Domicil by Birth.—By the Roman law, legitimate children have the same domicil as their father. It was open to them, however, subsequently to elect another domicil, upon which the first ceased to exist. But until they were competent to execute such choice, and actually executed it, their domicil followed that of their father in whatever changes he might make, provided they remained members of his household. The modern law differs from the Roman, in this respect, as follows: *Origo*, in the old Roman sense, is now obsolete. The modern idea of *origo* simply conveys the legal fiction that a child is domiciled, at his birth, in the place of his father's domicil. This form of *origo* (descent, Herkunft) fixes alike the jurisdiction that attaches to the child and the legal relations with which he is invested. To this state several modern civilians have applied the term *domicilium origins*, and although this expression involves an absurdity according to the Roman law, it rests upon a natural hypothesis in our own. It simply means: "This was a domicil acquired, not by choice, but by birth."

In England it has recently been held that there can be no change of domicil during infancy, and that the lapse of seven years after the attainment of majority cannot be regarded as affording a period sufficiently long to establish a change of domicil, in the face of any expressed intention to change.

Jopp v. Wood, 4 De G. J. & S. 616.

In the United States legitimate children accept the domicil of their father. A foreign born child of a domiciled city zen of the United States, however, has a double allegiance, and, on reaching maturity, he has the right to elect one allegiance and repudiate the other. And such election is final.

Ludlaw v. Ludlaw, 26 N. Y. (12 Smith) 356. See letter from Mr. Seward to Mr.—, Dip. Cor. 1868, pt. 11,935. That an infant follows the domicil of surviving parent, see Ryall v. Kennedy, 40 N. V. Sup. Ct. 347.

Illegitimate children inherit, as a rule, the mother's domicil, irrespective of the place of birth.

Whart. Conf. of Laws, § 37.

Under those codes, however, which give to the father the power of legitimating an illegitimate child by acknowledgment, the father's domicil, after such acknowledgment, followed by adoption, must prevail.

Second. Domicil and Nationality.—On this topic the following rules may be regarded as settled:

- Domicil and nationality are not convertible terms. There may be domicil without nationality, and nationality without domicil. Thus, a German who emigrates with his family to this country, intending to make his permanent home on our soil, loses his German domicil and acquires an American as soon as lie takes up his abode among us, though he may take no steps to become an American citizen, and, indeed, before he has had an opportunity to take such steps. So, on the other hand, an American citizen may acquire a domicil in Europe without abandoning his American nationality. This is peculiarly the case with merchants, who frequently, while retaining their national ties of allegiance, acquire a commercial domicil in foreign lands. So, also, in a still stronger sense, is it in relation to taxes. We do not hesitate, for instance, to tax, as domiciled among us, a French merchant who may, nevertheless, decline to view himself as an American citizen; may resolutely cling to his French allegiance; and may always express an intention of returning to France. Nor is it likely that our courts will hesitate to apply the same rule to the Chinese. They are a thrifty race, many of whom, in the course of time, may acquire large fortunes under the protection of our laws. At the same time they decline, as a class, to accept our nation- ality, and they adhere, with religious pertinacity, to the determination of returning, before death, to their native land. Are such men, living and growing rich under the shelter of our flag, to be relieved from taxation ? Are they to be treated, as is the case with other undomiciled strangers, as still clothed with the legal *status* assigned to them by their native land, and entitled, when among us, to avail themselves of the privileges of that *status?* This is one of the undetermined questions of the future. But when it arises I cannot but believe that the decision will be that, as there may be domicil without nationality, so the obligations of domicil must be held to attach to the Chinese who take up their permanent abode on our shores, no matter how solemn may be their determination ultimately to return to their own land, or how severely they may maintain among us the distinctiveness of their Chinese nationality.

We must also remember that, when there is no other claim to nationality, that of domicil, or even of a long residence, may decide. It should be observed that there may even be nationality without naturalization. That naturalization is not essential to citizenship has been established in the United States by many precedents. When Texas was annexed, in 1845, its citizens became citizens of the United States by force of treaty; and such was the case with the treaty with Spain, annexing Florida, in 1819, and the treaty with France, annexing Louisiana, in 1803. The same rule applies to the late annexations of Savoy by France, and of Alsace by Germany.

In a number of our states foreigners are admitted as citizens before they are naturalized as citizens of the United States; and, so far as concerns the right to enjoy state privileges, this was held to be constitutional in the Dred Scott case. A country may decline to pass naturalization laws, yet in such countries we can readily conceive of emigrants acquiring nationality; and so as to *bona fide* settlers in the United States, in the period between their declaration of intention and their final naturalization.

For two reasons the old feudal idea of the perpetuity of the nationality of birth, and, *a fortiori*, the perpetuity of the domicil of birth, must be now viewed as exploded. In the first place, a sovereign who permits his subject to emigrate relinquishes all claims of sovereignty over such subject. In the second place, recent treaties between the great civilized powers of Christendom recognize the right of expatriation, and renounce the claim of perpetual allegiance.

Third. How Domicil may be Changed.—A domicil once accepted is not to be viewed as divested by mere absence, no matter how long such absence may continue. Of this the most striking illustrations are those of merchants or factors in foreign ports; of officers in foreign service; of seafaring men; and of political refugees, whose return to their native land is temporarily barred.

"With regard to the domicil of birth," said Lord Cairns in a late case, "the personal *status* indicated by that term clings and adheres to the subject of it until an actual change is made by which the personal *status* of another domicil is acquired."

Bell v. Kennedy, Law Rep. 3 H. of L. 307.

The same rule may be applied, generally, to domicil by election or operation of law.

"The *animus* to abandon one domicil for another," said Lord Curriehill in a Scotch case,

Donaldson v. McClure, 20 D. 307; and see Jopp v. Wood, 4 De G. J. & S. 616.

"imports an intention, not only to relinquish those peculiar rights, privileges, and immunities which the law and constitution of the domicil confer—in the domestic relations, in purchases and sales, and other business transactions, in political or municipal *status*, and in the daily affairs of common life—but also the laws by which succession to property is regulated after death. The abandonment or change of a domicil is, therefore, a

proceeding of a very serious nature, and an intention to make such a change requires to be proved by a very satisfactory evidence." Intent is essential to a change of domicil, and unconditional intent must be substantially proved. And it has been ruled by Vice-Chancellor Wigram that the evidence necessary to support the intention must be either express, or such as to show that, if the question had been formally submitted to the party whose domicil is in dispute, he would have declared his wish in favor of a change. Such an intention must be either shown to have actually existed in the mind of the party, or it must appear that it was reasonably certain it would have existed if the question had arisen in a form requiring a deliberate and solemn determination.

Douglass v. Douglass, 41 L. J. Ch. 74.

When, however, an old domicil is definitely abandoned, and a new one selected and entered upon, "length of time is not important; one day will be sufficient, provided the *animus* exists."

See Moorhoase v. Lord, to H. of L. Cas. 272; *Munro v. Munro*, 7 C. & F. 842; Jopp v. Wood, 4 De G. J. & S. 616; Parsons v. Bangor, 61 Me. 457; Hamden v. Levant, 59 Me. 557; Ross v. Ross, 103 Mass. 575; First: Nat. Bk. v. Balcom, 35 Conn. 351; Moreland v. Davidson, 71 Penn. St. 371; Reed's Appeal, 71 Penn. St. 378; Smith v. Dalton, I Cin. (o.) 150; Daniel v. Sullivan, 46 Ga. 277; Hawkins v. Arnold, 46 Ga. 659, Wood v. Fitzgerald, 3 Oregon, 268. Cragie v. Servin, 3 Curteis, 448. *Uno solo die constituitur Comicilium si de volunlate affareat*.

It is important to observe, especially in reference to emigrants to the United States, that, when the point of destination is not reached, domicil may shift *in itinere*, if the abandonment of the old domicil and the setting out for the new are plainly shown.

Sir J. Leach, in Munroe v. Douglass, 5 Madd. 405; Forbes v. Forbes,. Kay. 354.

A constructive residence may on this plan give domicil, though an actual residence may not have begun.

Williams v. Roxbury, 12 Gray, 21. In Fayette v. Livermore, 62 Me. 229,. it was held that a domicil of a woman cannot be changed by a mere intention to move, until actual removal. See, also, Carey's Appeal, 75 Penn. St. 201; Kellar v. Baird, 5 Heisk. 39. In Bangs v. Brewster, III Mass. 382, where a master mariner, in 1867, being domiciled in B., went to sea with his wife, intending to make his home at O., and sent her, in 1868, to O., where she boarded with her father, and in July, 1869, arrived at O. himself, it was held that in May, 1869, his domicil was in O.

Settlement, however, whether actual or constructive, is necessary to domicil.

Munro v. Munro, 7 C. & F. 877; Blunier *ex parity* 27 Texas, 734 Hill v. Woodville, 38 Miss. 646; Hicks v. Skinner, 72 N. C. 1.

But it is enough to give the new domi- cil that the party should reside in it with the intention of remaining indefinitely. In such a case it is not necessary that there should be the purpose of technically permanent residence.

sleeper v. Paige, 15 Gray, 349; Whitney v. Sherborn, 12 AlIen, III; Wilbrsliam v. Ludlow, 99 Mass. 587; Whart. Conf. of Laws, §§ 20-24.

Much discussion has been had on the question whether, when an elective domicil has been abandoned, that which was original revives. Judge Story earnestly advocates such revival;

Story Conf. of Laws, § 48.

and to the same effect is the decision of a Scotch court

Colville v. Lander, Morison, 14,963, App.; 5 Madd. 384.

and of the supreme court of Tennessee.

Kellar v. Baird, 5 Heisk. 39.

Mr. Westlake explains and vindicates the old doctrine by saying,

Int. Law Art. 40; See Abdy's Kent, 217.

it "is commonly, though somewhat improperly, cited by the phrase, 'native allegiance easily reverts,' and its chief application has been in the prize courts. The liability of private property to warlike capture at sea has always depended, not merely on the nationality, but also on the domicil of the owner; or it may be said that, for this purpose, domicil is the criterion of nationality. The motive, doubtless, lay in the assumption that the benefit of trade mainly accrues to that country from the ports of which it is carried on; whence only an actually subsisting residence for commercial objects could afford protection to the owner's property as against his nationality, for when such residence was discontinued, nothing remains to take the case out of the general principle which exposed enemy's property, as such, to capture. With these considerations were combined the respect paid to the place of birth by the feudal principle of allegiance, and the recognized rule of international law, that a state to which allegiance has been transferred has not the right to protect the citizen against his former government, if by his voluntary act he again places himself within its power."

Yet it is important to remember that, whatever may be the reasons for the adoption of this doctrine of the revival of original domicil, when an elective domicil has been abandoned, it is inconsistent with the great body of the cases which place the adhesiveness of the elective domicil on the same basis as that of the original. Even

by those holding to revival of domicil it has been repeatedly admitted that, when an elective domicil is actually acquired, it continues until a new domicil is definitely assumed. Sir John Leach, always rapid in arriving at a necessary conclusion, tells us that the same evidence is required to prove the resumption of the old domicil as the acquisition of one that is new;

Munroe v. Douglass, 5 Madd. 403.

and, however this may be, we have an express decision of the Connecticut court of errors, that the abandonment of the elective domicil has no effect in reviving the original.

First Nat. Bk. v. Balcom, 35 Conn. 351. See, also, Hicks v. Skinner, 72 N. C. I, where it is held that, when domicil of origin is abandoned, residence is the test. So, in Reed's Appeal, 71 Penn. St. 378, it is said that original domicil revives only when there is an intent to return home.

Nor, in a question of this class, are we at liberty to keep out of view the test of policy. The consequences in the United States would be serious should the affirmative of this question be maintained. Emigrants come to us largely from countries subject to the modern Roman law, and make their domicil at their first port, often only to abandon it for another and then another, until they reach a home which affords them a convenient settlement. If we hold that on each abandonment they renew their original domicil, then their property and their persons would be frequently placed under the purview of a law utterly foreign to that which prevails in the country to which they emigrate. A German, for instance, abandoning a domicil in New York, in order to seek one, as yet undetermined, in the Northwest, would, as soon as he leaves New York, subject himself to the Roman law of marital community, thereby escaping the English common law of dower and curtesy; would sometimes, from being of full age, become a minor; would become sometimes incapable of any hypothecation of property without delivery, of possession; would subject himself to his native municipal burdens; and would throw his estate into foreign channels of succession. Such consequences are not to be tolerated; and yet such consequences necessarily flow from the position that native domicil revives on every abandonment of acquired domicil. Our wisest course is to reject this doctrine, and to return to that of the continuance of domicil in general, native or acquired, until a new domicil be secured.

In North Yarmouth v. Gardiner, 58 Me. 207, it is held that domicil may be in abeyance.

Fourth. How Change of Domicil is to be Proved.—I. Recitals.—It is a familiar principle that recitals of domicil in deed or will are not conclusive, but may be rebutted by proof that the actual domicil was elsewhere.

See cases cited in Whart on Ev. § 1097. Gilman v. Gilman, 52 Me. 165; Somerville *in re*, 4 Vesey, 750; Attorney General v. Kent, I Hurl. & Colt. 12; Curling v. Thornton, Addam's Rep. 19.

Recitals of domicil, in fact, are often inserted by a conveyancer according to his own notions, or according to what may suit a passing whim of the party. As a matter of every-day practice, also, persons having several residences are apt, in deeds relating to either, to have the local residence recited. The party's actual domicil, however, can be in only one of these residences, and it may, perhaps, be in none of them. Nor is this all. Local law may prescribe certain recitals, as in the Marquis de Bonneville's case, where Sir H. Jenner said: "I am not inclined to pay much attention to the descriptions of the deceased in the legal proceedings in France, for it may have been necessary, as the proceedings related to real property, that he should describe himself as of some place in that kingdom."

Curteis' Eco. Rep. 856.

If it be argued that the French courts attach much weight to this species of evidence,

See Phil. iv. 174, and cases there cited.

the answer is that the recitals appealed to in the French cases are principally those which occur in notarial acts, dictated by the party himself, and often verified by his oath.

II. Declarations.—Declarations preparatory to naturalization, under the present English and American statutes, are entitled to much weight as indicating intention. Even informal declarations of a person changing his residence, when accompanied with actual change, are always admissible to show the intent.

Brodie v. Brodie, 2 Sw. & Tr. go; Ennis v. Smith, 14 How. 400; Thorndike v. Boston, I Metc. (Mass.) 242; Kilburn v. Bennett, 3 Metc. (Mass.) 199; Burgess v. Clark, 3 Ind. 250.

It has, however, been held that mere unexecuted intentions are inadmissible,

Bangor v. Brewer, 47 Me. 97; see Whart. on Ev. &11097; and see Moke v. Fellman, 17 Tex. 367.

and even if this strong view be not taken, oral expressions indicative of an intention to change, if unaccompanied by actual removal, are so vague, and often so carelessly uttered, and so readily misunderstood, that they are entitled to very little credence.

Whart. Conf. of Laws, $63; Phil. iv. 156; Lord Somerville's Case, 5 Vesey, 750; Harvard College v. Gore, 5 Pick. 370; Anderson v. Lanenville, 9 Moore P. C. 325; Hallowell v. Saco, 5 Greenl. 143; The Venus, 8 Cranch. 253.

Unexecuted intentions, however, may be of importance, when they consist of statements of a person in a foreign country that he is not settled permanently in such country, but that he expects to return to the prior

domicil which he regards as his home.

. See Moorhouse v. Lord, 10 H. of L. 272.

III. Exercise of Political Rights.—Civilian jurists unite with our own in holding it important, in this relation, to determine the site of political rights: "Dictæ expressage declarationi domicile constituendi equipollent illa, si quis in civitate aliqua jus civitatis *das Bürgerrecht* impetraverit et ibi habitaverit, vulgo *da einer verburgert oder Brbschuldigung geleistel haüsslich und beständig gessesen ist*. Requtritur autem copulative, ut quis ibidem non solum jus illud impetraverit, sed etiam actualiter habitet."

Tractatio de Domicilio (1663), 27, cited by Phillimore, iv. 175.

Menochius also writes, after quoting other civilians, "et idem ego ipse respondi, *in cons*, 39O, etc., dixi civem hunc non sustinentem onera esse improprie civem et secundum quid;" and he adds the authority of other civilians, and the decisions in the *Rota Romana*, "qui scripserunt civem originarium aliquem non esse, nisi parentes ibi domicilium contraxermt et civitatis numera subierint; ita et. olim apud Romanos civis Romanos dicebatur is, qui etsi natus esset Romæ altamen domicilium Romæ in ipsâ urbe contraxîsset ac qui tribum et bonorum potestatem adoptus esset."

Lib. VI., Presump. XXX., s. xxiv., p. 1037; Phil, *ut supra*.

Under the old European systems, also, when political privileges were rare, and mostly had a feudal relation, the acquisition or acceptance of such privileges was viewed as connecting their possessor with a special territory. The domicil of the serf was in the land to which he was; the domical of the lord was in the land of which he was suzerain.

It was otherwise when political privileges became more common, and when they were annexed rather to the person than the soil. A man could have but one domicile, yet in England, in some parts of the Continent, and in Virginia, under the old system, he might vote at several polls. Suffrage now is regarded, under a wide and equal extension, as a personal right which may be exercised in any particular state of a general federation, only a few weeks' or months' special residence being required. In correspondence with this extension of suffrage, the presumption that the place of suffrage is the place of domicil has lost strength, and, where the right to vote is granted on brief and transient residence, the presumption arising from voting is easily rebutted by proof of actual domicil elsewhere.

Shelton v. Tiffon, 6 How. 163; Easterly v. Goodwin, 35 Conn. 279; Kellogg v. Oshkosh, 14 Wis. 623; Mandeville v. Huston, 15 La. Ann. 281; Folger v. Staughter, 19 La. Ann. 323; Guierv. O'Daniel, 1 Binney, 349, note. In Van Valkenburgh v. Brown, 43 Cal. 48, it was properly ruled that persons not citizens might legally be voters; this was the practice under the North-west Ordinance, which permitted the voting of French and Canadian settlers, not citizens. See Dr. Spear's article in Alb. L. J., 1876, 486. It is otherwise as to Indians with whom there is no treaty. McKay v. Campbell, 2 Sawyer, 118.

But the exercise of political franchise is not to be confounded with that deliberate surrender of one nationality and acceptance of another, which is marked by expatriation and naturalization. As the presumption of permanent residence to be deduced from voting is but slight, that to be drawn from expatriation and naturalization is of the strongest character, and amounts almost to conclusive proof. Even before expatriation was legalized by the government of Great Britain (as it has been by the statute of May 12, 1870), naturalization in another country was viewed in the English courts as very strong proof of transfer of domicil:

See Phil. iv. 176, 177; Moore v. Darral, 4 Hagg. 353.

Now, however, such expatriation and naturalization must be viewed as establishing a case of transfer of domicil which it would require extraordinary evidence of continuous inconsistent domicil to overcome.

IV. Payment of Taxes.—No strong inference can be drawn from payment or non-payment of taxes, unless in the case of property or income taxes of considerable amount.

Thomson v. Advocate General, 12 Cl. & Fin. 1; see Guier v. O'Daniel, I Binney, 349, note.

Yet here must we revert to the distinction already noticed. In a federal government, such as the United States, where an income tax is payable to the federal treasury, it may be a matter of indifference to a person taxed whether he pay in Maine or in Georgia; and after he has changed his domicil from the one state to the other he may continue, through his agent or otherwise, to pay such tax in the abandoned state. We cannot make this inference as to a tax payable to a state treasury. If this tax is considerable, we cannot, as has been previously hinted, presume that the party charged would pay when no longer liable to do so. Payment of taxes, therefore, in such cases, affords a strong presumption that the party believed his domicil to be in the state in which the taxes were paid.

V. Duration of Stay.—In this relation we may accept two propositions: *First*, no matter how long residence may be, it does not constitute domicil unless there be an intention to remain for an indefinite period; and, *secondly*, that if there be such a *bona fide* intention, executed by actual removal, or attempted removal, domicil may be constituted by a stay of a single day.

How Far there may be a Double Domicil.—A leading German authority tells us that a person may

municipally have distinct domicils in places in which his residence is equally established, using each as a centre of his business and legal relations, and, when needed, actually dwelling in each

Savigny, Rom. Recht. viii. § 354.

In the Roman law, so far as the abstract question of subjection was concerned, and so far as related to municipal burdens and local jurisdiction, this position holds good. Another result, however, was reached when the issue was as to what jurisdiction should impress upon the individual his peculiar legal type. According to the Roman law, *domicilium* yielded precedence in this respect to *origo* (municipal citizenship, Burgerrecht); and, when there were several titles of the latter class, the earliest prevailed.

Savigny, viii. §§ 356, 357.

That a man can have two domicils is thus emphatically denied by Chief Justice Shaw

Abington v. North Bridgewater, 23 Pick. 170.

"The supposition that a man can have two domicils would lead to the absurdest consequences. If he had two domicils within the limits of sovereign states, in cases of war, what would be an act of imperative duty to one would make him a traitor to the other. "But it is a serious objection to the able argument of which this is part that it not only blends domicil with allegiance, but overlooks the fact that domicil, in the view of those who hold that it may be cumulative, is capable of several degrees. It is admitted on all sides that a person can have but one testamentary domicil—*i. e.*, a domicil determining the law of the devolution of his property on his death. Yet, even by those courts by whom this position is most rigorously applied, it is maintained that domicil may be established, for the purposes of taxation or of divorce, on proof much less stringent than would be required to establish a testamentary domicil.

Thus, of this distinction we have a conspicuous English illustration in a case where it was ruled that a person may retain a foreign domicil for many purposes, and yet be domiciled in England so as to give jurisdiction to the court of divorce

Yelverton v. Yelverton, I Sw. & Tr. 574.

Of American cases we have an abundance to show that a matrimonial domicil may exist on evidence clearly insufficient to establish a domicil for the purposes of succession. The prize rulings of Lord Stowell, also, whatever may be their present authority, instruct us that it has been held in England that a commercial domicil can be acquired in a foreign land when the original political domicil remains unchanged.

The Ann, Dodson's Adm. Rep. 223; Phil. iv. 51; Wheaton's Int. Law, 159.

So, also, we are told by the judicial committee of the privy council that there is "a wide difference in applying the law of domicil to contracts and to wills."

Croker v. Hertford (Marquis of), 4 Moore P. C. 339. See, also, Thorn-dike v. City of Boston, I Metc. 242; Greene v. Greene, II Pick. 410; Putnam v. Johnson, 10 Mass. 488; Somerville v. Somerville, 5 Ves. 750.

Sir R. Phillimore well says (Vol. iv. 48): "It might, perhaps, have been more correct to have limited the use of the term domicil to that which was the *principal domicil*, and to have designated:simply as *residences* the other kinds of domicil; but a contrary practice has prevailed, and the neglect to distinguish between the different subjects to which the law of domicil is applicable has been the chief source of the errors which have occasionally prevailed on this subject. This view coincides with that of Domat

L. i. t. xvi. § 6.

. and of Chancellor Kent,

Lect. 37, § 4, note.

who held that, while there "is a political, a civil, and a forensic domicil, a man can have but one domicil for the purpose of succession."

See, also, Maltass v. Maltass, 1 Robertson's Ecc. R. 75 Robertson on Personal Succession, 142; Thompson v. Advocate General, 12 Cl. & Fin.; 1 Whart. Conf. of Laws, § 74.

Political domicil is subject to distinct considerations. For many years the tendency of the English courts was, by implication, to hold that a man can have a plurality of domicils of this class. "Acting on the principle of the indelibility of English allegiance, they maintained in theory that an Englishman and an Englishman's son must retain a political domicil till the tie was dissolved by death. Yet, practically, they were constrained, after the acknowledgment of American independence and the treaties that sprang therefrom, to acknowledge that a political domicil could also be acquired in the United States. For a while there was an attempt to enforce the theoretic domicil of origin. Personal taxes were to be due from such emigrants; impressment was threatened, and, in some few cases, executed. After the war of 1812, however, impressment was abandoned. The same result was reached as to taxation, in 1845, when the House of Lords, overruling the Scotch court of exchequer, held that legacy duty was *not* payable by the legatees named in the will of a British subject who had died domiciled in a British colony, though the personal property was locally situate in Scotland, to which the statute extended.

Thompson v. Advocate, General, 12 Cl. & Fin. 1.

The naturalization statute of 1870 settles this question definitely, so far as concerns English subjects naturalized in a foreign land. They are declared, by so doing, to have dissolved their relations to the mother country; and their single domicil, therefore, is in their adopted land. But the decision of the House of Lords, just noticed, goes beyond this. So far as concerns personal taxes, which is the main practical relation of political domicil, there is but one domicil. That domicil is the one the party has selected, and which, by residence without the purpose of return, he has acquired. There, and nowhere else, is he liable to be personally taxed. His alienage—*i. e.*, his non-naturalization—does not relieve him from such taxation in the country of his domicil;

State v. Bordentown, 3 Vroom (N. J.), 192.

nor is it a bar to prosecutions for political offences against the country of his residence.

Whart. Conf. of Laws, § 902.

But such change of domicil, though unaccompanied by change of allegiance, relieves him, as has been seen, from personal taxation in his native land."

Whart. Conf. of Laws, § 74.

Sixth. Conflict as to Domicils.—Cases constantly arise where it is important to decide which of two domicils envel- opes a particular person in its laws. In our own practice these questions come up most frequently in cases of taxation, when two or more states claim the same person as so domiciled as to be liable to taxation in each. A, for instance, has a colliery business in Nova Scotia, where he spends a month or two in the spring; a summer residence in Newport; a hunting-lodge in Maine, where he goes for recreation and diversion in the fall; and a winter home in Florida, where he tries to escape the cold. Is he domiciled in Nova Scotia, or Rhode Island, or Maine, or Florida, and by which is he personally taxable? And then, again, if he dies, by what jurisdiction is his estate to be distributed ? By what code of law is his personal *status* to be determined? The answer, of course, is, by the law of his domicil. But then comes the question, what is his domicil? And in answering this question the following points are to be kept in mind:

- Where there are two or more residences, that which the party selects as his domicil will be viewed, all other things being equal, as having the preference.

  The older cases will be found grouped in my work on the Conflict of Laws. Among the more recent cases may be noticed Hampden v. Levant, 59 Me. 557; Moreland v. Davidson, 71 Penn. St. 371; Chariton v. Moberly, 59 Mo. 238.
- Supposing him, however, to have made no such selection, and supposing the conflict to be between two *homes*, one in the country and one in the town, then the inclination should be in favor of the home which the party seems himself to have regarded as his permanent abode. In England this is regarded generally to be the town house. But it is otherwise if either house be used only for temporary purposes, and it is in a condition only to be temporarily used.

  Wharf. Conf. of Laws, § 69.

We have this distinction thus expressed by Lord Hatherly, when vice-chancellor: "If a party select two residences, in one of which he can reside all the year, whilst in the other his health will not permit him to do so; and he must from the first be aware that, should his health fail him, his days must be passed where alone he can constantly reside; there is an additional reason for concluding that he regards such place from the first as that which must be his home—a conclusion greatly fortified by his chief establishment being fixed there."

Forbes v. Forbes, Kay, 341.

Such considerations weigh still more strongly in the United States, where the attachment to the country residence of the summer is, on patrimonial grounds, comparatively slight. But, even in this relation, express intent must control.

We must at the same time remember that when there are two residences, the claims of which are in this connection about equal, the earlier may be presumed to be that preferred as domicil.

Gilman v. Gilman, 52 Me. 165.

But this fades away in the presence of evidence showing that the party, in selecting a second residence, selected it for permanent use. On this distinction, and on this alone, can we sustain a recent ruling of Vice-Chancellor Bacon,

Stevenson v. Masson, 22 W. R. 10.

where a Canadian came to Europe in order to educate his children, and, after living in Paris ten years, proceeded to England, where he remained, selecting, it as a permanent residence, three years longer, that he was to be regarded as domiciled in England, though he sometimes spoke of intending to return to Canada.

In an English case tried in 1870, before Vice-Chancellor James, A., a domiciled Scotchman, married an English-woman, and then, on account of health, left Scotland, where his business relations were established, and resided for ten years in England. After this he returned to Scotland, and remained there for a few months, for business purposes, but was again compelled by ill health to go to England, where, for nearly two years, he was confined in an asylum. He then spent five years in travelling on the continent and in England. At the end of

that time he settled at Brighton, and remained there, with his wife, for ten years till his death. His domicil was ruled to be in England.

Aitchison v. Dixon, Law Rep. 10 Eq. 589; *s. c.*, 39 Law T. (N. S.) pt. 1,705.

Nor does the fact that a Scotch residence has been retained make any difference, if the conjugal residence and the permanent seat of the family is in England.

Forbes v. Forbes, Kay, 341

But even to this there is an exception, put with great weight by Sir W. P. Wood, vice-chancellor, afterwards Lord Chancellor Hatherly: "If some particular state of health required the wife to reside in a warm climate not agreeable to her husband, or the like, so that he was obliged to visit his wife away from home, he might still be domiciled at a residence of his own, apart from her, supposing he retains his family with himself."

Forbes v. Forbes, Kay, 341. See Exchange Bank v. Cooper, 40 Mo. 169.

(*c.*) *Home, as a general thing, is to be preferred to place of business.* It is true that the English prize courts, in the wars with the first Napoleon, thought proper, in order to confiscate the property of neutral merchants trading in hostile countries, to reject this rule, and to hold that American traders sojourning in French ports were domiciled French-men, though the parties so adjudicated upon disclaimed French citizenship, and had families in America whom they visited in places they regarded as their homes.

The Indian Chief, 3 Robinson, 18; The Matchless, I Haggard, 103; The Rendsburg, 4 Robinson, 139; The President, 5 Robinson, 279; The Diana, 5 Robinson, 168. See The Venus, 8 Cranch, 279.

But when England has lately found herself in the position of a neutral, her views on this point have undergone a change, and the indications are that Lord Stowell's rulings, as above noticed,. Will be no longer respected.

It is admitted, even by Lord Stowell, that in oriental or barbarous lands no mere mercantile residence confers a domicil. "Wherever," he said,

The Indian Chief, 3 Robinson, 18.

"a mere factory is founded in the eastern parts of the world, European persons, trading under the shelter and protection of their establishments, are conceived to take their national character from that association under which they live and carry on their commerce. It is a rule of the law of nations, applying particularly to those countries, and is different from what prevails ordinarily in Europe and the western parts of the world, in which men take their present national character from the general character of the country in which they are resident; and this distinction arises from the nature and habits of the countries. In the western parts of the world, alien merchants mix in the society of the natives; access and intermixture are permitted, and they become incorporated to the full extent. But in the east, from the oldest times, an inmiscible character has been kept up; foreigners are not admitted into the general mass of the society of the nation; they continue strangers and sojourners, as all their fathers were. *'Doris amare enamore intermisceat undam.'* Not acquiring any national character under the general sovereignty of the country, and not trading under any recognized authority of their own original country, they have been held to derive their present character from that of the association or factory under whose protection they live."

These views have since been gradually extended to all cases of merely mercantile residence.

Advocate General (Bengal) v. Ranee Surnomoye Dossee, 9 Moore App. 387; 2 Moore, P. C. C. (N. S.) 22; and see Whart. Conf. of Laws, & 863.

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As between civilized states and, *a fortiori*, between coördinate states under the same federal government, as is the case with the United States, the home is, as a rule, to be treated judicially as domicil in preference to the place of business. In a case in which this rule was pushed to its extremest limit, the late Colonel James Fisk was held in New York to be domiciled in Boston, where his wife resided in a house bought by him for her in her own name, and where he occasionally visited, though his place of business had been for years notoriously and conspicuously in New York.

Fisk v. Chicago R. R., 53 Barb. 472. See, as a very strong case to this, effect, Graham v. Trimmer, 6 Kans. 230.

And however extreme this decision, under the particular circumstances, may appear, we must hold that where a man establishes his family there is his principal domicil.

Even as to unmarried persons, this rule applies in cases- where they have a family, though with that family their residence is only occasional. "If a man is unmarried," says Judge Story,

Story, Conf. of Laws, § 47.

"that is generally deemed the place of his domicil where he transacts his business, exercises his profession, or assumes and exercises municipal duties or privileges." Yet, at the same time, "this," the learned author goes on to say, "is subject to some qualifications;" and he judicially held, in a case tried before him in the circuit court, that a young, unmarried man who had resided with his mother in Providence, but who, at the service of

the writ, was engaged as a clerk in his brother's store in Connecticut, making frequent visits to his mother in Providence, was domiciled in Providence.

Catlin v. Gladding, 4 Mason, C. C. 308.

In Mitchell v. United States, 21 Wall. 350, Swayne, J., giving the opinion of the court, said: "The place where a person lives is taken to be his domicil until facts adduced establish the contrary. Bruce v. Bruce, 2 Bos. & Pull. 228, note; Bampde v. Johnstone, 3 Ves. 201; Stanley v. Bernes, 3 Hagg. Eccl. Rep. 374, 437; Best on Presumptions, 235. The proof of the domicil of the claimant in Louisville is sufficient. There is no controversy between the parties on that proposition. We need not, therefore, further consider the subject.

"A domicil once acquired is presumed to continue until it is shown to have been changed. Somerville v. Somerville, 5 Ves. 787; Harvard College v. Gore, 5 Pick. 370; Wharton's Conf. of Laws, § 55. Where a change of domicil is alleged, the burden of proving it rests upon the person making the allegation. Crookenden v. Fuller, I Sw. & Tr. 441; Hodgson v. De Buchesne, 12 Moore's P. C. 288 (1858). To constitute the new domicil two things are indispensable: first, residence in the new locality; and, second, the intention to remain there. The change cannot be made except *facto et animo*. Both are alike necessary. Either without the other is insufficient. Mere absence from a fixed home, however long continued, cannot work the change. There must be the *animus* to change the prior domicil for another. Until the new one is acquired the old one remains. Whart. Conf., *supra*, and the authorities there cited. These principles are axiomatic in the law upon the subject. When the claimant left Louisville, it would have been illegal to take up his abode in the territory whither he was going. Such a purpose is not to be presumed. The presumption is the other way. To be established, it must be proved. 12 Moore's P. C., *supra*. Among the circumstances usually relied upon to establish the *animus manendi* are: declarations of the party; the exercise of political rights; the payment of personal taxes; a house of residence, and a place of business. Phillim. 100; Whart. § 62, and *post*. All these *indicia* are wanting in the case of the claimant."

So, in a late case in Massachusetts, the domicil of an unmarried police officer was held to be in N., where he kept his clothes and resided occasionally, as at a home, expressing himself as being an inhabitant of that town, though he worked and boarded in the town of W.

Com. v. Kelleher, 115 Mass.

One important observation remains to be made as the summing up of the discussion which we are closing. It is impossible to get at the true idea of domicil unless we take into consideration the fact that it is man in his family relations whom it is the dominant policy of the state to preserve. Man as an individual may be well cared for by the state; but no matter what may be the care bestowed on him, he soon, if he is treated as a unit, passeth away as a flower, and is gone, and is no more seen. But man as a link in the chain of a family is continuous, and on the integrity and strength of the family depend the integrity and strength of the body politic. Hence it is that private international law envelopes a man in the jurisprudence to which his wife and children are subject. The jurisprudence in which he places them is that in which he himself is placed. Their home forms the anchorage to which he is judicially attached, no matter how widely and wildly he may wander. He may be absent for a series of years in a foreign land, yet by the law of his home is he governed, and not by the law of his foreign residence. He is taxed by his home law. His relations as to the three great decisive epochs of life—birth, marriage, and death—are determined by his home law.

Thus, persons who by the law of their domicil are precluded from contracting a marriage of particular class cannot, by removing from their domicil, contract such a marriage validly. So the converse is true; if their marriage is valid in their domicil, it will be there regarded as valid, though contracted abroad in a place where it is invalid. Medway v. Needham, 16 Mass. 157; Stevenson v. Gray, 17 B. Mon. 193; State v. Kennedy, Sup. Ct. N. C. 1877. See Brook v. Brook, discussed fully in Whart. Conf. of Laws,. §§ 141, 162, 183.

His home, or rather the home of his family, determines the law regulating his personal *status*, though he may be born when his parents are far distant from that home. His home determines the legal duties and privileges of his marriage, though he may be married in a foreign land. His home gives the law by which his property is to be distributed on his death, no matter how remote from home may be the place in which he dies. It would seem as if the law of nations, in its tenderness for humanity, had summoned, as man's attendant in the most critical junctures of his life, the genius of home, and had given to that genius supreme judicial control. What the *lex domicilii*, or the law of home, decrees at these junctures, is the law that is final. The reason of this is obvious. It is the family that is to be preserved, for the sake both of the man himself and of the state. The man will be a vagrant, the state will be dissolved, unless the family be preserved; and this preservation of the family is the first duty of the law. And the application is obvious. The sanction which civilized nations have agreed to impose, we, as a nation peculiarly dependent on family purity and integrity for our well-doing, must hold sacred. In treating judicially of the law of domicil, we must in no case forget that, by reason as well as by authority, the law of domicil is the law of home.

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COMPOSITION IN BANKRUPTCY.
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G. I. Jones and Company, St. Louis 1877.

Table of Cases.

Composition in Bankruptcy.

By virtue of the absolute dominion which every man has over his own property, a creditor at common law could refuse to receive less than the full amount due him in satisfaction and discharge of his demand, although a compromise might be for the best interest—not merely of other creditors, but of himself. In this way an obstinate creditor could defeat an advantageous composition unless his terms were accepted by the debtor and the other creditors. Such a power in the hands of an exacting and unscrupulous creditor, although legal, was inequitable, for it enabled him to violate that principle of equality which is equity, and, moreover, was contrary to that principle of natural justice which dictates that the majority of those having a common interest shall have the right to prescribe the course of action to be pursued by all.

The 17th section of the act of June 17, 1874 (18 Stat. 182), was passed for the purpose of remedying this wrong. It provides for the adoption of a resolution of composition in all cases in bankruptcy, whether voluntary or involuntary, and whether an adjudication has been had or not. By the express terms of the statute a case in bankruptcy must be pending in order to authorize the commencement of a proceeding for a composition.

In re Reiman & Friedlander, II B. R. 21; 13 B. R. 128; 7 Ben. 455; 12 Blatchf. 552.

Such a case would not be pending if the court had no jurisdiction of the cause, but, inasmuch as the requirement is merely that the case shall be pending, mere defects in the petition in bankruptcy, which do not affect the jurisdiction, will not vitiate a proceeding for a composition. This was so decided in a case where the petition in involuntary bankruptcy alleged that the petitioners constituted the requisite proportion in number and amount of the creditors of one of the petitioners, instead of the debtor.

In re Morris, II B. R. 443.

The case is pending from the time of the filing of the petition in bankruptcy; and as the statute expressly provides for the institution of proceedings for a composition, whether an adjudication has been had or not, the absence of an adjudication of bankruptcy will not render them void in either a voluntary or involuntary case.

In re Aaron Van Auken, 14 B. R. 425.

It has, however, been held that such an adjudication should be made; but this may be deemed doubtful, for the statute authorizes a proceeding in a pending case before adjudication, the very object of which is to suspend and eventually terminate the case without going through the ordinary course of a proceeding in bankruptcy. It would, therefore, seem to be the better doctrine that the proceeding for a composition, in general, stays or suspends all other pro-ceedings in the case until it is finally disposed of.

The statute provides for the acceptance of a composition proposed by a "debtor;" but this term includes corporations as well as natural persons.

In re Weber Furniture Co., 13 B. R. 529, 559.

So, at least, is the judgment of respectable authority; but it must be confessed that the question cannot be deemed to be settled yet, for a resolution of composition is a discharge within the meaning of the bankrupt law, and the Revised Statutes (§ 5122) provide that no discharge shall be granted to a corporation. If the case is pending by or against a firm, one partner may make a proposition alone, for the term "debtor" is construed to mean any one or more of the debtors. In such case all may unite in a proposition, or each debtor may make a proposition for himself.

Pool v. McDonald, 15 B. R. 560.

A petition for a meeting to consider a proposed com- promise may be filed by the debtor or bankrupt, as the case may be, or by any creditor of such debtor or bankrupt, and must be duly verified. It must set forth that a

compromise has been proposed by the debtor or bankrupt, and that the petitioner verily believes that such proposed composition will be accepted by two-thirds in number and one-half in value of the creditors of such debtor or bankrupt, in satisfaction of the debts due from such debtor or bankrupt.

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The fair inference from this language is that the terms of the proposed compromise need not be set out at length; but if they are, the creditors, at the meeting, may accept or reject that proposition, and the debtor may make, and the creditors may accept, a different proposition.

In re Haskell, II B. R. 164.

Upon the filing of the petition the court must forthwith order a meeting of the creditors to be called, to consider the proposition.

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This order may be made by the judge, or, if there is no contest, by the register.

n re Henry H. Stafford, 13 B. R. 378.

The statute provides that the meeting shall be called under the direction of the court, but does not direct by whom the notices shall be sent. The fair inference is that this matter is left to the court to fix in its order. In practice, the notices are sent by the clerk, marshal, or register.

In re Michael H. Spades, I B. R. 72; 6 Biss. 448.

The creditors are to be notified of the time, place, and purpose of the meeting, but not necessarily of the precise proposition to be made.

In re Haskell, II B. R. 164.

A notice must be sent to each known creditor not less than ten days before the meeting. It may be personal or otherwise, as the court may direct. It is generally sent by mail, and, in that case, should be properly addressed and postpaid.

In re Michael H. Spades, 13 B. R. 72; 6 Biss. 448.

If the notices are sent by the register, his own memorandum is sufficient proof that they have been duly sent. If they are sent by the clerk or the marshal, the officer so sending them should make a return of that fact on or before the day appointed for the meeting.

The register acting in the case, or, if no register has been assigned, a register to be designated by the court, must hold and preside at the meeting at the time and place specified in the notice.

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He has the power to regulate the form and order of proceedings at the meeting, and to decide questions that arise, subject to review by the court.

In re Holmes & Lissberger, 12 B. R. 86.

The debtor, unless prevented by sickness, or other cause satisfactory to the meeting, must be present, and produce a statement showing the whole of his assets and debts, and the names and addresses of the creditors to whom such debts are due. If he is prevented from being present, some one in his behalf may produce the statement. If the debtor has already filed sworn schedules, he may use them as the written statement.

In re Haskell, II B. R. 164.

The statute specifies no form, manner, or time at which the statement shall be made or presented, and, therefore, if the debtor is examined, his testimony will be deemed to constitute a part of his statement.

In re Reiman & Friedlander, 13 B. R. 128; 12 Blatchf. 562.

Where a debt arises upon a bill of exchange or promissory note, the debtor, if he does not know who is the holder thereof, may state the amount of such bill or note, the date on which it falls due, the name of the acceptor and of the person to whom it is payable, and any other particulars within his knowledge respecting the same, and the insertion of such particulars is a sufficient description in respect to such debt. If a debtor disputes the claim of a creditor, he should have the amount ascertained either by the trial of an action at law or by an enquiry in the bankrupt court.

In re Trafton, 14 B. R. 507.

If the amount due to any creditor is found to be different from that contained in the statement, the statement should be altered at once and the true amount inserted.

Ex parte Peacock, L. R. 8 Ch. App. 682; *In re* B. C. Asten, 14 B. R. 7.

The statute merely provides that the creditors may accept the composition proposed by the debtor, and that the provisions of the composition so accepted shall be binding on them. It has, therefore, left the debtor and the creditors to arrange the terms of the composition in each particular case. To this remark there is one exception. Every composition subject to the priorities allowed by the bankrupt law must provide for a *pro rata* payment or satisfaction in money to the creditors in proportion to the amount of their unsecured debts, or their debts in respect to which they may have surrendered any security held by them. If any of the creditors are entitled to priority, the composition should provide for it; otherwise they might be entitled to share only *pro rata* with the

other creditors.

Ex Parte Walter, L. R. 15 Eq. 412.

The term "money "is used, in contradistinction to property, so as to preclude all traffic, or dicker, or speculation in property by which a large nominal debt may be paid by small actual value, or by which one creditor may receive more than another. The amount or proportion to be paid must be fixed in currency, and all must receive alike.

In re Reiman & Friedlander, 13 B. R. 128; 12 Blatchf. 562.

A composition, therefore, cannot provide for a payment in notes.

In re Langdon, 13 B. R. 60; *In re* James T. Hurst, 13 B. R. 455.

Where notes are to be used, the proper provision is that the payment shall be secured by notes. The term "money," however, does not mean cash on the nail or on demand, but that, whenever paid, it shall be in what the law admits to be money. A composition may, therefore, provide for payment in installments' at stated future times.

In re Langdon, 13 B. R. 60; *In re* Reiman & Friedlander, II B. R. 21; 13 B. R. 128.

If the debtor desires to relieve himself from the obligation at common law to seek the creditor and tender the composition, he should make the money payable within a certain time after notice or demand, or introduce some other provision for his protection.

Hazard v. Mare, 6 H. & N. 435.

If the payment is to be secured by an endorsement, the resolution should either name the endorser or provide for his being definitely named;

In re Reiman & Friedlander, II B. R. 21; 7 Ben. 455.

but a provision that the endorser shall be satisfactory to certain persons who act as a committee for the creditors is sufficient.

In re Solomon Louis, 14 B. R.144; 7 Ben. 481.

If the endorser is to be secured by an assignment of the property, the trust as to any surplus that may remain after the payment of the composition should be declared; otherwise the endorser may be entitled to retain it.

Ex parte Wilcocks, 44 L. J. (Bankruptcy) 12.

The resolution may provide for the appointment of a trustee, either to receive and distribute the money due under the composition, or to take an assignment of the debtor's, assets to secure the payment of the composition. Under the English statute the debtor remains in the possession and control of his property,

Ex parte M. & L. D. Banking Co., L. R. 18 Eq. 249; *Ex parte* Birmingham G. & C. Co., L. R. II Eq. 204; *Ex parte* Burrell, L. R. I Ch. Div. 537.

but our act, in requiring the pendency of a case in bankruptcy, to a certain extent deprives him of that control.

n re Thomas McKeon, II B. R. 182; 7 Ben. 513; *In re* Reiman & Friedlander, II B. R. 21; 7 Ben. 455.

If he desires to have the power to dispose of his assets, in order to meet the composition which he stipulates to pay, he may insert a provision to that effect.

In re Aaron Van Auken, 14 B. R. 425; *In re* Thomas McKeon, II B. R. 182; *In re* Reiman & Friedlander, II B. R. 21; 7 Ben. 455.

The debtor, at the meeting, must answer any enquiries, that may be made of him. It is not the intent of the statute that the debtor shall answer only such questions as may be put by the meeting, or with its consent. The provision was designed to protect the minority, and enable them to instruct themselves and the majority upon the expediency of the proposed composition before it is voted on. A creditor, therefore, may examine the debtor, although the majority object to his doing so,

In re Morris, II B. R. 443; *In re* Holmes & Lissberger, 12 B. R. 86.

and, if he desires it, the examination, must be completed before the vote on the resolution can be taken.

In re Holmes & Lissberger, 12 B. R. 86.

If other creditors are not willing to be detained while the examination is in progress, the taking of the vote may be postponed to a specified time, and those who do not desire to remain can depart, and return at the designated time.

In re Holmes & Lissberger, 12 B. R. 86.

The creditor is entitled to the fullest opportunity to put questions calculated to ascertain all the material facts in regard to the debtor's affairs, but this right must be exercised in good faith, and the examination must be confined to such material facts.

Ex parte Mackenzie, L. R. I Ch. App. 88.

The object in view in requiring the debtor to be present and answer enquiries is to enable any creditor who is dissatisfied with the contents of the statement, or may regard it as inaccurate in omitting things which it ought to contain, or in containing erroneous items, to ask the debtor as to the particulars respecting which information is thought to be desirable, and thus arrive at a true exhibit of his affairs. The enquiries, therefore,

must be only such as will properly be in furtherance of such object, and such as will aid in determining whether any composition at all ought to be accepted, or the terms of the one which ought to be accepted.

In re Holmes & Lissberger, 12 B. R. 86.

If the debtor has kept books in his business, such books must be produced on the demand of any creditor and the debtor must answer all enquiries in reference to any entry in such books which bears upon the question of the exact condition of his affairs. If it seems necessary that time shall be allowed to have them examined by an expert, an adjournment may be had for that purpose.

in re Holmes & Lissberger, 12 B. R. 86.

The examination of the debtor should be conducted in the same manner as the examination of a witness in open court, and the debtor should answer the enquiries made of him by the creditor, and do no more until the creditor has finished, after which he may, of his own volition or in answer to interrogatories by his counsel, make such explanations as are relevant. The answers of the debtor should be reduced to writing, in the form of an examination, and the debtor should sign the document and be sworn to the truth thereof.

In re Holmes & Lissberger, 12 B. R. 86.

After the examination is completed, the vote on the resolution may be taken. The register has the right to decide who are entitled to vote, and in respect to what amount of debt, and pass upon the propriety and regularity in form of the proofs of debt and the letters of attorney.

In re Holmes & Lissberger, 12 B. R. 86.

The statute provides that the creditors may resolve that a composition proposed by a debtor shall be accepted. The term "creditors," however, is not used in a technical sense, but includes all persons who have provable claims.

In re Trafton, 14 B. R. 507.

The mere fact that the name of a creditor appears on the statement does not give him the right to appear without proof, and be recognized as a creditor for the sum named. None but *bona fide* creditors are to have a voice in the proceedings, and the mere fact that the debtor chooses to put their names on his statement does not, even *prima facie* establish that they are creditors. Everyone who claims to be a creditor must, therefore, establish his claim. If a creditor, however, in an involuntary case, is one of the petitioning creditors, and has established his debt so as to obtain the issuing of an order to show cause, he need not prove his debt anew.

In re Scott, Collins & Co., 15 B. R. 73.

As a minor cannot bind himself by a valid contract, he is not competent to vote.

Ex parte Greaves, L. R. 5 Ch. App. 326.

The same principle would seem to be applicable to a *feme covert*, but it has been held that she may vote if she has the authority of her husband, whether exhibited or not, and that an affidavit subsequently filed by him to the effect that she had such authority is a ratification which relates back to the vote and gives it validity.

In re Bailey & Pond, 2 Woods, 222.

If a child of one of the debtors is *sui juris*, he may prove his claim and vote, although it consists of a note made payable to his father as guardian, which has never been endorsed to him.

In re Bailey & Pond, 2 Woods, 222.

Where a partnership proposes a composition, all the creditors, both partnership and individual, may vote without any classification if no objection is made; but if one of any class of creditors perceives that the other class is about to force an unjust composition upon him, he may demand a separate vote.

In re Michael H. Spades, 13 B. R. 72; 6 Biss. 448; Tomlin v. Dutton, L. R. 3 Q. B. 466; *Ex parte* Glen, L. R. 2 Ch. App. 670.

A creditor may buy up the claims of others and vote thereon to defeat the composition, if his motive is merely to realize more money from the estate thereby.

In re Morris, 12 B. R. 170.

When an attorney at law appears before the register to represent a creditor, he is to be accepted as such attorney unless some one puts him to proof, by a rule therefore, to:show his authority.

In re Scott, Collins & Co., 15 B. R. 73. *Contra, In re* Purvis, I B. R. 163.

All others who desire to vote on behalf of another must produce a letter of attorney duly executed.

In re Scott, Collins & Co., 15 B. R. 73.

If the letter of attorney specially authorizes the attorney to sign a composition for a precise sum, thus leaving him a mere ministerial duty to perform, there is no incompatibility in the same person appearing as attorney for the debtor and also as attorney in fact for a creditor.

In re Weber Furniture Co., 13 B. R. 529, 559.

In order that the resolution may be adopted, it is necessary that it shall receive the votes of a majority in number and three-fourths in value of the creditors assembled at the meeting, either in person or by proxy; but, in calculating the majority, creditors whose debts amount to sums not exceeding $50 are reckoned in the

majority in value, but not in the majority in number, and the value of the debts of secured creditors above the amount of the security, to be determined by the court, is estimated in the same way. Creditors whose debts are fully secured are not entitled to vote on or sign the resolution without first relinquishing the security. This provision in regard to secured creditors applies only to those who have a lien, in some form, on the debtor's property. A. creditor who has personal security, such as an endorsement, is to be counted as an unsecured creditor.

In re Michael H. Spades, 13 B. R. 72; 6 Biss. 448.

Where the assets are sufficient to pay workmen to the extent of $50 each, they are within the equity of the law, and their claims cannot be counted except to the extent of their respective' debts above $50.

In re O'Neil, 14 B. R. 210.

A creditor who has an attachment issued within four months before the commencement of the proceedings in bankruptcy is a secured creditor.

In re Scott, Collins & Co., 15 B. R. 73.

A claim for damages on account of a trespass to personal property which is unliquidated, and marked on the statement as disputed, cannot be counted.

In re Bailey & Pond, 2 Woods, 222.

A claim held by a minor must be taken into account in the computation, although he cannot vote.

Ex parte Greaves, L. R. 5 Ch. App. 326.

Creditors whose debts do not exceed $50 are not to be reckoned in any part of the process of calculating the number, either as a part of the whole number or as a part of the requisite proportion.

In re John B. Gilday, II B. R. 108; 7 Ben. 491.

If the resolution is adopted by the requisite proportion of the creditors, it must afterwards be confirmed by the signatures thereto of the debtor, and two-thirds in number and one-half in value of all the creditors. It is not necessary that a second meeting of creditors, as such, shall be held to confirm the resolution,

In re Scott, Collins & Co., 15 B. R. 73.

or that the confirmation shall take place at the first meeting.

In re Benjamin F. Spillman, 13 B. R. 214; *In re* Scott, Collins & Co., 15 B. R. 73.

The confirmatory signatures may be obtained after the first meeting,

In re Benjamin F. Spillman, 13 B. R. 214.

and a reasonable time will be allowed for this purpose

In re Michael H. Spades, 13 B. R. 72; 6 Biss. 448; *In re* Benjamin F. Spillman, 13 B. R. 214.

but they must be obtained before the hearing for a ratification.

In re Scott, Collins & Co., 15 B. R. 73.

In determining whether the requisite proportion of the creditors have confirmed the resolution, the same mode of computation is observed as in determining whether the resolution has been duly adopted.

In re John B. Gilday, II B. R. 108; 7 Ben. 49; *In re* Wald & Aehle,. 12 B. R. 49; *In re* Michael H. Spades, I 3 B. R. 72; 6 Biss. 448.

In composition cases the register should keep a docket and minutes, but need not send the usual memoranda to the court.

In re Benjamin F. Spillman, 13 B. R. 214.

He should cause the proceedings, as they take place before him, to be reduced to writing, in order that he may make a report thereof.

In re Holmes & Lissberger, 12 B. R. 86.

It is his duty to report the proceedings to the court, with his opinion thereon.

Rule xxxvi. *Vide In re* Weber Furniture Co., 13 B. R. 559.

It has been said that he need not pass upon the confirmation,

In re Benjamin F. Spillman, 13 B. R. 214.

but where an order is passed, referring the case to him, it is usual to direct him to pass upon the confirmation, and also to report whether the composition is for the best interest of all concerned.

In re Scott, Collins & Co., 15 B. R. 73.

It would seem to be the better practice for him to retain the proceedings in all cases until the confirmation is filed with him, and then to transmit the proceedings to the court, with his opinion on all the questions involved. The proposition, statement, resolution, and confirmation, together with such evidence as may have been taken, should all be so transmitted.

As soon as the proceedings are filed, the clerk should give notice, of not less than five days, to all the creditors to show cause why the resolution shall not be recorded.

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It is not necessary that the debtor shall appear on the day appointed for the hearing, to submit anew the

statement previously made by him, or any other statements

In re Scott, Collins & Co., 15 B. R. 73.

Nor is he then subject to examination as a matter of right.

Ex parte Levy & Co., L. R. II Eq. 619; *In re* Godfrey Davis, 19 W. R. 524.

But, if a creditor can show that justice will be furthered thereby, the court, in its discretion, may direct an examination.

Ex parte jones 16 Eq. 386; *Ex parte* Tachiri, L. R. z Ch. App. 368; *Ex parte* Brooks, I W. R. 924; *In re* Marks' Trust Deed, L. R. I Ch. App. 429; *In re* Godfrey Davis, 19 W. R. 524.

An objection may also be taken, at the hearing, to the legality of a debt which was proved at the meeting.

Ex parte Weil, L. R. 5 Ch. Div. 345.

If a controversy arises, the court may refer the matter to the register for enquiry as to any particular facts.

In re Blaney T. Walshe, 2 Woods, 225.

On the day appointed for the hearing, opposition may be made to the recording of the resolution. A creditor who is fully secured cannot enter an objection, and it is doubtful whether he can then surrender his security for the purpose of opposition, for he ought to elect at or before the meeting of creditors, and not speculate on the chances of litigation.

In re Scott, Collins & Co., I B. R. 73.

The grounds of opposition are prescribed by the statute, and this excludes all others. The fact, therefore, that the debtor has given a preference,

In re Haskell, II. R. 14.

or made an assignment for the benefit of creditors,

Pool v. McDonald, 15. R. 560.

does not of itself constitute a ground for rejecting the resolution. An opposing creditor may file any objection which goes to the regularity of the proceedings—as, for instance, that the resolution was not duly passed, or that the requisite confirmatory signatures have not been obtained, or may object on the ground that the composition is not for the best interest of all concerned.

In re Scott, Collins & Co., I B. R. 73.

The refusal of the debtor to answer a material question at the meeting

Ex parte Mackenzie, L. R. 10 Ch. App. 88; *In re* Morris, II. R. 443.

or a failure to produce a statement of assets and debts,

Ex parte Sidey, 24 L. T. (n. S.) 401.

is a matter which affects the regularity of the proceedings and constitutes a sufficient cause for refusing to record the resolution. A composition, however, may be valid although the statement is defective in omitting either a debt or an asset. As to this point each case must be determined according to its own particular facts and depends mainly on fraud or good faith as affecting the question whether a resolution so passed is for the best interest of all concerned.

In re Scott, Collins & Co., 15 B. R. 73; *In re* Reiman & Friedlander. II B. R.: 21; 13 B. R. 128; 7 Ben 1. 455; 12 Blatchf. 562.

In determining whether the requisite proportion of the creditors have agreed to the resolution, the court is governed by the statement, and if that shows that the requisite proportion have not so agreed, the resolution will be rejected, although the statement is inaccurate.

In re B. C. Asten, 14 B. R. 7.

The statute has vested the creditors with the power to decide upon the proposition of compromise, after a full investigation into the affairs of the debtor, and the action of the court is in the nature of a review on appeal. Hence the presumption is in favor of their decision, and if an objecting creditor desires to introduce any facts not shown before them he must produce the evidence.

In re Weber Furniture Co., 13 B. R. 529. 559.

In one case, where the resolution and statement alone were presented to the court, without the examination taken at the meeting, it was held that the resolution must be recorded.

In re Weber Furniture Co., 13 B. R. 529, 559.

But, in all cases, the fact that the attention of the creditors at the meeting was called to a matter which is made the ground for an objection before the court has an important influence upon the decision of the question.

In re Reiman & Friedlandei, II B. R. 21; 13 B. R. 128; 7 Ben. 455: 12 Blatchf. 562; *In re* Blaney T. Walshe, 2 Woods, 225; *Ex parte* Linsley, L. R. 9 Ch. App. 290.

The power, however, that is given to a majority of the creditors to bind the minority is in the nature of a statutory power, the exercise of which is valid only when it is free from all fraud.

Ex parte Cowen, L. R. 2 Ch. App. 563.

The statute assumes, as an essential condition to the validity of the composition, that it shall be in all

respects just, and any taint of fraud, whether it consists in concealment, misrepresentations, inequality, or injustice, vitiates the arrangement.

Ex parte Williams, L. R. 10 Eq. 57.

The mere fact that the majority are animated by motives of kindness towards the debtor does not, of itself, render the composition fraudulent,

Ex parte Linsley, L. R. 9 Ch. App. 290.

but they cannot practise the moral virtues at the expense of other people. To hold the contrary would be directly opposed to the commonest principles of justice and honesty.

Ex parte Williams, L. R. 10 Eq. 57; *Ex parte* Cowen, L. R. 2 Ch. App. 563; Hart v. Smith, L. R. 4 Eq. 61; *In re* Weber Furniture Co., 13 3. R. 559.

A resolution, passed merely for the purpose of giving relief to the debtor, is not a *bona fide* exercise of the power, nor such a bargain as the statute contemplates or requires. A resolution may be recorded although there are no available assets;

Ex parte Elworthy, L. R. 20 Eq. 742.

but in such case, if it provides for the payment of a merely nominal composition without security, it will be rejected, upon the objection of a dissentient creditor, as a fraud on the law.

In re Terrell, L. R. 4 Ch. Div. 293; *Ex parte* Morrison, 43 L. J. (Bankruptcy) 47.

The mere fact that the resolution was passed for the purpose of defeating a judgment creditor does not render the composition fraudulent, but is a circumstance to be considered in connection with the other facts in the case.

Ex parte Cowen, L. R. 2 Ch. App. 563; *Ex parte* Morrison, 43 L. J. (Bankruptcy) 47.

The principle of law which requires that the majority shall exercise their power in good faith, for the benefit of all the creditors, prohibits the influencing of their votes by any unfair means. If a claim, therefore, is sold by the holder for an amount in excess of the composition, a resolution which is carried only by means of such vote will not be confirmed.

Ex parte Cobb, L. R. 8 Ch. App. 727; *In re* Fore Street Warehouse Co., 30 L. T. (N. S.) 624.

It has also been held that, if a creditor is induced to vote, or to withdraw his opposition to the resolution, by any unfair means, whether known to the debtor or not, his vote, so influenced, operates as a fraud on the other creditors, and renders the composition voidable by any one of them.

In re James M. Sawyer, 14 B. R. 241.

But the mere fact that claims have been bought at a price in excess of the composition will not prevent the recording of the resolution if it was known to the creditors at the meeting, and the resolution was passed by the requisite proportion of the creditors, without counting the claims so purchased.

In re Blaney T. Walshe, 2 Woods, 225.

In regard to what constitutes unfair means, it has been held that the expectation of an advantage, without any positive promise, does not leave the vote so unbiased that it can be deemed a fair vote.

In re James M. Sawyer, 14 B. R. 241.

Although the resolution may have been passed in good faith, yet it cannot be recorded unless it is for the best interest of all concerned. This means the best interest at the time, in view of all the circumstances.

In re Haskell, II B. R. 164.

The interest of all is to be considered, and the resolution will not be rejected merely because a peculiar benefit will thereby accrue to some particular creditor.

In re Scott, Collins & Co., 15 B. R. 73.

The mere fact that the payment of the composition is secured by the personal agreement of the debtor is not, of itself, sufficient cause for rejecting the resolution.

Ex parte Roots, L. R. 2 Ch. App. 559.

But if the composition does not provide for the payment of as much as the assets may be reasonably expected to pay, then it is not for the best interest of all concerned, and will not be recorded.

In re Reiman & Friedlander, II B. R. 21; 13 B. R. 128; 7 Ben. 455; 12 Blatchf. 562 *In re* Morris, 11 B. R. 443; *In re* Scott, Collins & Co., 15 B. R. 73; *Ex. parte* Cowen, L. R. 2 Ch. App. 563; Hart v. Smith, L. R. 4 Ex. 61; *Ex parte* Williams, L. R. 10 Eq. 57; *In re* Page, L. R. 2 Ch. Div. 323.

In passing upon this question some deference is always given to the judgment and discretion of the creditors who are presumed to be familiar with the debtor's business and the value of the assets, and their decision will not be weighed with extreme nicety, nor over-ruled on account of any slight difference between the value of the assets and the proposed composition.

Ex parte Linley, L. R. 9 Ch. App. 290; *Ex parte* Cowen, L. R. 2 Ch. App. 563; *Ex parte* Roots, L. R. 2 Ch. App. 559.

The question is not whether the debtor might have offered more, but whether his estate will pay more in bankruptcy.

In re Morris, II B. R. 443; *In re* Whipple, II B. R. 524.

The elements of this comparison must necessarily vary with the amount of debts, the amount and character of the assets, the nature of the business, and other circumstances.

In some cases, where the resolution has been held to be defective at the hearing, the debtor has desired to change the terms, but it has been uniformly held that this can be done only by calling a new meeting and adopting a new resolution; for the creditors have the sole power to make the resolution, and the court can decide only whether their work: conforms to the statute or not.

In re Reiman & Friedlander, II B. R. 21 13 B. R. 128; 7 Ben. 455 12 Blatchf. 562; *In re* B. C. Asten, 14 B. R. 7; *In re* Scott, Collins & Co., B. R. 73.

If no valid resolution has been passed, on account of some mistake on the part of the debtor or on the part of the creditors, or for any other cause, a new meeting may be called; for the case stands then precisely as if no resolution had ever been offered.

In re Morris, II B. R. 443; *In re* Terrell, L. R. 4 Ch. Div. 293; *Ex parte* Cobb, L. R. 8 Ch. App. 727.

If the meeting was duly called and held, and the proposition was rejected, after due consideration, by the creditors, a new meeting will not, in general, be called;

In re McDowell & Co., 10 B. R. 439; 6 Biss. 193; *Ex parte* Cobb, L. R. 8 Ch. App. 727.

but if the rejection arose by accident or mistake—as, for instance, from a failure on the part of a creditor to properly instruct his attorney—a new meeting may be called.

In re McDowell & Co., 10 B. R. 439; 6 Biss. 193.

A mistake made inadvertently in the statement of debts may be corrected, upon a reasonable notice and with the consent of a general meeting of the creditors; but if the composition is payable in installments, and the time for the payment of the first installment is past, a meeting will not be called for the purpose of correcting an omission of the name of the holder of a bill of exchange.

Ex parte Matthews, L. R., 10 Ch. App. 304.

The creditors may, by a resolution to be passed in the same manner and under the same circumstances as the original resolution, add to or vary its provisions. The meeting for this purpose, within the contemplation of the statute, is one that is to follow the recording of the original resolution,

In re Scott, Collins & Co., 15 B. R. 73.

and is allowed for some cause that occurs or is discovered subsequently—as, for instance, if the debtor should unexpectedly be held liable on a claim against which he thought he had a good defense, and for this reason should be unable to comply with the original resolution.

Ex parte Radcliffe Investment Co., L. R. 17 Eq. 121.

Such additional resolution must be presented to the court in the same manner, and proceeded with in the same way, and with the same consequences, as the original resolution. No person taking interests under the original resolution, who does not assent to such addition or variation, can be prejudiced thereby; but this provision does not apply to a creditor who was bound by the original resolution. He will be bound by the additional resolution, although it is adopted after the debtor has made default in the payment of an installments under the original resolution.

Ex parte Radcliffe Investment Co., L. R. 17 Eq. 121.

But a creditor whose name was omitted from the statement produced at the original meeting would not be so bound.

Ex parte Radcliffe Investment Co., L. R. 17 Eq. 121.

The district court has full control over the order to record the resolution, and may vacate it upon the application of any creditor who can show that the composition was obtained by fraud, either in the concealment of assets or in procuring the assent of creditors by unfair means.

In re Thorpe, L. R. 8 Ch. App. 743; *In re* James M. Sawyer, 14 B. R. 241

The provisions of the resolution are binding on all the creditors whose names and addresses, and the amounts of the debts due to whom, are shown in the statement produced at the meeting, but does not, in general, affect or prejudice the rights of any other creditor. The debt will be barred, although the amount was not stated accurately—as, for instance, by giving the principal and omitting the interest.

Beebe v. Pyle, I Abb. (n. C.) 412.

But the creditor will not be bound where a sum is put down as claimed, with a remark that it is in dispute, for the statute applies only to debts the amount of which is ascertained. The debtor cannot dispute a debt and at the same time compound for it."

Melhado v. Watson, L. R. 2 C. P. Div. 281. *Vide In re* Trafton, 14 B. R. 307.

If the debtor puts down the name and amount due to the payee of a note or bill of exchange, and it is held by another, the claim of the latter is not barred.

Ex parte Matthews, L. R. 10 Ch. App. 304.

The provision that the composition shall not affect the rights of a creditor whose name and address were omitted from the statement does not apply to a creditor who appeared at the meeting and voted for the resolution, for the statute contemplates two kinds of creditors who may be bound by a composition—those who are bound because they have agreed to be bound, and those who are bound although they have not so agreed—and the provision applies only to the latter class.

Campbell v. Im Thurn, L. R. I C. P. Div. 267.

The statute, in providing who shall be bound by a composition, uses the phrase, "all creditors," and as it is the latest enactment, and repeals all prior acts inconsistent there-with, there is no exception of fiduciary debts, or debts created by fraud, as in the case of a discharge.

So held in a recent case in the Supreme Court of New Hampshire.

Although a resolution operates as a satisfaction of the debt due to a secured creditor, yet it does not deprive him of his security, but merely confines him to his security and discharges the debtor from personal liability.

In re J. L. Lytle & Co., 14 B. R. 457; *Ex parte* M. & L. D. Banking Co., L. R. 18 Eq. 249; *Ex parte* Birmingham G. & C. Co., L. R. II Eq. 204; *Ex parte* Jones, L. R. 10 Ch. App. 663.

An attachment is within the protection of this principle where no assignee has been appointed, although it was issued within the period of four months prior to the commencement of the proceedings in bankruptcy.

In re W. D. Clapp & Co., 14 B. R. 191; *In re* Shields, 15 B. R. 532. *Contra*, Miller v. Mackenzie, 13 B. R. 406; 43 Md. 404; Smith v. Engle, 14 B. R. 481.

It is true that the Revised Statutes (§ 5044) provide that an assignment shall relate back, and dissolve such attachment; but this provision does not apply to a composition without an appointment of an assignee and an assignment to him, for express words or a clear implication are necessary in order to take away a legal right. If an attachment has been dissolved by an assignment, a subsequent resolution will not revest the security in the creditor.

In re W. D. Clapp & Co., 14 B. R. 191; *In re* Chidley, L. R. I Ch. Div. 177.

If a creditor proves his debt as unsecured, and votes in favor of the resolution, he cannot afterwards set up his security, for this would be a fraud on the other creditors.

In re Balbernie, L. R. 3 Ch. Div. 488.

A resolution of composition is a discharge,

In re Alphonse Bechet, 12 B. R. 201; 2 Woods, 173; *In re* Knight, 2 W. N. 479.

and hence is within the provision of the Revised Statutes (§ 5118) which enacts that no discharge shall release, discharge, or affect any person liable for the same debt for or with the bankrupt, either as partner, joint contractor, endorser, surety, or otherwise.

M. & H. Organ Co. v. Bancroft, I Abb. (N. c.) 413; Megrath v. Gray, L. R. 9 C. P. 216; Andrew v. Macklin, 6 B. & S. 201; *Ex parte* Jacobs, Ch. App. 2xI. Contra, Wilson v. Lloyd, L. R. 16 Eq. 60.

It also seems to be the better doctrine that such joint debtor or surety would not be released, although the creditor voted in favor of the resolution; for, if the law were otherwise, a great number, or even a majority, of the creditors in some cases could not vote without imperilling their rights.

Megrath v. Gray, L. R. 9 C. P. 216; *Ex parte* Jacobs, L. R. 10 Ch. App. 211; Andrew v. Macklin, 6 B. & S. 201.

It is not necessary that a creditor shall prove his debt prior to the tender of the composition, or in order to be entitled to receive it, for the amount inserted in the statement is the amount upon which the composition is to be paid.

Ex parte Peacock, L. R. 8 Ch. App. 682; *Ex parte* Waterer, 22 W. R. 426.

If the resolution does not fix the time for the payment of the composition, the debtor is entitled to a reasonable time,

Edwards y. Coombe, L.R.7 C. P. 519.

but if it provides that the composition shall be paid within a certain time, then, in order to be entitled to the benefit of the resolution, he must, in the absence of any provision to the contrary, tender the stipulated sum within that time, or the creditor will be restored to his original rights and may sue for his whole debt.

Edwards v. Coombe, L. R. 7 C. P. 519; Newell v. Van Praagh, L. R. 9 C. P. 96; Goldney v. Lording, L. R, 8 Q. B. 182; *In re* Hatton, L. R. 7 Ch. App. 723; *Ex parte* Peacock, L. R. 8 Ch. App. 682. *Vide Ex parte* Hemmingway, 26 L. T. (N. S.) 298.

It is not enough for him to be ready and willing to pay; he must actually pay the money within the prescribed time.

Fessard v. Mugnier, 18 C. B. (N. S.) 286; Hazard v. Mare, 6 H. & N. 435.

The fact that the creditor voted for the resolution,

Edwards v. Hancher, L. R. I C. P. Div. in. III.

or that the payment has been secured by the debtor's note, with a surety,

Edwards v. Hancher, L. R. I C. P. Div. in. III; Erskine v. Moreland, 10 Ir. R. C. L. 243.

or that one of several installments has been paid,

Erskine v. Moreland, 10 Ir. R. C. L. 243.

makes no difference in the application of this doctrine. This principle rests upon the fact that the creditors agree to accept the composition, and not the resolution, in satisfaction of their debts. It was the design of the statute that there should be reciprocity, and that the creditor should be bound only if the debtor performed his part according to the terms of the arrangement. To enforce the resolution against the creditor after a default on the part of the debtor would, in effect, be to make a new agreement. The debtor may, therefore, be deemed to be estopped from setting up the terms of a composition which he has wholly neglected to carry out. The creditor is bound by the composition while it remains in force and his rights and remedies are suspended, but when the composition becomes ineffectual he is restored to his original position, and his rights are the same as they would be if the composition had never had any existence. He has, however, an election to resort to the original debt or accept the composition, and if he demands payment of the composition, after a default, this is an election and a waiver of the right to resort to the original debt.

Ex parte Waterer, 22 W. R. 426.

It has also been held that, where the default occurred through a mistake as to the day on which the composition fell due, and the debtor tendered the money within a reasonable time, and before the creditor had availed himself of the default or the condition of the parties had changed, the creditor was then bound by the resolution.

Newington v. Levy, L. R. 5 C. P. 607; L. R. 6 C. P. 180.

If the resolution appoints a trustee to receive the composition, and the money is paid to him according to the terms thereof, he is the agent of the creditors, and a failure to pay on his part will not affect the debtor.

Ex parte Waterer, 22 W. R. 426; Campbell v. Im Thurn, L. R. I C. P. Div. 267.

The district court, on motion made in a summary manner by any person interested, and on reasonable notice, may enforce the provisions of a composition, but not as against a surety. A person who becomes a surety for the payment of a composition does not, by so doing, make himself subject to the jurisdiction of the bankrupt court.

Ex parte Mirabita, L. R. 20 Eq. 772.

A creditor whose name and address were not placed in the statement may waive the protection of the provision which exempts him from being bound by the composition, and apply to the court to enforce its terms against the debtor, but not, perhaps, to the prejudice of other creditors.

Ex parte Carew, L. R. Io Ch. App. 308.

As the provisions of the composition may be enforced on the motion of any party interested, they may be enforced on behalf of the debtor as well as against him. The bankrupt court, therefore, has jurisdiction to restrain a creditor from maintaining an action against the debtor for a debt which is included in the composition.

In re Thorpe, L. R. 8 Ch. App. 743; *In re* Trafton, 14 B. R. 507. *Contra, In re* J. L. Lytle & Co., 14 B. R. 457.

One of the objects in con- ferring this jurisdiction was that, when a question is raised as to the validity of a composition, the question should be tried, once for all, in a court which had jurisdiction over all the creditors and over all the subject-matter. The court is to try the question—not merely between the particular creditor and the debtor, but generally; so that, if the court holds the composition to be good, it is good as to all the creditors, and if it holds the composition to be bad, then it is bad as to all the creditors.

In re Thorpe, L. R. 8 Ch. App. 743.

The exercise of the jurisdiction is a matter of discretion, for the other courts ought not to be prevented from trying cases proper to be tried by them, unless there is some good reason for granting an injunction.

In re Thorpe, L. R. 8 Ch. App. 743.

If the case arises before the debtor is in default in complying with the terms of the composition, the creditor will not be allowed to prosecute an action for the purpose of impeaching the whole composition—as, for instance, to have it declared void on account of some alleged concealment of assets;

In re Thorpe, L. R. 8 Ch. App. 743.

but he will be allowed to proceed where the controversy is merely between himself and the debtor

Ex parte Paper Staining Co., L. R. 8 Ch. App. 595.

—as, for instance, whether he is bound by the composition when his name was not properly placed on the statement.

Ex parte Paper Staining Co., L. R. 8 Ch. App. 595.

If he joins counts in tort with counts in contract, arising from the same cause of action, he will be restrained from prosecuting an action for a provable claim, but not for a non—provable claim.

In re Samuel B. Tooker, 14 B. R. 35.

In such case, if he desires to take any benefit under the composition, he must elect between the composition

and the action at law.

Ex parte Baum, L. R. 9 Ch. App. 673.

If the debtor has been guilty of negligence in omitting to plead his discharge in an action at law, no relief will be granted against a judgment so rendered.

Ex parte Baum, L. R. 9 Ch. App. 673.

If the debtor is in default in complying with the terms of the composition, an injunction will not be granted, for the court will not enforce an agreement which he himself has failed to keep.

In re Hatton, L. R. 7 Ch. App. 723; *Ex parte* Peacock, L. R. 8 Ch. App. 682; *In re* Masters, 33 L. T. (N. S.) 613.

The granting of an injunction is a matter of discretion, although there is an allegation of a default in complying with the terms of the composition, for it is the duty of the court to protect the debtor from being harassed by an action which is obviously and clearly unfounded. But if there is a substantial question to be tried, whether or not the terms of the composition have been complied with, an injunction will not be granted.

Ex parte Lopez, L. R. 5 Ch. Div. 65; *Ex parte* Watson, L. R. 2 Ch. Div. 63.

It has been said that there may be cases of accident where the court may feel bound to relieve the debtor from the effect of a default,

In re Hatton, L. R. 7 Ch. App. 723.

but in practice such relief has been given only where the creditor has done anything which makes it inequitable for him to enforce his strict legal right.

Ex parte Peacock, L. R. 8 Ch. App. 682; *Ex parte* King, L. R. 17 Eq. 332

If an additional resolution is adopted after a default, a creditor who was bound by the original resolution will be restrained from prosecuting an action commenced after the default.

Ex parte Radcliffe Investment Co., L. R. 17 Eq. 121.

If the composition is to be paid in installment, or at a future time, the debtor may plead the resolution in bar of an action brought before an instilment is due or any default has occurred.

Slater v. Jones, L. R. 8 Ex. 186.

But if an instalment is due, a plea of the resolution would not be good, under the English statute, unless there was also an allegation of payment *modo et forma*,

Hazard v. Mare, 6 H. & N. 435; Fessard v. Mugnier, 18 C. B. (N. S.) 286; *In re* Hatton, L. R. 7 Ch. App. 723.

and the only ground on which it could be contended that the same principle did not hold good under our law would be that it has been affected by the provisions of the Revised Statutes (§5119) pertaining to the mode of pleading a discharge. Whatever may be the technical mode of ascertaining the default—whether from the failure of the debtor to plead a compliance with the terms of the composition, or from a replication alleging it—yet, if it is ascertained, the creditor may maintain his action for the original debt, for the provision of the statute allowing him to enforce the composition in the bankrupt court is not exclusive, and does not prevent him, if he so elects, from resorting to the original cause of action.

Edwards v. Coombe, L, R. 7 C. P. 519; Newell v. Van Praagh, L. R. 9 P. 96; Goldney v. Lording, L. R. 8 Q. B. 182; In re Hatton, 7 Ch. App. 723; *Ex parte* Peacock, L. R. 8 Ch. App. 682.

A judgment in favor of the debtor on a plea averring a discharge by virtue of a resolution of composition is a bar to an action relying upon a default that had occurred before the entry of the judgment,

Newington v. Levy, L. R. 5 C. P. 607; L. R. 6 C. P. 180.

but not to a suit instituted on account of a default in the payment of an installment that fell due after that time.

Hall v. Levy, L. R. 10 C. P. 154.

Forms for use in Composition Proceedings.

[Petition for Composition.]

IN THE DISTRICT COURT OF THE UNITED STATES,

For the_____District of_____ In the Matter of _____*In Bankruptcy, To the Hon_____Judge of said Court:*

The petition of_____respectfully shows:

I. That a petition has been duly filed in this court, praying that the above-named debtor____may be adjudged bankrupt____, and that proceedings are now pending in this matter.

II. That the said debtor_____unable to pay_____debts in full, and, subject to the priorities declared in the acts of Congress relating to bankruptcy, ha____proposed a composition to____creditors, in money, in full satisfaction and discharge of____respective debts, which said proposed composition is as follows, to wit: [here set forth the proposed composition] and that your petitioner____verily believe____that such proposed composition will be accepted by two-thirds in number and one-half in value of all of the creditors of said debtor____in satisfaction of debts to them respectively, as aforesaid.

III. That the schedule hereto annexed, marked "A," contains a true statement of the names and addresses, and of the amounts of the debts due to' each, of the creditors of said debtor____respectively, and where the debt, or any portion thereof, arises on a bill of exchange or promissory note, the said debtor____ha____stated in said schedule the amount of such bill or note, the date on which it falls due, the name of the acceptor and of the person to whom it is payable, and such other particulars as are within the knowledge of said debtor____

IV. That_____Wherefore, your petitioner____pray____that a meeting of the creditors may be called under the direction of the court, pursuant to notice, for the purpose of acting upon a composition proposed by the debtor____to____creditors, as afore-said, and that if, at such meeting, the creditors shall legally accept such proposed composition, such further proceedings may be had herein as may be: authorized by law, or to the court shall seem proper.

____,
Petitioner

____,
Attorneys for petitioner____

United States of America, _____District of._____

I,____, the petitioner mentioned and described in the foregoing petition, do hereby make solemn____that the statements contained therein are true, so far as the same are stated of my own knowledge, and that those matters which are stated therein on information and belief are true, according to the best of my information and belief.

____
Subscribed and____to before me, on this____day of____A. D. 187____
[Signature of Judge, Register, or United States Comissioner.]

[List of Creditors to Accompany Petition.]

Schedule "A."

Referred to in annexed petition of____, and containing a true statement of the names and addresses of the creditors of____, the amount due to each creditor, the dates of notes and bills, and particulars in relation thereto.

No. Name of Creditors. Address. Description Of Debt. Amount.

[Order of Court for Meeting.]

IN THE DISTRICT COURT OF THE UNITED STATES,

For the____District of____ In the Matter of ____ ____ *In Bankruptcy.*

Upon reading and filing the petition of said____proposing a composition with,____creditors, it is ordered that a meeting of the creditors of said____be held before____, Esq., one of the registers in bankruptcy of this court, at his office in the city of____in said district, on the____day of ____, A. D. 187____, at o'clock,____M.,

for the purposes named in the 17th section of the amendment to the bankrupt law, approved June 22, A. D. 1874; and it is further ordered that said register [or clerk] give notice of the time, place, and purpose of such meeting by sending a written or printed notice thereof, by mail, to each known creditor of said ____By ____the____day of____A. D. 187____

____

United States of America, ____District of____ ss.

I, ____clerk of the district court of the United States, for said ____district of____do____hereby certify the above and foregoing to be a true, correct, and complete copy of an order entered of record in said court on the____day of____A. D. 187____, in the matter of_____in bankruptcy, as appears from the records of said court now in my custody.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court, at my office in____, in said [SEAL.] district, this____day of ____A. D. 187____

____
Clerk.
[The notice to be sent to the creditor is a copy of the above order.]

[Proposition of Debtor.]

IN THE DISTRICT COURT OF THE UNITED STATES,

For the,____District of____ In the Matter of *In Bankruptcy*.

____the debtor____above named, being unable to pay____debts in full, do hereby, pursuant to the provisions of the acts of Congress relating to bankruptcy, and subject to the priorities therein declared, propose a composition to____creditors of____cents on the dollar of the debts due from____to them respectively, to be paid in money at the times hereinafter stated, and to be evidenced and secured in manner following, that is to say: [here set forth the terms of the proposed composition.]

[Signature of debtor]

[Statement Of Assets And Debts Filed By Debtor At Meeting.]

IN THE DISTRICT COURT OF THE UNITED STATES,

For the____District of____ In the Matter of *____In Bankruptcy*.

Statement showing the whole of the assets and debts of said____and the names and addresses of the creditors to whom such debts respectively are due, on the_____day of____A. D. 187____

Assets. Cash on hand____ 'Stock and fixtures____ Promissory notes and bills of exchange, as per schedule "A"____ Open accounts, as per schedule "B" Real estate and interests therein, as per schedule "C" Miscellaneous assets, as per schedule "D"____ Total assets____ Debts. Preferred debts, as per schedule "E" Secured debs, as per schedule "F" Unsecured debts, as per schedule "G" Contingent debts and accommodation paper, as per schedule "H,"

[Schedule "A" to Statement.]

Schedule "A."

Promissory Notes, Bills of Exchange, etc.

No. Names Of Debtors Addresses. Description Of Debt. When Due. Amount.

[Schedule "B" to Statement.]

Schedule "B."

Open Accounts.

No. Names Of Debtors Addresses. Description Of Debt. When Due. Amount.

[Schedule "C" to Statement.]

Schedule "C."

Real Estate and Intersts therein.

Nature And Description. Encumbrances Theron. Estimated Value.

[Schedule "D" to Statement.]

Schedule "D."

Miscellanous Assets.

Nature And Descrption. Estimated Value.

[Schedule "E" to Statement.]

Schedule "E".

Preferred Debts.

No. Names Of Creditors. Addresses Description Of Debt. Amount.

[Schedule "F" to Statement.]

Schedule "F".

Secured Debts.

No. Names Of Creditors. Addresses Description Of Debt. Amount.

[Schedule "G" to Statement.]

Schedule "G".

Unsecured Debts.

No. Names Of Creditors. Addresses Description Of Debt. Amount.

[Schedule "H" to Statement.]

Schedule "H".

Contingent Debts and Accommodation Paper.

No. Names Of Creditors. Addresses Description Of Debt. Amount.

[Affidavit to Statement and Schedules.]

United States of America, ____District of____ ss.

On this____day of____A. D. 187____, before me personally came____, the person mentioned in, and who subscribed, the foregoing statement and the schedules marked respectively "A," "B," "C," "D," "E," "F," "G," and "H," and who, being by me first duly____, did declare the said statement and schedules to be a true statement of all his assets and debts, in accordance with the Revised Statutes of the United States, Title LXI, Bankruptcy, and the amendments thereto.

[Resolution Accepting Composition.]

IN THE DISTRICT COURT OF THE UNITED STATES,

For the____District of____ In the Matter of ____*In Bankruptcy*.

We, the undersigned, being a majority in number and three-fourths in value of the creditors of said____and who have proved our debts to the amounts affixed to our signatures respectively, assembled, either in person or by proxy, at the first composition meeting of said creditors in the above entitled matter, at the office of____, one of the registers in bankruptcy of said court. No____street, in the city of____, county of____, and state of____, and district aforesaid, this____, day of____, A. D. 187, pursuant to an order of said court, dated the____day of____A. D. 187____, for the purpose of said____proposing a composition to____creditors in satisfaction of the debts due from____to such creditors respectively, do hereby resolve as follows: That the composition proposed at this meeting, by said____of____cents on the dollar, in money, payable as stated in the proposal for composition, made at said meeting by said____shall be accepted in full satisfaction and discharge of the debts due to the creditors respectively, from said____

No. Names Of Creditors. Residenence. Amount.

[Confirmation of Resolution.]

IN THE DISTRICT COURT OF THE UNITED STATES,

For the____District of____ In the Matter of ____*In Bankruptcy*.

WHEREAS, a majority in number and three-fourths in value of the creditors of said who were assembled, either in person or by proxy, at a meeting of the creditors held on the____day of____187____, at the office of____one of the registers in bankruptcy of said court, No____street, in the city of county of and state of____, and district aforesaid, did resolve to accept a composition then proposed by the said____which is as follows, to wit: [here set forth the terms of composition.]

Now we, the undersigned, being two-thirds in number and one-half in value of all the creditors of said____,

having proved our debts respectively, do hereby, by our respective signatures, confirm the resolution so passed as aforesaid.

No. Names Of Creditors. Residence. Amount.

[Report of Register of Proceedings.]

IN THE DISTRICT COURT OF THE UNITED STATES,

For the____District of.____ In the Matter of *____In Bankruptcy. To the Hon____Judge of said court:*

I,____one of the registers in bankruptcy in and for said district, do respectfully certify and report: That, pursuant to an order of this court directing the same, a meeting of the Creditors of the above-named debtor____was held before me, on the____day of____, A. D. 187____, at____o'clock in the____noon, at____my office, in the city of____in said district, to act upon a composition proposed by said debtor____

That more than ten days prior thereto [or, that____clerk, has caused to be mailed to each known creditor of said debtor____a notice of the time, place, and purpose of such meeting, as will appear by copy of said notice and the clerk's return thereon, which is herewith returned, marked "A," and made a part of this report], I caused to be mailed to each known creditor of said debtor____a notice of the time, place, and purpose of such meeting, a copy of which said notice is hereto annexed, marked "A," and made a part, of this report.

That, at the time and place appointed for said meeting, the debtor____duly and personally attended, produced____, books of accounts, and____duly Sworn and examined in relation to____affairs, and presented to the said meeting____proposed composition, in writing, duly signed by____, which said proposition for composition is hereto annexed, marked "B," and made: a part of this report.

That the said debtor____also presented to said meeting a sworn statement, showing the whole of____assets and debts, and the names and addresses of the creditors to whom such debts respectively are due, which said statement is hereto annexed, marked "C," and made a part hereof.

That thereupon a resolution was introduced accepting such proposed composition, and the same was then and there passed, and the said composition was then and there accepted by a majority in number and three-fourths in value of the creditors of the debtor-assembled at such meeting, either in person or by proxy. Said resolution is hereto annexed, marked "D," and made a part hereof.

That the schedule hereto annexed, marked "E," is a true statement of the: names and addresses of all the creditors assembled at said meeting, either in person or by proxy, and shows the residences of said creditors, the amounts of their respective claims, and the manner in which each of said creditors voted upon said resolution.

That thereupon the said resolution was duly confirmed by the signatures thereto of the said debtor____, and two-thirds in number and one-half in value of all the creditors of said debtor____, which said confirmation is hereto annexed, marked "F," and made a part hereof.

And I do further certify and report that all of the proceedings had before me were *bona fide* and regular in all respects. All of which is respect-fully submitted.

Dated,____

____

Register.

IN THE DISTRICT COURT OF THE UNITED STATES,

For the____District of____ IN THE MATTER OF *____ In Bankruptcy. Bankrupt*

The resolution of the creditors of said bankrupt, accepting his proposed composition, together with a statement of his assets and debts, having been presented to this court, it is ordered, this day of____A. D. 187____, that the matter of said resolution stand for hearing on the____day of____, 187____, at which time this court will enquire whether the said resolution has been passed in the manner directed by law; provided, a copy of this order be served upon, or mailed to, each of the creditors of said bankrupt at least five days before the said day of____187____

Judge.
True copy. Test,____
Clerk of said district court.
[The notice to be sent to the creditors is the copy of the above order]

[Order of Court for Recording Composition.]

IN THE DISTRICT COURT OF THE UNITED STATES,

For the____District of____ In the Matter of *In Bankruptcy. Bankrupt.*

At a stated term of the district court of the United States of America, for the____district of____held at the United States court rooms in the city of____, on the____day of____, in the year one thousand eight hundred and seventy____Present, the honorable____, district judge.

It appearing satisfactorily to the court, from the report of____, and from all the papers and proceedings herein, that an order was made herein on the____day of____A. D. 187____, whereby the clerk of this court was ordered to call a meeting of the creditors of said____, bankrupt, proposing a composition to____creditors, in accordance with section 17 of the Bankruptcy Amendment Act, approved June 22, 1874; that such meeting was called, and was held at said time; that said____bankrupt, was present at said meeting and answered all enquiries made of____and produced to said meeting a statement, verified by oath, showing____the whole of the assets and debts of said____bankrupt, and the names and addresses of the creditors to whom such debts respectively are due, in accordance with the requirements of said section 17; that the composition specified in the resolution hereto annexed was, at said meeting, proposed by said____, bankrupt; that the same was accepted by the passing, at said meeting, of said resolution, by a majority in number and three-fourths in value of the creditors of said____, bankrupt, assembled at said meeting, and was confirmed by the signatures thereto of the said____bankrupt, and of two-thirds in number and one-half in value of all the creditors of said bankrupt; that said resolution so passed and so confirmed, and said statement of assets and debts, were presented to this court; that on the____day of____A. D. 187____, an order was made herein, whereby the clerk of this court was ordered to call a meeting of the creditors of said ____, bankrupt, to be held on the____day of____A. D. 187____, for the purpose of said____enquiring, upon hearing, whether the said resolution accepting such composition was passed in the manner required by said section 17, and was confirmed by the signatures required by said section, and whether it is for the best interest of all concerned that the said resolution should be recorded, and that the said statement of assets and debts should be filed; that such last-mentioned meeting was held, as by said order required, on the____day of____A. D. 187____; that the said resolution was passed in the manner directed by said section 17, and has been confirmed by the signatures required by said section 17; and that it is for the best interest of all concerned that the said resolution accepting the composition proposed as aforesaid be recorded, and that the said statement showing the whole of the assets and debts of said____, bankrupt, be filed.

Now, therefore, it is ordered that the said resolution, accepting the composition proposed by said____, bankrupt, at a meeting of____creditors, held at the office of____on the,____day of____, A. D. 187____, be recorded, and that the said statement of assets and debts of said____bankrupt, produced by____to said last-mentioned meeting, be filed with the clerk of this court

WITNESS, the honorable____, judge of the said court, and the seal thereof, at the city of____[Seal.] in said district, on this____day of____, A. D. 187____Clerk.

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Preface.

THIS pamphlet took its origin in the strong convictions of the author that the prosperous fortunes of Great Britain and of her people were, and must be in the future, inextricably bound up with those of the other communities of British race scattered throughout the world, and especially with those that are now united under the shadow of her empire; and that a failure on the part of Englishmen now to recognize this truth must lead them to danger and to disaster.

No one can be more sensible than he is of the extreme incompleteness and imperfection of his attempt to consider one of the most gigantic questions of the present age. If he had seen that the men, who most justly command the confidence of Englishmen, and to whom they rightly look for advice on subjects, which not only require the exercise of practical wisdom, but also reasoning from the past and a long look into the future, were occupying themselves with this truly national concern, he would have hesitated to publish any of his own views, however well founded he might have believed them to be. But this has not been the case, and he has therefore ventured to tread on ground that might justly have been considered beyond his reach, if it had been previously occupied. It is his hope, that as even the smallest effort may, in concert with others, have some result, so may this have the effect, either of, in some degree, drawing the attention of the public to this great question, or of persuading some thinker of earnestness and weight to devote his abilities to its solution.

There are many matters, such as the consideration of the number of members best fitted for carrying on the work of an Imperial House of Commons, which have been omitted, although they fall within the proper limits of the discussion in this pamphlet. The author has considered their omission preferable to further increasing its bulk.

The Government of the Empire.

No patriotic Englishman who regards the progress already made by his race in civilization, and in spreading it throughout the world, can look forward, without hope and confidence, to the part that race is destined to play in the future history of mankind. That this part will probably be a predominant one, the organized colonies of Great Britain, covering vast tracts of land in the most important parts of the globe, and apparently settled beyond chance of dispossession, are a proof. The causes also which have produced this development are still at work. The material prosperity that has allowed early marriages, the magnificent improvidence with which they have been entered into, and the large families resulting there from, show no signs of diminution; while the enterprise continues which has transferred our redundant population to unoccupied or uncivilized countries in the temperate zones, and has formed: communities of our countrymen in every part of the world for the purposes of commerce. As long as these outlets remain, we may look with satisfaction on any possible increase of our numbers, and even the individual hardships thereby; produced, and must guard only, by stringent sanitary regulations, against a deterioration of physical type, and by a watchful discrimination of almsgiving, both legal and voluntary, against the moral evil of pauperism.

The genius of the race has not been less displayed by the facility with which it has peopled our colonies, and has organized governments in them, than in the administrative power, shown especially by the educated classes, in ruling, with justice and for the general benefit, vast numbers of the people of alien races in India and the plantation colonies. England is not only a European power, an Asiatic power, a Colonial power, a Maritime power, a Christian power, and a Mahommedan power; she is a world-power, perhaps the only, certainly the greatest, world-power.

We are so familiar with these facts, that a confidence has been created in our minds, both in the prosperous future of our race, and in the wisdom of continuing to rely unhesitatingly on the policy by which our present position with regard to our Colonial Empire has been attained. This policy has not been part of any wide and general scheme for national extension, but has been one of expediency, treating, as occasion required, and with little regard for uniformity, the circumstances of the various settlements of Englishmen. The process has, however, been one of growth, the true source of strength and per- manence; and an empire has sprung up around us, full of life, full of promise, but without unity, unsettled, disjointed, fragmentary, and containing on every side opposing forces, powerful enough, if misdirected and unharmonized, to effect its disruption.

The object of this paper is to make a few suggestions, as to the means by which our position can be organized and strengthened, and by which the development of the empire may proceed as vigorously as before, but within lines insuring unity and permanence.

There is a very general consent that it is for the benefit of both England and her colonies, that a connection

should be maintained between them as long as it is practicable and consonant, as now, with the wishes of Englishmen in all parts of the empire. I shall not attempt to analyze these benefits in an exhaustive manner, but will mention a certain number of them which affect both the mother-country and the colonies. The benefits to England herself, are both actual and prospective, and great as are the former of these in giving Great Britain profitable outlets for her surplus population and capital, her trade and energy, it may be that future and more comprehensive advantages ought to have the greater weight upon English opinion.

Great Britain has now a population so large, as to render it improbable that it can ever maintain a very large increase of its numbers. But even if this were found practicable, still the maximum must some time be reached, and that within a limited period.

In every healthy community the population is constantly increasing, and it may confidently be expected to do so here. It is therefore necessary to look forward to a time when the whole of this constant increase will have to be exported to other lands in search of subsistence. It will be of the deepest interest to the mother-country, where her emigrant sons shall betake themselves, whether to places in which they will retain their character as Englishmen, such as her colonies and dependencies are, or to other countries, in which they will be absorbed into, and become part of nations, either actually or possibly hostile to her. It cannot, I think, be doubted that it will be then a very great advantage to her to have suitable and rising colonies to which to send her surplus population. But if it were made a practice to abandon our present colonies as soon as they were in any way able to support themselves, no such places would remain in her possession, or be available for acquisition by her for the purpose. All those who value the corporate influence of Great Britain, as well as the individual influence of Englishmen as a power exercised throughout the world, in favour of free government, free trade, and freedom generally, would regret to see it dissipated and neutralized by subdivision and internal dissension.

It is also improbable that the relative superiority of England to her colonies will always continue. We cannot look forward with any certainty to a perpetual continuance of the commercial prosperity which has enabled England to attain her present position, and which now enables her to support the whole cost of empire. History shows that a vigorous people, commercial aptitude, and a command of the sea, have not prevented the decay of the Italian Republics, and of Holland; and though Great Britain, no doubt, holds a stronger natural position than they ever did, a change in the course of trade, the growth of a maritime power able to interfere with our present practical monoply of the carrying trade of the world, or a diminution of our power of underselling other nations in manufactures, would produce a rapid decline of our commercial importance, to be followed by as rapid a lowering of our population. But whatever may be in store for these islands, there can be little doubt that no decadence of the British race generally is to be feared; and, if we in England now, while it is still in our power, succeed in fixing, with a wise and generous comprehension, such lines of government as will insure the political unity of the race, our descendants here may look with cheerfulness upon even a declining home trade, and have reflected upon themselves the rising greatness of their countrymen in Australasia, America, and Africa. Far from having to abandon, in weakness or decrepitude, such a noble work as the government of the empire of India, or see it pass into other hands, they would find themselves aided in their task by their brother Englishmen in every part of the globe. Thus a continued connection with the colonies may be to England in the nature of insurance.

It is equally the interest of the colonies to maintain a close connection with the mother-country and with each other. The due development of all of them is greatly dependent upon three things: 1st. The maintenance of public security from war, from revolution, and from attacks or insurrections of native races; 2nd. Upon a sufficient supply of capital requisite for commencing and carrying out new undertakings; as well as, 3rd. Upon facilities for obtaining a due importation of labour. All these requisites are supplied by the connection now existing with the mother-country.

(1) The combination of all the various countries inhabited by Englishmen under one Imperial Government is a sufficient protection from war among themselves. It is difficult to believe that if the restraining hand of the mother country were taken away, the colonies would long remain on good terms with each other. Our experience has shown that, even under present circumstances, the relations of the various local governments, in Canada, in Australia, and South Africa, have not been always friendly, and their antagonism would be greatly extended if each colony, without any check for the general interest, could legislate, and take measures to the extent of war, as its fancied requirements for the moment might demand. The energy so necessary to fulfil the mission of civilization and the development of the waste places of the earth, would be in danger of being expended in intestine struggles. On this point I may quote the opinion of Sir George Cornewall Lewis, who remarks:

'Government of Dependencies,' p. 249.

"It would appear from the perpetual hostilities between the republics of ancient Greece and Italy, and between those of Italy in the Middle Ages, that a multiplicity of independent and small states multiplies the chances of war. It is certain, moreover, that the mutual wars of the numerous independent states subdued by the

Roman arms, were extinguished by their common subjection to the Imperial city; and that the peace of the civilized world was commonly preserved by the Imperial Government, so long as the dependence of the provinces was not substantially impaired."

It has been said that the British Empire is the greatest of coalitions, and the united weight of it is sufficient to render any external attack from an equal power very improbable. It has in the past secured English colonies from the covetousness of foreign states which might have attempted to govern upon despotic principles. By it also the whole power of Englishmen is available for repressing native inroads, and the knowledge of this latent power both gives the colonists most liable to them, confidence and prevents the policy of extermination, which is too often regarded as the safest course for small communities, composed of men of civilized races and surrounded by large masses of those of inferior ones. Sir George Lewis says,

'Dialogue on the Best Form of Government,' p. 109.

"With respect to wars, the colonial policy of England has been successful in preventing them in the dependencies of English origin. The war with the American colonies belongs to a period when the extent of the Imperial control was as yet undefined, and when the colonial problem had not been worked out. The Canadian war of 1837 principally grew out of the mixture of races in that province, and the feelings of the French population of Lower Canada. Our recent colonial wars have been against neighboring aborigines."

The English connection has been equally a security against insurrection. I make no apology for again quoting Sir George Lewis, who, in his 'Dialogue on the Best Form of Government,' p. 98, says, through one of his debaters, "The legal supremacy of the mother-country, capable in any extreme case of being called into activity, operates as a check open the excesses of the democratic spirit." Moreover, a wide and educated public opinion has been much more easily brought to bear upon selfishness in any political or social order or clique than is possible in a limited community. The weight caused by the consent of a great empire renders the support of any abuse, maintained in some local interest, extremely difficult. Such would be even more the case if colonists had some share in the general government; we might then look forward with confidence that they would continue accustomed, as Englishmen now are, to surrender whatever the majority should pronounce to be against the public good of the *empire*. If the Northern and Southern States of the North American Republic had remained parts of the British Empire, the late war between them would have been impossible.

(2) Nor are the colonies less indebted to England for the requisite supply of capital to stimulate their commercial enterprise. England is the great lender of the world, because it is there only that the increase of wealth exceeds what is required for home use. Any connection, therefore, having the effect of promoting the transference of its surplus accumulations to places where they are thus needed, is of the greatest benefit to our colonists. That our connection with them has the effect of so promoting a transference of capital is proved by the low rate of interest at which colonies and colonial cities are able to borrow in the London market, and by the number of English trust deeds under which securities in the colonies are accepted as investments. The English lender believes that he will get his money again; because the resources of the colony will be fostered under British rule; because British courts administer justice; because no civil war is likely to break out, or the colony to be attacked by foreign enemies; and because he believes a national public opinion will secure that his interests are treated fairly. The British Government has also directly advanced money to her dependencies. This is shown in detail in Sir John Lubbock's article in the 'Nineteenth Century Review,' for March 1877, on the "Imperial Policy of Great Britain," which should be read by everyone who takes an interest in the present position of England with regard to her dependencies. He points out that from 1859 to 1869 this expenditure amounted altogether to over £41,000,000, and though since that period the annual sums expended for them have decreased, owing to her ceasing to pay the colonial military expenses, this subsidy in the year 1875 still exceeded £1,500,000. He also explains that the navy is entirely paid for by the thirty millions of Englishmen in Great Britain and Ireland, while two hundred millions of our countrymen in the colonies and in India, who reap many of the benefits it confers, pay scarcely anything for it. Since the year 1830 the British Government has either advanced or guaranteed loans to our colonies for over £7,000,000. I may also remark, that the facility by which a government, with the prestige and influence of the British, can assist commercial interest, is of value to the colonies, particularly as no local government could have anything like the same weight in negotiating with foreign powers.

(3) It has been much discussed whether English connection with the colonies has the effect of specially promoting emigration of labour to them in preference to other localities. Emigration is at present so entirely dependent on the emigrant's own wishes, that the sole powers that the British Government exercise with regard to it, are those of regulating the means of transit, and of giving public warning if it believes that large numbers of laborers are being attracted to other countries by untrue statements. The latter function has recently been exercised in the case of emigration to Brazil, where English emigrants had learnt by sad experience that fertile soil and a magnificent country were no compensation for insecurity of government amongst an alien race. It follows, therefore, that the most favorite fields for emigration will be those which are most prominently brought

before the notice of persons willing to emigrate, as insuring good prospects of success, and to which they can proceed at the smallest cost to themselves. The United States, from their comparative nearness to Great Britain, and the consequent cheapness of transit, have had great advantages in procuring labour, and these advantages have increased as each succeeding emigrant left friends behind him, whom he often attracted by his example. Now, however, from various causes, of which the undue development of the large American cities is a prominent one, the tide of emigration to the States has almost ceased, though it will probably again revive in some degree. The position and natural advantages of the United States must, as long as property is secure there, always lender them the most formidable rival of the colonies in attracting emigrants. On the other hand, the political connection of the colonies with England supplies a means for bringing their circumstances to the notice of the English public, and this would be vastly more the case if colonial representation in Imperial matters were adopted, when arrangements for systematized emigration to the colonies would probably be made an Imperial question. Even as it is, the fact that emigration to a foreign country involves a change of allegiance, has an influence in attracting a class of emigrants, and that the best class, to our colonies. It is impossible within these limits to discuss as it deserves, the complicated question of emigration and its relation to Imperial interests, but it may be said generally, that the fact that the colonies remain parts of the empire has weight, and may have much greater weight, in attracting English labour to them, and that the home connection cannot possibly, except in the case of persons whom any community had better be without, have a deterring effect on emigration.

Besides the advantages of union which I have mentioned, there is another, less material, but perhaps even more likely to draw the colonies towards us with the cords of affection. It is the desire of colonists to continue to share directly in the deeds of Englishmen, and in the inheritance of those great names, in literature, science, and arts, already produced, and to be produced by Great Britain—in fact, to be Englishmen, with all that the name imports.

I shall now attempt to show that it is absolutely necessary, in order to maintain any lasting connection between England and her colonies, that some wide, practical, and simple scheme of union should be agreed upon, without delay, towards effecting which our policy should be unswervingly directed. Up to the present time no such scheme has ever been brought prominently before the public, though several propositions have attracted momentary attention. English statesmen, without having any definite aim towards which they could point their efforts, have been willing to shape their colonial policy according to the immediate pressure of circumstances. The fortunes of the colonies have drifted with the tide, but the tide has never set away from home. Glimpses, however, of a new spirit have been seen, and there are signs that both the public and public men are more deeply interested in the colonies than was formerly the case, and would be both to see any of the ties weakened which bind them to the mother-country. The successful Confederation of the Dominion of Canada' and the attempt of Lord Carnarvon to consolidate our South African colonies the commencement of a more defined action on the part of the Home Government, and are a sign that the doctrines, that benefit would accrue both to England and to her colonies from separation, which were formerly urged by persons of weight, have ceased to have any great hold upon the public mind. As long as any doubt existed, whether it might not become the creed of a great political party, that separation was inevitable, and should be accelerated, all action for the consolidation of the empire was paralyzed.

That this question has now been set at rest is due to the patriotic instincts of the people generally, who, both at home and in the colonies, regarded the political unity of the race as a fact of greater importance, and having a more practical bearing on politics than did some of their ordinary political teachers. As Mr. Herman Merivale

'Lectures on Colonization and the Colonies,' ed. 1861, Lecture xxii., app. p. 645.

most truly says, "The sense of national honor, pride of blood, the tenacious spirit of self-defence, the sympathies of kindred communities, the instincts of a dominant race, the vague but generous desire to spread our civilization and our religion over the world, these are impulses which the student in his closet may disregard, but the statesman dares not, for they will assuredly prevail, as they so often have prevailed before, and silence mere utilitarian argument whenever a crisis calls them forth."

In Mr. C. Buxton's 'The Ideas of the Day on Policy,' published in 1868, the following are given as the opinions of a large part of the public on colonial questions. I do not think that they can be regarded as representing the views of any considerable section of either educated men or of the people now. He says, p. 123, "Some politicians would sever the tie that still binds us to the colonies, and leave them, not merely to self-government, but to independence.

" 1. They seek this, first, on the principle, that with nations as with men, dependence weakens independence strengthens, character.

" 2. The idea that this would be a cheaper policy.

" 3. The idea that it would be a more peaceful one, as lessening the points of contact, and therefore of possible war between us and other nations. This has been especially felt with regard to Canada."

At the outset, it must be admitted that our present relation with regard to our colonies can only, of its nature, be a temporary one, and must give way, sooner or later, either to a more complete union, or to complete disunion. This may be maintained, although we may allow that there are some advantages in the existing mode of connection. As Sir George Cornewall Lewis, in his 'Dialogue on the Best Form of Government' (page 110), says, "The modem English system of dependencies admits of the successful government of a larger surface of the earth as one empire than any system which has hitherto been devised. An almost indefinite number of new dependencies might be aggregated to the British Empire, without deranging the constitution, or disturbing the action, of the Imperial Government. The practical limit seems to be expense of military and naval defense, which falls principally on the Imperial exchequer, and to which the dependencies (with the important exception of India) make little or no contribution." But as he subsequently points out, the system of dependence upon another government for some of the most important attributes of government, is suited only to weak communities, and could not be retained by those of advanced civilization and large population.

The colonies are theoretically parts of British soil, which we are bound, in case of war, to defend at any cost as our own shores, and cannot without disgrace abandon; and they are inhabited by men who are Englishmen, and have as keen a sense of our national honor as those who live at home, but who cannot, without breaking custom adhered to since the rebellion of American colonies, be called upon by the Imperial Parliament, to pay one single penny towards their own defence. In the first extended war in which we may embark, particularly with a naval power, it will be absolutely necessary to define, as it were at the cannon's mouth, and at the point of the bayonet, a position which we have neglected to determine during years of peace. For the Home Government would then be in this position—either (1) it would be obliged to defend the flourishing colonial cities at its own expense; or (2), against precedent, tax the colonies for so doing, a proceeding sure to arouse jealousy and resistance; or (3) leave the colonists themselves to defend their own shores.

In the first case, the strain upon the resources of England would be greater than she could hear. But for the great increase of English wealth, which has been partly acquired by trade with the colonies themselves, the United Kingdom could not have afforded the whole of the Imperial funds, and it would be unreasonable and unjust to it to propose that it should permanently do so. This is no doubt a question of time. The relative importance of the colonies to Great Britain must become greater, and with their greatness, their duties to the empire of which they are members, will acquire more importance. The inequality of the present system would not attract so much notice in a war in which special efforts were not needed on their behalf, but in a war such as we are supposing, this would be the case.

In the other cases, difficulties with the colonies would almost certainly arise which would greatly impair our strength and prestige, even if they did not produce a disintegration of the empire.

I believe that to attempt to tax our colonies under present circumstances would certainly prove disastrous. On this point, we have had a lesson that we can never forget, and we should run the risk, if we attempted to enforce such taxation in time of war, not merely of failing to get our money, but of getting an additional enemy into the bargain. For it must be remembered that it would be always open to a disaffected colony, threatened by the enemy, to make a separate peace, or even a hostile alliance, on the footing of severing its fortunes from ours.

Again, the defense of each colony at its own expense, without reference to other parts of the empire, would cause a severance of its interests from those of the empire, and would amount to a practical independence of the mother-country. It would also be the most inefficient form of defense. A general commanding purely local forces, not acting in concert with the regular troops of the empire, would, although perhaps appointed by the Home Government, find himself unable to use his forces in any way not sanctioned by the public opinion of the colony to which the forces belonged, or to take part in the organized defense of a neighboring colony, however urgent the need might be. The same difficulties would probably arise in the uncertain case of voluntary gifts to the Imperial Government by the colonists, though that such gifts would be made is against our past experience. There would be a danger that each colony would require the allocation of its grants to special works on its own shores, or to the maintenance of a local militia, and would view with jealousy the expenditure of funds, collected locally, on the general defense of the empire, in pursuance of a policy in the direction of which its citizens had no voice.

There are other questions of Imperial policy, of which it is unfair that the home countries should bear the sole burden, but which, apparently, cannot at present be settled in any other manner.

The Imperial Government has lately, at its own expense, and in consequence of the earnest request of our Australian fellow-countrymen, accepted the cession of the Fiji Islands. The colonies, which were most interested in the annexation, were asked to contribute towards the cost incurred, but they all refused to do so. On a subsequent request, made by the Australian colonies to Lord Carnarvon, to annex New Guinea to the possessions of the British Crown, he, though declining to do this at present, stated that as such an annexation

would be principally for the advantage of Australia, Great Britain should not be asked to incur heavy expenditure for the purpose, unshared by any Australian colony.

In commenting upon this answer, the correspondent of the 'Standard' newspaper in Melbourne stated that Australians boldly challenged the principle of these views—that certain portions of the empire should furnish funds towards the acquisition of new territory for the empire at large, and continued: "Is it to be understood or laid down as a doctrine that for the future no remote dependency of Great Britain is to derive assistance from the State without paying an amount to be assessed on some definite basis? For this is really the question arising out of Lord Carnarvon's dispatches having reference to Fiji and New Guinea, and a very important question it is—one which should be settled before any one part of the empire Shall conceive it has cause for discontent because it has been called on for payments which have not been exacted from other portions under similar conditions."

A discussion of the relation of our colonies to the Home Government is enough to show that there are questions of primary importance in the fundamental constitution of the British Empire which require settlement, and this will have to be done either at a time of peace, such as the present, when men, both here and in the colonies, can regard the questions and principles at stake with calm and unbiased minds, or in the excitement and pre-occupation of war, and under pressure of immediate necessity. I would submit that it is the duty of every Englishman, to whom the honor and interest of his country are dear, to turn Ms attention at once to the proper definition of the rights and obligations of our colonies, in order that we may, in the time of peril, present over our vast territories an unbroken and unwavering front to the enemy.

It is probable that but for the secession of the United States in the last century we should have been before this forced to settle the precise relations of the mother-country to the colonies—a settlement which would have involved some arrangement for colonial representation. The great spread of the English race in America, its comparative proximity to England, and the enormous interests at stake, would have prevented a merely temporizing colonial policy, possible towards less advanced settlements. Whether, in such a case, the lines of union would at first have been marked out in as broad and liberal a spirit as they may be in the future, is perhaps doubtful. The schemes for Imperial comprehension, which were advocated previous to this secession, planned the centralization in England of all branches of colonial government, and did not provide for the local self-government which subsequent experience has proved both to be practicable and not to be necessarily destructive of the Imperial tie.

It is very necessary that any arrangements for the closer political connection of the scattered members of the British race with England must, to insure their adoption in the first instance, and to produce strength and permanence afterwards, be laid on lines adapted to the habits of the people, so as to impair neither freedom nor sense of local responsibility. One of the greatest qualities of Englishmen, wherever they are found, is their power of local self-government, and the habit has been, by our policy towards the colonies, developed to its utmost. Perhaps the only principle from which our colonial policy has for the last thirty years never swerved, is that of compelling the colonies to govern themselves. This may in some cases have been carried too far, but it has had the effect of generally producing stable and self-reliant communities. Self-government has, however, proceeded in accordance with English traditions, and in no case has local development gone on in a path diverging greatly from home experience. Colonists have also been most sensible of English public opinion, and though resenting interference in purely colonial affairs, or what they have regarded as such, have always been willing to consider calmly recommendations of the Home Government laid persuasively and without pressure before them.

If colonists have not in every case taken a sufficiently large view of the requirements of the empire generally, and have preferred provincial and local to Imperial interests, the cause may partly be found in the fact that they have no voice in central government, and have been too much encouraged by public men at home to regard their interests as apart and diverse from those of the mother-country.

But it is, I think, incontestable that any radical change in the policy of our colonial government must be effected with the general consent of colonists, and not by any interference with the independent action to which they have become accustomed and attached. I shall therefore assume that no system of Imperial union is practicable that does not allow to each local community the same or as great power of local self-government as it has at present.

The question next arises, Can any closer political union be formed such as still to concede to the local governments forming part of it, an autonomy, as complete as that now possessed by our principal colonies? Before considering this, I will notice very briefly the respective powers possessed and exercised at present by the Home or Imperial Government, and by the colonial com*munities*, together with certain marked distinctions amongst the latter.

Our colonies are divided into three classes, each having different forms of local government; though within these classes no two of the colonies have institutions precisely similar to each other. The classes are defined in

the 'Colonial Office List,' as follows:—

- "Crown Colonies, in which the Crown has the entire control of legislation, while the administration is carried on by public offices, under the control of the Home Government." Of this class, the most conspicuous examples now are Jamaica and Ceylon.
- "Colonies possessing representative institutions, but not responsible government, in which the Crown has no more than a veto on legislation, but the Home Government retains the control of the public officers." The principal colonies of this class are the South African, and Western Australia.
- "Colonies possessing representative institutions and responsible government, in which the Crown has only a veto on legislation, and the Home Government has no control over any public officer except the Governor."

A further explanation of this class of colonies is also given in the same list. It is stated that "under responsible government, the Executive Counselors' are appointed by the Governor alone, with reference to the exigencies of representative government, and other public offices by the Governor, on the advice of the Executive Council. In no appointment is the concurrence of the Home Government requisite. The control of all public departments is thus practically placed in the hands of persons commanding the confidence of a representative legislature." In this class are included the Dominion of Canada, all the Australian colonies (except Western Australia), and New Zealand.

Thus we have to deal with communities having various degrees of self-government, of which it may generally be said that the widest local powers are given to those which contain the smallest admixture of foreign races.

As it is with the colonies of the third class, to which both responsible and representative government has been granted, that difficulties would be most likely to arise, it will be sufficient for my purpose to point out, very briefly, what is their legal and practical position. The powers of their legislatures originate with the Acts of the Imperial Parliament creating them, and though these Acts differ in their terms, they all bestow the widest authority within the limits of the respective colonies to which they refer. In short, they give all that is included in the power of making laws for good government, with this restriction, that such laws cannot alter existing, and are subject to future Imperial laws

See Sir Edward creasy 'Constitutions of the Britannic Empire.'

By usage, which has not been infringed for many years, the legislatures of these colonies have alone exercised the power, determined the incidence, and directed the expenditure of the proceeds of taxation within the limits of their own colonies. They have, however, in relation to foreign governments, or generally to persons outside their boundaries, had no status separate from that of the British Government, and in cases where they have entered into contracts with strangers for borrowing money and other purposes, they have done so as a municipality or corporate body, with the sanction of the colonial Governor rather than as a separate power.

The colonial legislatures are moreover subject to the absolute authority of the Parliament of Great Britain, and to the limited authority of the Crown.

The authority of the Crown over these colonies is exercised in three ways: by military protection; by allowing and disallowing laws made by the local legislatures; and by the appointment of a Governor having certain administrative powers.

The Parliament in England, which consists of the Crown, the House of Lords, and the House of Commons, acting in concert, has two characters, that of the local legislature of the three kingdoms, and the wider and Imperial one, of being the supreme authority over all parts of Her Majesty's dominions. This is finely expressed by Burke in his speech on American taxation, April 19th, 1774; and no change has since that time been made which in any way alters its position in this respect. He says,

Burke's Speeches, vol. i., p. 237.

"The Parliament of Great Britain sits at the head of her extensive empire, in two capacities: one is the local legislature of this island, providing for all things at home immediate', and by no other instrument than the executive power: the other, and I think, her nobler capacity, is what I call her Imperial character, in which, as from the throne of heaven, she superintends all the several inferior legislatures, and guides and controls them all without annihilating any." In this Imperial capacity the Parliament in England has at present the legal right to legislate for all the dominions of the Crown, whether or not in possession of representative institutions and responsible government; and this power of legislation includes that of taxation and all other attributes of the *summa potestas civil is*.

This is very clearly pointed out by Sir Edward Creasy, in his 'Constitutions of the Britannic Empire,' p. 156, where the authorities on this point are enumerated.

But although this legal right may exist, usage, based upon the English maxim, which in the minds of men of English race has the force of a moral law, that taxation and representation go together, effectually prevents

Parliament at home from exercising the highest right of government, in compelling contributions towards Imperial expenditure from the unrepresented communities in the colonies. In many other branches of administration, such as the recognition of religion, experience has suggested limits to the exercise of control by the Imperial Parliament, which are not likely to be overstepped; and this experience will be most valuable by enabling us, in promoting any system of consolidation for the empire, to determine what functions should appertain to the Imperial and to the local governments respectively. The present position of the empire presents a thousand opportunities for a dead-lock, and it is due only to the aptitude for government and the self-restraint, in view of the common welfare, shown alike by colonists and English statesmen and people, that difficulties of the most serious character have been avoided. As it is stated in a letter to the 'Times' newspaper of June 1st, 1876, by Historic us, "The constitutional supremacy of the Imperial Legislature, as of right, is universal, but in practice it is never exerted in local, as distinguished from Imperial interests, or in any case where its application would not be generally recognized as just and reasonable. What these cases are must be determined by practical statesmanship. The real problem of politics is to distinguish between that which you have a right to do, and that which it is right you should do. That the Imperial Legislature has a right to legislate for the colonies cannot be disputed; how far it is right that it should do so is a matter of policy and discretion."

I would urge that it is in the separation of these two distinct functions of the British Parliament, and in the gift to the colonists of direct representation in a Parliament called solely for Imperial purposes that the true key is to be found to the permanent and effective political union of Great Britain and her colonies, and to the consolidation of the British Empire.

Since the time of Burke the germs of British colonization, that even then gave promise of a luxuriant growth, have grown into mighty trees which overshadow the world. But for the great catastrophe which his wise and eloquent appeals in Parliament were unable to prevent, of the secession of the American provinces, this growth would probably have taken place entirely within the dominion and under the purview of the Imperial Parliament of Great Britain, and the British Empire would now have been conterminous with the British race. This was, however, not the destined course of events, and in consequence many of the most interesting problems of government and national development have been worked out, and are in process of being so, outside the direct influence of home opinion and tradition. It is impossible for Englishmen not to feel both pride and interest in the progress of the United States: blood is thicker than water.

But putting on one side this great severance, the duties of the British Parliament, as it carries on the business of its wide and Imperial sway, are sufficient in their magnitude and importance to occupy and exhaust the faculties of any assembly of men, without being hampered and choked, as is the case now, with the importunate and more minute cares of a local legislature. This evil of repletion has long been growing, and with the progress of the nation's prosperity must increase more, until either some change of system is made, or one or more kinds of necessary business are, as a rule, pressed and huddled out of notice. And if the latter predicament should occur, it is not difficult to see what interests are likely to suffer most; those which appear most pressing in the ordinary life of a member of Parliament and his constituents, such as the licensing of public-houses and the reduction of the rates, important as these are, or those move remote, and less understood, which appertain to the general welfare of the empire at large and of the distant colonies. And it must be also remembered that as the tendency is nowadays for constituents to elect representatives to the House of Commons for local reasons, and to advance local objects, so will these men both prefer to direct their energies to local matters, and be of a class incompetent to form independent opinions of value on the more important questions of Imperial policy. At the present moment the discussion of such questions is in the hands of a few members, to whom either extended views or personal experience have caused them to be interesting; and the policy of the Colonial Office is directed by the Minister of the day without any check, and except in case of expenditure from Imperial funds or of wide- spread disturbance, without any remark in Parliament. Indeed, it is difficult to believe that unless some public disaster in the colonies should impend, colonial policy could be of sufficient weight to determine the formation or rejection of any Ministry.

The present unsatisfactory state of affairs has long been acknowledged, and was lately remarked upon by the Home Secretary; and several propositions have already been made for delegating much of the local authority now exercised by Parliament, either to other elective bodies, or to administrative agents.

I would maintain that both local and Imperial interests are of such importance that they require complete and undivided attention from the representative bodies to which they are entrusted, and that they are of such a character that each is, in the majority of cases, best served by a different kind of men from those which are of most use in the other. Many men are of course equally fitted to grasp and superintend both the wider and more contracted interests of England, and for the sake of unity of policy it is most desirable that they should continue to exercise an influence upon both of them. It would be proper and practicable that this should be provided for in a Parliament reformed in an Imperial sense. There can be no doubt that there exists in Great Britain an abundance of suitable men to represent her various interests, both in an Imperial and a local Parliament, and the

real difficulty of late years has not been to find men who are worthy to be members of the House of Commons, but to get them elected to it. Population, and with it the number of educated and enlightened men, have enormously increased, while the number of members of Parliament remains a comparatively fixed one.

The dream of colonial representation in an Imperial Parliament has fascinated the minds of many men of genius who have thought and speculated on the future of the British constitution, even of those who have believed that the difficulties in its way rendered it impracticable. A century ago Adam Smith wrote in the 'Wealth of Nations,' on the eve of the secession of the American colonies,

Murray's ed., 1870, p. 493.

"There is not the least probability that the British constitution would be hurt by the union of Great Britain with her colonies. That constitution, on the contrary, would be completed by it, and seems to be imperfect without it. The assembly which deliberates and decides concerning the affairs of every part of the empire, in order to be properly informed, ought certainly to have representatives from every part of it. That this union, however, could be easily effectuated, or that difficulties, and great difficulties, might not occur in the execution, I do not pretend. I have heard of none, however, which appear insurmountable. The principal perhaps arise, not from the nature of things, but from the prejudices and opinions of the people, both on this and on the other side of the Atlantic." The views of this great thinker, expressed in the 'Wealth of Nations,' have already moulded and transformed the opinions of his countrymen on the principles which underlie the transactions of trade, have caused an entire change in the scheme of our commercial legislation, and may perhaps yet prevail, in the matter of colonial representation.

In Mr. Burke's great speech in Parliament, on March 22, 1775, upon his resolutions for conciliation with the American colonies, he said:

Burke's Speeches, vol. i., p. 305.

"My idea, therefore, without considering whether we yield as a matter of right, or grant as a matter of favors, is *to admit the people of our colonies into an interest in the constitution*." And subsequently, in the same speech:

Ibid., p. 314.

"You will now, Sir, perhaps imagine that I am on the point of proposing to you a scheme for the representation of the colonies in Parliament. Perhaps I might be inclined to entertain some such thought; but a great flood stops me in my course. *opposite natural*.. I cannot remove the eternal barriers of creation. The thing in that mode I do not know to be possible. As I meddle with no theory, I do not absolutely assert the impracticability of such a representation. But I do not see my way to it, and those who have been more confident have not been more successful. However, the arm of public benevolence is not shortened, and there are often many means to the same end. What nature has disjointed in one way, wisdom may unite in another. When we cannot give the benefit as we would wish, let us not refuse it altogether. If we cannot give the principal, let us find a substitute." And again later:

Ibid., p. 335.

"My trust is in her (America's) interest in the British constitution. My hold of the colonies is in the close affection which grows from common names, from kindred blood, from similar privileges, and equal protection. These are ties which, though light as air, are strong as links of iron. Let the colonies always keep the idea of their civil rights associated with your government; they will cling and grapple to you, and no force under heaven will be of power to tear from their allegiance."

These extracts show the spirit of Mr. Burke, and that though he regarded colonial representation as incompatible with the resources of the empire a hundred years ago, he would have hailed it as the principal benefit which could be accorded to our dependencies, if it had been possible. The Nature that opposed his wishes has been overcome by the invention and energy of In's successors; the eternal barriers of the creation have been bridged and over-thrown by steam and the telegraph. But the lesson that he tried to teach has been learnt; and since the great catastrophe of his time, no English colony has loosened the tie which binds it to the British Crown. Who can tell what he would deem possible now, if he could live again? The objections on other grounds, which he made elsewhere in his speeches, to colonial representation in England, do not apply to representation for purely Imperial affairs, but to the proposition that had been made—that the sole control of purely local matters, in the colonies, should be left to a central representative body. I may also remark that he was of opinion that direct grants for Imperial purposes would, and ought to be, made to the Crown by colonial legislatures; but this, experience has proved, has not been the case.

Mr. Joseph Hume, the economist, Mr. W. E. Forster, Sir Edward Creasy, and other eminent Englishmen, have at various times expressed themselves in favors of colonial representation for Imperial purposes.

The difficulties caused by distance from the central power which formerly existed, such as the length of time necessary for representatives from the colonies to come for attendance at a Parliament in England, and to discover the sentiments of colonists on questions of importance, have already been obviated by steam and the

telegraph, and may in process of time be still further removed. At present the transmission of news is much more rapidly accomplished, and the transit of persons little less so, from the most remote colonies to London, than was the case, from one part of the kingdom to the other, in the early days of the English Parliament.

What I would urge, then, is that a true Imperial Parliament, having its seat in London, be created by the reform of the present Parliament, consisting of the Crown, an hereditary House, and an elective body with representatives from the United Kingdom, and from every colony having representative institutions; and that this Parliament should possess, over every part of Her Majesty's dominions, the supreme power now vested in the present British Parliament under this Imperial Parliament there should be in the United Kingdom, and in each colony, or confederation of colonies, a local legislature, having the power of taxation within its own limits, and allowed, subject to the veto of the Crown, to legislate uncontrolled in all affairs within those limits; and that this veto should not be exercised except where, in the opinion of the Imperial Ministers of the Crown, the proposed legislation was against the general interests of the empire. That the Imperial Parliament should assume the sole supervision of the foreign policy, and the defense by land and sea, of the empire; the control of the Crown colonies and of the great dependencies, such as India, belonging to the empire; also of the communications, telegraphic and postal, between its various parts; and the maintenance and appointment of the Imperial Courts of Appeal. That for this purpose the Crown should appoint Imperial Ministers, who should retain office, as at present, at the pleasure of the Imperial Parliament, and that these Ministers should consist of a Prime Minister, who would be acquainted with home affairs, and Ministers for Foreign Affairs, for War, and for the Admiralty, for the Colonies, for India, for Finance, and for Commerce and Communications. To these might, perhaps, be added a Judicial Minister, to watch over the codification of the law, its assimilation, where practicable, in various parts of the empire, and the working of the Imperial Courts of Appeal in England.

Of the effect which such a change would have upon the local legislature for the United Kingdom, I propose subsequently to treat.

I am most fully sensible of the extreme difficulties which would arise in any attempt to carry out such a scheme, or indeed any other scheme for the consolidation of the empire, and of the improbability that, even if its main principle, the separation of the Imperial and local functions exercised by the present Parliament, should ever be adopted, the details I am now sketching would be accepted as worthy of notice; nevertheless, I have determined to continue these, though futile, as illustrations of my proposition. I believe however, that the changes in the constitution here proposed are the smallest which could be adopted, if a uniform plan giving equal rights to Englishmen in all parts of the empire, be regarded as the necessary object to be attained.

The English people, fortunately for themselves, are not in the habit of accepting cut and dried constitutions from legislators, or even at once, for good and all, adopting a new principle and carrying it out, in all branches of government, by a comprehensive enactment. On the other hand, new principles are generally evolved out of a series of tentative measures, through which the people both get accustomed to the novelty, and are enabled to test its truth. Assuredly we shall not see the unification of the empire accomplished by different means.

The Sovereign is the visible expression of the unity of the empire, even as it now exists, and is the means through which every subject, of whatever race or color, living in any part of her dominions, realizes his relationship to all other subjects. Under no other form of government but that of a monarchy would the continuous political connection of the scattered communities of British race be in any way possible. The spirit of loyalty, which is so powerful a sentiment in the mass of people when not too much opposed to their material interests, is impossible towards an abstraction, and is greatly weakened when its object holds only a temporary position. There is every sign that this feeling of personal attachment to the Sovereign, which is taken out by emigrants from the mother-country to the colonies, is maintained unabated amongst their descendants; and it has shown itself in a marked manner during the visits of the children of our present Queen to British dependencies. Probably even now an average citizen of the United States of British descent feels a greater amount of personal devotion to Queen Victoria than he does to the President of his Republic for the time being. Mr. Herman Merivale has remarked,

' Lectures on Colonization and the Colonies,' Lecture xxii.

that Imperial Rome for five centuries held the various races forming her empire in willing allegiance, regarding her with reverence as the fountain of laws, order, and civilization; and that her empire was torn asunder by foreign violence, but never divided from within. And he says:

'Lectures on Colonization and the Colonies,' ed. 1861, p. 634.

"May we not figure to ourselves, scattered thick as stars over the surface of this earth, communities of citizens owning the name of Britons, bound in allegiance to a British Sovereign, and uniting heart and hand in maintaining the supremacy of Britain on every shore which her unconquered flag can reach ? "

Under any system by which a direct share in the government of the empire is given to colonists, it is to be expected that the personal influence of the Sovereign will be of vital importance. Standing in precisely the same relation to each province and subject, the occupant of the throne, unfettered by local interest, may regard with

absolute impartiality any question which may arise from time to time between the various parts, and will have it in his or her power, by persuasion, and by the influence which the possessor of a position so magnificent and exalted must ever have, to foster a spirit of compromise and public-mindedness, and to harmonize and guide the conflicting desires of the various parts of the empire to the general benefit. This is a difficult task, but with the traditions of the British Monarchy it is not too much to hope that it will be met and fulfilled. It is reasonable to suppose that the powers and duties of the Crown, in administration of the Imperial Government, and as a part of the Imperial Parliament, would remain as at present; the Crown possessing a veto in legislation, and exercising its power in according with the advice of Imperial Ministers.

English experience has shown forcibly the stability and permanence which is given to the constitution and to government by the hereditary principle, and in spite of the arguments which may be brought against it, the majority of observers are still of opinion that where, as is here the case, a nation is fortunate enough to have a wide-spread aristocracy in sympathy with popular aspirations, an hereditary legislative body composed of its chiefs, is a means of government not rashly to be discarded. It is necessary to consider what part the House of Peers should play in any revised scheme of Imperial Government. At present that House is an integral part of the Imperial Parliament; and it certainly occupies itself in far greater proportion than is the case in the House of Commons with subjects of Imperial interest. Discussions upon foreign policy are frequent in the House of Lords, and in these there is a marked tendency to lay greater stress on the principles on which that policy should permanently be based, than on the passing phases of every question. This tendency to look below the surface of a problem, and to discover the true principles on which it rests, is also to be seen in most of the debates of the House of Lords on other subjects. It is to be remarked that since the days of Canning every Minister for Foreign Affairs, except Lord Palmerstone, who might, if he had chosen, have sat in the House of Lords as a representative peer for Ireland, has been a member of that House, or has subsequently become one; and since the creation of the Colonial Office as a separate department of State, almost every Colonial Secretary has also been a peer. These and other facts tend to show that there is something in the calm atmosphere of the House of Lords, where the members hold positions unaffected by the turmoil of popular elections, peculiarly suited to the discussion and supervision of Imperial affairs. That House also contains the representatives of many of the men who have done most to place England in her present Imperial position. To take away, therefore, from the House of Lords its place as part of the Imperial Parliament, would be a revolutionary act, not demanded by the public interest.

At the same time, it would probably be necessary, if the Imperial bond should endure, to add to that body persons who should not necessarily belong to the local Parliament of Great Britain. This could be done by appointing as peers some of the most conspicuous members of the families of hereditary wealth, which are certain to arise in the colonies as their resources become more developed; and by the nomination by the Crown, as life members, of men such as past governors of colonies, diplomatists, and others, whose opinions may be valuable in Imperial politics. By this means, one of the greatest defects of the constitution of the United States, in which the richer and territorial classes are habitually excluded from political influence, would be avoided. It might also prove a politic measure to create the great subject feudatory princes of India peers, by tenure, of the Imperial Parliament, with a view to blend their interests, in a more marked manner, with those of the empire generally. There are, however, dangers in this step which might render it impracticable.

It may perhaps be objected that the numbers of the present hereditary House would form too large a proportion in a reformed Imperial House of Lords; and that the colonies would not consent to the preponderance to home interests which such an arrangement would give. I do not believe that this would be the case. It is not to be expected that the Upper House would exercise a larger or more stringent control over the Imperial policy than it does at present, and there would be no fear that its wishes would over-ride those of the representative House, in which the colonies would be directly represented, in any matter where the latter took a strong interest. But there would be this great benefit to the empire, that the traditions which have guided us so far in safety would be retained, or rendered less liable to be forgotten, during the time that change and expansion might be altering its whole appearance. There would, moreover, be great difficulty in devising any plan for diminishing the number of peel's who should sit in the Imperial Upper House, which should leave it in any way the same as it is at present. Certainly the mode of election of representatives by the hereditary peers of Scotland and Ireland has not been successful.

But there is one body of men with most useful functions in the present House of Peers that we could not look to see included in a future Imperial House. I mean the bishops of the Church of England. Thirty years ago there seemed still a chance that this Church might have gone hand in hand with each community of Englishmen taking root in our colonies, recognized by each local government, and aiding it in spreading over a willing people the blessings of religion and civilization. That prospect has now vanished forever. I believe there is a great future before the English Church in the colonies, but it will not be connected with that of the State. The principle that no one form of religion shall be specially assisted and protected has finally been recognized by

almost all of them, and it would not be possible to organize an Imperial Legislature in which the colonies are represented, where any religious body should possess, as of right, certain seats in either chamber, although the appointments to fill these were made by one of the local governments acting under that Imperial Legislature. But, of course, the present restriction preventing the clergy from sitting in the House of Commons would be done away with, and bishops might be properly nominated to sit as life peers. There could be also no objection to their continuing to sit in the local House of Lords. Should such an Imperial House, as I have imagined, ever be created, the position of a member of it would be as dignified and influential as that of the holder of a seat in any legislative body which has ever existed.

I now approach the most interesting part of the question I have been considering, the pivot, in fact, upon which any scheme of Imperial reform must turn, namely, the constitution of the Imperial House of Commons. Unless it be possible to reform the present House by such an addition to or arrangement of its members, that it may be regarded with confidence and respect by all parts of Her Majesty's dominions, any change in the present state of things must be for the worse. The change here proposed, though a radical one, rests, I believe, on an equitable basis, and follows nearly the lines which natural growth has pointed out; and, I hope, will not offend any person's sense of justice. However, it may prove that even the most equitable plan may fail, either because the cohesion and common interests and sentiments of the various component parts of the empire are less than they appear to be, or because individual ambitions, the product of present want of unity, prevent the adoption of reform at the proper time.

In the first place, the essence of my proposition would be that this representative House should be the same as the old House of Commons, a continuation of its existence, but so reformed as to be better fitted to perform its Imperial functions. There are obvious advantages in continuity with the past, and they have been recognized in every great reform carried out by the English people. There is a strong analogy between the admission of the colonists to share in the government of the British Empire, and the respective unions of Scotland and Ireland with England and Great Britain, in 1707 and 1800. In both these cases, the position of the Parliament, meeting in England, remained unaltered; the only change made was to place Scotland and Ireland under its control, and add fresh representatives from these countries. The same care to preserve continuity with the past was shown in the reform of the Church of England in the sixteenth century, and in the change of dynasty in the revolution of 1688. The effect of maintaining the legal existence of the House of Commons would be to preserve unimpaired the status and the traditions and customs of the present House, which would have these advantages: (1) That no fresh powers would be needed to give it, with the other branches of the Imperial Parliament, supreme authority in every part of Her Majesty's dominions; (2) That its present great prestige, which is most necessary to secure the consideration and respect of those it controls, would remain; and, (3) That the constitutional maxims as to its relation with the other branches of the legislature, together with the privileges and rules which are the fruit of six hundred years of national experience and development, would continue.

Undoubtedly very large reforms would be needed to make the House of Commons a representative legislative assembly for the empire. I shall Endeavour to treat them as they group themselves under two heads; the delegation of the control of purely local affairs in England, Scotland, and Ireland to a subordinate legislature, and the admission of representatives from colonies having representative local government.

The first of these heads, relating to the formation of a local legislature, I propose to consider subsequently.

The admission of representatives into the House of Commons from all parts of the wide empire of England would doubtless cause many changes in its constitution and its course of business, which it is difficult to foresee, and which will have to be left to experience to settle; but there are some which depend upon principles that it is necessary should be agreed upon at the outset, as the basis upon which the lines of reform are to be set. And the foremost of these principles follows upon the answer given to the question: How is the number of representatives which each province or local unit shall send to Parliament to be fixed? Is this to depend upon some general rule to be applied to each of these units alike, or upon some arbitrary arrangement, such as may appear temporarily expedient? I would reply, without hesitation, that if the work is to be permanent, and not carry within itself the seeds of its own dissolution, it must proceed on the principle of giving relative equality to every part of Her Majesty's dominions included in its scope. To order otherwise would be to create jealousies fatal to public spirit, and perhaps never to be appeased, which would cause an aggrieved colony to regard its local interests in any question that might arise apart from the general welfare of the empire. What I would propose, therefore, is, that representation should, throughout the empire, in the United Kingdom as in the colonies, be always strictly proportionate to population.

A difficulty no doubt arises in arranging such a proportionate representation in colonies like the West Indian Islands, which contain a large number of persons of native or negro blood. This difficulty is lessened, however, by the fact that the most important of these, such as Jamaica and Ceylon, have not representative governments, but are Crown colonies, and would not therefore, according to my proposition, share in Imperial representation, until representative local governments were granted them. In the other colonies it will probably

be wiser only to include persons of European descent, except in those places where, as the Red River Settlement, the native population is being assimilated and blended with them by intermarriage, or, as in the case of the Chinese in Australia, they form orderly and civilized communities.

It would be necessary, in order to ensure a legislative body sufficiently wieldy and efficient, to reduce to some extent the number of representatives at present sent by Great Britain and Ireland. Such a reduction would involve a recasting of the entire system of home representation and the distribution of seats—a process that is inevitable, irrespective of any scheme for colonial representation. It is not necessary to discuss here the mode in which this redistribution should be made. I will only say, that though the number of Imperial representatives sent by the present constituents of the House of Commons would be less, still, taking into consideration the local House, a much larger number of representatives would have to be elected in the three kingdoms than is done under present circumstances. This consideration will have practical importance in securing the support of politicians to a scheme of colonial representation.

It is worthwhile for a moment to regard the present state of representation in the British Parliament. The House of Commons may be taken to contain approximately 658 members, 493 of whom are elected in England, 105 in Ireland, and 60 in Scotland. According to the last census (1871), the population of those countries together amounted to about 31,485,000, England having about Ireland 5,412,000, and Scotland 3,360,000, thus giving one representative to about 47,800 persons in the whole; or, taking England, Ireland, and Scotland separately, the proportion is about one representative to 46,000, to and to 56,000 respectively. It is more difficult to fix the number of persons of European descent living in the various colonies, but, according to the calculation given in the 'Statesman's Year Book for 1877,' the population of the colonies having representative governments amounts to about 7,110,000, namely:—

If we then suppose that a reformed Imperial House of Commons should consist of 700 members, it would, under these circumstances, give one member to about 55,000 people. Thus, the United Kingdom and Ireland would together send to Parliament 575 members, Canada and Newfoundland 68, Australasia 35, and the whole of the colonies together, 125 members. Should it be subsequently found possible to give representation to dependencies, such as Jamaica and the other Crown colonies, the proportion of colonial members would be increased.

Probably, however, at the commencement of a system of Imperial representation, a House of Commons of not much more than half the size above mentioned would be the most suited to the wants of the empire; and it would allow for future increase, as the colonies become more and more nearly the equals of the mother-country in the numbers of their inhabitants. If, at the outset, the Imperial House of Commons should contain the maximum number of representatives which would be convenient for such a body, all subsequent equalizations would have to be made by a removal of representaves from existing constituencies—a process sure to cause discontent in the parts of the empire thus affected.

As, however, the population throughout the British empire is constantly increasing, and in some parts of it at a much greater rate than in others, it is absolutely certain that to maintain approximately the proportion that representation should have to population, equalizations and adjustments will be continually necessary. Up to the present time such adjustments have not in any way been provided for by the British Constitution, and have only been made as the result and at the expense of considerable political disturbance. This has been unavoidable, and has not, on the whole, caused detriment to the State. But the case would be very different if this political disturbance were to take place throughout all parts of the empire represented in the Imperial Parliament, and which are not bound together by the inevitable natural connection which exists between the United Kingdoms. It would cause, wherever inequality was felt, discussions as to value to the aggrieved colony of the Imperial tie, and whether it was worth the trouble necessary to be taken to re-equalize representation. This, if the object in view is to maintain the empire, would be most dangerous and undesirable. I would therefore propose that at the time of admitting colonial members, Parliament should pass an Act providing for the recurrent reform at stated intervals, say of twenty-five years, of the Imperial representation on the principle of proportion on which it was originally framed, and providing for the proper taking under Imperial supervision of a census of the population in all parts of the empire as a basis of such reform. This Act would not, of course, interfere with the supreme power of future parliaments, who might amend or reject it, nor would it amount in any way to a treaty between the various component parts of the empire; but it is most unlikely that, if it were passed, the principle it laid down would be tampered with or impugned, and it would remain as the perpetual safety-valve of the constitution.

Supposing, therefore, that the number of representatives to be sent to Parliament by each unit or province of the empire were settled, it remains to be considered how, and on what principle, they are to be elected? Is it possible to devise any uniform standard of fitness for the status of an elector, to be applied alike to persons in all parts of the empire sending representatives ? And if the answer is in the affirmative, then how is Parliament to arrange the mode of election—whether in electoral districts, or in cities and counties, or in one general

election or *plébiscite*, for the whole province? It may very likely be that a Parliament containing representatives from all parts of the empire might, after some years' experience of the working of the system, be able to arrange some uniform qualification for voters, and general principle for the exercise of voting throughout the empire; but that would seem to be quite beyond the power of the present Parliament, which has not the complete knowledge of the facts relating to all the colonies requisite to decide so difficult a question, nor could attempt to lay down any general law, without causing unnecessary controversy and opposition. Probably the plan which would have at first the best chance of success would be that the Imperial Government should ask the local government of each colony to obtain the approval, by the local legislature, of a scheme for the exercise of the Imperial suffrage within the colony; and that this scheme should, unless it contained some clearly unjust or impolitic provisions, be included in the Imperial Act of Consolidation as the law for voting in the colony. By this means colonists would be themselves enabled to adapt the Imperial franchise to their own wants; and any inconvenience arising from want of uniformity in the various parts of the empire would be more than compensated for by the stability that their satisfaction in this important particular would give.

A further question of great importance to the success of such a scheme as is here proposed is, whether the colonists are able and willing to send to a Parliament in England as large a number of fit representatives as would be required by it? It would be too bold to prophesy that a difficulty in this would not at times occur with some of the scattered members of our extended empire; but I believe, as a rule, the burden to the colony would not be felt, and the demand for representatives would, as in the demand for other things, create the supply.

Such a difficulty did occur in England during the Middle Ages, when boroughs were frequently excused, at their own request, from sending members to Parliament. This happened then without detriment to general interests; but the case is rather different now.

For it would be possible for the colonies to send as representatives persons of two classes, either of which would supply able and fit members of an Imperial Parliament.

The first of these would be naturally the class from which the bulk of the members of the local legislatures are at present elected—a class mainly political by profession, the product of universal suffrage in new countries, and resembling that which engrosses political power in the United States. This class, in consequence of the activity, cleverness, and facility shown by its members in urging measures which appear to be for the pecuniary interest of the most numerous classes, has great influence, and would have enormous weight, if united, in promoting or discouraging any scheme of colonial representation. The members are not, however, as a rule, rich, and they would require that, if sent as representatives to England, this should be done at either local or Imperial expense. It is impossible not to feel that a great difficulty may arise from this fact, as the tendency of remote colonies would undoubtedly be to demand payment for their representatives from Imperial funds; while to grant this might be productive of great peril to the State, and would, perhaps, to some extent neutralize the advantages of Imperial unity. The discretion and duty of making this payment should, as a matter of public policy, be left to the local governments, the matter being a local one, and varying in each colony, according to its distance from England and its social position. There are at present signs that some of the colonies, such as Victoria, which have adopted the plan of paying the representatives in their provincial legislatures, may cease to do so. It does not seem to have produced a better or more independent class of legislators.

The other class from which colonial representatives could be drawn is that composed of the rich merchants, stock owners, and planters, who now return to England to spend the fortunes they have made in colonial enterprise. It has been the weakness of the empire, and the misfortune of the colonies, that the men who have frequently done most for the industrial development, and have the largest stake in the welfare of our rising dependencies, are practically shut out from all political power. As Mr. Herman Merivale, speaking especially of the Australian colonies, says:

' Lectures on Colonization and the Colonies,' Lecture xxii., app. p. 644.

"We see the higher and more educated class, as a class, politically ostracised there, as in the United States. We see them, consequently, looking to England as their home; anxious only to accumulate wealth in the colonies as fast as they may, and using such indirect power as they may still possess almost wholly for the purpose of maintaining their own pecuniary interests against apprehended encroachments of the multitude."

It is much to be desired in the general interest that these men should have some outlet for their political energy, and should be induced, when they have the leisure which wealth gives, to devote it with their influence and thoughts to the service of their own colony. The power of representing that colony in an Imperial Parliament would supply such an outlet. Instead of gradually losing all concern, and finally parting with their property, in the theatre of their early lab ours, they would have opened to them a noble object of ambition; they would be induced to keep up a constant connection with their old home, to study its interests, and advocate its claims in a manner more forcible than it would be possible for representatives of lesser weight to do. At the same time there would be no reason why the populace in the colony should hesitate to entrust to them their interests in the Imperial Government; for, whatever might be the different views of the various parties in the

colony, it would be but very seldom that the interests of lab our and capital would diverge with regard to the relative connection of the colony with the other parts of the empire. And it might not be without weight in the estimation of a colonial constituency, that the services of persons who would represent it with dignity in the most important legislative assembly in the world were to be obtained without cost or burden to itself. The advantage to the empire at large, in using for the general good these nearly wasted forces, would be very great. This class, attached to the mother-country, and rooted in the colonies, would form a constant link between metropolitan and provincial feeling, would encourage breadth of view and largeness of aim, even in local politics, and would exercise continually a mitigating influence in the disputes between neighboring colonial communities, which form a serious danger to the maintenance of the Imperial tie. Of course it is not to be desired that all the colonial members should come from this class, but it would probably supply a considerable proportion.

In disputed elections in the colonies, it would probably be the best plan to let the facts be investigated and decided upon by the Chief Justice of the colony in which the dispute occurs. Though these judges are not necessarily appointed by the Imperial Government, the high character that they always bear would insure an impartial consideration even amidst political clamour.

Altered circumstances render it necessary to have altered rules, and it would probably be found convenient to give colonial constituencies powers of readily appointing substitutes for representatives to whom attendance in Parliament had become inconvenient. For such purposes the telegraph would supply useful assistance. It would be impossible, within these limits, to discuss all the details of change; but there are many changes which would require the greatest consideration and forethought, as it is upon the smooth working of the constitution that its success would depend; and in the state of our wide-spread dominions, many varied conditions must be provided for suitably, to prevent a breakdown in one part of the empire endangering the unity of the whole.

I will now endeavor shortly to consider the functions which would necessarily belong to an Imperial House of Commons such as I have supposed.

This Imperial House would, in the first place, undertake the supervision of the expenditure, and be the sole body capable of granting supplies and levying taxes for Imperial purposes.

With power comes responsibility, and if a direct share in the government of the British Empire be given by those who have hitherto been the sole possessors to their brethren in the colonies, these in turn are bound to bear their part of the expense of maintaining that empire, which, when the direction of its destinies was entirely out of their own control, they might plausibly have refused to do.

This reciprocal duty of colonists of granting funds for Imperial purposes, through their representatives in an Imperial Parliament, is probably that part of any such scheme as the present which will most attract attention throughout the empire, should it ever come to be publicly discussed. It will be urged in the colonies, and the cry will be repeated at home, that it is unjust to colonists to give to an assembly in which the members for any particular colony will only form a very small part, the power of taxation for purposes in which that colony has only a fractional interest. It will be urged that the value to the various members of the empire of the Imperial protection, and their interest in the objects for which expenditure is made, such as the annexation of fresh lands, the maintenance of communications, and the erection of fortifications, is in all cases different, and that it is beyond the power of a central authority to arrange taxation in an equitable manner.

In the first place, I may point out that the Imperial Parliament, as at present constituted, has had, and has, the absolute power of taxation in the colonies, without ever exercising it, though in the majority of cases it would have been easy to do so. It has also provided, through the taxation of its own constituents alone, the funds by expending which the colonies have been protected. Is it therefore likely that a Parliament only reformed by the introduction of representatives from the colonists themselves, would act in a manner unjust to those colonies ? It must also be remembered that protection from foreign enemies, diplomatic representation abroad, and the other objects for which Imperial expense is incurred, are necessary to every community, a fact which has been proved in the case of the United States. Now the only course possible in the future, if the Imperial tie is not preserved, is that each colony or group of colonies should become separate and independent states, when they would have to provide these requisites for themselves at their own expense. I think it is indisputable, that in such a case, the cost would be far larger than where they would only have to provide their quota in the general expenditure. Of course it cannot be expected that the United Kingdom shall permanently find all the necessary funds for Imperial purposes.

Further, with respect to the want of equality of interest, I would remark that British lands are the outlet for the energy of the British race, in which all members have an equal interest, and though at one time, perhaps, expenses are, and have to be, incurred, which seem only to benefit one part or one class of persons in Her Majesty's dominions, in the long run this is equalized, and the general expenditure proves to be for the equal benefit of all. I believe the truth of this reasoning might be shown by a detailed examination of English expenditure for Imperial and colonial purposes in past times, and the principle it represents furnishes one of the

causes of the consolidation of the small states on the continent of Europe, which existed in the times of our ancestors, into the large empires which we have now.

The due adjustment of the incidence of taxation for Imperial purposes is, without doubt, a matter of great difficulty. Our empire is so vast, and contains so many and various stages of social, economical, and political progress, that it is perhaps rash to expect that any wide and general principle can be applied to all parts alike. If, however, it be once admitted that the interest of every subject of Her Majesty, wherever located, in the maintenance of the empire is the same, it is possible that some rule of taxation may be arrived at, which can be acted upon in the greater number of cases, and be subject to exceptions only where special circumstances occur, that in all probability time may in due course remove. If this could be done, a great step would be made in removing friction and promoting the smooth working of the entire system. It appears to me that a valuation, based upon the rate able value of property and the estimated incomes of all persons in each part of the empire, should be made at certain intervals under Imperial supervision, and that from this valuation the amount payable by the United Kingdom and by each colony, or confederated group of colonies, should be arrived at. The difficulties of making such a valuation would be at first enormous, and the principles upon which it should be formed would probably cause great discussion and debate; but if the plan were once adopted, these principles would gradually become settled and the imperfections be removed. Until then, some rough system of allotment must be adopted, in which the mother-country would not, we may be sure, err in want of generosity to the colonies.

But I believe although an Imperial Parliament may justly allot to a particular colony a proportion of the general taxation, that it is wiser to leave to the local legislature of that colony, the functions of determining in what manner it shall be raised there, and the persons who shall pay it, and of superintending the collection. In fact, the local legislature should be the body responsible to the Imperial Parliament for the due payment into the Imperial exchequer of the proper quota of the colony. In case of its refusal to do this, the Imperial Parliament, in virtue of its supreme power, could act as it should think most fit under the circumstances of the case.

The other functions of the Imperial House of Commons are the maintenance of those affairs and interests which may be considered as strictly Imperial, and for which the funds raised by it are applicable.

The first in order of these, is the protection of all parts of the empire from injury by foreign enemies, and the suppression of any insurrection or revolt of native people, beyond the power of the local governments of those provinces where such insurrections or revolts may occur. To fulfill this duty there will be required an army and navy under Imperial control, capable of defending and keeping up the prestige of the empire, of protecting its shipping and commerce, and of putting down the slave trade. Also, the maintenance of naval stations and military posts, wherever required by Imperial interests, and of the principal fortifications, arsenals, and dockyards in Great Britain and the colonies. While these are by far the most important items in Imperial expense, the burden of them would in a system of taxation, such as I have suggested, fall approximately upon those who would have to pay them in a ratio corresponding with the benefits conferred by the expenditure. In passing, I may remark, that such a system of Imperial forces would not prevent a militia being also maintained in each province at local expense. Such militia should, except during time of war, be under the orders of the local government, and should never without that government's consent be moved out of its own province. Minor fortifications might be provided for in an analogous way.

The next Imperial duty would be to support and regulate diplomatic and consular representation in foreign countries, and to maintain the machinery of the Foreign Office. No function of the government is more Imperial than this, and none would be more strengthened by colonial representation. At present there is scarcely as much disposition on the part of persons at home as is desirable to consider foreign politics in any other light than that of home interests. A change in this disposition would naturally be made, if the cost entailed by our foreign policy was partly defrayed by colonists. Our wide-spread dominions, extensive commerce, and mercantile marine, render the appointment of proper and sufficient consuls in foreign ports and cities of the greatest importance to the inhabitants of all parts of the empire alike.

The close political connection of the scattered members of the empire, knit together in one Imperial representative government, would cause the ready communication of the various parts with the centre, and with each other, to be a matter of the very highest importance. It would, therefore, be a duty of that government to watch over and, if necessary, to create rapid and certain intercommunications by means of steam and the telegraph, and to maintain convenient postal arrangements. No system would more promote and mark the unity of the empire, than one providing for the transmission of letters at one charge, say of a penny, from any one part of it to another. The cost of these works would be fitly defrayed by Imperial funds; but, under careful management, there is reason to believe that this branch of government might be made self-supporting.

One feature of Imperial government now exists, the right of every colonist to appeal from the local civil courts to the Sovereign in Council

It is true that appeals to the Privy Council from Canada are at present suspended, but that may only be a

temporary measure.
This has had great effect in keeping up in the minds of colonists a sense of connection with the mother-country, and the impartial manner in which the judges, to whom the Sovereign has confided the task of hearing appeals, have performed their duties, has generally caused both confidence in and attachment to the existing privilege. In a revised scheme of Imperial Government it would be convenient that a Court of Appeal representing the Sovereign should be formed by the fusion of the Courts of the Privy Council and of the House of Lords, which should command general respect, and decide causes sent on Appeal from every province of the empire. A court of this kind would supply the only means capable of preserving such unity in the law of the various parts of the empire, as at present exists, and of maintaining a Code of Common Law for all parts of the empire, if it should be found practicable at some future time to create one. The maintenance of this court and the salaries of the judges composing it would properly be provided for by the Imperial House of Commons. The same may be said of the office and necessary machinery of the Imperial Minister of Justice.

The duties of the Sovereign are, as has already been pointed out, in very great measure Imperial ones, and it is therefore reasonable that a large part at least of the income of the Sovereign should be a charge upon the empire generally, and be provided from Imperial funds. But as the seat of government is in the United Kingdom, and the relations of the Sovereign to the local government of that part of the empire must be different from what they are to those of the other parts where he is represented by a Governor only, we may suppose, that the United Kingdom would itself provide the remainder of his necessary income. It may possibly be found a convenient course for colonies to allot to the Sovereign unoccupied land, which should be inalienable by him, and might be managed either by his personal agents or by the government for his benefit. This plan might not at first be a profitable one in some colonies, as the land so allotted would remain unworked till the progress of the surrounding holdings of resident freeholders caused it to be valuable for leasing purposes. It would then enable the local government to provide for the Sovereign without expense to itself. I am aware that a plan, similar to that I propose, was tried in Upper and Lower Canada, and subsequently had to be abandoned. No doubt much would depend upon the nature of the colony and the land appropriated. In Australia, for instance, where unoccupied land is let to squatters for grazing purposes, and has to be given up by them to any persons who purchase the land from the local governments, there could be no difficulty in obtaining some immediate income from land appropriated to the Crown, and there would be less reason to fear that unoccupied tracts of land would stand in the way of local progress. In a more advanced state of development, these lands of the Sovereign might be of great public advantage, as has been the case with many Crown lands in England.

The Imperial Parliament would also assist in making the necessary provision for the members of the Royal Family, this being an expenditure also required for the support of the Monarchy.

The objects for which the foregoing Imperial expenses would be incurred, are such as affect equally all parts of the empire, and for them the Imperial House of Commons might justly obtain the necessary funds ratably from each local government. There are, however, other revenues raised and expended under the control of that House and of Parliament, viz. those of India and the Crown colonies. In the former, and in some of the latter dependencies, the relative cost of protection by army and navy is far greater than in the rest of the empire; and accordingly up to the present time the Imperial Parliament has, in virtue of its supreme power, raised by taxation in these places sufficient money to recoup itself for all expense of this protection; in fact, protection has been afforded not only without any pecuniary expense to the Imperial Government, but in some cases, with a profit to it. This practice will no doubt continue when necessary and possible, as it has many advantages, and India could not be governed without it. Moreover the position of those provinces of the empire which have representative local government must always be very different from the others, and legislation for them, including taxation, is carried on sometimes under the prerogative of the Crown, and at others by Acts of the Imperial Parliament. As the latter is in all cases supreme, and the power of the Crown is exercised at the advice of Ministers who have the confidence of the Imperial House of Commons, a substantial unity of administration exists. The system is anomalous, but it has worked well, and will probably be continued until the time arrives, if it ever does, when local self-government can be given to every part of the empire.

The Crown has now the power of granting local self-government to colonies without consulting Parliament, but cannot recall the grant without its consent. If, however, Imperial representation should be accorded to every colony having this right, it is desirable that the prerogative should be then exercised at the advice of the Imperial Parliament only, as otherwise the constitution of the Imperial House of Commons could be altered without its own concurrence. There is no reason to believe that Parliament would be unwilling to grant full representation wherever there might be just claims to it, but it is obviously a step which would require the fullest consideration.

In concluding these remarks upon the possible position of an Imperial House of Commons, I may say that I assume that the privileges and prerogatives of the present House, and the relation that it bears to other branches of the legislature, would remain as now. They are the fruits of experience; we are accustomed to them, and they

have been copied in both British and foreign constitutions all over the world. It is possible, however, that in carrying out reforms it may be necessary to consolidate into positive enactments what is now only custom and constitutional usage. This would be part of a system of codification, for which our law and people are nearly ripe. Imperial representative government would make it immediately necessary to have drawn up a code of Imperial law, incorporating all those statutes which apply to the empire at large; though a rigid expression by statute of the precise relations of the Imperial Ministers of the Crown to the representative House might be in-expedient. Those relations must, from the nature of things, remain very much as they are at present, as no government could either perform its functions or would be tolerated by public opinion, which did not act in harmony with the opinions of the majority of the House of Commons.

In thus sketching what I believe to be at once the most constitutional and the most practical means of giving to the colonies Imperial representation and responsibility, I do not overlook the difficulties which would have to be overcome in every stage of progress towards that result. But there are good omens for the future. No race has ever shown such self-restraint, forbearance, and spirit of compromise in polities as the English people, and these are the qualities of which we shall have need. To them, stimulated by patriotism, we may look for a successful end, both at home and in the colonies.

A few remarks remain to be made upon the second branch of reform of the present Parliament; the delegation of the control of purely local affairs in England, Ireland, and Scotland to a subordinate legislature.

The details of this change would be more conveniently discussed, and the Act of Delegation passed by Parliament before the admission of colonial representatives.

If a plan similar to the one sketched here were adopted, the ancient Parliament of England would have developed into a legislature wielding the supreme power in the widest and most important dominion in the world; while the care of the local interests of England, formerly the principal work of that ancient Parliament, would have become the duty of a dependent and provincial legislature. Such would be the fruit of the Imperial spirit in an Imperial race.

But this change need have no terrors for Englishmen at home. The empire is theirs, and they must for many years hold the preponderance in Imperial counsels. The seat of government being in England, they are at the centre of affairs, and reap the pecuniary advantage which this Imperial expenditure brings. And a great advantage to them would be to have the undivided attention of a competent and distinguished Parliament on affairs of the greatest importance to their happiness and prosperity, which are now, of necessity, neglected. In settling the lines of this provincial Parliament, the aim to be kept in view must be to ensure as far as possible that the high character of the British Parliament be kept up, and that the local legislature may not degenerate into bodies of the stamp of our London vestries, or of the State legislature of the United States, but should contain and express the cultivated intelligence of the land. There is little fear of such a legislature not being sufficiently representative in the democratic sense. I would propose that, as far as possible, the present system should be preserved in the local Parliament, which should consist of Sovereign, Lords, and Commons, as now. The Sovereign, being resident in the United Kingdom, would naturally fulfils duties towards the local government of the United Kingdom similar to those he does at present, and to those performed by colonial governors appointed by himself at the advice of the Imperial Ministers. I do not think the theoretical objection which may be raised, that he would in this case be the servant of the Imperial Parliament, whose master in another capacity he is, and that the two duties might clash, is really of importance. Occasional difficulties might occur, but then it would be of great advantage to the State that a person whose deepest interest it was that no dead-lock should arise, should exist as a moderating influence upon both bodies. But under any circumstances, it would be most undesirable that a person other than the Sovereign should be appointed to such a position as that of local governor in the United Kingdom.

I would suggest that the members of the present House of Lords, together with those Scotch and Irish peers who have not at present seats in it, should form an hereditary House of local legislature, to which the Crown should have power to add fresh members, who need not be also members of the Imperial House of Lords. The same reasons exist for having an hereditary House of Peers in the local Parliament for the United Kingdom as for having one in the Imperial Parliament, and I shall not again state them. Such a House is not to be made off-hand, and it is peculiarly necessary that the class which forms our present House should both be interested and be able to act in local politics. It will of course be objected that the attention of the same men would be too much occupied in forming separate legislative bodies for Imperial and local affairs, and that too much power would be given to a class not always, from a democratic point of view, in sympathy with progress. To the first objection it may be replied, that the functions of the present House of Lords are more consultative than initiative, and this would remain the case; so that the lab our of attending both Houses of Lords would not be so great as that of a member of both representative Houses. Moreover, different men would probably take the principal shares of Imperial and local affairs. In process of time, also, the composition of the two hereditary Houses would become diverse, as old peerages became extinct, and new ones, confined to one particular House,

were created.

To the other objection, I may say that the framework of modern society, the power of public opinion through the press, and the control of the purse, which is exercised by the representative House, elected on the widest basis of suffrage, altogether render it impossible that any progress or change, that the majority of the people desired, could be prevented by an hereditary House. On the other hand, thinking men are convinced that it is necessary for public safety that some constitutional check should exist, out of the power of the government of the day, to secure that measures of vital importance to the country should not be carried headlong, in a moment of popular ardour, before their real bearing and effect had been brought to notice by discussion and detailed consideration. Further, no power would be given to the class composing the hereditary House beyond that it possesses at present; the only change made would be that its exercise would be adjusted to meet modern requirements. The change involved in separating Imperial and local government would be quite a sufficient work in itself, without attempting to join with it the alteration of the balance of political power at home; a junction of the two attempts would only inflame party spirit, and render Imperial consolidation impossible. It might be advisable, in this case also, to give the Crown power to appoint a certain number of life peers.

Little change would probably be necessary in the number and mode of election of the members of the local representative Houses from that now existing in the House of Commons. I have before pointed out that, in our enlarged and varied community, there is no lack of competent men, with leisure and knowledge fitting them for being representatives, who would be willing to put their services at the disposal of the electors, and that the high character of the interests and principles involved would attract persons of the greatest weight. There could be no reason why the character of the House should be lower than that of the present one.

It might be found convenient that the Imperial and local Parliaments should meet in London, at different times of the year.

In the constitutional relations of the various branches of the legislature, it is probable that the model of the existing constitution would be followed. Local administration would necessarily be carried on by a Ministry who would retain office at the pleasure of the local Parliament. It would be necessary to revise the departments of State; but those which at present are solely concerned with local affairs would, of course, be controlled by a local Parliament. In the revision it might be possible to appoint Ministers for Scotland and for the Metropolis.

No doubt a point of some difficulty at the commencement of a purely local Parliament would be to discriminate accurate between matters which are of Imperial interest and those which concern only local administration. There are many questions, such as free trade and laws relating to land, which are clearly of the greatest importance to both, and many others which lie on the border-line of both jurisdictions. Practice only would teach the exact limits which must be observed on each side; but it is obviously for the interest of all that powers as wide as possible should be conceded to the local government, and that the Imperial Parliament should not interfere with local authority, unless such interference was clearly called for in the interests of the empire at large. At the same time a legal dead—lock could not, under the plan I propose, occur, because the Imperial Parliament would as now be legally supreme over all local legislatures, even in purely local matters, if it should choose to legislate upon them. There are no people in the world who would more readily perceive than the English the true limits of Imperial and local affairs, or could more surely be trusted, in acting from either point of view, to keep those limits in practice.

Among the powers that ought most clearly to be confided to local Parliaments throughout the empire is that of amending and reforming their own constitutions. So long as the forms of representative government and allegiance to the Crown were observed, it could be of no Imperial interest to control any local development of government, and it would then be open to every province of the empire to modify its constitution according to its special needs. Nothing could be more dangerous to the stability and welfare of the empire generally than a desire for uniformity in its various parts.

But, on the other hand, the boundaries of each local government are certainly matters of Imperial concern. It is impossible not to foresee that a severance of the two functions of the *British Parliament* would be made the occasion of a fresh demand on the part of a large number of Irishmen for a separate local government in Ireland, apart from that of Great Britain. It is possible that such a separation would not, under these circumstances, be so injurious to all parties as it would be now; but probably the same reasons that have now so much weight will continue to prevent any form of repeal of the present union. But under any circumstances a separation of the governments of the two islands would be an Imperial as well as a local matter, and would have to be discussed on rather different grounds. The same question of boundaries must arise in many of the other provinces of the empire, as it has already done. At present no change can be made in these boundaries without the consent of the English Parliament. The Imperial interest in this is solely that of the majority of the parts composing the empire, whose desire it must always be that every part should be as strong and as rapid in its development as possible, provided that in so doing no counterbalancing harm be done to other parts.

It must always assist the due development and smooth working of the whole of the empire that those parts

which touch each other, and have common interests, should be so far united in local government as to ensure a uniform policy being adopted with regard to public works, trade regulations, and other matters. It will, therefore, be the general interest either that each local government should be as large as possible, or that systems of colonial confederation, like the Canadian, should be adopted. By having large areas for local government, many of the effects of the local selfishness prevailing in small communities, which might cause serious difficulties to the empire, would be avoided. But it would be most unwise for the Imperial Government to press confederation or union upon adjacent colonies before such a step is largely supported in the colonies themselves. There is often a certain repulsion from each other existing in neighboring colonies, where outsiders would suppose that, from interest and common origin, the inhabitants would naturally be attracted towards each other. A premature attempt to promote confederation would both fail of success and cause the Imperial Government to be unpopular. I have seen it asserted that Imperial consolidation was not possible until some system of inter colonial confederation had been previously adopted. It is difficult to see the grounds for such a statement, and I am convinced that it is erroneous. In fact colonial confederation would probably be rendered much more easy by Imperial representation. At present the sole connection of the various colonies to one another is as being co-dependencies, and containing co-subjects of the Crown; while, with colonial representation in an Imperial Parliament, their representatives would sit there side by side—a fact which would have some effect in removing mutual jealousy. When confederation or union of colonies became expedient, it would be pressed and carried by the colonists themselves, with every necessary help from the Imperial Government Confederation of groups of colonies has been urged in the interest of common defense against external enemies or native races, which became necessary, as the Imperial Government declined the duty of protection. In a consolidated empire, where the central government undertook to protect all parts alike, this would be less immediately necessary.

With regard to the local governments other than that of the United Kingdom and Ireland, no change would be necessary. The Governor of each would continue to be appointed by the Crown, at the advice of the Imperial Ministry, and would, as now, watch over affairs in the Imperial interests. He would also, in the absence of some other arrangements between the Imperial and local governments, be the Commander-in-chief for any local militia and forces.

The regulation of the franchise is a question of very great difficulty, and must differ in almost all our colonies according to the circumstances of each. This is shown by the fact that no two of them have now precisely the same constitutions. The presence of a large native population in many of them of itself causes distinctions according to the nature of the races composing them, and their progress in civilization. These difficulties exist now, and must he met, whether Imperial consolidation is accomplished or not; but there is 110 reason to suppose that it would do other than help their solution.

It will be well for a moment to look forward to some of the most immediate and certain results of Imperial consolidation; and, in the first place, to the pecuniary position of the empire. While I think it is clear that a care for the pocket is not the sole argument which will prevail in determining the course of a people, and that those persons err vitally who consider that the nation's affairs should be guided purely by economical reasons, disregarding the more constant and permanent instincts of race, and aspirations alter an Imperial destiny; it is also necessary to watch well that these diverse feelings should not clash, and that neither our people, nor a section of them, should ever have deliberately to balance one against the other. So to arrange is one of the first requirements of good government. It will at all times need much care to do this in so widely spread an empire as ours. But it is essential that, at the outset, our colonists should not look to Imperial consolidation as bringing to them an enormous liability from transactions in the past, in which they have had no say. Nothing would make the prospect of Imperial representation more distasteful to them than to suppose that any part of the public debt of the United Kingdom would be laid upon their shoulders. This debt now amounts to about £770,000,000, and the interest upon it is solely paid by the inhabitants of the United Kingdom. Adam Smith, in the last chapter of the 'Wealth of Nations,' in arguing in favour of the union of Great Britain with Ireland and the then existing colonies under a centralized government, says:—"It is not contrary to justice that both Ireland and America should contribute towards the discharge of the public debt of Great Britain. That debt has been contracted in support of the government established by the Revolution, a government to which the Protestants of Ireland owe not only the whole authority which they at present enjoy in their own country, but every security which they possess for their liberty, for their property, and their religion; a Government to which several of the colonies of America owe their present charters, and consequently their present constitution, and to which all the colonies of America owe the liberty, security, and property, which they have ever since enjoyed. That public debt has been contracted in the defense, not of Great Britain alone, but of all the different provinces of the empire; the immense debt contracted in the late war in particular, and a great part of that contracted in the war before, were both properly contracted in defense of America."

Though so many changes have taken place since 1776, when this passage was published, much of this

reasoning still applies, and might be regarded now if it were possible to organize the empire and determine the liabilities of its several parts from a strictly logical standpoint. It is true that much of our debt has been contracted for purposes which affect the interests of the colonies as much as those of the United Kingdom, and for wars, of which the only permanent result to Great Britain has been the acquisition of some of the colonies themselves. It is true that but for the annual expenses incurred by England in maintaining and protecting her colonies, a large amount of the debts contracted in time of war might have been paid off in time of peace. But what statesman dare, with hopes of success, go to the colonies offering them a share of Imperial Government with one hand, and a share of our national debt with the other ? In reality, it is no hardship to England that she should retain the sole responsibility of her debt. Under present circumstances she could never look to do otherwise, as she cannot practically tax the colonies to meet that or any other object. And in making Imperial reform it would be a graceful act, suitable to her dignified and parental character, that she should take upon herself the burden of the past, *while her children, though sharing* her glory, have only the brilliant hopes and prospects of the future.

But with regard to any debt incurred by the Imperial Parliament subsequently, the case would be different. No province of the empire would incur any debt except for local purposes. If it should become necessary for the Imperial Government to borrow, the debt would be contracted by the whole empire, and would be met by Imperial taxation in the usual way. A new stock would be created. The effect upon the old stock, which exists at present, would probably be to raise its value, as no more money for wars and the other purposes which have been hitherto the principal causes for borrowing would be needed; and therefore the stock would not in future be liable to increase to the extent it has hitherto done. The value and popularity of the new Imperial stock would depend upon the view of the stability of the consolidated Imperial Government taken by the investing classes. If this were a favourable one, this stock would also probably be more valuable than the old United Kingdom stock, as besides the United Kingdom, the rising colonies would also be liable. In this j case, the pecuniary position of both Great Britain and of the empire at large would be improved.

I think there can be no doubt that Imperial consolidation would increase the estimation in which Great Britain is held by foreign nations. This would happen, perhaps, not so much because the immediate physical power of the empire would be increased, but because there would be a pledge that the development of our race would go on without hindrance, and that its future strength would not be wasted and split up by disintegration and internal quarrels.

Imagination has great weight even in diplomacy, and the minds of foreign statesmen would be impressed with the vision of our mighty empire, its peopled continents and countries throughout the world, knit together firmly in one harmonious whole. Until now they have, instead, looked forward to the time when England, shorn of her crown of colonies, despised and treated with ingratitude by the children that she has brought forth, should sink into a Holland or a Denmark, a memory of past glories, and a lesson for the ages to come. That this would be the result if all our dependencies were parted from us, and were ruled by governments animated by the jealousy of their mother-country, which the policy of the United States Government has undoubtedly shown, is, I fear, more than a possibility; but a popular belief that it would be so is the best surety that such a partition shall not occur. To no power would the change be more beneficial than to the United States themselves. We have no really antagonistic interests, and ought mutually to rejoice in each other's prosperity, which, after all, is the common glory of our race.

And, with regard to our foreign policy and general interests, a close political union with our colonies would give such a definite character to our national aims that neither we ourselves nor foreign countries in regarding our policy could stand in doubt, as all do at present, as to what it is we really value and would defend at the cost of war.

It would be, perhaps, a rash prophecy to say that any principles of government are so unalterably settled, that it is certain that a supreme Imperial Parliament would insist on their being recognized in every part of the empire by every local Government. There are, however, a few fundamental rules which we at present maintain everywhere, and which I believe will rather increase than loosen their hold upon the public mind in England. They are, Representative Government, Personal Freedom, or absence of slavery in any form, Humane Treatment of Native Races, and Toleration of all Religious Opinions. To these may perhaps be added, Free Trade. All these matters are of Imperial importance, and concern either the national conscience or interest.

The first—Representative Government—has already been sufficiently discussed.

There is no principle of political morality with which Englishmen now-a-more universally agree than with the maxim that Slavery is itself a wrongful practice—of such a character that no compromise may be made with regard to it. Though this national conviction is not one of very long standing, there is no other moral principle which we have carried to all its consequences so unhesitatingly and so thoroughly. With regard to it, we have acted as national proselytises; we have not, as in the case of the truths of Christianity, contented ourselves with the peaceful persuasion of private missionaries, but we have carried the gospel of freedom, *vi et armis*, with fire

and the sword. We have rooted out the unclean thing from our own dominions at great cost and with unsparing hand. And yet there exists a danger that without the exercise of a watchful eye we may in some parts of the empire find ourselves gradually permitting some of the features of slavery. The temptation to this is very strong in those parts where we have at once a virgin and fertile soil, and a climate so hot as to incapacitate persons of European descent from out-door bodily work. The importation of lab our, of the Indian Coolie to Ceylon, the Mauritius, and the West Indies, and of the Polynesian to Queensland, is, though a most proper and useful practice both for the employer and the employed, still one which for its proper regulation requires an active and organized supervision on the part of the Imperial Government. It is the common habit of mankind to fail in recognizing the injustice to other and inferior races of systems to which they are accustomed, and from which they derive pecuniary advantage. It would have been difficult to get the planters in Jamaica and in the Southern States of North America to acknowledge the unfairness of the state of society in which their lot in life was cast. It would therefore be scarcely prudent to leave to the local governments, composed in a great measure of the employers of imported lab our, the task of regulating the traffic in which they have such an interest. For in some circumstances the pecuniary interest of the masters may become opposed not only to the happiness and comfort but to the very existence of the imported laborers. We cannot suppose that the Imperial Government would, as at present constituted, act less rigorously in suppressing any practices analogous to slavery in any colony than it would do if the colonies were granted representation in an Imperial Parliament. But, in the former case, the Government would act with this disadvantage, viz. that the colony, which might consider itself aggrieved by an interference of which it might not recognize the necessity, would have no constitutional means of bringing its views to bear upon the Government, and thus general dissatisfaction would be caused. If, however, the colony were able, through its representatives in the Imperial Parliament, to express its wishes and to ensure that the real facts relating to any question at issue were known, it would more readily listen to the views of the majority of the empire as there expressed, and acquiesce in the measures adopted.

The same may be said of the Humane Treatment of Native Races in and adjoining our colonies. Experience has already shown how precarious is the position of aboriginal and uncivilized tribes in countries colonized by European peoples. In those countries where the climate allows Europeans to settle and increase, it has been the almost invariable result of colonization that the aboriginal races have gradually died, or are in process of dying out, except in cases where they have been artificially protected in a state of dependence. This decline of aboriginal races has not been less experienced where they have come in contact with the English race than in other cases, but rather more so. Perhaps even our repression of slavery may have tended to this result, as it has prevented the compulsory employment of natives, the only means by which they can usually be induced to do organized work, and thus has caused the settlers to regard them as mere cupbearers of the ground, and hinderers of the progress of civilization. There is no more likely cause of disturbance between the colonies and the mother-country than the treatment of these aboriginal races. No doubt in all our colonies a much higher standard of the duty which we owe to these weak and defenseless residents in lands formerly their own now exists than was formerly the case with the pioneers of our earlier colonization, and the barbarities which have exterminated the native populations of Tasmania, of Newfoundland, and of great parts of the continent of North America are not likely to be repeated. But the causes which produced them are still at work in other of our colonies. Indeed, great practical difficulties have to be met, as by the increase of the European population land becomes scarce, and, in consequence, that occupied by the remaining natives becomes more valuable. The present treatment of the Red Indian tribes in the United States, and of the South African caffes by the Boers of the Transvaal shows what a policy might be expected if the persons who are immediately brought into contact with inferior races were allowed, uncontrolled, to act as interest and temporary expediency might prompt. I believe that public sentiment in England would revolt against the manner in which there is a strong tendency in some colonies to treat the natives; and that large numbers of persons at home would rather see a dismemberment of the empire than allow dealings with aborigines, which they would consider wicked and unjust, to take place under the shadow of the British flag. It would, under present circumstances, be unwise for the Imperial Government to interfere minutely in the relations of local governments with aborigines in their provinces; but it is bound, for the credit of the empire, to keep a watchful supervision over native interests. Mr. Merivale indeed says:

' Lectures on Colonization and the Colonies,' Lecture xviii., p. 495.

"That the protection of natives should in all cases be withdrawn altogether from the colonial legislature and entrusted to the central executive, is a principle in which I think even the most jealous friends of colonial freedom must acquiesce. One of the most useful functions of a distant central authority, counterbalancing to a certain extent its disadvantages, is to arbitrate dispassionately between classes having so many mutual subjects of irritation." And, subsequently, in the appendix to that lecture (p. 518) he says: "It cannot be doubted that a consistent and regulated system of management of the natives by the home authorities would be better, as regards justice towards the natives, than the arbitrary will of the settlers." But he admits that there appeared

little hope, from the weakness of the Imperial Government, that this desirable system would ever be adopted. I believe it would now be impossible for the Imperial Government generally to take the arrangements with native races into its own hands, but there is one contingency in which it is bound to do so, that in which it is necessary to defend the colonists by military force from native attack or revolt. It is frequently in these cases that the feelings of colonists are most strongly excited against the native races. The true remedy lies in a stronger and a representative Imperial Government. It is not likely that an Imperial Parliament with colonial representatives would take a less humane view of our duty to aborigines than the present one, but it would speak with far more authority, and would be credited by colonists with greater knowledge of the real state of the various parts of the empire. I believe that such a Parliament could, without taking away any authority possessed by local governments, by its expression of opinion alone, secure that native interests should be treated with more consideration than at present; and that if it became necessary for it directly to interfere, it could do so with greater assurance that its decisions would be cheerfully accepted.

There is fortunately less likelihood that any difference of opinion could arise between the Imperial and any of the local governments as to the fullest toleration of religious opinions of every kind, and to their public exercise, provided this did not involve the commission of acts contrary to public policy or decency, or to humanity. We have fortunately no European religious body within our empire whose creed is connected with a practice so opposed to public interest and law as the polygamy of the Mormons, which, I believe, would be tolerated neither by home or colonial sentiment; but if such a sect were to arise, and become numerous in any of our colonies, it would clearly be a matter of Imperial interest to decide how far the practice of polygamy should be allowed within any of the dominions of the Crown. In this case, also, the presence of representatives of the provinces specially affected would be able to assist the Imperial Parliament in coming to a wise decision.

Free trade does not, perhaps, properly come within the same category as the principles first enumerated, as it is one which has not been hitherto practised or enforced as part of our system of Imperial Government. Taxation has been considered as a local question entirely within the province of each local government, which has looked only to its own interests, apart from the effect that its financial policy might have upon other parts of the empire. This has been the natural result of England's own mercantile policy, which, until a comparatively recent time, made its tariffs and commercial laws solely for the advantage, as it was then considered, of English merchants, without consideration of the industrial interests of either the colonists or of Ireland. In both cases, however, there has been the same principal cause, namely, that the local bodies who made the taxes, tariffs, and laws, have regarded their own interests as separate from those of their fellow subjects who happen to live outside the boundaries of their own province, although those boundaries were sometimes of an entirely arbitrary kind.

It is of the deepest importance to the empire that its various parts should so order their fiscal arrangements as to interfere as little as possible with the progress of the others, and so of the whole. It is admitted that the effect of free trade is generally to increase the commerce and prosperity of the world: the arguments now used against it lie as to the effect that it may have upon the position of limited areas. It is urged that as the effect of free trade is to cause production of commodities only where they are to be produced at the cheapest rate, and to discourage the production of them where local manufacturers will be undersold by importers from abroad, it may be the true interest of inhabitants of these latter places, to protect such local industries in order that, in case of enforced isolation from other places, they may have the means of supplying all their wants. It is also urged that it is the interest of every province or area of local government to be self-supporting, as the result is that suitable employment will then be found for all the inhabitants, each of whom may not be fitted to take part in the production of the staple for which the province is best fitted, and with which it can undersell other places. These arguments pre-suppose that the interest of persons is confined to that of the locality within which they live, a proposition I do not believe to be true of any community in the world, and which certainly is not so of citizens of the British Empire. The real interest of an Englishman, whether living in England or in the colonies, is that of the empire at large. He cannot, without showing the most short-sighted selfishness, limit his sympathies to the part of it in which he happens to live. The interest of the empire at large is that each part of it should be encouraged to the utmost to produce those commodities for which it is best fitted by nature, and so to develop itself as rapidly as possible. This can only be done if the other parts take as much of its productions as they can, and if it devotes the whole of its energies to do that which it can do best. A very simple example of this exists in the relations between England and her Australian colonies at the present time. The progress of Australia in a very great measure depends upon its finding sufficient markets for its wool and its meat. These it finds in England, But England can only buy the products of Australia by the profits, and for the purposes of her own manufactures and commerce, a considerable part of which spring from intercourse with Australia. If Australia then artificially protects its own manufactures in which it is undersold by England, it reduces its power of producing wool and meat, and also the profits of England, which she thereby prevented from purchasing the products of Australia to the extent it did before. On the other hand, if England, anxious to be

self-supporting in the matter of food, artificially protects her own farmers, then it will be impossible to feed the multitudes employed in her commerce and manufactures, which will dwindle away, leaving no market for Australia. When Australia's economical position becomes suitable for manufactures, they will arise by natural growth without protection.

A most remarkable practical proof of the advantages of free trade has recently been shown in the relative progress of two Australian colonies, New South Wales and Victoria, the former adopting a free trade and the latter a protective policy. In the five years from 1870 to 1875, the exports of New South Wales, with free trade, increased 83 per cent., while those of Victoria only increased 16 per cent. The shipping of the former also increased 48 per cent., and that of the latter 25 per cent., in the same period. The relative increase of New South Wales in other respects has been little *less* remarkable. The taxation in New South Wales is at the rate of £1 18s. 3d. per head, while in Victoria it is £2 2s. 9d.

The same arguments apply to the relations of all parts of the empire with each other.

With free trade the empire will be self-supporting, though each part of it may not be so by itself. We must trust to our great navy and extensive mercantile marine to keep open communications between the various parts, which will thus attain their highest possible development, and the different wants of the large populations which must result will always provide suitable employment for every person. The cost to the empire of the largest navy will be nothing compared with the enormous pecuniary advantages derived by it from *Imperial free trade*. At the same time it does not follow that it would be wise for the Imperial Government to press free trade against the wish of the colonists. It would possibly have been politic for that government, in granting representative local government to each of the colonies having that privilege, to have provided that the local government should not have the power of imposing prohibitory duties upon goods coming from other parts of the empire; but this opportunity has been allowed to pass, and we have to regard each of those colonies as practically independent of Imperial control in the matter of taxation, and as accustomed, by its means, to interfere with the free course of trade. There is no necessity, however, why such restrictive measures on the part of the colonists should be passed without notice by the Imperial authorities. England has long been in the habit, by its ambassadors, of pressing upon the notice of powerful European Governments the injury that their protective commercial systems were doing to English manufactures and to the production of raw materials in English colonies, and it has frequently succeeded in obtaining modifications of those systems. The Imperial Government would be at least entitled to use the same pressure upon colonies of the empire that it does upon foreign and independent States; and it could do so with the greater force, that its efforts would be made on behalf of interests in which the colonists shared, and to which they could not become politically opposed. As public opinion in the colonies is the eventual arbiter of all disputed questions, such pressure would be suitably and sufficiently exercised by a statement by the Imperial Government of the evil effects caused, in their opinion, by the taxation or Customs' duties complained of, to the general welfare of the empire. This statement might be addressed in the first place to the colonial government, and then published for the consideration of colonists. It can scarcely be expected that Imperial consolidation would of itself immediately cause the colonists to abandon their protective measures; but it would have this good result, that they would be encouraged to regard the relative interests of their own and ot other provinces of the empire from a broader and less exclusive point of view. From this, and also from the progress of economical knowledge, we may expect the gradual adherence of all local governments to the munificent principle of free trade.

It now only remains to consider the means by which Imperial reform can be carried into effect. And the first requisite for this result is that there should be a general opinion, both at home and in the colonies, that such a reform is necessary and practicable. For this purpose every speech of a public man, every article in a newspaper, and every book, which has the effect of drawing the attention of men of British race to the relation of England and her colonies' does a public service. As might be expected, the colonists, who have their relations more often brought to their notice in a practical way, have taken the lead in insisting that some closer connection between the various parts of the empire is demanded by Imperial interests. The Royal Colonial Institute in London has greatly contributed to a healthy state of opinion in colonial affairs, and has been the means of bringing together, for the exchange of ideas, residents in the most opposite parts of the empire. Some of the members of the Institute are much in favour of Imperial confederation for the empire, involving Imperial representation of the colonies; though, as far as I am aware, no elaborated scheme, nor consideration of details, has yet been made. Though our objects for the consolidation of the empire are the same, it will have been seen that the arrangement I have here sketched can in no sense be called Imperial confederation.

A federal system, or confederation, in its nature presupposes that each member of it is an equal and independent party to a contract by which the confederation is formed, and has theoretically the same right to secede from the union that it had to enter into it. The United States of North America is legally a confederation of equal States, and the late war by which the secession of the Southern States was suppressed was, constitutionally, an illegal war, and was opposed as such by the strict constitutionalists in all the States.

Moreover, in a confederacy, no change of the basis upon which the union is formed can properly be made without a reassembling of the equal and independent parties to re-settle the terms of the contract. No doubt in practice this is often avoided, but it is always with inconvenience and with a straining of the strict letter of the law—ever an undesirable expedient. These evils are constantly liable to appear in confederations, and almost always do so in one form or other. In dissentions between the whole of the parts, the victory is usually with the central authority; but it is at the expense of much ill-feeling, and of the convictions of some of the most worthy members of society.

Fortunately the present position of the British Empire allows us to obtain all the advantageous results of confederation without its dangers. We have now a Sovereign and a Legislature "in these her realms, and all other her dominions and countries, over all persons, in all causes, as well ecclesiastical as temporal" supreme; and we are accustomed to see that supremacy exercised in all the empire in a manner agreeable to all classes of her subjects. It is possible that by these means a union of all the dominions of the Crown may be made with the same consent of the various parts that a confederation implies, but in a legal form at once more stable and more elastic. It is indubitable that, in strict constitutional law, the Queen in her Imperial Parliament might reorganize the empire, by granting the Imperial suffrage to the colonies, without consulting the colonists at all, and the latter would be guilty of rebellion in resisting any of her decrees thus made. But with semi-dependent and at the same time loyal states as the colonies are, such a course would be equally unwise and unjust. What can be done is, that when the colonists have arrived at the state of mind which would have impelled them, if they were independent parties, to confederate, the Queen and her Imperial Parliament shall pass an Imperial Act which of its own force shall knit the empire into a compact whole, legally unassailable at any future time by any dissentient part. In this case, if any dissatisfaction arose, and a part of the empire attempted to secede from it, the sympathies of all constitutionalists would, unlike those of the United States, be always against secession. And also, unlike the United States, where the rigidity of the constitution is, and probably will continue to be, a danger to progress and order, the Imperial constitution could be modified by the supreme authority to suit the changing circumstances of the empire without either illegality or scrapie. I know of no attributes of a wide representative government more likely to produce permanence than these. The modern tendency on the Continent and elsewhere towards the political unity of races has not expressed itself in the form of confederation, but rather in that of a central government, with an Imperial head for certain Imperial purposes; and this has been shown, undoubtedly, to produce a stronger government than a merely federal bond can do. What is wanted is not Imperial confederation, but Imperial reform, which, both as a word and a thing, is more suited to our traditions and wants than the former.

We may hope that the Royal Colonial Institute will continue its efforts in favour of Imperial representation of the colonies; and in consequent discussions by men acquainted both with home and colonial opinion, the plan for its accomplishment most suitable to the position of the empire will be arrived at.

Though many of the most enlightened colonists are already alive to the necessity of some change, and are pressing the matter into notice, it has not been found that the colonial political class, as a rule, have advocated any steps for bringing the colonies into closer relation with England, and the reason for this is not hard to seek. The position of a politician acting in the government of one of our colonies is one of great importance and dignity, naturally cherished by its possessor. If he is a far-sighted man, who looks forward with confidence to the great future that awaits his colony, he is naturally anxious that his name should be associated in the minds of posterity with the history of its early fortunes. He therefore is tempted to regard with suspicion any measure which he fears might have the effect of taking any of the control of those fortunes which he now has out of his hands, and thus reducing his actual and historical claims to notice. That these fears are really unfounded where such extensive powers of local government must always exist I have already endeavoured to show, and that the effect of colonial representation would really be to offer a political career far more magnificent than at present to a colonist of first-rate abilities; still, I fear it cannot be doubted that this reform would encounter the opposition of a section at least of the colonial political world. No change of magnitude can be carried out without interfering with some apparent interests. However, if the matter were formally before colonial notice, we might reasonably expect that parties would be divided on this as on every other subject, and that, if reform were opposed by the colonial government, it would be supported by the colonial opposition.

The difficulty lies in this, neither at home nor in the colonies is there any wide-spread dissatisfaction with the present state of things. Everyone admits that it is only a temporary state which cannot in its nature be of any long continuance, but few people have any notion of what may be the result, or would be willing to take steps towards a great change purely from speculative reasons. On the other hand, if some real cause of dissatisfaction with the present connection of the empire were to arise either here or in the colonies, hostile feelings would be aroused on both sides, which would throw the greatest difficulties in the way of making any Imperial reform or preserving our present unity. This has been already proved by our experience in the disputes with our American colonies, now forming the United States. There is also this further difficulty in the case of our present colonies.

They have the additional reason for satisfaction with the present state of affairs, that they now have all the benefit of England's great Imperial expenditure without contributing anything towards it, while they have, at the same time, the most complete autonomy in their own internal affairs. In any possible scheme for Imperial unity some provision must be made for their providing a share of the funds required for this expenditure. Would the colonists then consent to a new system, entailing this burden upon them, unless they were compelled to do so by some urgent cause, such as pressure by the Imperial Government ? The only means of pressure upon the colonies open to the Imperial Government would be to threaten to withdraw the protection now afforded by Great Britain, and thus to compel them to incur much greater expenses in providing separately for themselves all the requisites of protection and government than they would undertake in simply contributing to the Imperial exchequer. But this would be to threaten a dismemberment of the empire, a catastrophe which it would be the special object of any reform permanently to avert; and I am convinced that public sentiment in England would never sanction such a course being taken. It is probable that threats of any kind on the part of the Imperial Government would tend, as the separatist policy fashionable in England some time ago undoubtedly did tend, to weaken the attachment of the colonists to the mother-country. If the colonists believe that England is unfeignedly anxious, even at the cost of much expense and trouble, to retain then in union with herself, they will be much more willing to meet her just wishes. Those of British race will be generous to those who act generously and openly towards them. If, therefore, the full facts connected with England's share in Imperial government were laid before them, and were discussed calmly without any pressure, the reasonableness of their assisting her in her great work would be admitted, and colonial governments would be forced by public opinion in the colonies to unite with the Imperial Government in carrying some comprehensive and suitable Imperial measure. Moreover, colonists will be anxious in time to be rid of the kind of quasi-dependence to which they are subject at present, and to have personally some share in directing the affairs of the great empire of which they form so important a part. When this anxiety becomes strongly felt, as it undoubtedly will be, if no great disputed question should previously arise to estrange colonial attachment from the mother-country, they will be met at once by the obvious difficulty that they cannot in fairness ask for power without being willing at the same time to undertake some of the consequent responsibilities.

To the two noble motives, desire to have a share in the Imperial government of their race, and justice towards the mother-country, who has long protected them at her own expense, I look, as the mainsprings which shall induce the colonists to support a fair and lasting Imperial union.

With people living in the United Kingdom, the position is altogether different; for them Imperial consolidation would bring with it, not a new liability to taxation, but a renunciation of power. And, no doubt, parting with exclusive power is always accompanied with a pang, as we see in the case of the monarch who finds himself obliged to submit to the pressure of a popular assembly. But none the less is it often necessary to do it, and wise to do it with a good grace. And there never was a renunciation of power to which those who make it, need look with less apprehension. For it is the admission by a parent of the children that he has reared, to share in a great enterprise and in mighty aims. To them he relinquishes some of the control and some of the glory, and to them he looks in their young strength for help in the burden and heat of the day, to maintain not only the glorious work that he has created, but to carry it where even his strong arm alone cannot reach. We in England should no doubt lose our exclusive right of determining the foreign policy of the empire, but that policy would be strengthened by the very loss, and we should show a fatal short-sightedness, if for the sake of the sole exercise of Imperial power we threw away any opportunity of engaging our colonies to cast in their lot with us, both for better and for worse. Most truly did Burke, in his speech for conciliation with the American colonies, say, on March 22nd, 1775,

' Burke's Speeches,' vol. i., p 327

"As we must give away some natural liberty to enjoy civil advantages, so we must sacrifice some for the advantages to be derived from the communion and fellowship of a great empire."

I have already pointed out, in discussing the effect of Imperial consolidation upon the colonies, that the difficulty most likely to hinder their acceptance of any scheme for it will be that they must undertake at the same time a share in Imperial taxation, which has been till now the burden of the United Kingdom alone. It must not be supposed that the acceptance of a share of this burden by the colonies would cause a corresponding alleviation of the Imperial taxes paid in Great Britain. It is probable that these would at least be as large as at present, if not more so.

One of the consequences of the existing unsettled relations of the colonies to the mother-country is, that defences by fortification, coaling stations for ships of war, and necessary communications by telegraph, are, especially as regards the Australian colonies, either non-existent or greatly deficient, over large areas, which would have to be defended by us in time of war. This deficiency has lately attracted a good deal of attention, but nothing has yet been done really to meet the difficulty in a sufficient manner. The colonists have neglected to do for themselves what it was imagined might be done for them by the Imperial Government; and the latter

has naturally objected to spend English money on what appeared to be really a local concern. And besides these existing deficiencies, fresh centres of wealth are day by day arising in most of the colonies which will render necessary constant additions to the defences that are now required. Though under a centralized Imperial Government, it will probably be found practicable to make a certain class of military fortifications a purely local charge, there is much to be done in the colonies, the expense of which properly fall on the Imperial exchequer. The colonists would justly expect that upon their contributing to the Imperial funds, steps should at once be taken to provide for their security, and they would press their wants through their representatives in the Imperial Parliament in a manner not likely to be neglected.

Probably one of the greatest difficulties in the working of an Imperial Parliament with colonial representation, would be at the commencement, in moderating the demands made by out lying provinces upon the Imperial exchequer, without at the same time causing local dis-satisfaction.

But as the United Kingdom must, for a good many years to come, still provide by far the largest share of the Imperial funds, it is likely not only that all colonial contributions would in reality be spent in the colonial interest, but that a considerable part of those obtained from the United Kingdom would go to the same destination. The people of Great Britain, therefore, cannot be attracted to a support of Imperial unity by the prospect of a diminution of their burdens (except, as I have already attempted to show, in the matter of their funded debt), and they must consequently look, for the advantages of such a scheme to themselves, to other considerations. And what these considerations has followed in history the course of England, since her people became a nation, can doubt. For it has been prompted by a spirit working within, passing on from the fathers to the children, and ever showing itself from age to age, in varied and diverse forms. This spirit is the spirit of empire, and it lives not in the brain of the despot, but in the heart of the people. With the government, or without the government, it has worked its way, and it will work its way still. No English monarch has been permanently popular who lacked this spirit, and it is an essential qualification of a great Minister. With the two great weapons of trade and colonization, it is gaining the supremacy of the world and no force has yet appeared which can check its march onward. It aims at empire, not for the glory which is attained thereby, nor for the simple pleasure of ruling over wide lands and numerous races, nor for the tribute of peoples but that it may assimilate other races to the English race, and enforce their obedience to laws of action that Englishmen have evolved for themselves, and wish to see everybody else follow. But like all great forces, it shows no haste, and works on, biding its time. It is to this powerful spirit of the empire of race we must look as a principal cause, not only to make Imperial unity possible, but to force it into a reality.

There would be also material advantages to Great Britain in such a union, which cannot fail to have their weight. The easing of the over-worked and over-weighted machinery of her present Parliament; the strength that she will draw from her increasing colonies as time rolls on; the sense that they can never become her enemies, and that with their help her work may indeed delevop channels, but can never decay, and is ensured against the weakness of old age these are considerations which may well influence a nation that has done much in the past, and has much to show for it in the present, but who knows, or ought to know, that what has been gained has been out of all proportion to the little geographical space which has produced the men that have gained it, and that they have been aided in their work by physical and other causes unlikely to exercise the same weight in perpetuity. Indeed, Imperial unity is the only fitting climax to our noble history in the past. England has only once really failed in her functions of government, and though that failure occurred with regard to her dependencies, she has learnt and profited by it. But she has to prove to the world that she is able, besides providing freedom and tranquillity at home, to consolidate her empire on the basis of that freedom and tranquillity. Without Imperial unity, she will have shown herself able indeed to sow, but not to reap. And the harvest ought surely to be near; it is ready to our hand. Other nations have achieved the union of the branches of their races under one government by violent revolutions, by wars, by annexations, and with the greatest difficulties. We have the union already made, and have only by wise reforms to render it permanent and put it out of the reach of danger. Let us seize the present moment for these efforts, when the empire is tranquil and progressive; when no great question of home politics disturbs our minds; when faction is hushed; when no controversy exists between the Government in England and any province of the empire; when those who would dismember the empire have been tried and found wanting; and when Englishmen, both at home and in the colonies, so readily admit the advantages they gain from allegiance to a common Sovereign. Let us not wait till the blood is heated by disputes which the present uncertainty may any day produce. Our experience in America shows that an arrangement is then impossible, and that experience is the best guide to the future.

No doubt the change would be in a certain sense a revolution; but the history of the English people has been one long series of revolutions carried on often imperceptibly, and preserving order and old names and associations. Such revolutions were the emancipation of the villeins, the reformation of the Church, the amalgamation of Scotland and of Ireland with England, and the gradual assumption by the House of Commons of the supreme power in the State. These revolutions are not to be feared, and with them the word is robbed of

its sting.

And how can these great reforms be made ? I would reply, in the same manner, that all great reforms are made in these islands and among men of British race, by the Legislature, after the public have become convinced by means of general discussion that they are necessary and practicable. The first step is the forcing of the questions at issue upon the public mind at home and in the colonies; the second is the determination of the form in which change can safely and wisely be made. In both these the help of the Ministers of the Crown is needful. And at present there is little doubt that it would be accorded by Ministers of either of the political parties that Her Majesty can summon to her service. There is no substantial difference in the present policy towards the colonies advocated by either of them. And there is no measure that British statesmen could carry which would be so glorious as this; as it concerns the deepest interests of their country and people, not only now, but in the most distant future; and it would affect, perhaps more profoundly than any other political course open to human action, the destinies of the world at large. The Minister who should succeed in carrying into effect the political consolidation of the British race would earn for himself an imperishable name, and the era in which it was accomplished would merit the respect of posterity. The course which has been taken by Lord Carnarvon, in South Africa shows what an able and disinterested Colonial Minister may do in educating and convincing colonial opinion in favour of a wide and beneficent scheme of comprehension; and the same process is possible with regard to a wider and more important scheme for Imperial unity. Probably, the most reasonable course, if a Minister were willing to promote such unity, would be that he should send out to the colonies, to which it was proposed to offer Imperial representation, the draft of an Imperial scheme for public information and discussion, and should request the colonial legislatures to send to England delegates to explain the feelings and wishes of their colonies upon the subject. It is possible that intercommunication between the delegates of the various colonies, the Ministers of the Crown, and other home statesmen, might have the effect of smoothing difficulties and promoting the spirit of compromise, most necessary to complete a work of such magnitude.

For the interests of England we may hope that the question may never, at home, be made one of party. It is a national question, and the interests, sentiments, and sensibilities of so many communities of Englishmen are affected by it, and have to be considered in the discussion upon it, that violent party opposition, or harsh words on the part of prominent Englishmen might produce complications which would destroy all chances of success, and perhaps lead to the dissolution of the empire.

I believe no motion in favour of the consolidation of the empire, by giving the colonists Imperial representation, has been brought before the House of Commons in recent times, but such a motion would be of great service, as it would induce a discussion which would put before the world the advantages which might be gained, and the difficulties which have to be met, in the accomplishment of Imperial reform. If these pages should have the effect either of inducing any member of Parliament to undertake such a motion, or of bringing the enormous interest which the people of Great Britain have in the adoption of a sound basis of union with their brethren in her dependencies, in any way to the notice of the public, they will have fully attained the purpose of their author.

In conclusion, I would point out that if in spite of difficulties and opposition the genius of the English people should succeed in accomplishing this crowning work in their political development, there would be at least this pledge of its stability and permanence, that it would have on its side the only great principle which has in modem times proved strong enough to cause either the formation or the disintegration of states—a community of race and language. And, if we ask whether this success would result in the moral, intellectual, and material benefit of the race that it more particularly concerns, and of the world at large, I think that the deeds of England in the past, and the spirit in which she now looks forward to the future, will unite in giving an affirmative reply.

Note upon MR. GOLDWIN SMITH'S *Article in the 'Fortnightly Review' of April* 1*st*, 1877, *upon the 'Political Destiny of Canada'*

Since nearly the whole of the foregoing pages were written, Mr. Goldwin Smith has published an article containing reasons why, in his opinion, the Dominion of Canada, in particular, and incidentally also, why the other English colonies cannot in the future be united with Great Britain and each other under one Imperial Government. He regards the hope of colonial representation as an extravagant dream. But when his reasons are examined, I think they will be found by no means of crushing weight. Mr. G. Smith well says, and I for one entirely agree with him, "The great forces prevail. They prevail at last, however numerous and apparently

strong the secondary forces opposed to them may be. They prevailed at last in the case of German unity and in the case of Italian independence. In each of these cases the secondary forces were so heavily massed against the event that men renowned for practical wisdom believed the event would never come. It came, irresistible and irrevocable, and we now see that Bismarck and Cavour were only ministers of fate.

"Suspended, of course, and long suspended by the action of the secondary forces the action of the great forces may be. It was so in both the instances just mentioned. A still more remarkable instance is the long postponement of the union of Scotland with England by the antipathies resulting from the abortive attempts of Edward I., and by a subsequent train of historical accidents, such as the absorption of the energies of England in continental or civil wars. But the Union came at last, and, having the great forces on its side, it came for ever."

Mr. Smith then states that the great forces are in favour of the separation of Canada from the English empire. It is a little remarkable that the only instances he gives of great forces in the foregoing passage, are those that have compelled the political union of the various brandies of one race under one government. But the great forces on which he relies for compelling the separation of Canada from the empire, are, its distance from England, the divergence of interest and the divergence of political character of Englishmen living in those two parts of the empire, and lastly the attractions presented by the United States, with their identity of race, language, religion, and general institutions, to those of Canada, together with economic influences. Mr. Smith's opinion is a valuable one where it has been formed from facts which his residence in Canada and the United States of America has brought under his notice. His views are, however, here founded upon what he considers general possibilities, of which persons who have not resided in America may form as valuable opinions as himself. He is a witness to the existence of a strong Canadian feeling in favour of a continued connection with England, and to the "glamour of British association." His political predictions and wishes are on one side; the evidence that he is compelled to bear as to actual facts, is on the other. His local knowledge, however, enables him to show that certain forms of the Unionist feeling are of secondary and transient importance; but he entirely puts out of sight and undervalues the great force which is at work to prevent disintegration and create unity, and which, aided by the secondary forces, that he admits together make a strong cable, may be found of supreme importance—I mean the love and the power of race.

Of geographical distance, as a great force, he finds little else to say than that "few have fought against geography and prevailed," while he admits that increasing skill is likely to increase our powers of intercommunication by steam and telegraph, though he thinks the cost of transit will not be lessened. In truth, the ocean is no real barrier between England and America; it is our safest and best highway. It is an unfailing permanent road which requires no money to keep it fit for travelling, and which, to a great naval power, can be closed neither by public nor by private enemies. With no land between, we are adjacent countries. The strongest argument against Mr. Smith's views for the future is, that with far inferior means of communication than those which are now open to us, the union has continued to exist in the past. If England's distance from America is what Mr. Smith calls geography, then we have fought against it, and have prevailed.

With Mr. Goldwin Smith's next great force, of "divergence of interest," it is still more difficult to deal, for he does not say much more about it than that such a divergence exists, and is as wide as possible both in diplomatic and economical questions. It is difficult to see why Englishmen in Canada have nothing to do with the European and Oriental concerns of England, and with the development of their race in other parts of the world. As a matter of fact, however, such is not their opinion. Mr. Smith points out and laments that the Canadian has not such an exclusive attachment as he would wish to Canada, as the sole country round which his feelings of patriotism should cling; but he does not see that the cause of this is that the Canadian feels he is a member of a great and a wide-spread race, and owes attachment, not merely to the fortunes of the land upon which he resides, but to the race of which he is proud to be a member. That he lives where he does is an accidental circumstance; his relationship to the other members of his own race is a force out of his own control, affecting nearly every sentiment and hope that he has. Certainly Mr. Smith's way of regarding national ties is not the way of his countrymen, and helps to show his want of sympathy with their feelings That he apparently thinks it possible that the Chinese may ultimately be allowed to expel people of the British race from the Australian colonies, and that the unassimilated Irish may take their place in the United States, and possibly in England herself, is an example of the unsympathizing and jaundiced view with which he regards the progress and aspirations of his fellow-countrymen. Such is not the spirit in which Englishmen have made their way in the world, and will continue to make it.

The remissness that may possibly have been shown by the Imperial Government in the advocacy of the claims of Canada, in dealings with the United States, would be remedied by the colonial representation that I have attempted to urge in the foregoing pages; it has occurred, when it has, not so much from diversity of interest, as from want of some recognized way by which the Canadians could make known their wishes and wants in England.

It is scarcely an argument against the permanent unity of the empire that Canada has retained the same

currency that it had previous to the secession of the United States, and which was inherited by both of them from the original Spanish colonizers of America.

It is undoubtedly in the power of the United States to interfere with and injure the trade of Canada by hostile duties, trade regulations, and the shutting up of their markets; but even Mr. Smith does not appear to suppose that Canada could be coerced into secession from the empire, and into a union with the States, by such means. It is more reasonable to believe that the people of the United States will come to see that their real interests lie in favour of free trade, and will enter into commercial treaties with the British Empire for the general advantage. Such treaties are far more likely to be negotiated by the Imperial Government, acting in the interests of the empire at large, and of the bulk of all the United States' customers, than by the government of Canada alone, which represents a very small part of them. I would also remark that it yet remains to be seen what will be the effect upon the United States themselves of the increased value which is now set upon the blood-relationships in the various peoples. It is not at all likely that they will be unaffected by it; in fact, there are signs that the consciousness of a common race with ourselves is already having some influence there; and if this is so, we need not expect that United States' influence will be used towards weakening the general power of their brothers remaining within the British Empire, and of which power they themselves reap many of the advantages.

Mr. Smith's third great force, the divergence of political character between the citizen of the Old and the citizen of the New World, is one still more likely to be attenuated as time goes on. He evidently conceives the English Government to be based upon feudalism and aristocratic pride, and therefore to offer the most marked contrast to the democracy and equality of the colonies. Whatever may be thought of some of the hereditary forms of English society, the policy of the government in Imperial matters, and domestic too, is as democratic, and in favour of free government, as that of the most popular republic. With regard to the government and its policy, aristocracy in England merely means that there is a supply of honest and educated men to fulfil the popular will in public affairs. It does not, and would not, affect Imperial policy, that England and Scotland have each of them an Established Church; and an hereditary Imperial Chamber could no more alter the course of affairs to suit aristocratic prejudices than the House of Lords does at present. Besides this, the representatives of the various colonies would bring with them to the popular House their own modes of thought, and would be a sufficient counterbalance to any retrograde tendencies on the part of the Home Ministers. If they should at the same time imbibe some of the high notions of political and personal honour which have so long distinguished English politicians, in place of the unscrupulosity and corruptness of which Mr. Smith accuses those of Canada, he would probably consider it an advantage to America.

With regard to the attractions of the United States, which Mr. Smith thinks will prove an irresistible force, all predictions, Mr. Smith's included, are mere guesses in the dark. Those attractions are not at present of great power, as Mr. Smith's whole paper bears unwilling witness, and there seems but little to attract in the immediate future. A divided people, a huge debt, gigantic profligacy in all branches of the executive government, are not things of a character to allure free and contented neighbours, who share but in a small degree in such curses, to a more intimate union with them. But these things are marked features of the United States as a community. The present commercial depression there, though no doubt only temporary, shows that republican government and boundless land are no preventives of the most serious evils which occur in modern civilized life. At the same time I am quite willing to admit that if under present circumstances the tie which binds Canada to the rest of the British Empire were loosened by the upsetting of the British Monarchy in a revolution at home, or by any other cause weakening the cohesion of the British race, the attraction to the United States, if they remained in their present form, might be too great to be resisted. If, however, some such Imperial union as I have urged should be adopted, it is more probable that the attraction to the rest of the British Empire would remain in the preponderance, and the circumstances under which the United States could exercise a superior influence would never arise. In such a case the attractive force might be found acting upon, rather than from, the United States themselves.

Mr. Smith asks what has been the destiny of colonies down to the present time, and what has become of the American dependencies of Spain, Portugal, France, and Holland? The colonies of Spain, except Cuba, have no doubt separated from her, but it was not until, by continued intermarriage with the native races, the people of those colonies had become Spaniards in nothing but name, and the principle of race had become a repellent instead of an attractive power. The government of Mexico since the separation from Spain has for considerable periods been carried on by full-blooded natives. The same has been the case in some of the South American States. There is surely no analogy between these instances and British colonies where no such deterioration of blood has taken place. In Brazil and the Portuguese colonies the same extinction of pure European blood had occurred before their separation from the mother-country, and the relation of Brazil to Portugal was further complicated i by dynastic disturbances. The colonies of Holland we have mostly ourselves acquired by the fortune of war, and are gradually assimilating the Dutch people there to the English type. Such a conquest of

our own colonies by another nation does not at present appear probable. The lost colonies of France have been likewise either annexed by us like Canada, or seized by an over-mastering inferior and alien population like San Domingo. In Canada, as Mr. Smith points out, the French population remains practically unassimilated by the surrounding English one, and is no doubt a disturbing factor in the development of the Dominion in a British mould; but this would be equally the case if it were joined to the United States, the only other possible course for it. Besides, the United States would be far less likely than the Imperial Government to allow the continuance of the separate and ancient institutions to which the French Canadians are much attached, and the fear of a disturbance of these privileges would always of itself prevent them from intriguing for the separation from the empire and a union with the neighbouring people. I think it is clear that the causes which have produced the separation from themselves of the colonies of those other European nations do not exist to disturb the connection of British colonies with the mother-country.

As Mr. Smith aspires to the character of a political prophet, it is worth while to notice the manner in which some of his past prophecies appear to be working their fulfilment. In 1863, he published in a work called 'The Empire,' some letters which he had written in the previous year to the newspapers upon the subject of our colonial sway. In the Preface, p. xxi., he says:

The *italics* are my own.

"If in the midst of the vast revolution which is going on over the world, the almost invisible filaments of political connection which still bind England to her colonies should at length cease to exist, and if she were to find that a few military positions no longer answered the purpose for which they had been occupied, or repaid the money they cost, history a century hence would not number this amongst the greatest events of an eventful age, nor give it so large a space in her record as she will give to other things of which England itself is the scene." Here Mr. Smith evidently connects, as likely to be contemporaneous circum-stances, the snapping of the tie which unites England to her colonies, and the abandonment of her military positions in them. The latter has almost universally taken place, and yet the tie remains stronger than ever. In one of the letters, on page 10, Mr. Smith says, that Lord Palmerston, though youthful in bodily vigour, was old in ideas, and unconscious of the great moral and material changes that had taken place in Europe since he first entered public life: and then proceeds, "But he will be succeeded, probably, by statesmen more imbued with the ideas and alive to the exigencies of our own age, and, depend upon it, such statesmen will be disposed to retrench our empire in order to add to our security and greatness." Lord Palmerston passed away twelve years ago, and five Ministries have since directed the fortunes of Great Britain; but her empire has been increased and not retrenched by them, and no government which showed a desire to diminish Her Majesty's dominions could stand for a session of Parliament. So much for Mr. Smith's predictions; but he sings the same song still.

Mr. Smith, in his recent article, asks if a great effective union of all the provinces of the British Crown could be made, what would be the good of it ? I have attempted in the foregoing pages to point out the many and most important benefits all branches of our race would receive, and I will only repeat now, that it would ensure that civilization should proceed in a smooth and even manner that one colony of Englishmen should not cut the throats and destroy the progress of other colonies of Englishmen; that the prosperity of Englishmen in one part of the world should be made conducive to the benefit of Englishmen in another, and the general and united progress of Englishmen, to the benefit of the world; that the great and humane principles of government which Englishmen have discovered, and upon which they act, should be observed in the future development of their race, and that they should be encouraged to take wide views and exhibit broad sympathies rather than to narrow the sphere of their influence, and to limit their power of good by local and often short-sighted selfishness.

If the prospect of the whole and united British race moving onward together in peace and in happiness to higher developments of civilization and social progress, produces glory to the people that exhibit it, so much the better, for it will be glory of the truest kind. But to the race, with such a prospect before it, that chooses from timidity, from selfishness, from want of a wide and noble aim to refrain from encountering the difficulties through which it may be realized, no glory will be accorded either by bystanders or by history; but it will be regarded as another' instance of a people to whom vast opportunities were accorded, but who were not strong or good enough to avail themselves of them.

And if such a prospect were realized, might not the mother-country share in that glory ? There would be a sufficient material advantage in it for her to satisfy the requirements of Sir George Cornewall Lewis, which Mr. Smith quotes for she would secure for herself in a couple of small islands a right to the protection, the care, and the respect of her children inhabiting half the world.

London: Printed by Edward Stanford, 55, Charing Cross.

New Zealand State Forests

A Mode of Transaction,
(Modus Operandi)

Combining their Conservation and Improvement with Financial Advantages.
By A. Lecoy, L.L.B., of Paris,
(Late of the French Forest Department).
Wellington: Lyon & Blair, Steam Printers Lambton Quay. 1878.

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New Zealand State Forests.

I. The Forest Legislation.

Public attention was recently called to the very important question of the Conservation and Management of the New Zealand State Forests, when it was remarked that the evils arising from past and present reckless waste and destruction of timber demonstrate and urge the necessity for new legislation in the matter.

It may be approximately calculated that the consumption of timber, together with its reckless waste and destruction, is now approaching the round figure of 200,000,000 of superficial feet yearly. The out-turn of the saw-mills for the year 1876 amounted to about 150,000,000 super-ficial feet of sawn timber, to which quantity should be added the destruction by bush-fires, etc., etc. Should such consumption and destruction be on the increase at the same rate as the population, and should the present *far niente* in the matter continue, *the timbered State Forests* of the colony could hardly last more than *fifty years*.

Although it is obvious that a new, fundamental, and permanent forest legislation should be of considerable interest here, at the same time it does not appear that the question has attained sufficient maturity to be tabled in Parliament, there being no immediate danger—*no periculum in domo* requiring hasty measures. Moreover, the measures to be taken at present are entirely pertinent to the adminstration.

The question of the State Forests in New Zealand is a broad one, bearing as much on considerations of political economy as on technical forestry; and the statesman who will have the honor to attach his name to it will feel the necessity of showing that extensive and immediate advantages are to be derived from his proposals when submitting them to Parliament.

It must be admitted that people are generally but imperfectly acquainted with matters of State Forestry; still, those people who, by their energy., and industry, are the founders of the prosperity of the colony, have their representatives in Parliament whose duty it is to study such questions as involve the welfare of the public property.

II. Beneficial Effects of Forests, and Danger of their Indiscriminate Clearing.

Forests have not only the beneficial effect of affording a produce of high importance, as well as climatic and financial advantages, they also afford a protective influence to lands situated on hill-sides and at the base of hills and mountains. At the time of the melting of snow or of heavy rains, they are an obstacle to the sudden irruption of immense volumes of water into valleys, by breaking and dispersing the torrent, so allowing the water to come down by degrees, and not with the destructive force of one single and unopposed mass.

Events which have taken place in France demonstrate the importance of such natural protection against floods, and the danger arising from its neglect or destruction.

When the French nation began to suffer from the disastrous effects arising from the destruction of some of their State Forests in the mountainous districts, they seat their foresters to Germany to study the forest law and institutions of that country; and the reports of those agents have been the basis on which rested the radical reforms then introduced in the French Forest Law and its administration. It was in the year 1827 that the new French Forest Law was established, when the Legislature, compelled by circumstances, and acting for public good and security, found it necessary to infringe on the secular principles and rights of private property. Not only the clearing of forests belonging to the State was prohibited, but likewise private property of the same nature was included in the prohibition, and further was made subject to certain rules of conservancy under the control of the State Forest Department.

However, too late the French legislators set to work in order to prevent the recurrence of inundations,

which have been increasing in magnitude since 1827.

Some thirty years ago, the inundations from the Loire river extended the disaster a distance of *more than 400 miles from the locality whence it originated*—that is to say, from the denuded hills and mountains. All along the river fertile valleys were ruined by the flood-waters.

More recently, in 1875, in another part of France, the inundations from the Garonne river caused a loss of life to the extent of 4,000 persons, and the destruction of property has been calculated to amount to £4,000,000.

Do not such facts sufficiently prove the danger of indiscriminate clearing of forests in mountainous and hilly countries,—and do they not call for the serious attention of the colonists ?

III. Expenditure of Forest Departments in Europe. A Serious Omission in Parliamentary Debates in New Zealand.

In the House of Representatives here, in 1874, the original Forest Bill introduced by Sir Julius vogel had to be withdrawn on the ground that the conservation of natural forests would not pay, *judging from the results obtained in Germany*, etc. It had been stated that the expenditure of the Forest Department in Prussia amounted to about 50 per cent. of the annual revenue.

Such a large amount of expenditure ought to have been explained, and the French Forest Department, which stands so high in the opinion of foresters all over Europe, might have been mentioned and compared with that of Prussia. It seems desirable the omission should not be overlooked.

The total area of the State Forests in France is now about 3,000,000 acres, the annual revenue of which is about £1,400,000. The expenditure of the department per annum is about £68,000 (rather less than 5 per cent).

The Communal Forests in France represent an area more than double that of the State Forests. They are managed under the direction and supervision of the State Forest Department, and the Communes have only to pay for the salary of their own forest guards.

Private forest property in the same country exceeds the area of the above. The owners are compelled by law to reserve a certain quantity of growing timber, even where they cultivate coppice wood; and they are not allowed any clearings of their forests without special authority.

Had the administration of the Forest Department of France been known here, the organization of the Forest Department of this Colony might have been practically settled by this time.

A fact well worth the attention of Statesmen and Economists is that in France, where the management of the State Forests may be considered as a model system, those forests may be assimilated to a capital invested at 30 per cent interest. In that country, landed property under cultivation, and forest included, is estimated as affording a nett revenue of 8 per cent. So, a property bringing in an annual revenue of 8,000 francs will be considered as representing a capital or money value of 100,000 francs.

The area of the State Timbered Forests of France under systematic treatment, is about 1,000,000 of hectares representing (as money and by assimilation to actual value of private property of same nature and quality) a capital of 100,000,000 of francs (£4,000,000), bringing in annually, a nett revenue of £1,332,000.

Although that revenue may be assimilated to the interest of a capital, it is, in fact, nothing else than a portion of the inexhaustible and self-reproducing capital (forest) that falls in every year. Why should not the same advantageous management be applied to private forest property ? The reason of it is that those timber forests are worked by rotation, the period being generally 150 years for oak forests. Therefore, a system of forestry where trees are to be felled at the age of 150 years can only apply to immense areas, etc., etc.

In Prance, private property in wood consists principally of coppice-wood, (taillis) which can afford seven crops within the period of rotation of a timber forest, each crop bringing in high financial returns on account of the bark and firewood they afford. Coppice-wood for bark is available from the age of 15 to 20 years,—older, the quality of the bark would be less. The felling takes place in the spring when the sap is ascending,—which facilitates the skinning of the wood. Bark should become here one of the most important articles of export to Europe.

IV. Financial Resources obtainable from Natural Forests.

Besides climatic and other advantages which State Forests can afford, they present also a financial aspect, as yielding a regular annual revenue when systematically treated.

State Forests, even where no systematic treatment had ever existed, have likewise proved to be an important financial resource to Governments when proper measures were taken to prove their actual value, as will be seen in the following case:—

When the Ottoman Government, some twenty-two years ago, felt the necessity of improving their finance department, they were told they had immense wealth and resources in the shape of forests, which until then had

been given up to waste and depredation without any profit to the State. Then the Turkish Administration thought of applying to the French Forest Department, for the purpose of obtaining the assistance of some of their best officers, which was granted.

The eminent French forester, Monsieur Tassy (Conservator) was appointed Director-General of the French Mission in Turkey. He was assisted by M. Simon (Inspector) and two other officers.

The first steps taken by the French foresters were the organization, or rather the framing, of a Forest Department, and at the same time the establishment of a School of Forestry at constantinople., The pupils attended the lectures of the French foresters during the winter, and followed them in forest explorations in the fine season, when then special education was practically continued.

Two years had not elapsed before the reports and estimates of the French foresters, relating to several forests of the Turkish empire, were ready, and served as a basis for sales and important leases granted to foreign companies, all those transactions being thus carried out with great success.

V. Modus operandi. *A Lease for Ninety-nine Years: its Conditions and Effects*.

In the matter of the New Zealand Forests, the problem to be solved is this:—

How to obtain from a large portion or portions of those forests (the land excluded from disposal) an amount of money equal to the present commercial value of the forest, and to secure at the same time its conservation and improvement.

Should a sale be contemplated, of course a very extensive area of forest would be required to bring in a large amount of purchase-money. Now, the working of such a large area would require many years, and most probably the buyer, having no interest in the conservation of the forest, might treat it indiscriminately, for the prevention of which an expensive supervision would be necessary.

Opposed to such a view, it may be said that the State, having still in hand about 11,000,000 of acres of forest lands, can well afford to sell 1,000,000 of acres to speculators, and that the clearing of such an area could not cause any injury to the country, etc., etc.

To such argument it may be answered that offering such a large area of forest for sale would prove an urgent want of financial resources on the part of the vendor, and that the buyer, taking advantage of circumstances, would require the absolute sale of the land as well as that of the timber on it, and most likely would not pay more than current prices for it.

Granting the same area of forest on a lease of long duration, and subject to by-laws and supervision of the State, would be considered good management of the public property, and would *afford greater financial advantages* than in the case of a sale, as hereafter explained.

Now, let us suppose that a large area of forest—say one million of acres (to be formed of several blocks taken in different parts of the colony, as may be advisable),—would be leased for ninety-nine years to an European Company.

The forest to be divided into *one hundred* sections. One-fourth (or thereabout) of the growing timber, as selected by the State foresters, to be reserved on sections for systematic treatment.

Plantations to be made on sections immediately after the clearing of the felled timber, at the expense of the lessee, and under the directions of the State foresters (allowance being made for that expense as hereafter indicated).

Of course conditions respecting the working of the forest, the interference and supervision of the State foresters (which interference would be of benefit to both parties), should be embodied in the lease.

It must be observed that in the case of a lease of such duration a double object is in view, viz.:—

First, that in such a period two fellings (crops) could be obtained from the same section, consequently enhancing the value of the whole transaction.

Secondly, that the lessee should be bound by his own interest to the proper management of the forest on account of the second fellings, which will include not only the old reserved fourth of timber trees but also plantations made by him which have attained sufficient dimensions for market requiremens—less, however, one reserved fourth of these plantations.

The result of the transaction would be that, *beside immediate and subsequent financial advantages*, the State, at the expiration of the lease, would come into possession of a well-regulated forest yielding a considerable annual revenue.

Another advantage would be, that such a transaction would form a starting-point for developing the Forest Department, which in this country *should bring in the largest amount of revenue*.

VI. Approximate Estimates: Present Commercial Value of New Zealand State Forests (exclusive of Kauri Forests, for which Special Terms should be made).

What may be the present commercial value of *one million* of acres of New Zealand State Forests (for the forest alone, the land being reserved) ?

It is obvious that no strictly correct estimate can be made at present. Official statistics and information are wanted. The method of averaging, so often leading to error, cannot even he applied to the present case as regards quantity for each species of wood, there being so many different species often mixed together in the same block of forest. However, an average commercial value may be taken from market prices, and from such calculation, imperfect as it may be, *an idea* of the financial value of those forests can be formed, *and may lead to the official investigation* Hereafter Suggested.

Many portions of the State Forests have been explored and worked in all parts of the colony by saw-millers, who, from their practical knowledge, can afford valuable information. Still, it may be remarked that they have no interest to over-estimate the wood they buy from the State.

The saw-millers' state that the average out-turn of indigenous New Zealand forests does not exceed 15,000 superficial feet of timber per acre.

Captain Campbell Walker and Mr. Kirk have estimated the proper out-turn of timber in a portion of the Seaward Bush, Invercargill, at close on 31,000 superficial feet per acre.

The latter estimate, affording information perfectly corrects, but limited to one single locality, cannot be taken as the rule for the general out-turn of the State Forests of the colony. The average between the two estimates might be taken, and it would give an out-turn of 23,000 feet per acre. Still, through fear of exaggeration in the present computations, the lower estimates may be adopted, so in the following calculations the averages out-turn in timber of those forests is to be reckoned as 15,000 superficial feet per acre.

Now, the average price of timber, for all New Zealand markets, and for all species of wood, cannot be calculated under 13s. for 100 superficial feet.

From inquiries, it is found that 100 superficial feet having to be obtained from the growing timber, represent a value equal to one-half of the selling price of the timber at the market. Thus the value of the growing timber to produce the same quantity should be 6s. 6d. Let the latter estimate be reduced to 4s., and such considered as the actual value of the growing timber, thereby leaving a margin sufficient for the cost of felling, sawing, transportation, and other expenses, as well as affording a nett profit of say 20 per cent.

These estimates apply to enterprises undertaken on a large scale, and not to individual labour.

Therefore, by quoting the out-turn in timber at 15,000 superficial feet per acre, and the value of the growing timber at 4s. per 100 feet, the value of the forest for the timber alone would be £30 per acre, and £30,000,000 would be the present value for 1,000,000 acres.

VII. Approximate Returns from the Forest within the period of the Lease.

What may he the returns to be obtained from the forest in the case of a lease for 99 years?

Besides the present value of the forest, calculated at £30 per acre, it is obvious that on a lease for such duration there will be an increased value arising not only from the natural growth of trees during the period of the lease, but much more on account of the enhanced value of timber resulting from augmentation of the population in the colony, diminution of the produce, and from markets to be found abroad, etc.

Details as to the working of the forest need not be entered into at present; and it may suffice to say that the lessee would have to fell the entire indigenous forest within the period of the lease, coming back on sections for the old reserved fourth as soon as the plantations did not require any longer the protection of the old trees.

Respecting the fellings of the planted forest and natural reproduction, time and experience will tell at what age they may be available

From the fertility of the soil and favourable climate of New Zealand, it may be thought that several species of trees may attain valuable dimensions before or at the age of fifty or sixty years.

Captain Campbell Walker strongly recommends the introduction of the Eucalyptus in the forests of the colony. Trees of that species planted here some fifteen years ago are now measuring two feet in diameter.

In such a case there would be nearly two fellings of the new forest within the period of the lease.

However, it may be prudent to calculate on a period of seventy-five years for the fellings of the new forest, in which case they could not be affected on more than one-half of the area within the duration of the lease on

account of the reserved fourth, and of plantations on the last- worked sections not being of age to be felled before the expiration of the lease. Delay for clearing his own wood may be granted to the lessee without affecting the duration of the lease, and plantations not to be available to him should be made at the expense of the State.

Again, the value of the new forest when it shall have attained sufficient growth, say in 75 years from date of the lease, will be fully double the value of the indigenous forest at the present time, for the reasons previously stated, so that one-half of the total area in planted forest would afford returns *equal in value* to those of the entire old forest.

Within the period of the lease the lessee would have received—

From the indigenous forest:

VIII. Value of the Lease.

The rough sketch given of the returns to be afforded to the lessee could hardly be taken as a basis for fixing the value of the lease. Evidently the Colonial Government must be prepared to allow considerable profit in order to induce capitalists to enter into an affair of such magnitude, and it rests with them to fix that value. However, it might not be considered as too far intruding into the matter to submit that the grant of such a lease could be made on terms to approach the present value of the forest, calculated above at *thirty millions sterling*. For instance: that a considerable sum of money should be paid to the lessor as may be arranged, *besides which* a royalty, *averaging for all species of timber* say 3s. on every 100 superficial feet (ready for the market) obtained from the forest, should be paid; the said royalty to remain at the average amount of 8s., notwithstanding any increased value of the timber.

The out-turn as put down at 15,000 superficial feet per acre, and the royalty being fixed at 3s. per 100 feet, would return an amount of £22 10s. per acre, and £22,500,000 for the total area. Should the out-turn in timber be more or less than 15,000 feet per acre, the lessor would benefit or lose accordingly.

The system of a royalty instead of an annual fixed rent is equitable, and would facilitate the intended transaction, as affording at the head-quarters of a Company a most efficacious control over the operations of their agents in the colony.

IX. The required Official Estimates.—A School of Forestry to be established.

A mode of transaction in the matter of New Zealand State forests, through which financial returns and a good forest management can be combined, has been indicated; it might be adopted as a rule for the treatment of most of the State Forests, and only applied to a certain number of blocks to begin with.

State Forests, and especially natural forests of great extent, require to be treated on a large scale; that is to say, with such means as Governments or Companies alone can afford.

Should the Colonial Government decide to move in view of any transaction of importance respecting the State Forests, it may be submitted that some preliminary measures would have to be taken.

In the first instance, a Committee of official agents should be appointed for the following purposes:—

- To select blocks of forest in different parts of the colony well suited for commercial enterprise.
- To estimate the out-turn in timber of one acre of the forest, operating at the rate of one acre for an area of about 10,000 acres, the estimated one acre areas to be at about equal distances from each other.
- To give the number and species of timber trees of the area where the estimate is made; the name of the nearest timber market, and current prices there for the principal species of timber; the distance of the market from the block; and likewise all information respecting transportation and the nature of the undergrowth of the forest; the general aspect of the forest, especially as to the species it may contain as far as can be judged.

The Colonial Government has not yet a staff of foresters at hand to go through those forest operations; but surely scientific and trained foresters are not an absolute necessity in such a case. There is here a Survey Department, most remarkable for its good organization and efficiency, in which department men of high scientific and administrative qualifications are to be found, and to whom the direction of those operations can be entrusted. Therefore all those preliminary operations could be made by the Survey Department—they do not exceed the competency of its officers.

Vendor and buyer, lessor and lessee, all require sufficient official information, and no transaction of importance can be entertained without it.

Another measure of great urgency here is the practical organization of a Forest Department. Such an undertaking requires, time, and the first steps to be taken towards it should be the establishment of a School of

Forestry, which, in the course of two years, could issue a staff of foresters sufficient to begin with. There are in the colony scientific men to whom the direction of the school and likewise special scientific tuition may be intrusted, and they should be assisted by two Professors of Technical Forestry, to be obtained from the French or German Forest Departments, those officers to be of a superior grade in their own country. Here, besides their lectures at the school, they could act as advisers at the head-quarters of the department; and moreover the verification of some of the survey officers' estimates should be made by them, to the effect that they may be parties to the official report and estimates to be made by the Committee, *ad hoc.* Their names and qualifications would add to the importance of that document, in case it might be used as a basis on which the promoters of a Company in Europe should be able to build.

The question of extent, as to the total area of blocks of forest to be leased, should not be decided at present. Let the Committee of Forest Estimates proceed with its work, and it would remain for the promoters of a Company in Europe to judge what can be done in the case as to the extent of forest to be leased.

There is no reason why some of the estimated areas should not be leased to colonial enterprise, but the general conditions of all leases should be homogenous, only prices and royalties varying according to localities, species, etc.

Such measures would have the effect of enhancing the value of the growing timber all over the colony. Private property would benefit by them in a high proportion, and so likewise would the treasury, in the way of laud taxes being made proportional to the value of the property.

The price of timber at market should not be affected by such events. Operations on a large scale can afford moderate prices, and competition would keep down exaggeration in the case. The increase of population, the diminution of produce, and the outlets abroad, will be at a future and distant period the cause of advanced prices for timber.

X. Industries actually connected with the Forest not affected by the indicated measure.

The industries immediately connected with the forest produce concern a large fraction of the population of this colony; for that reason, and likewise because those people supply the market with an article of absolute necessity, a special consideration must be given to the effects which the above-mentioned measures may have on their welfare.

If the information given be correct, only a very small minority of the saw-millers have been successful in their trade. Such a result might be ascribed to the following cause:—

Having before them a large field of operation—that is to say, a quantity of growing timber apparently inexhaustible, and which they can now get at a nominal price—saw-millers have thought of taking advantage of actual circumstances for increasing their business, and therefore had to strain their means in the expenditure of a more extensive enterprise. Then, they had to contend with all commercial eventualities—competition, high price of labor, etc.

In Europe, where large forest business is carried out, the saw-miller attends only to his own special industry. He saws logs brought to the mill by the forest contractor, and his trade does not extend beyond that.

The forest contractor applies his attention to all the various produce which can be obtained from the forest; and, if the market is dull for firewood or timber for building purposes, bark or wood for cabinet-work, coopers'-work, etc., etc., may at the same time reach high prices, which will make up for the other depressed articles.

Commerce and industry, as a rule, ought not to be managed as a single mixed-up business. Many of the saw- millers here will feel and understand that, and would prefer having then mills well supplied, by a forest contractor than to rest on their present depressed business, which depression cannot be ended unless a better system of working the forests be adopted.

The New Zealand Forests represent an immense wealth, and, to be turned to profit, these forests must be worked within certain limits and regulations. They must be worked principally in view of exports to Europe, where a ready market is sure to be found *for most of their produce*.

At all events, the above-indicated measures could not affect the interests of the saw-millers, who at present are doing neither good for themselves nor good to the Treasury, and are only performing a work of destruction in the forest for the sole benefit of the market, when otherwise the same supply to the market could be as well afforded by the working of the forest under a proper system of conservation. Any increase of price on the growing timber would not affect the commercial parties concerned in the matter; they would have only to increase their selling price, the only difficulty being in the actual disproportion between the supply and the demand. The requirements in wood and other forest produce of the European markets (so little known here beyond the English market) would soon fill up the deficiency on the side of the demand.

decorative feature
Lyon and Blair, Steam Printers, Wellington, New Zealand.

National Domains.

(*From* THE NEW ZEALAND COUNTRY JOURNAL.)

THE subject of national domains, parks, or reserves, is a matter of such general interest, that probably no long time will elapse before the question will thoroughly engage the attention of the public. These proposed national domains concerning which it is intended to offer some remarks and suggestions, may be divided into several classes, according to the purposes for which it is proposed they should be specially dedicated; they may be associated with the establishment of *sanitaria*, forest conservancy, or the preservation of the indigenous fauna of New Zealand. Tears ago, a large-hearted philanthropist (all honour to him) devised a notable and important scheme, having for its object the institution of a great *sanitarium* in the celebrated hot-lake district, including Rotomahana and Rotorua. Why should so beneficent a project be subjected to further delay ? It may be anticipated that no insuperable difficulties would be found to beset the path of a Government which should show a disposition to enter into equitable arrangements and agreements with native landowners, to the effectual exclusion of speculative land *acquirers*, so that the famous health-giving region should not present a field for the exhibition of rapacity in the way of forestallment. If the philanthropic scheme of the proposed *sanitarium* was carried out, with due exercise of proper care and management, the result, beneficial alike to pakeha and Maori, would be the bestowal of a boon to the whole world, but more especially would the institution be appreciated by those who have "cast their lines in pleasant places" in Australasia. It could be made a blessing in which the afflicted poor should have their portion in the alleviation of acute sufferings, too often brought on from toil and exposure in a changeful climate; medical men, trustees of hospitals, distributors of charitable aid, must doubtless be interested in this question. Under the present state of affairs, which can scarcely be deemed satisfactory, even by those disposed to look only on the bright side of things, visitors and invalids from afar, repair to this celebrated tract of country, seeking the benefit of, its healing waters they have to endure the roughest form of accommodation, they have to take the baths rashly, or perhaps without medical supervision. These pools, unlike that of Bethesda, are at present only open to the wealthy, they are altogether too costly for any but the rich who can bear golden keys to unlock the gates. The expression "taking the baths rashly" is used because, out of the almost countless geysers, springs, jets of water, vapour, or mud, what proportion of them have been subjected to thorough chemical analysis? what is really known of their constituent parts, so that an appreciative value can be attached to them as to their specific value for aiding suffering humanity?

Now here, surely, is good and ample work for the laboratory—work which calls for prompt action, but which *must be undertaken on the spot*, the most careful, searching investigation; what is required to be known is the truth—the whole truth, and nothing but the truth—for which scientific authority must he held responsible. Let us look at the area of country it is proposed to deal with, it includes many square miles, it is most unlikely that satisfactory, trustworthy deductions could be drawn from the results of tests, however carefully applied, to the contents of vessels of waters, collected by agents, and forwarded to a distant laboratory. In all probability, the agents employed would have no special interest in the work, possibly no chemical knowledge whatever, it would be almost miraculous if they did not overlook sources which yield products of most valuable hygienic qualities. It may be said that a searching investigation *in situ* would necessarily entail the expenditure of time and money, but surely both would be well and profitably employed in the diffusion of accurate knowledge of a great natural resource for the healing of the sick. The Government could avail itself of the assistance of the Geological Survey department to secure the services of an accomplished chemist, who would doubtless esteem it a piece of good fortune to be selected for the duty of exploring an almost untrodden field, stored with unsolved problems, awaiting the interpretation of scientific research. The establishment of a beneficent *sanitarium* whose curative virtues should be within reach of the very poorest of our afflicted fellow-creatures, would make such a domain as proposed, an institution of which any nation might feel proud in having so valuable a trust committed to its keeping.

Reserves for forest conservancy commend themselves to those who take into thoughtful consideration some of the effects that follow the speed with which the settlement of Europeans on the soil progresses throughout the greater part of New Zealand—effects which every year makes it more manifest, that the indigenous objects which illustrate the province of natural history are becoming rarer from day to day; the state of decadence or exhaustion applies both to vegetable and animal life. Anyone desirous of ascertaining something like a notion as to the extent to which the produce of our forests is annually consumed (not to say wasted, in some cases), would probably turn for information to papers and reports on New Zealand forests, interesting documents which have at various periods been laid before the Houses of Assembly. He is advised to use the evidence of

his own eyes—also—which probably he will find fully as reliable as the contents of any "Blue Book" he is likely to peruse, not that Parliamentary papers do not contain information of peculiar value*—sometimes. However, from whatever sources the inquirer may obtain his information, he will find the progress of disforesting is startling from its very rapidity; looking near home, he might feel surprised at the indifference with which our administrators have viewed the process of denudation, and be led to infer that Banks' Peninsula, the forests of Oxford, Alford, and Mount Peel, were alike unknown to them. Let us take a glance beyond Canterbury. Accessible timber forests are almost everywhere attacked with ruthless determination, whilst, on the other hand, the formation of plantations for the future timber growth of the country advances slowly indeed; the very interesting inquiry suggests itself, what proportion does the extent of timber-planted land bear to the acreage of woodlands used up or destroyed? Concerning these forests, which form so valuable a portion of the estate of the country, which are so well worth the trouble and outlay of being carefully tended, are we satisfied that they are not permitted to suffer damage from culpable neglect? Kauri, totara, black pine, puriri, pohutukawa, kowhai, rata, and a host of other timber, possessing qualities of known value for building or general purposes, appear to be threatened with speedy destruction, unless their impending fate is averted by ample reserves being made and *preserved*. These tracts of woodland it is thus proposed to set aside for the purposes of conservation would to a great extent become the nurseries and storehouses (so to speak) of the indigenous *flora* of New Zealand. It must be borne in mind that no sufficient reason has yet been advanced why the cultivation of native forest trees should be abandoned; it seems almost puerile to give up attempts to reproduce indigenous forest trees, because there may have been failures; disappointments may have been caused, because the ordinary method of the English nursery system, may be unsuitable to cope with certain climatic influences in New Zealand, as regards the cultivation of its native trees.

The problem has yet to be solved as to the quality o£ the timber of exotic species which are being grown here; this, too, a question of a rather remote future, unfortunately cannot be determined till after the lapse of many a decade has enabled proof to be obtained as to the influence, beneficial or otherwise, of the soil and climate of New Zealand on the wood of foreign timber trees. Under the softer clime of these latitudes, will the sturdy British oak retain its fame for compactness and solidity, or will it more nearly approach the less valued qualities of the Turkey oak *(Q. certis)*? Will the ash (truly the farmers' tree) produce its wood as tough and elastic as in the old country ? What can be learnt from analogous cases? We know that long experience amongst foresters has proved the Scotch fir *(Pinus sylvestris)* grown in the cold upland districts in the Highlands, yield timber far superior in quality to that of the same species cultivated in England, or even in the Lowlands of Scotland. Briefly, is it probable that the timber of foreign species will necessarily surpass in valuable qualities that of the native forest trees ? Then there is the danger of fashion, be it remembered, it ever surpasses reason in the readiness, and boldness of its followers.

There is a fashion in planting trees as in other matters; old settlers can doubtless recollect the rise, progress, and decay of the willow and poplar period, which was succeeded by a *furor* for the blue gum *(Eucalyptus globulus);* this stately fast-growing Australasian in its turn had to succumb to the fresher attractions of Californian conferee, of whose economic uses but little that is certain is as yet known. How long will needle-leaved pines maintain their hold on public favour?

In the present rage for disforesting broad tracts of woodland, there is surely room enough for all; let there be planted every valuable exotic that can be acclimatised, but do not let us become reckless, and sweep away native timbers whose qualities have been proved, either because their cultivation has been attended with difficulty, or the ready method of rearing them is yet imperfectly understood. It has taken hundreds of years to produce some of the magnificent specimens of vegetable growth which so thickly stud our New Zealand forest; these gigantic trees are but too often wantonly destroyed; we believe nowhere amongst older communities could be witnessed or would be permitted, so much wanton waste of valuable resources. ? For the preservation and reproduction of the valuable native timber trees, we place faith in reserving ample tracts of the best forest growth (where it is yet possible) for conservancy purposes, under strict and responsible supervision. Let us not consume everything to-day without thought of the morrow.

The interesting forms of animal life indigenous to New Zealand evidently require further protective care than they at present receive from the legislative enactments of the General Assembly. Anyone who reads the schedules containing the names of birds sought to be protected may possibly feel disposed to enquire

The General Assembly commenced their long and arduous task of making laws for the protection of certain animals and birds within New Zealand, and the increase arising therefrom, &c., &c., by passing "The Protection of Certain Animals Act 1861," followed by—

- "The Birds Protection Act, 1862"
- "The Wild Birds Protection Act, 1864"
- "The Protection of Certain Animals Act, 1865"
- "The Protection of Certain Animals Act, Amendment Act, 1866"

- "The Protection of Animals Act, 1867"
- The Protection of Animals Act, Amendment Act, 1868"
- "The Protection of Animals Act, 1872"
- "The Protection of Animals Act, 1873"
- "The Protection of Animals Act, Amendment Act, 1875."

It is rather singular that in the list of the protected birds the names of those the are of the very greatest value to farmers, have been entirely omitted.

why or on what principle those favoured names were enrolled as to be special objects of legislative care, whilst those of so many other species, with apparently equal claims to consideration, were left to take their chance in the close struggle for life. Native birds have to contend against the effects of the changes which colonisation has wrought in the aspect of the country, the substitution of the occupations, sports, and customs of Europeans for those of the aboriginal inhabitants. The regular farming system of the European over a wide extent of country, must be far less friendly to bird life than was the comparatively cramped cultivations of the Maoris, their patches of ground exhausted after a certain amount of cropping, were again suffered to throw up a rank wilderness of untouched vegetation. Birds were killed for food rather than sport, though no doubt the successful hunter marked his triumphs by wearing some of the spoils of plumage; a custom at first adopted perhaps as a modest and concise method of announcing the result of a wearisome but successful chase. Pray allow the space of a line or two in which to deplore the ignorance of these wild children of the forest, to lament that in the depth of their heathenness they lost so much of the luxuries of civilisation. Even in the taking of animal life to satisfy their food cravings, they exhibited their savagery, for unknown to them was the art of the taxidermist, in whose skilful hands the pliant wire, covered with flaxen tow, causes birds to posture in strange attitudes, with limbs arrayed sometimes in colours as fanciful as proud Malvolio's hose. Alas, they knew not of the wondrous simulation of life derived from glittering eyes of glass, the rich variety of expression; they dreamed not that the joyous mokomoko, with its rippling peals of song, would ever bewilder their descendants by appearing in the forest glades with irides beaming with deepest red, whilst from his life-like pose on his scientific perch, he probably gazes at the shuddering onlooker "with eyes of heavenly blue." The efforts of some taxidermists show as lavish an employment of pigments and powder as a modern Venus, made beautiful for ever, when rising from the hands of a Madame Rachael; in one well-known collection of these garments of the dead, a pair of pukekos bear on their heads glistening knobs of sealing-wax that would perhaps suffice to secure inviolability for half a dozen bank parcels. All, the heathen Maori never realised these joys. Under our *régime*, we find sportsmen, dealers, and collectors, all more or less exacting in their requisitions of the life of our native *fauna*. Sportsmen, one is bound to say, are usually conscientiously punctilious in observing certain rules as to proper times and seasons in which their sport may be pursued, they fairly recognise breeding seasons; but their improved weapons of precision must' tell heavily against the escape of their feathered game. Bird dealers, agents, and collectors for museums, are not as a rule troubled with any scruples as to times and seasons in which their spoils may be obtained; winter and summer plumage, sexual distinctions, immature and adult forms, are each in their several states attractive to collectors. You are not expected to speak out on this subject of bird slaughter, you are numbered with the Philistines if you murmur at wounding and maiming in the interests of museums; mortal offence was said to have been given by an indiscreet individual who recorded the fact that one collector alone had killed and disposed of above two thousand specimens of the harmless kiwi.

Biologists have made New Zealand a special province on account of some of its very peculiar forms of life; this in itself stimulates the anxious local collector, who trades on his spoils with European and American museums. It will not redound to our credit if we suffer the indigenous *fauna* to be exterminated without some further efforts for its preservation. It is offered as a suggestion that considerable areas of land might be set aside and held under tapu as to dog and gun; out of nearly seventy million of acres, a block here and there might be reserved for this special purpose. There is, for instance, Resolution Isle, amongst the sounds to the S. W. of this Island, favourably situated for the purpose; it is out of the track of settlement at present, visited but now and then by a band of wandering sealers. It might be proclaimed as a park or domain where animals should not be molested under any pretence whatever, in fact it should truly be a camp of refuge. Some of the small! islets off the N. E. coast of the North Island might be similarly dealt with. Of course it will be said there are difficulties in the way, collectors will be specially attracted to these spots, when so proclaimed; but, it is added, how are the quarantine grounds protected from intrusion?

In strongly advocating the policy of conservancy, it only remains to say that it is now ten years since the writer had the honour of introducing to the General Assembly the subject of forest conservation; that the reservation of Resolution Island for the purpose indicated was suggested in a series of papers on natural history which appeared in an English periodical, and was subsequently reprinted here.

It is firmly believed that the proposals contained in this article, if carried out, will show from year to year that without risk or loss much public benefit can be drawn from the establishment of national domains.

T. H. POTTS.
decorative feature